NO. 97777-1

COURT OF APPEALS NO. 78327-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICARDO LIARD BRUNO,

Petitioner.

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

The Honorable Kristin Richardson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Ricardo Liard Bruno, the appellant below, seeks review of the Court of Appeals decision in State v. Bruno, noted at ___ Wn. App. 2d ___, No. 78327-1-I, 2019 WL 3555078 (Aug. 5, 2019) (Appendix A), following denial of his motion for reconsideration on September 17, 2019 (Appendix B).

B. ISSUE PRESENTED FOR REVIEW

On resentencing, the trial court rotely imposed the same exceptional sentence the previous judge imposed even though this sentence was reversed because it was based on an incorrect offender score and two aggravating circumstances that were neither found by a jury beyond a reasonable doubt nor stipulated to by Bruno. The resentencing court stated it was confused by the Court of Appeals decision requiring resentencing, seeming to believe the previous sentencing judge's exceptional sentence was legally compliant. The resentencing court also declined to review the evidence admitted at Bruno's trial or previous sentencing, basing its sentence instead on a law enforcement officer's certification for determination of probable cause. The resentencing judge gave absolutely no explanation for imposing the identical exceptional sentence other than to state that it was the exceptional sentence imposed by the previous sentencing judge. By failing to exercise its independent

sentencing discretion on resentencing and by refusing to avail itself of facts actually adjudicated, did the court abuse its discretion in imposing an identical exceptional sentence at resentencing?

C. STATEMENT OF THE CASE

The Court of Appeals vacated Bruno's exceptional sentence of 180 months and remanded for resentencing based on three sentencing errors. See State v. Bruno, noted at 1 Wn. App. 2d 1010, 2017 WL 5127781 (Nov. 6, 2017); CP 27-49 (copy of mandate and decision, to which Bruno will hereafter refer). First, the offender score was miscalculated as two instead of one based on a Georgia conviction that was not comparable to a violent offense in Washington. CP 31-32. Second and third, to impose a 180-month exceptional sentence, the trial court relied on two aggravating circumstances that were neither proved to jury beyond a reasonable doubt nor stipulated to by Bruno, violating Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). CP 32-38.

At resentencing, the trial court acknowledged the correct offender score of one and the resulting standard range of 86 to 114 months. RP 14. The trial court acknowledged it had not heard the testimony and had not reviewed the transcripts. RP 7 ("I don't have access to the transcript of the sentencing"); RP 12 ("I had access to the cert and the jury instructions, and, basically, the record below, as well as the Court of Appeals opinion that

came out"); RP 13 ("I didn't have the benefit of having heard the trial testimony; but I do have the benefit of having the record below, before the appeal"). For this reason, the court relied on the certification for determination of probable cause to support its sentence, not the evidence actually adduced at trial. RP 14 (reciting various factual allegations "according to the cert").

The trial court also expressed confusion over the Court of Appeals decision:

> I'm a little confused by this because in the special verdict, the jury found that the State had found the crime was an aggravated domestic violence offense. And the definition of an aggravated domestic violence offense includes sexual abuse of the victim, manifested by multiple incidents over a prolonged period of time.
>
> Do you believe that Judge Heller simply misspoke, making it a separate aggravator; or is that something that the Court is not -- was there an error in the instructions?
>
> What happened?

RP 6. The State confirmed that the previous sentencing judge, Judge Bruce Heller, had "read a number of additional aggravators that the jury didn't find" but thought

> the Court is probably rightly focusing on what I felt was a strange part of the [Court of Appeals] opinion . . . . where they noted that specific language. . . . And I didn't really understand why they restated that language, which was the language of the jury instruction, and, I believe, the special verdict form.

RP 6-7.

The apparent confusion stems from the differences between the aggravator the jury found—the domestic violence aggravator pursuant to RCW 9.94A.535(3)(h)(i)—and the similarly worded aggravator of RCW 9.94A.535(3)(g), which reads, "The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time," and which the jury did not find. See CP 125-28 (jury instructions 13 through 16 relating to the domestic violence aggravator under RCW 9.94A.535(3)(h)(i)), 132 (special verdict form). Even though the jury was not asked to nor did it find the RCW 9.94A.535(3)(g) aggravator, Judge Heller nonetheless relied on the RCW 9.94A.535(3)(g) aggravator to impose an exceptional sentence on Bruno at his first sentencing. RP (sentencing) 791.

