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Washington State
Supreme Court

94981-6

No. 48865-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

PEDRO GODINEZ JR.

MOTION FOR DISCRETIONARY REVIEW

By Pedro Godinez

Pedro Godinez Jr. DOC# 341908
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, Wa 99362

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Appendix

A. Lower Court Opinion & Denial of Reconsideration

A. IDENTITY OF PETITIONER

Pedro Godinez respectfully asks this Court to accept review of the decision designated in Part B of this Motion.

B. DECISION

On July 25, 2017, The Washington State Court of Appeals Division Two Affirmed the second Direct appeal of Pedro Godinez. No. 48865-5-II. In the first Direct appeal, the Court of Appeals remanded for resentencing for an offender score miscalculation. At resentencing the same sentencing Judge INCREASED the amount of time imposed for the exceptional sentence to compensate for having to resentence Godinez with one less offender score point. Godinez Appealed and Division Two Affirmed. Godinez Motioned for Reconsideration and was DENIED on August 30, 2017. See Appendix A. 1-9. Godinez now TIMELY seeks review of the Division Two decision denying relief.

C. ISSUES PRESENTED FOR REVIEW

Godinez can demonstrate that the unpublished opinion denying him relief is in direct conflict

with a United States Supreme Court Opinion, raises a significant question of law under the Constitution of the State of Washington art. 1 § 9, and may involve an issue of substantial public interest that should be determined by the Supreme Court.

1. Did the Appellate Court Err when it determined that the original sentencing Judge did not abuse his discretion when he INCREASED the exceptional sentence portion of Godinez's sentence in order to compensate for the reduction in offender score and standard sentencing range, without any additional findings of facts or conclusions of law?

2. Was Godinez essentially punished for successfully appealing his sentence?

3. Does the increasing of an exceptional sentence on remand for an offender score miscalculation violate double jeopardy and or the appearance of fairness doctrine?

D. STATEMENT OF THE CASE

A jury found Pedro Godinez guilty of attempted murder in the first degree(count 1), kidnapping in the first degree(count 2), and robbery in the first degree(count 3). By special verdict, the jury found that Godinez was armed with a firearm for each count. Also by special verdict, the jury found two aggravating circumstances for each count: Godinez manifested a deliberate cruelty to the victim and demonstrated or displayed an egregious lack of remorse. Finally, the jury also found Godinez guilty of unlawful possession of a firearm in the first degree(count 5).

The trial court sentenced Godinez to an exceptional sentence of 607.75 months of confinement because the jury found aggravating circum stances. The trial court entered findings of fact and conclusions of law for the exceptional sentence, based on the jury's findings of the aggravating factors. The actual document did not contain new findings. The document stated "see attached findings of jury." Clerks papers (CP) at 60.

Godinez appealed his conviction and sentence. In an unpublished opinion, the division two

court of appeals remanded for resentencing because the trial court improperly added a point to his offender score. (State v. Godinez, No. 46153-6-II (Wash. Ct. App. Dec 15, 2015) (unpublished)). The exceptional sentence was not reversed.

At resentencing, with the corrected offender score, the standard ranges for each of Godinez's convictions including enhancements were as follow: attempted murder was 313.5 to 397.5 months of confinement; kidnapping in the first degree was 111 to 128 months of confinement; and unlawful possession of a firearm in the first degree was 57 to 75 months of confinement.

The trial court stated that multiple aspects of sentencing remained unchanged on remand: the criminal history, the convictions entered, and the exceptional circumstances found by the jury. The error that had occured was that Godinez was on supervision for a misdemenor offense and had erroniously considered that to be counted as an extra point. On remand the trial court stated that the only change was one less point on Godinez's offender score. The court further stated that Godinez was subject to the same sentencing range, "or even higher" was within

its available sentencing options on remand.

However, Godinez was not off the scale on his offender score, and his sentencing range was reduced. But the court chose not to depart significantly from the prior sentencing range after considering the change in calculation from the new offender score. Godinez was sentenced to 600 months of confinement which results in a reduction of only 7.75 months, a fraction of what should have been reflected in the reduction in range. The same sentencing Judge again entered findings of fact and conclusions of law for the exceptional sentence, which included the jury's findings of the aggravating factors. There were however, no new findings of facts, conclusions, or aggravating factors to consider to justify the increase in the exceptional sentence so Godinez appealed. Division Two AFFIRMED, Godinez motioned for Reconsideration which was denied, and now Godinez timely seeks Discretionary Review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court of Washington should accept review of this case because, despite the way

Godinez's appointed counsel argued the issue, Godinez was punished for successfully appealing his sentence and the resulting Opinion from the Division Two Court of Appeals is in direct conflict with controling United States Supreme Court Opinion which states:

