SUPREME COURT NO. 98656-8

NO. 79954-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DIONDRAE BROWN,

Petitioner.

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

The Honorable Patrick Oishi, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Diondrae Brown, appellant below, asks this Court to review the published decision of the Court of Appeals referred to below.

B. COURT OF APPEALS DECISION

Brown seeks review of the Court of Appeals published decision in State v. Diondrae Brown, __ Wn. App. 2d __,__ P.3d __ (Slip Op. filed May 18, 2020).[1] A copy of the slip opinion is attached as an appendix.

C. REASONS WHY REVIEW SHOULD BE GRANTED

Review is warrant under RAP 13.4(b)(4) because the decision in State v. Brown, supra, involves an issue of substantial public interest that should be decided by this Court.

D. ISSUES PRESENTED

Do sentencing courts have the authority to impose a mitigated exceptional sentence by reducing the terms of and/or running concurrent multiple firearm enhancements because under the Sentencing Reform Act (SRA), a sentencing court's discretion is limited only by the mandatory minimum sentences required under RCW 9.94A.540(1), which are

[1] Although the decision "published," it does not yet appear on Westlaw, which may be a byproduct of the problems associated with posting the decision on https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.recent that occurred in May 2020. This petition will therefore cite to the slip opinion.

expressly exempt from the exceptional sentencing authority granted trial courts under RCW 9.94A.535?

E. STATEMENT OF THE CASE

In March 2019, Diondrae Brown was convicted of four counts of first degree robbery, one count of attempted first degree robbery, two counts of second degree assault and one count of eluding. CP 84, 86, 88, 90, 92, 94-96. A jury also found by special verdict that Brown was armed with a firearm during three of the robberies, the attempted robbery and one of the assaults. CP 87, 89, 91, 93, 97. Brown was sentenced in May 2019 by the judge who presided over the trial, The Honorable Patrick Oishi. RP 1384-1409.

At sentencing, defense counsel asked the court to impose a mitigated exceptional sentence of 189 months based on concurrent low-end standard range sentence of 129 months for each first degree robbery (the convictions with the highest presumptive standard range sentences), plus one 60-month firearm enhancement. Brown's counsel argued a mitigated exceptional sentence was warranted based on Brown's substance abuse and mental health issues, lack of prior adult felony convictions, and because the "consecutive imposition of multiple firearm enhancements increased the sentence range from 129-176 [months] plus one 60 month [sic] firearm enhancement to 381-423 months when multiple firearm enhancements are

imposed consecutively" constitutes a "clearly excessive" sentence. CP 188-94; RP 1389-90.

The prosecutor argued in response that under State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999), overruled in part by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), the sentencing court lacked authority to grant Brown's request. CP 182-87; RP 1393.

The trial court rejected Brown's request for a mitigated exceptional sentence, explaining that it "cannot lawfully do" what the defense was requesting. RP 1396. The court then imposed a 381-month sentence, which includes concurrent low-end standard range sentence for each offense, three consecutive 60-month firearm enhancements and two consecutive 36-month firearm enhancements. CP 152-62; RP 1397. Brown appealed. CP 170-81.

On appeal, Brown argued that under the SRA and recent developments in case law, the trial court erred as a matter of law in concluding it "cannot lawfully" impose a mitigated exceptional sentence by reducing the terms of the multiple firearm enhance or running some or all of them concurrent to the others. Brief of Appellant (BOA) at 3-12.

The Court of Appeals rejected Brown's claim, finding it was bound by this Court's 1999 decision in Brown, supra. Slip Op. at 3-4.

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F. ARGUMENT

THE SRA AUTHORIZES TRIAL COURTS TO REDUCE THE DURATION OF FIREARM ENHANCEMENT OR ORDER MULTIPLE FIREARM ENHANCMENTS TO BE SERVED CONCURRENTLY AS A MITIGATED EXCEPTIONAL SENTENCE.

Under the SRA, the only expressed categorical prohibition on reducing the statutory presumptive sentence terms are for those mandatory minimum sentences required under RCW 9.94A.540(1), which provides,

> Except to the extent provided in subsection (3)[2] of this section, the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:[3]
>
> [The statute then list the minimum sentence term for various offenses ranging from aggravate first degree murder (25-year minimum term) to first degree assault (five-year minimum term)]

Emphasis added.