At resentencing, Bruno's offender score was one and his standard range was therefore 86 to 114 months. CP 75; RP 1. When the trial court turned to the exceptional sentence, it stated,

> [B]ecause of the lowered offender score and the lowered range, I would note that Judge Heller went 55 months over the top of the sentencing range originally, on an offender score of 2, to get to 180.[1]

[1] Based on the erroneous offender score of two, Judge Heller sentenced Bruno using the incorrect standard range of 95 to 125 months. CP 10.

> I'm going to go 55 months over the top of the sentencing range on the new score, to get to 169; and that will be the Court's sentence on Rape in the Second Degree.

RP 14; see also CP 75, 78 (judgment and sentence exceptional indeterminate sentence of 169 months to life).

Bruno appealed. CP 92. He argued that the resentencing court had failed to exercise its own discretion and instead just imposed previous sentence without providing any reason for doing so, even though the previous sentence was based on an incorrectly calculated offender score and two Blakely errors. Br. of Appellant 5-9. Bruno also pointed out that, given the lower offender score, imposing the exact same exceptional sentence was in fact harsher exceptional sentence that what Judge Heller imposed, given the lower standard range. Br. of Appellant at 7.

The Court of Appeals did not address Bruno's actual arguments, nor did it accurately represent the facts before it. Despite the resentencing judge acknowledging that she did not have the sentencing transcripts and was relying on the certification for determination of probable cause, the Court of Appeals concluded she "expressly stated at the hearing that she had access to the record from the previous appeal" and "at no point did she suggest that she failed to read the transcripts or familiarize herself with the facts produced at trial." Op. at 4.

The Court of Appeals also rejected Bruno's argument that the second sentence was inexplicably harsher, claiming "comparison with standard length sentences is inconsistent with substantial and compelling reasons that justify imposition of an exceptional sentence. State v. Ritchie, 126 Wn.2d 388, 397, 894 P.2d 1308 (1995)." Op. at 6. According to the Court of Appeals, an exceptional sentence has no relation to a correct calculation of the standard range. Op. at 6.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE COURT OF APPEALS DECISION CONFLICTS WITH CASES HOLDING THAT INDEPENDENT DISCRETION MUST BE EXERCISED IN IMPOSING A SENTENCE

This case presents an example of a trial court judge refusing to exercise her independent discretion at resentencing. Rather than exercising her independent discretion, the judge copied the exceptional sentence of the previous judge, a judge whom the Court of Appeals held had erred several ways in imposing his sentence. The resentencing court stated it was imposing the same exceptional sentence for no reason other than that the previous judge had imposed it. RP 14. This refusal to exercise independent discretion constitutes an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005); State v. Garcia Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Because the

Court of Appeals decision conflicts with this legal principle, review is appropriate under RAP 13.4(b)(1) and (2).

The trial court stated, (1) "I don't have access to the transcript of the sentencing," (2) "I had access to the cert and the jury instructions, and basically, the record below, as well as the Court of Appeals opinion that came out," and (3) "I do have the benefit of having the record below, before the appeal." RP 7, 12-13. The Court of Appeals failed to acknowledge these facts or their obvious meaning: the trial court did not have transcripts from Bruno's trial and did not review them in conjunction with an exercise of her independent discretion.

The Court of Appeals stated, "at no point did [Judge Richardson] suggest that she failed to read the transcripts or familiarize herself with the facts produced at trial. Absent other evidence, we will not assume that a judge with access to the appropriate records failed to read them." Op. at 4. It also claimed, "Judge Richardson expressly stated at the hearing that she had access to the record from the previous appeal." Op. at 4.

The Court of Appeals wrongly refused to address the actual facts. Judge Richardson expressly stated she had no sentencing transcripts. RP 7. If she did not have the sentencing transcripts, she did not possibly have "access to the record from the previous appeal," which obviously included the sentencing transcripts. Op. at 4.

Judge Richardson also stated she had "the record below" or "the record below, before the appeal." RP 12-13 (emphasis added). She was not referencing "the record from the previous appeal," as the Court of Appeals claimed. Op. at 4. Rather, she was referencing whatever she meant by the record below, which, from context, most likely meant the superior court's file with pleadings, motions, and the like, which existed *before* the appeal. The "record below" could not be the same as the "record from the previous appeal" as the Court of Appeals would have it—if anything, the record from the appeal is the record *above* the trial court, not *below* it. And, the transcripts from the trial and sentencing were created for the purposes of the previous appeal, so whatever the "record below, before the appeal" is, it could not possibly have included the transcripts that were created *after* the appeal was instituted.

