

NO. 46791-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHAD STANDS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Vicki Hogan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

The trial court denied appellant his right of allocution.

Issues pertaining to assignments of error

Appellant was sentenced following a negotiated plea agreement. At sentencing he asked the court to consider a mitigation package prepared during negotiations for settlement of the case. The court refused, stating negotiations for settlement were not presented to the court. Where a criminal defendant has the right to present any information to the court in mitigation of sentence, did the court's ruling deny appellant his right of allocution?

B. STATEMENT OF THE CASE

On July 15, 2013, the Pierce County Prosecuting Attorney charged appellant Chad Stands with two counts of attempting to elude a pursuing police vehicle, three counts of second degree assault, and one count of third degree assault. CP 26-29. The State notified Stands that a conviction of any of the second degree assault charges would be a third strike, subjecting him to sentencing as a persistent offender. 1RP¹ 8.

After having communication difficulties with two appointed attorneys, Stands moved to proceed pro se. 1RP 6-7, 10-11. The court

¹ The Verbatim Report of Proceedings is contained in 5 volumes, designated as follows: 1RP—10/25/13; 2RP—1/30/14; 3RP—8/20/14; 4RP—10/17/14; 5RP—10/22/14.

granted his request to represent himself and also his request to have appointed counsel serve as standby counsel. 1RP 14. While he was representing himself, Stands worked with the Department of Assigned Counsel to prepare a mitigation package. 2RP 5. He subsequently asked the court to re-appoint counsel, and the court granted his motion. 2RP 10-12.

The parties then negotiated a plea agreement under which Stands pled guilty to two counts of third degree assault, one count of first degree malicious mischief, and one count of attempting to elude. CP 53-55, 57-66. Stands stipulated that the offenses were “separate course of conduct.” CP 65; 3RP 6. He also stipulated to an exceptional sentence based on the fact that his prior unscored misdemeanors and other current offenses would result in a presumptive sentence that is clearly too lenient in light of the purposes of the SRA. CP 65; 3RP 6. The agreed sentence recommendation was for 60 months on each of the two assault counts, 40 months on the malicious mischief count, and 20 months on the attempt to elude count, with all counts running consecutively, for a total of 180 months confinement. CP 60; 3RP 3. The recommended sentences on counts III and IV were below the standard range, but run consecutively to the other counts. 4RP 7-8.

After the court accepted Stands' plea, defense counsel asked the court to set sentencing over because Stands wanted various members of the public and his tribe to be present. Counsel said he had advised Stands that these people would not typically be allowed to speak at sentencing, but they could file written information with the court. 3RP 7. The court indicated that it would review information submitted prior to sentencing. 3RP 8-9.

At the sentencing hearing Stands asked for a continuance so that he could submit his mitigation package for the court to review. 4RP 6-7. Defense counsel told the court that the mitigation package had been prepared for settlement of the third strike charge, which was a wholly different purpose than sentencing, and counsel did not want to present materials inconsistent with the plea agreement. 4RP 4. Counsel therefore submitted an edited copy to the court for review. 4RP 5; CP 1-25.

Stands told the court that the mitigation package had been prepared for this case, and he believed it could be used for more than one purpose. 4RP 6. The court said it was willing to consider information for sentencing, and it would hear from the prosecutor, defense counsel, and Stands, but it would not allow Stands to submit for sentencing the mitigation package which was prepared for settlement. 4RP 7. The

prosecutor and defense counsel then made the agreed sentence recommendation. 4RP 7-10.

When Stands was given the opportunity to speak, he told the court he was still not satisfied with the court's denial of his request to submit the mitigation package. He repeated that, even though it was prepared for negotiating the plea, it could be used for more than one purpose, and since the agreed sentence includes two sentences below the standard range, it was appropriate to present mitigating factors to the court. 4RP 11.

The court responded that negotiations for settlement are not presented to the court. 4RP 12. It indicated that it had considered the edited mitigation materials presented by defense counsel. 4RP 12. It then imposed the agreed upon sentence. 4RP 13; CP 72-74, 82. Stands filed this timely appeal. CP 92.

C. ARGUMENT

THE COURT DENIED STANDS HIS RIGHT OF ALLOCUTION.

As an initial matter it should be noted that Stands is not seeking to withdraw his plea, and the challenge raised on appeal does not breach the plea agreement. Although Stands stipulated to the exceptional sentence as agreed, he did not waive his right to allocution.

Washington State has afforded criminal defendants the right of allocution since its inception. State v. Canfield, 154 Wn.2d 698, 703, 116 P.3d 391 (2005). The right of allocution is guaranteed by RCW 9.94A.500(1), which states that “[t]he court [shall] ...allow arguments from ... the offender... as to the sentence to be imposed.” State v. Ellison, ___ Wn. App. ___, 346 P.3d 853, 855 (2015). Our Supreme Court has specified that “[a]llocution is the right of a criminal defendant to make a personal argument or statement to the court before the pronouncement of sentence. It is the defendant's opportunity to plead for mercy and present any information in mitigation of sentence.” Canfield, 154 Wn.2d at 701; Ellison, 346 P.3d at 855.

In this case, although Stands was permitted to address the court at sentencing, Stands also asked the court to review his mitigation package before pronouncing sentence. The court refused to do so. The court's objection was not that Stands was seeking to submit written materials. It told Stands it would consider certain written information. The court refused to consider the mitigation package offered by Stands on the basis that the package was prepared for negotiation and settlement of the charges. Allocution is the defendant's opportunity to present *any information* in mitigation of sentence, however. Canfield, 154 Wn.2d at 701; Ellison, 346 P.3d at 855. Stands had worked with DAC to prepare

the mitigation package, and it was his desire that the court consider that information before sentencing him. The court's refusal to consider, or even to let Stands submit, the mitigation package denied Stands his right of allocution.

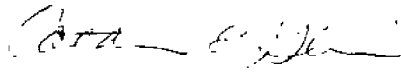
This Court should remand for resentencing. Although the parties stipulated to the sentence imposed, the court was not bound by that stipulation and was free to impose any sentence supported by law. See CP 60; State v. Brown, 178 Wn. App. 70, 79, 312 P.3d 1017 (2013) review denied, 180 Wn. 2d 1004, 321 P.3d 1206 (2014). Here, the sentencing court failed to consider information it should have before imposing sentence. Because this Court cannot assess what impact the mitigation package might have had on the court's decision, remand for resentencing before a different judge is the appropriate remedy. See Brown, 178 Wn. App. at 80-81 (remand for resentencing where court failed to obtain presentence investigation); State v. Crider, 78 Wn. App. 849, 861, 899 P.2d 24 (1995) (remand for resentencing before a different judge).

D. CONCLUSION

Stands was denied his right of allocution. This Court should reverse and remand for resentencing before a different judge, at which Stands should be permitted to submit those portions of the mitigation package he wants the court to consider before imposing sentence.

DATED June 17, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski". The signature is written in a cursive style with a long horizontal flourish at the end.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

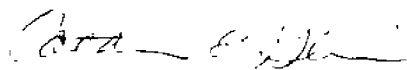
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
June 17, 2015

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