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NO. 96992-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEITH ROBERSON,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 50414-6-II
Clallam County Superior Court No. 16-1-00058-3

ANSWER TO PETITION FOR REVIEW

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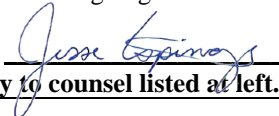
SERVICE	<p>Mark W. Muenster Attorney for Petitioner 1010 Esther Street Vancouver, WA 98660 Email: markmuen@ix.netcom.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED April 25, 2019, Port Angeles, WA </p> <p>Original e-filed at the Supreme Court; Copy to counsel listed at left.</p>
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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Clallam County Deputy Prosecuting Attorney Jesse Espinoza.

II. COURT OF APPEALS DECISION

The State respectfully requests this Court to deny review of the Court of Appeals unpublished decision affirming the conviction in *State v. Roberson*, No. 50414-6-II (March 5, 2019), a copy of which is attached to the petition for review.¹

The Court of Appeals, in conformity with well-established principles held “that the trial court did not abuse its discretion when it refused to impose an exceptional sentence.” *State v. Roberson*, 2019 WL 1040680, at *5 (Wn. App. Div. 2, 2019).

The Court of Appeals reasoned that the trial court properly exercised its discretion because it did consider the “impaired-capacity mitigating factor, but found it inapplicable based on the evidence presented” and, further, “Dr. Muskel’s report did not establish that the effect of Roberson’s mental impairment could be separated from the effects of his voluntary drug use.” *Roberson*, 2019 WL 1040680, at 6.

Additionally, the court held that the trial court did not err in refusing to impose an exceptional sentence based upon *Houston-Sconiers* because that case applied to juveniles and is not applicable in the instant case. *State v. Roberson*, 2019 WL 1040680, at *6 (Wn. App. Div. 2, 2019) (citing *State v. Houston-Sconiers*, 188 Wn.2d 1, 23, 34, 391 P.3d 409 (2017)).

¹ See also *State v. Roberson*, 2019 WL 1040680 (Wn. App. Div. 2, 2019).

III. COUNTERSTATEMENT OF THE ISSUES

The question presented is whether this Court should decline to accept review because none of the criteria set forth in RAP 13.4(b) are met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or the Court of Appeals; and
2. The petition fails to present a significant question of law under the Constitution of the State of Washington and of the United States; and
3. The petition fails to present any issue of substantial public interest that should be determined by this Court?

IV. STATEMENT OF THE CASE

Michael Elkhart (Ct. 1 victim) testified that he lives with his wife at a house on Barr St. near Port Angeles, WA. RP 273–74. Elkhart heard the alarm sensor at his house go off when he and his wife were about to go to sleep. RP 274. One evening in February 2016, Elkhart got up to see what was going on outside and saw two persons that he identified as Israel Lundstrom and Jennifer Cox near the dead end part of the street and also saw a vehicle which turned out to be a van. RP 275–77. Lundstrom and Cox walked away north on Barr Street and Elkhart called 911. RP 277. Two officers showed up and the vehicle was towed away. RP 277–78.

Elkhart and his wife went to bed again and were watching T.V. when they heard a gunshot. RP 278. Elkhart got up again and went out his front door with 911 on the line and then heard cries for help. RP 279. Elkhart, concerned for his neighbor Louie Ricklick ran towards Ricklick’s house, jumped over his fence and

realized that the cry for help was coming from Mike Walters' house which was next to Ricklick's separated by a fence. RP 280. Elkhart went over to Walters' property and saw a person dressed in black (identified as Roberson) standing in Walters' carport and Walters standing by his back door. RP 281. Walters was yelling at Elkhart to get out of the area. RP 281, 298.

Elkhart was standing by the wooden fence about 40 to 50 feet away from the carport where Roberson was standing. RP 525. Elkhart testified as follows:

A. When I was standing there, the gentleman -- he turned around and reached out, and I seen his arm go up in the air and then a big flame came out when his gun -- when the gun went off.

Q. Uh-huh.

A. And so he ended up shooting at me.

Q. Okay. And what was he -- he pointing in your direction, was he shooting at the ground --

A. He was pointing -- it was -- it was headed right straight towards me, yes.

Q. Okay. Did you --

A. I told the officers when we went down and they came up to see me at 8:00 in the morning, I told them that you come down -- we went down and I showed them where I was standing and I said if you look real close at this fence someplace, I said there's going to be a hole unless it's pointed a little bit too high.

Q. Uh-huh.

A. And I said then you ought to be checking the building, the shops behind here.

Q. Uh-huh.

A. And they turned around and it ended up being eight to ten feet or something like that, from right where I was standing.