Therefore, there is not an "absen[ce of] other evidence" suggesting that the judge "with access to the appropriate records failed to read them." Op. at 4. Judge Richardson candidly admitted she had not reviewed the appropriate records. RP 12-13. She also relied on the certification for determination of probable cause for her facts, seemingly indifferent to whether such facts were proven at trial or not. RP 12, 14. There is no need to assume the judge failed to review the appropriate records because the record plainly shows she didn't.

Because the Court of Appeals decision conflicts with Washington Supreme Court and Court of Appeals decisions indicating that a judge must exercise her own, independent discretion in imposing a sentence, review is warranted under RAP 13.4(b)(1) and (2).

2. THE COURT OF APPEALS DECISION CONFLICTS WITH PRECEDENT ESTABLISHING THAT AN EXCEPTIONAL SENTENCE DIRECTLY RELATES TO THE CORRECT CALCULATION OF THE STANDARD RANGE

The Court of Appeals cited State v. Ritchie, 126 Wn.2d 388, 397, 894 P.2d 1308 (1995), for the proposition that Bruno's "comparison with standard length sentences is inconsistent with substantial and compelling reasons that justify imposition of an exceptional sentence." Op. at 6. The issues in Ritchie, however, were whether the trial court was required to provide a written explanation for the length of its sentence and whether exceptional sentences must be proportionate to sentences in other, similar cases. 126 Wn.2d at 394-97. In this context, the court corrected noted that the legislature had provided no requirement that the length of exceptional sentence directly correlate to the standard sentence range. Id. at 397. Ritchie does not stand for the proposition that the standard range sentence and the exceptional sentence are completely analytically divorced from one another, as the Court of Appeals held here. Op. at 6.

Indeed, a couple years after Ritchie was decided, State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997), was decided. The Parker court made clear that exceptional sentences could generally not be affirmed when the standard range had been miscalculated: "We are hesitant to affirm an exceptional sentence where the standard range has been incorrectly calculated because of the great likelihood that a judge relied, at least in part, on the incorrect standard ranges in his calculus." Id. at 190. "Affirming such would uphold a sentence which the sentencing judge might not have imposed given correct information and would defeat the purpose of the SRA." Id. The only exception is where "the record clearly indicates the sentencing court would have imposed the same sentence anyway." Id. at 189 & n.9 (collecting cases); see also State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992) ("Imposition of an exceptional sentence is directly related to a correct determination of the standard range." (emphasis added)); CP 33-37 (reversing Bruno's last sentence because the 55-month exception sentence was based on a miscalculated offender score and two Blakely violations). Thus, under Parker, Collicott, and the law of this case, the standard range sentence should appropriately factor into the exceptional sentence imposed by the trial court. There is no indication it did upon review of resentencing in this case, contrary to the Court of Appeals decision.

The trial court imposed the exact same exceptional sentence length that was previously imposed despite the previous exceptional sentence being based on an incorrectly calculated standard range and two Blakely errors. Imposing the same 55-month exceptional sentence is in fact a harsher exceptional sentence that what was previously imposed: it was only 44 percent of the previous 125-month high end standard range sentence and now is 48.2 percent of the new 114-mont high end standard range sentence. Thus, as a function of the high end of his standard range, Bruno fared worse on resentencing. This is illogical and extremely problematic when the previous exceptional was based on an incorrectly calculated standard range and two aggravating factors that had not been found by a jury.

The resentencing court said nothing about why it was imposing exact same exceptional sentence length other than to note that the previous judge, who had committed three legal errors, imposed it. RP 14. Bruno agrees with the general proposition that the trial court is not required to impose a different sentence, provided that it says something about why it chooses to impose the same sentence within its discretion.[2] Here, the trial

[2] The Court of Appeals decision begins, "Judges must exercise discretion at resentencing, but it does not follow that a judge must impose a different sentence." Op. at 1. But Bruno has never argued that resentencing judges must impose a different sentence. The problem is not that the trial court did not choose a different sentence. The problem is that the trial court imposed the

court said nothing of the sort and the record therefore defies any conclusion that the trial court exercised independent discretion in imposing the exact same exceptional sentence length. Because the Court of Appeals decision misapprehends both the facts and the law relating to the exceptional sentence, conflicting with Parker, Collicott, and even with what the Court of Appeals held in Bruno's previous appeal, RAP 13.4(b)(1) and (2) review is warranted.