Brown's convictions do not fall under RCW 9.94A.540(1). As several of this Court's decisions indicate, sentencing courts have greater discretion to impose mitigated exceptional sentences than may be

[2] Subsection (3) prohibits application of section (1) to offenses committed by juveniles after July 24, 2005, and who are tried as adults, neither of which is applicable here.

[3] RCW 9.94A.535 sets forth a nonexclusive list of mitigating and aggravating factors a sentence court may consider for purposes of imposing a sentence other than a standard range sentence.

immediately obvious from the language of the SRA. These developments in the law show the sentencing court here abused its discretion as a matter of law by concluding it lacked legal authority to entertain Brown's request to serve the firearm enhancement portions of his sentence concurrently as a mitigated exceptional sentence under RCW 9.94A.535.

The relevant developments in the law regarding mitigated exceptional sentences includes In re Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007), where a jury found the defendant guilty of six counts of first degree assault and one count of drive-by-shooting. The jury also found the defendant was armed with a firearm for each of the assaults. At sentencing, the court concluded it lacked the legal authority to order the underlying sentences for the assault convictions to be served concurrently because each was a "serious violent offense" that must be served consecutively under RCW 9.94A.589(1)(b). 161 Wn.2d at 326.

RCW 9.94A.589(1)(b) provides:

> Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences

> imposed under this subsection (1)(b) **shall** be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

Emphasis added.

The Mulholland Court addressed the question of "whether, notwithstanding the language of this statute, a sentencing court may order that multiple sentences for serious violent offenses run concurrently as an exceptional sentence if it finds there are mitigating factors justifying such a sentence." 168 Wn.2d at 327-28. The Supreme Court agreed with the Court of Appeals-Division Two, that despite the seemingly mandatory language in RCW 9.94A.589, as indicated by use of the term "shall,"[4] sentencing courts nonetheless have authority to impose concurrent sentences for "serious violent offenses" as a mitigated exceptional sentence under RCW 9.94A.535. 161 Wn.2d at 328-30. The Mulholland Court also noted that under State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005), it constitutes an abuse of discretion when a sentencing court fails to consider a proper request for an exceptional sentence. 161 Wn.2d at 333-34.

Just as the consecutive-sentence requirement for multiple serious violent offenses set forth under RCW 9.94A.589(1)(b) is subject to

[4] "The use of the word "shall" is a mandatory directive." Planned Parenthood of Great Nw. v. Bloedow, 187 Wn. App. 606, 622, 350 P.3d 660 (2015).

exception under RCW 9.94A.535, the requirement for consecutive firearm enhancements set forth under RCW 9.94A.533(3) should be subject to the same exceptions. RCW 9.94A.533(3) provides:

> The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:
>
> (a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;
>
> (b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;
>
> (c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

> (d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;
>
> (e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be:
>
> (i) Granted an extraordinary medical placement when authorized under RCW 9.94A.728(1)(c); or
>
> (ii) Released under the provisions of RCW 9.94A.730;

Emphasis added.

Just like RCW 9.94A.589(1)(b), the language under RCW 9.94A.533(3)(e), when viewed in isolation, suggests all firearm enhancements must be imposed, served in total confinement, and consecutive to all other sentence terms, including other sentence enhancements. Despite this seemingly mandatory verbiage, there are two explicit exceptions: subsections .533(3)(e)(i) & (ii) allow for early release for medical reasons or for offenses committed before the offender turned 18 years of age. Thus, despite the "Notwithstanding any other provision of

law" language, there are in fact "other provisions of law" that provide for exceptions to the rule.

Moreover, similar to RCW 9.94A.589(1)(b), and unlike RCW 9.94A.540(1), subsection .533(3) contains no express categorical prohibition on applying RCW 9.94A.535 to the presumptive standard range sentence it creates. Although there is no prior case law specifically holding RCW 9.94A.535 does apply in the context of multiple sentencing enhancements, other decisions support this conclusion.

In State v. DeSantiago, 149 Wn.2d 402, 410, 68 P.3d 1065 (2003), the Supreme Court considered whether an offender could be ordered to serve both a deadly weapon and a firearm enhancement for a single offense committed with two weapons. In concluding in the affirmative, the Court noted the legislature's response to its earlier decision in Matter of Charles, 135 Wn.2d 239, 955 P.2d 798 (1998), which held the SRA allowed for multiple sentence enhancements to run consecutive to the base sentence but concurrently to each other. Following Charles, the legislature amended the statute with the italicized language below to read:

> Notwithstanding any other provision of law, all ... enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, *including other firearm or deadly weapon enhancements*,....