Q. Okay. When you were over at the carport area near Mr. Walters' house, did you see anybody around the carport other than Mr. Walters and the Defendant, Mr. Roberson?

A. No.

Q. There was no one else around?

A. Huh-uh.

RP 283-84.

Elkhart was in shock after Roberson fired the gun toward him because Elkhart was only there to respond to the repeated calls for help. RP 286. After Roberson fired the gun, Elkhart retreated behind a concrete structure and then got himself out of the area. RP 287. Elkhart did not see anybody else in the area as he went back to his own house to wait for police. RP 288.

Roberson testified as follows on cross-examination:

Q. Uh, you said you remembered everything that night clearly?

A. Yes, ma'am.

Q. Okay. So do you remember when Mr. Walters said -- he was talking on 911, and yo[u] do remember when he said -- he started talking about his neighbor being there. Do you remember him saying, no, there's a neighbor who came over with a flashlight and I told him to get lost; do you remember him saying that?

A. Yes, ma'am.

Q. Okay. Okay, so that was before you fired your warning shot, so you knew --

A. No, that wasn't -- that -- the warning shot happened before that happened.

Q. Well, there were two shots.

A. Absolutely.

Q. And you're saying they were both warning shots?

A. Absolutely.

Q. Okay. So, I'm talking about the second shot at Mr. Elkhart that you're saying is a warning shot as well?

A. I didn't shoot at Mr. Elkhart.

Q. Okay. So, when Mr. Elkhart says, um, you stepped out around the carport and in the direct line with him and he saw you raise your arm one-handed and shoot at him, um, that didn't happen?

A. No.

RP 503–04.

Michael Walters testified by deposition. RP 72 (State’s Ex. 32, video testimony of Michael Walters, hereinafter “Dep. Walters”). Walters testified that Roberson came to his back door and was frantic and trying to get Walters to call 911. RP 81–93 (Dep. Walters). Walters called 911 and Roberson pulled a gun and was pointing towards the neighbor’s home and then directly at Walters while he was on the 911 call. RP 85. Walters told Roberson to not point the gun at him and don’t shoot on multiple occasions. RP 40, 42, 44 (State’s Ex. 4, 911 call).

Roberson did not deny that Mr. Walters called 911. Roberson testified that Walters told Roberson on multiple occasions, while on the phone with 911, to not point a gun at Walters. RP 500; RP 40 (State’s Ex. 4, 911 call). Roberson also testified that he was not pointing the gun at Walter’s. RP 500–01.

The prosecutor cross-examined Roberson as follows:

Q. Um, do you remember him [Mr. Walters] saying don’t shoot?

A. Yes.

Q. In fact, he said don’t shoot more than once; right?

A. Yes.

Q. Okay. Do you remember him saying don’t point it at me?

A. I heard him say that.

Q. Okay, and he said that more than once; right?

A. Yes, he did.

Q. And you were pointing the gun at him?

A. No, I wasn’t.

Q. So he was just – you weren’t pointing the gun at him, and he was just saying don’t point it at me for –

A. Absolutely, because he was on the phone with dispatch. But the reason why he was saying don’t point the gun at me, don’t point the gun at me,

I'm just looking at him hollering for help.

Q. So he was just making that up?

A. He was -- that's all, don't point the gun at me, don't point the gun -- I wasn't -- had no reason -- I had no -- this man's saving my life. I had no reason to point the gun at him, I didn't want anything from him but help. I just wanted him to help me.

RP 500.

Roberson admitted to consuming methamphetamine prior to the incident.

RP 470, 471.

Roberson's trial counsel successfully argued for a self-defense jury instruction for Count I which required the State to disprove self-defense beyond a reasonable doubt. CP 82. The defense was also successful in having the trial court instruct the jury that the defendant could act in self-defense even if there was no actual danger. CP 83.

At sentencing the trial court overruled the State's objection to consideration of Dr. Muscatel's report on Roberson's mental health for sentencing purposes. RP 632-35, 641. The State had argued that at trial Roberson argued self-defense, not a mental health defense, and that Dr. Musketel's report did not separate Roberson's mental health from the effects of Roberson's methamphetamine use at the time of the offense. RP 634-35. The State recommended 86 months of prison and the defense recommended 3 years total, an exceptional sentence to run the firearm enhancements concurrently, and no time at all on count 2. RP 644, 646.

The trial court explained that it did not believe there was much in the way of mitigating factors supporting an exceptional sentence. RP 653. The court

believed that “to the extent that [Roberson was] not capable of appreciating the wrongfulness of [his] behavior that night” was largely attributable” to voluntary use of methamphetamine. RP 653–54.

V. ARGUMENT

A. THE PETITIONER HAS NOT ESTABLISHED ANY OF THE CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW SET FORTH IN RAP 13.4(b).