Finally, a trial court's plain refusal to exercise independent discretion (and the Court of Appeals' spurious upholding of such a refusal) will serve to undermine public confidence in the judiciary, and it should. Judges must be expected to state the reasons for imposing their sentences, not just copy other judges' sentencing decisions without explanation. Because affirming Bruno's sentence erodes the requirement of independent judicial discretion, this case presents a matter of public importance that should be considered pursuant to RAP 13.4(b)(4).

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identical 55-month exceptional sentence that the previous judge imposed without stating any reason for doing so other than that the previous judge did so. RP 14. The first sentence of the Court of Appeals decision shows that it wholly failed to acknowledge or address Bruno's actual arguments in this appeal.

E. CONCLUSION

Because he satisfies the review criteria in RAP 13.4(b)(1), (2), and (4), Bruno respectfully requests that this petition for review be granted.

DATED this 17th day of October, 2019.

Respectfully submitted,

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APPENDIX A

FILED
8/5/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RICARDO LIARDO BRUNO, Appellant.	)	No. 78327-1-I DIVISION ONE UNPUBLISHED OPINION FILED: August 5, 2019

HAZELRIGG-HERNANDEZ, J. — Judges must exercise discretion at resentencing, but it does not follow that a judge must impose a different sentence. On resentencing, Ricardo L. Bruno's exceptional sentence was again 55 months above the standard range. Bruno argues that the trial court failed to exercise discretion and asks us to remand for another resentencing hearing. But because the colloquy regarding the meaning of our prior opinion demonstrates careful consideration, we hold that the judge properly exercised discretion. Affirmed.

FACTS

Ricardo Bruno was tried and convicted for second degree rape. The jury found that the offense was against a household member and was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim manifested by multiple incidents over a prolonged period of time. That finding satisfied the aggravated domestic violence circumstance codified as RCW 9.94A.535(3)(h)(i).

At sentencing, in addition to the domestic violence aggravating circumstance found by the jury, the Honorable Bruce Heller considered two additional aggravating circumstances, namely that Bruno should have known that the victim was particularly vulnerable and that the victim was under the age of 18 and the crime was part of an ongoing pattern of sexual abuse. Judge Heller sentenced Bruno to 125 months confinement, the top of the standard range, and 55 additional months as an exceptional sentence, for a total of 180 months. Bruno appealed his sentence. This court reversed and remanded for resentencing because his offender score had been improperly calculated and Judge Heller had considered aggravating circumstances that had not been found by the jury.

Because Judge Heller had retired, the resentencing hearing was held before the Honorable Kristin Richardson. The state asked the judge to reimpose the same exceptional sentence of 180 months. Bruno asked the judge to consider the minimum of the standard range.

Judge Richardson engaged in a colloquy with the parties regarding the meaning of the opinion remanding the case for resentencing. She did not have a transcript of the previous sentencing hearing. Specifically, she noted that ongoing abuse manifested by multiple incidents over a prolonged period of time, which Judge Heller appeared to consider as a separate aggravating circumstance, used language comparable to an element of the aggravated domestic violence circumstance. Judge Richardson also acknowledged that the vulnerable victim circumstance considered by Judge Heller was not found by the jury.

Before pronouncing judgment, Judge Richardson noted that she had not heard the trial testimony, but she had access to the certification for probable cause, the jury instructions, the record on appeal, and our previous opinion. She listed the jury's findings of the crime of conviction, rape in the second degree, which in this case involved forcible compulsion, and the domestic violence aggravating circumstance, which in this case involved an ongoing pattern of psychological, physical, or sexual abuse of a family or household member, manifested by multiple incidents over a prolonged period of time. Judge Richardson correctly noted that those were the facts she could take into account when determining the sentence. She elaborated on some of the factual details, including the victim's age. She also noted that the sentencing range was lower because of the reduced offender score. Judge Richardson sentenced Bruno to 114 months, the top of the new standard range, and 55 more months as an exceptional sentence, for a total of 169 months. Bruno appeals.