"In an opinion by Stewart, J., it was held, apparently expressing the unanimious view of the court, that (1) the constitutional guaranty against multiple punishments provided by the double jeopardy clause of the fifth amendment, applicable to the states through the fourteenth amendment, requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense; and (2) the equal protection clause of the fourteenth amendment does not impose an absolute bar to a more severe sentence upon reconviction; and it was futher held in varying majorities, that (3) neither does the double jeopardy clause of the fifth amendment impose an absolute bar to a more severe sentence upon reconviction; (4) the due process clause of the fourteenth amendment requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial, and that he be freed of the apprehension of such retaliatory motivation on the part of the sentencing judge; and (5) to assure the absence of such motivation whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear, and the factual

data upon which the increased sentence is based must be made part of the record for purposes of reviewing the constitutionality of the increased sentence, which reasons and factual data did not appear in the record of the instant proceedings." North Carolina v. Pearce, 395 U.S. 711, 23 L. Ed. 2d 656, 657, 658, 89 S. Ct. 2072 (1969).

Godinez cannot be freed of the apprehension of a particular vindictiveness and or bias on the part of the sentencing judge in this case. Particulary because the judge had no new or additional facts or findings to consider other than the reduction in offender score to base the more severe exceptional sentence on.

Double jeopardy claims are reviewed de novo. State v. Hughes, 166 wn.2d 675, 681, 212 P.3d 558 (2009). In re Pers. Restraint of Borrero, 161 wn.2d 532, 536, 167 P.3d 1106 (2007). State v. Weber, 159 wn.2d 252, 256, 149 P.3d 646 (2006).

The fifth amendment affords three distinct protections: the protection against a second prosecution for a same offense after aquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. State v. Glocken, 127 wn.2d 95, 100, 896 P.2d 1267 (1995).(quoting Pearce, 395 U.S. 711,).

Appellate counsel for Godinez attempted to argue that there were no "substantial and compelling" reasons to justify an exceptional sentence. Although clearly ambitious, the appellate court did not agree. Next, counsel attempted to argue that the sentence was excessive, the appellate court disagreed with this assertion as well. But what counsel and the reviewing court failed to see was that due to the offender score miscalculation, Godinez was forced to run the GAUNTLET of sentencing twice, and at the second sentencing the same Judge increased the exceptional sentence portion of his sentence for no reason other than the offender score miscalculation. This is the definition of double jeopardy.

It also calls into question the potential bias of the sentencing court judge and undermines the confidence in the imposition of an exceptional sentence as appellate counsel tried to argue.

Godinez would further assert that the result of his sentence is manifestly "clear" and or "plain" error that the reviewing court should have acknowledged and remedied.

F. CONCLUSION

Godinez respectfully requests the Supreme Court to grant review of the Opinion in the instant case because the result, not necessarily counsels arguments, are in direct conflict with the Supreme Court of the United States, the Washington Constitution as well as controlling case law. Godinez prays for the relief of a remand to a different Judge for a new sentencing hearing where such factors as his institutional behavior, and the lack of current public interest can be considered for purposes of resentencing as he was sentenced to 50 years in a case involving no loss of life.

Respectfully submitted this 14 day of Sept. 2017

Appellant Pro Se

*** Godinez was represented through trial and post-conviction by appointed counsel, his declaration of indigency is on file and would request the waiver of any fees.**

APPENDIX - A

Filed
Washington State
Court of Appeals
Division Two

August 30, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PEDRO GODINEZ JR. Appellant.	No. 48865-5-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Pedro Godinez Jr. moved for reconsideration of the court's July 25, 2017 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Melnick, Sutton.

FOR THE COURT:

Melnick J.

Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

July 25, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PEDRO GODINEZ JR. Appellant.	No. 48865-5-II UNPUBLISHED OPINION

MELNICK, J. — Pedro Godinez Jr. appeals his sentence. We conclude that the trial court did not err by imposing an exceptional sentence or an excessive one. We affirm.

FACTS

A jury found Godinez guilty of attempted murder in the first degree (count I), kidnapping in the first degree (count II), and robbery in the first degree (count III). By special verdict, the jury found that Godinez was armed with a firearm for each count. Also by special verdict, the jury found two aggravating circumstances for each count: Godinez manifested deliberate cruelty to the victim and demonstrated or displayed an egregious lack of remorse. Finally, the jury also found Godinez guilty of unlawful possession of a firearm in the first degree (count V).

The trial court sentenced Godinez to an exceptional sentence of 607.75 months of confinement[1] because the jury found aggravating circumstances. The trial court entered findings of fact and conclusions of law for the exceptional sentence, based on the jury's findings of the aggravating factors. The actual document did not contain new findings. The document stated "see attached findings of jury." Clerk's Papers (CP) at 60. Based on those findings by the jury, the court determined "to run Count 5 consecutively to Counts 1 and 2 as an exceptional sentence." CP at 60.