RAP 13.4(b) sets forth the considerations governing this Court’s acceptance of review:

A petition for review will be accepted by the Supreme Court only:

If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or

If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or

If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

- 1. Whether a court may grant an exceptional sentence downward when there is both evidence of mental illness and voluntary use of a controlled substance is not an issue of public importance in this case where there was no evidence establishing by a preponderance that Roberson's mental health impairment was a mitigating factor under RCW 9.94A.535(1)(e).**

“The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. . . . (e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was

significantly impaired. Voluntary use of drugs or alcohol is excluded.” RCW 9.94A.535(1)(e).

Here, the sentencing court, over the State’s objection, considered Dr. Musketel’s report of Roberson’s mental health at the time of the offense.

“Dr. Muscatel's report stated:

[I]t is likely that methamphetamine played a very significant role in the incident.... It is likely that methamphetamine exacerbated [Roberson's impaired mental health.]...

It is likely his impaired mental status, reflecting both pre-existing mental health impairment and chronic features of impaired mental health, as well as his use of methamphetamine at the time, were the likely participants of this rather bizarre incident.”

State v. Roberson, 2019 WL 1040680, at *6 (Wn. App. Div. 2, 2019) (citing CP at 45).

Here, the evidence before the sentencing court was that voluntary drug use played a *very significant* role in the incident and *exacerbated* Roberson’s impaired mental health. Roberson does not challenge legislature’s specific exclusion of voluntary drug use as a mitigating factor.

Furthermore, mitigating factors must be established by a preponderance of the evidence. RCW 9.94A.535(1). Dr. Musketel stated nowhere in his report that Roberson’s already existing and chronic mental health impairment alone were likely to cause a significant impairment in Roberson’s ability to appreciate the wrongfulness of his conduct, or ability to conform his conduct to the requirements of the law.

Moreover, the trial itself yielded minimal to no evidence of the effects of Roberson’s mental illness on his actions because Roberson did not pursue a

mental health defense and did not present an expert to testify how his mental state effected his actions. RP 633. In fact, Roberson's argument was never that his actions were significantly affected by his mental health issues. Roberson instructed his attorney to not seek a diminished capacity defense. RP 533, 535.

Rather, Roberson testified that he remembered the events well and flat out denied that he ever pointed a gun at anyone. Additionally, the defense argued that if he did, it was for self-defense as to count I. RP 602–03, 633. Prior to that, the defense argued that the intent in regards to count I was simply to scare, it was a warning shot. RP 598. As to the assault in count II, involving Mr. Walters, the defense argued there was a reasonable doubt.

Roberson argues further that the “trial court concluded that even where there was evidence of mental illness which clearly affected Mr. Roberson's behavior, if drug use also contributed, an exceptional sentence was categorically excluded.” Br. of Petitioner at 14.

This conclusion attributed to the trial court is not accurate. The trial court was aware that Roberson's voluntary methamphetamine use impacted his behavior through trial testimony. RP 483, 494–95, 567, 576, 585, 587. Nevertheless, at sentencing, the court still considered Dr. Musketel's report regarding Roberson's mental illness as a mitigating factor over the State's objection. RP 632–35, 641. Therefore, the court did not categorically exclude consideration of the mitigating factor because voluntary methamphetamine use was also involved.

Therefore, review of the issues presented in this case would not serve a substantial public interest.

2. The *Roberson* Court's interpretation of *State v. Allert* was accurate and does not merit review because legislature clearly intended that voluntary intoxication be excluded as a mitigating factor, which necessarily requires that there must be independent evidence of other legitimate mitigating factors to support an exceptional sentence downward.

Roberson presents the question of whether a defendant's voluntary intoxication may not exclude an exceptional sentence downward if it was combined with an existing mental illness at the time of the offense. This argument assumes that an expert is not capable of evaluating whether a defendant's existing mental illness, without the influence of voluntary intoxication, was likely to have significantly impaired a defendant's ability to appreciate the wrongfulness of his or her actions or conform his or her conduct to the requirements of the law at the time of an offense. This is clearly incorrect.

There is no evidence in Dr. Musketel's report that Roberson's chronic issues with suspiciousness and paranoia by themselves would have resulted, by a preponderance, in significantly impairing his ability to appreciate the wrongfulness of his actions or conform his conduct to the requirements of the law. In fact, the evidence shows that if Roberson's mental state was significantly impaired on that night within the requirements of RCW 9.94A.535(1)(e), it was more likely due to methamphetamine use.

Roberson's mental illness pre-existed independently of his methamphetamine use on the night in question. Dr. Musketel stated, "It is likely that methamphetamine exacerbated the underlying features of paranoid

personality and disturbance of behavior that have characterized Mr. Roberson's psychological makeup for all of his adult life." CP 45. Yet, Roberson presented no evidence that his pre-existing mental issues were not by themselves capable of satisfying the requirements of RCW 9.94A.535(1).