DeSantiago, 149 Wn.2d at 416 (citing) former RCW 9.94A.510(3)(e) (firearm) and former RCW 9.94A.510(4)(e) (other deadly weapon) (emphasis added); Laws of 1998, ch. 235, § 1).

Despite the "Notwithstanding any other provision of law" and the language added by the legislature in 1998, in State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), the majority held that trial courts are "vested with full discretion to depart from the sentencing guidelines and any otherwise mandatory sentence enhancements" when sentencing juvenile offenders in adult court. 188 Wn.2d at 34. This conclusion was based on Eight Amendment jurisprudence as expressed in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) and Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 2470, 183 L.Ed.2d 407 (2012). 188 Wn.2d at 18-26.

The concurrence in Houston-Sconiers, however, would have reached the same result, but on statutory interpretation grounds instead of the Eight Amendment. The concurrence concluded "the discretion vested in sentencing court under the Sentencing Reform Act (SRA) includes the discretion to depart from otherwise mandatory sentencing enhancements when the court is imposing an exceptional sentence." 188 Wn.2d at 34 (Madsen, J, concurring). In reaching this conclusion, the concurrence relied

on the express purpose of the SRA as set forth under RCW 9.94A.010, which provides:

> The purpose of this chapter is to make the criminal justice system accountable to the public *by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences,* and to:
> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
> (2) Promote respect for the law by providing punishment which is *just*;
> (3) Be *commensurate* with the punishment imposed on others committing similar offenses;
> (4) Protect the public;
> (5) Offer the offender an opportunity to improve himself or herself;
> (6) Make frugal use of the state's and local governments' resources; and
> (7) Reduce the risk of reoffending by offenders in the community.

188 Wn.2d at 35-36 (emphasis added by Madsen, J.).

The concurrence notes the purposes set forth under RCW 9.94A.010 are furthered by RCW 9.94A.535, which states "The court may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." 188 Wn.2d at 36. Justice Madsen's concurrence in Houston-Sconiers, is consistent with her 1999 dissent in Brown, supra.

In Brown, a four-Justice dissent authored by Justice Madsen noted the Court's prior holding that "An enhancement increases the presumptive or standard sentence." 188 Wn.2d at 32 (quoting State v. Silva–Baltazar, 125 Wn.2d 472, 475, 886 P.2d 138 (1994)). Thus, statutorily authorized sentence enhancements are distinct from "mandatory minimum" sentences as set forth in RCW 9.94A.540(1), supra. 188 Wn.2d at 32. Thus, the concurrence reasoned that unlike statutorily imposed mandatory minimum sentences, which are expressly exempt from application of RCW 9.94A.535, statutorily imposed sentence enhancement are part of the presumptive standard range sentence that is subject to modification, up or down, as provided under RCW 9.94A.535. 188 Wn.2d at 32-40.

In light of this Court's recent decisions recognizing the SRA does not restrict a sentencing court's discretion as much as pre DeSantiago, Mulholland and Houston-Sconiers jurisprudence had come to conclude, this Court should grant review to decide if its 1999 Brown decision is still valid. Whether Brown is still valid involves an issue of substantial public interest because if it is no longer valid, sentencing courts need to know so they can exercise their discretion to craft sentences that better serve the purposes of the SRA, as described in the concurrence in Houston-Sconiers. 188 Wn.2d at 35-36. Without such clarification from this Court, the 1999 Brown decision will persist as the state of the law and therefore result in the

continued imposition of sentences that exceed what a trial court concludes is warranted for a particular offender, who may be guilty of the crimes charged, but committed them under circumstances that objectively warrant more leniency than the current interpretation of the SRA allows, an interpretation that thwarts rather than furthers the objectives of the SRA of promoting just and proportionate sentences based on structured sentencing court discretion. Review is warranted under RAP 13.4(b)(4).

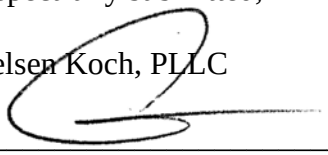
G. CONCLUSION

For the reasons stated, this Court should grant review.

DATED this 12th day of June, 2020.

Respectfully submitted,

Nielsen Koch, PLLC



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. DIONDRAE BROWN, Appellant.	No. 79954-1-I DIVISION ONE PUBLISHED OPINION

PER CURIAM—Diondrae Brown appeals the sentence imposed following his jury conviction on multiple felony counts, several of which carried firearm enhancements. He argues that the sentencing court erred by concluding that it lacked discretion to impose an exceptional sentence downward with regard to the firearm enhancements. Finding no error, we affirm.