Godinez appealed his conviction and sentence. In an unpublished opinion, we remanded for resentencing because the trial court improperly added a point to his offender score.[2] We did not reverse the exceptional sentence. *Godinez*, No. 46153-II, slip op. at 8.

At resentencing, with the corrected offender score, the standard ranges for each of Godinez's convictions including enhancements were as follows: attempted murder was 313.5 to 397.5 months of confinement; kidnapping in the first degree was 111 to 128 months of confinement; and unlawful possession of a firearm in the first degree was 57 to 75 months of confinement.

The trial court stated that multiple aspects of sentencing remained unchanged on remand: the criminal history, the convictions entered, and the exceptional circumstances found by the jury. The court called the case "an egregious case . . . not a case you forget." Report of Proceedings (RP) at 28-29. The trial court noted that the only change was one less point on Godinez's offender

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[1] The standard ranges for each of Godinez convictions with the incorrect offender score including enhancements were as follows: attempted murder in the first degree was 337.5 to 429.75 months; kidnapping in the first degree was 111 to 128 months; and unlawful possession of a firearm in the first degree was 67 to 89 months. The court vacated Godinez's conviction for robbery in the first degree.

[2] *State v. Godinez*, No.46153-6-II (Wash. Ct. App. Dec. 15, 2015) (unpublished), https://www.courts.wa.gov/opinions.

score. The court stated, however, that the same sentencing range, or even higher, was within its available sentencing options on remand. For those reasons, the trial court chose not to depart significantly from the prior sentencing range and after considering the change in calculations from the new offender score, sentenced Godinez to an exceptional sentence of 600 months of confinement. The court again entered findings of fact and conclusions of law for the exceptional sentence, which included the jury's findings of the aggravating factors.[3] Godinez appeals.

ANALYSIS

As an initial matter, the State argues that we should decline to review the issues on appeal because Godinez could have raised this issue on his first appeal and did not. We conclude that the issues are not barred and consider the merits of the appeal.

"The general rule is that a defendant is prohibited from raising issues on a second appeal that were or could have been raised on the first appeal." *State v. Mandanas*, 163 Wn. App. 712, 716, 262 P.3d 522 (2011). However, we have also stated that a defendant "may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but not when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence." *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009).

Similarly to our decision in *Toney*, we unequivocally "remand[ed] for resentencing." *Godinez*, No. 46153-6-II, slip op. at 8. Godinez's sentence was not final because our remand did not limit the trial court to making a ministerial correction. Accordingly, we consider the appeal.

[3] The court attached the jury's findings to the written findings and conclusions and stated that based on those findings, the court determined "to run Count 5 consecutively to Counts 1 and 2 as an exceptional sentence." CP at 174.

I. IMPOSITION OF EXCEPTIONAL SENTENCE

Godinez argues that even assuming the aggravating factors found by the jury were supported by substantial evidence,[4] the facts do not, as a matter of law, create "substantial and compelling reasons" to justify an exceptional sentence. Br. of Appellant at 4. Godinez argues that the trial court's findings of fact and conclusions of law were insufficient to permit review because the court did not provide any reasoning to justify the exceptional sentence. We disagree with Godinez on both points.

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, permits a court to order a sentence above the standard range "if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. A sentence outside the standard range may be reversed if "either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or . . . that the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4).

Review of a court's imposition of an exceptional sentence is governed by RCW 9.94A.585. An appellate court determines the appropriateness of an exceptional sentence by answering three questions:

> "(1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient."

State v. Feely, 192 Wn. App. 751, 770, 368 P.3d 514 (quoting *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013)), *review denied*, 185 Wn.2d 1042, 377 P.3d 762 (2016). Because

[4] Godinez does not challenge the jury's finding of either aggravating factor.

Godinez challenges the trial court's reasons for imposing the exceptional sentence and argues the trial court failed to properly include substantial and compelling reasons within its findings of fact and conclusions of law to justify the exceptional sentence, we review the issue de novo. *Feely*, 192 Wn. App. at 770.

Prior to 2004, Washington courts allowed sentence enhancements to be imposed based on the trial court's own factual findings, as opposed to the jury's, and without requiring proof beyond a reasonable doubt. *In re Pers. Restraint of Jackson*, 175 Wn.2d 155, 159, 283 P.3d 1089 (2012). In 2004, the Supreme Court held that all factual findings necessary to impose a sentence beyond the statutory range must be submitted to the jury and proved beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Now, if the jury finds the alleged aggravating circumstances beyond a reasonable doubt, the trial judge is bound by the jury's finding and left "only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence." *State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006); *State v. Williams–Walker*, 167 Wn.2d 889, 899, 225 P.3d 913 (2010); *State v. Hale*, 146 Wn. App. 299, 306, 189 P.3d 829 (2008); *see also* RCW 9.94A.537(6).