In *State v. Allert* the trial court considered the defendant's voluntary intoxication through alcohol as a factor when combined with the defendant's mental disorders. The *Allert* Court found "the record shows that it was alcoholism *combined* with the depression and compulsive personality which caused defendant's impairment in appreciating the wrongfulness of the conduct." *State v. Allert*, 117 Wn.2d 156, 165, 815 P.2d 752 (1991). However the *Allert* Court also found "the portion of the finding which holds that the *separate* effects of these disorders caused this result is not supported by the record." *State v. Allert*, 117 Wn.2d 156, 166, 815 P.2d 752 (1991) (emphasis added).

We conclude that voluntary use of alcohol is an improper factor to consider in deciding whether to impose an exceptionally low sentence. Since the experts and the trial court utilized the impermissible factor of alcoholism as a mitigating factor, finding 1.2 does not constitute a compelling and substantial reason to support a lenient sentence. *The record does not bear out that absent alcohol abuse the defendant would have been impaired in appreciating the wrongfulness of his conduct.*

Allert, 117 Wn.2d at 167 (emphasis added).

This same analysis applies in the instant case. The record did not show that Roberson's mental health issues, without the use of methamphetamine, likely caused impairment of Roberson's mental state within the bounds of RCW 9.94A.535(1)(e) on the night in question. Dr. Muskel's report only suggested that the *combination* of Roberson's pre-existing mental issues *and his voluntary*

intoxication by use of methamphetamine was likely to impair Roberson's mental state. Thus it would have been inappropriate for the trial court to consider the bundle as a basis for an exceptional sentence as voluntary intoxication must be excluded.

Roberson argues that "[t]his Court should take review to determine whether RCW 9.94A.535(1)(e) only applies to cases where mental illness was the *sole or predominant* factor underlying a defendant's ability to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, and where drug use was not involved in the offense behavior at all." Br. of Petitioner at 15.

The Court need not review this question as it is resolved by RCW 9.94A.535(1)(e) and its unambiguous exclusion of voluntary intoxication and *State v. Allert*, establishing that there must be evidence of mental impairment independent from voluntary intoxication to support an exceptional sentence downward under RCW 9.94A.535(1)(e). *Allert*, 117 Wn.2d at 167.

Roberson asserts that this Court should hold that "if the record contains evidence of a mental illness which affects a person's ability to conform his behavior to the law, that is a mitigating factor a court can consider, notwithstanding the fact that the person's behavior was also affected by a drug which contributed to the bizarre behavior." Br. of Petitioner at 17.

There is nothing under the current state of the law that would prevent a sentencing court from considering such a mitigating factor. The problem in the instant case is that there was no evidence in Dr. Muskel's evaluation that

Roberson suffered from a mental illness which affected his ability to conform his behavior to the law during the day in question. Had that been the case, the sentencing court would have been able to consider that as a mitigating factor.

Therefore, this Court should deny review.

3. Whether mental illness is analogous to youth in terms of culpability and should allow courts to grant an exceptional sentence downward is not an issue of public importance because the SRA already instructs courts that mental illness may serve as a mitigating factor justifying an exceptional sentence downward.

“The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. . . . (e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.” RCW 9.94A.535(1)(e).

Additionally, the mental health defenses available to a defendant go even further than the policy concerns of *Houston-Sconiers* by requiring a jury to consider a defendant's ability to form the requisite intent when sufficient evidence of diminished capacity or insanity is presented. WPIC 18.20 (“Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form (fill in requisite mental state).”); *see also State v. Atsbeha*, 142 Wn.2d 904, 914 16 P.3d 626 (2001); RCW 9A.12.010.

These mental defenses and mitigating factors already recognize and account for the relationship between mental illness and mental culpability. Finally, mental illness may impact a person's actions, regardless of age.

Therefore, whether the reasoning of *Houston-Sconiers* should be applied to mental illness cases is not an issue of substantial public interest.

VI. CONCLUSION

Review of the Court of Appeals decision is not warranted under RAP 13.4(b)(3) because Roberson has not established that this case raises an issue of substantial public interest that should be decided by this Court. The issue presented by Roberson is resolved by RCW 9.94A.535(1)(e) and *State v. Allert*.

For the foregoing reasons, the State respectfully requests that the Court deny Roberson's Petition for Review.

DATED April 25, 2019.

Respectfully submitted,
MARK B. NICHOLS
Prosecuting Attorney

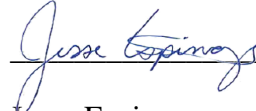


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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically to Mark W. Muenster on April 25, 2019.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

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