DISCUSSION

I. The resentencing judge appropriately exercised discretion.

Bruno argues that Judge Richardson failed to exercise her discretion on resentencing. Failure to exercise discretion is an abuse of discretion subject to reversal. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); see State v. Kennedy, 19 Wn.2d 152, 154, 142 P.2d 247 (1943); see also Brunson v. Pierce County, 149 Wn. App. 855, 861, 205 P.3d 963 (2009).

Bruno argues that Judge Richardson committed multiple errors that lead to her giving inappropriate deference to Judge Heller's exceptional sentence. Bruno

argues that she failed to read the transcripts of the evidence produced at trial, believed Judge Heller correctly imposed the exceptional sentence, expressed confusion about our previous decision, and imposed a harsher exceptional sentence. We disagree.

Judge Richardson expressly stated at the hearing that she had access to the record from the previous appeal. A copy of that complete record was not filed with this appeal, but the transcript from the sentencing hearing held in April 2016 suggests there were at least 795 pages of transcribed proceedings in Bruno's first appeal. While Judge Richardson stated that she did not hear the testimony, at no point did she suggest that she failed to read the transcripts or familiarize herself with the facts produced at trial. Absent other evidence, we will not assume that a judge with access to the appropriate records failed to read them.

Neither does it appear that Judge Richardson was under the mistaken impression that Judge Heller's view of the aggravating circumstances was correct, nor that she was meaningfully confused about our prior decision. Judge Richardson engaged the parties in a colloquy regarding the meaning of our decision remanding the case for resentencing. Engaging in a colloquy with the parties and allowing each to be heard regarding the meaning of an appellate court decision is the most appropriate course of action for a trial court on remand. Judge Richardson twice acknowledged that the vulnerable victim aggravating circumstance was not found by the jury. Judge Richardson also noted that Judge Heller erroneously considered the ongoing pattern of sexual abuse of a minor

aggravating circumstance, RCW 9.94A.535(3)(g), separately from the domestic violence aggravating circumstance, RCW 9.94A.535(3)(h).

The only confusion that arose was because of the similarity in language between those provisions. RCW 9.94A.535(3)(g) reads: "The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time." As provided to the jury in this case, the relevant parts of RCW 9.94A.535(3)(h) read "The current offense involved domestic violence, as defined in RCW 10.99.020 . . . . (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim . . . manifested by multiple incidents over a prolonged period of time." The statutes use identical language to punish offenders who engage in ongoing patterns of abuse manifested by multiple incidents over a prolonged period of time. They vary in that RCW 9.94A.535(3)(h), the domestic violence aggravating circumstance, protects anyone in a household relationship with the offender from various forms of abuse and RCW 9.94A.535(g) protects any child from sexual abuse.

Judge Richardson's careful consideration of the language in each aggravating factor supports the conclusion that she exercised her discretion regarding the facts of the case and the appropriate sentence. After comparing the other aggravating circumstances, Judge Richardson concluded that she could only consider the domestic violence aggravating circumstance found by the jury. While Judge Richardson did mention the age of the victim as she listed the facts in more detail, the parent-child relationship and pattern of abuse over a prolonged period

of time were inherent in the domestic violence aggravating circumstance found by the jury. Judge Richardson was entitled to consider the facts that supported the domestic violence aggravator. It does not appear that she considered the victim's age separately, and we find no error.

Bruno argues that Judge Richardson imposed a harsher exceptional sentence on resentencing because 55 months is a larger percentage of 114 months than 125 months. But comparison with standard length sentences is inconsistent with substantial and compelling reasons that justify imposition of an exceptional sentence. State v. Ritchie, 126 Wn.2d 388, 397, 894 P.2d 1308 (1995). Because an exceptional sentence is determined by the discretion of the judge based on the reasons that justify the exceptional sentence, not based on the relationship to the standard range sentence, a 55 month exceptional sentence is not automatically harsher when applied to a 114 month standard range rather than a 120 month standard range. Here, because the 55 month exceptional sentence was based on the facts supporting the domestic violence aggravating circumstance, we find no error.

Finally, Bruno argues that this case should be assigned to a new judge on remand. Because we affirm the judgment of the trial court, we need not address that issue.

Affirmed.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RICARDO LIARDO BRUNO, Appellant.	)	No. 78327-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Ricardo L. Bruno, filed a motion for reconsideration for the opinion filed on August 5, 2019. A majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

October 17, 2019 - 2:03 PM

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