The legislature has since amended our statutes to conform to *Blakely*, but RCW 9.94A.535 still requires a trial court to enter findings of fact and conclusions of law to justify sentences outside the standard range. *Hale*, 146 Wn. App. at 306. Specifically, it provides that "the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535.

Here, the jury found two aggravating factors based on the evidence presented at trial: that Godinez acted with deliberate cruelty and a lack of remorse. By incorporating the jury's findings into its written findings and concluding that an exceptional sentence upward was appropriate based on the jury's findings, the trial court found substantial and compelling reasons justifying the exceptional sentence. Its reasons for imposing an exceptional sentence are clear and reviewable. RCW 9.94A.535 does not require the court to recite the words "substantial and compelling," which would not substantively add to the court's reasoning for imposing the sentence. Therefore, the trial did not err by imposing the exceptional sentence.

II. EXCESSIVE EXCEPTIONAL SENTENCE

Godinez argues that the exceptional sentence imposed was excessive and should be reversed.[5] We disagree.

A sentence outside the standard range may be reversed if the reviewing court finds that the sentence imposed was clearly too excessive. RCW 9.94A.585(4)(b). "Whether a sentence is clearly too excessive is reviewed for an abuse of discretion." *State v. Mann*, 157 Wn. App. 428, 441, 237 P.3d 966 (2010). "A trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds." *Mann*, 157 Wn. App. at 441.

[5] Godinez also argues that the trial court erred because it "in effect" imposed "essentially the same sentence" as the initial sentence. Br. of Appellant at 10. Godinez cites no authority for his argument that upon reduction of an offender score, the trial court must reduce the length of a properly imposed exceptional sentence. He also cites no authority that the trial court lacks the discretion to impose "essentially the same sentence" after remand to correct an offender score. Br. of Appellant at 10. We do not consider conclusory arguments that are unsupported by citation to authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.3d 549 (1992). Failure to provide argument and citation to authority in support of an assignment of error precludes appellate consideration under RAP 10.3(a)(6). *Cowiche Canyon*, 118 Wn.2d at 809. Regardless, the trial court did not sentence Godinez with the same sentence.

When a sentencing court bases an exceptional sentence on proper reasons, the sentence is excessive only if its length, in light of the record, "'shocks the conscience.'" *State v. Knutz*, 161 Wn. App. 395, 410-11, 253 P.3d 437 (2011) (quoting *State v. Kolesnik*, 146 Wn. App. 790, 805, 192 P.3d 937 (2008) (internal quotations omitted)). "A sentence that shocks the conscience is one that 'no reasonable person would adopt.'" *Knutz*, 161 Wn. App. at 411 (quoting *State v. Halsey*, 140 Wn. App. 313, 324-25, 165 P.3d 409 (2007)).

Here, the jury found both of the aggravating factors that the State alleged, i.e. deliberate cruelty to the victim and an egregious lack of remorse. The jury's findings were based on the evidence presented at trial. The court sentenced Godinez to the standard range on each count. The exceptional sentence involved a consecutive sentence on the unlawful possession of a firearm in the first degree conviction. The total sentence imposed on each count was significantly less than the statutory maximum terms the legislature provided for each of these offenses based on Godinez's offender scores: either imprisonment for life, for counts 1 and 2, or 10 years for count 5. *See* RCW 9A.28.020, RCW 9A.32.030, RCW 9A.32.040; RCW 9A.40.020; RCW 9A.56.200.

Given that the trial court has "'all but unbridled discretion in setting the length of the sentence,'" we conclude that the trial court's exceptional sentence does not "shock the conscience," especially, as the trial court noted, in light of the egregious nature of the case. *Knutz*, 161 Wn. App. at 411 (quoting *Halsey*, 140 Wn. App. at 325).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Bjorgen, C.J.

Sutton, J.

WASH. SUPREME COURT
UNASSIGNED

STATE OF WASHINGTON)
)
V.)
PEDRO GODINEZ JR.)

NO.

AFFIDAVIT OF SERVICE
BY MAILING

I, PEDRO GODINEZ JR., being first sworn upon oath, do hereby certify that I have served the following documents: (A MOTION FOR DISCRETIONARY REVIEW)

Upon:
THE WASHINGTON SUPREME COURT
TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

&

THE WASHINGTON COURT OF APPEALS
DIVISION TWO
950 BROADWAY #300
TACOMA, WA 98402-3636

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 14 day of SEPTEMBER, 2017.

Pedro Godinez D.O.C 341908
Name & Number

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.