FACTS

A jury convicted Brown of four counts of first degree robbery, one count of attempted first degree robbery, two counts of second degree assault, and one count of attempting to elude a pursuing police vehicle. Five of the convictions included firearm enhancements.

At sentencing, the State recommended a sentence of 381 months. The State's recommendation included a low-end standard range base sentence of 129 months, and five firearm enhancements running consecutively to each other and to the base sentence. Citing his history of substance abuse and mental health issues,

Brown requested the sentencing court impose an exceptional sentence below the standard range by ordering the firearm enhancements to be served concurrently. The sentencing court, relying on State v. Brown, concluded that it lacked the authority to impose concurrent sentences on firearm enhancements. 139 Wn.2d 20, 29, 983 P.2d 608 (1999) (overruled in part by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017)). The trial court imposed the State's recommended sentence. Brown appeals.

DISCUSSION

Brown's sole claim is that he is entitled to resentencing because the sentencing court erroneously believed it lacked the discretion to depart from the required term of confinement for a firearm enhancement. We disagree.

Interpretation of a statute is a question of law we review de novo. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). Under RCW 9.94A.535, a court may impose an exceptional sentence below the standard range if it finds mitigating circumstances are established by a preponderance of the evidence and substantial and compelling reasons justify an exceptional sentence.

However, RCW 9.94A.533(3)(e) provides that "[n]notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." In Brown, the Washington Supreme Court held that this statutory language deprives sentencing courts of the discretion to impose an exceptional sentence with regard to firearm enhancements. 139 Wn.2d at 29.

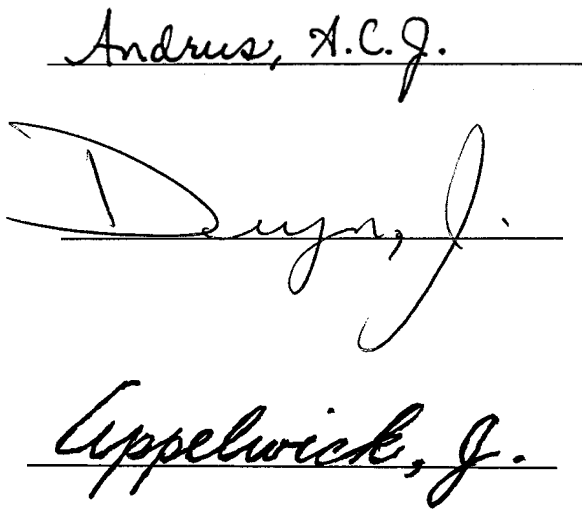
Brown cites In re Pers. Restraint of Mulholland, to argue that a sentencing court has the discretion to impose concurrent firearm enhancements despite the statutory language requiring them to be served consecutively. 161 Wn.2d 322, 166 P.3d 677 (2007). Mulholland is distinguishable. Mulholland held that RCW 9.94A.535 gives a sentencing court discretion to impose concurrent terms for serious violent offenses, despite the language of RCW 9.94A.589(1)(b), which requires that convictions for serious violent offenses "shall be served consecutively to each other." But RCW 9.94A.535 explicitly allows for a departure from RCW 9.94A.589(1) as an exceptional sentence. RCW 9.94A.533(3)(e), on the other hand, applies "[n]otwithstanding any other provision of law." Mulholland did not address RCW 9.94A.533(3)(e), and is not applicable to Brown's case.

In the alternative, Brown argues, this court should depart from Brown and adopt the reasoning in Justice Madsen's concurring opinion in Houston-Sconiers, which concluded that "the discretion vested in sentencing courts under the Sentencing Reform Act of 1981 (SRA) includes the discretion to depart from the otherwise mandatory sentencing enhancements when the court is imposing an exceptional sentence." 188 Wn.2d at 34. But Houston-Sconiers overruled Brown with regard to juveniles only, holding that the Eighth Amendment requires the court to consider "mitigating circumstances associated with the youth of any juvenile defendant." Id. at 21. Brown was 31 when he committed the crimes at issue in this appeal, and Houston-Sconiers does not apply to him. In any event, a decision by the Washington Supreme Court is binding on all lower courts of the state. State v.

Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). This court does not have the authority to overrule Brown.

Affirmed.

FOR THE COURT:



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