SUPREME COURT NO. 99653-9

COA NO. 82069-9-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

GABRIEL NORMAN,
Petitioner.

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

Cowlitz County Cause No. 19-1-00732-08

The Honorable Stephen M. Warning, Judge

PETITION FOR REVIEW

Skylar T. Brett
Attorney for Appellant/Petitioner

LAW OFFICE OF SKYLAR T. BRETT, PLLC
P.O. Box 18084
Seattle, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

Petitioner Gabriel Norman, the appellant below, asks the Court to review the decision of Division I of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Gabriel Norman seeks review of the Court of Appeals unpublished opinion entered on March 8, 2021. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

> **ISSUE 1:** A sentencing court may only impose an exceptional sentence pursuant to a plea agreement if it finds that doing so is "consistent with the purposes of the Sentencing Reform Act." Did the sentencing court in Mr. Norman's case lack the authority to impose an exceptional sentence absent such a finding?

> **ISSUE 2:** A stipulation to an exceptional sentence as part of a plea agreement can form the required statutory basis for imposing that sentence. Did the trial court exceed that authority by imposing an exceptional sentence that was more severe than the one to which Mr. Norman had agreed, absent any other statutory basis for imposing such a sentence?

IV. STATEMENT OF THE CASE

Mr. Norman pleaded guilty to one count of second-degree assault, domestic violence. CP 18-28.[1] The standard sentencing range for the

[1] In exchange, the state dismissed charges for assault of a child. *See* CP 1-4, 16-17, 28.

second-degree assault offense was 63-84 months of confinement plus 18 months of community custody. RP 9.

As part of his plea deal, Mr. Norman agreed to an exceptional sentence of 72 months of confinement and 36 months of community custody, for a total of 108 months. CP 21, 28.

The plea deal did not require Mr. Norman to stipulate to any facts supporting any statutory aggravating circumstances for an exceptional sentence. CP 18-28.[2]

At sentencing, however, the court imposed an exceptional sentence over and beyond that to which Mr. Norman had agreed. RP 16; CP 36-37. The court sentenced Mr. Norman to 78 months of confinement plus 36 months of community custody, for a total of 114 months. RP 16; CP 36-37.

The court entered findings of fact and conclusions of law in support of the exceptional sentence. CP 42. Those findings and conclusions state only that the "parties stipulate to exceptional sentence" and that the "stipulation is appropriate." CP 42.

[2] Mr. Norman agreed that he had an offender score of 24. CP 29. But he was not required, as part of his plea deal, to stipulate to any facts regarding the relationship between that score and his sentence. CP 18-28.

Mr. Norman timely appealed his sentence. CP 46. The Court of Appeals affirmed the sentence in an unpublished opinion. *See* Opinion (Appendix),

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the sentencing court exceeded its authority by entering an exceptional sentence in Mr. Norman's case without first finding that doing so was "consistent with the purposes of the Sentencing Reform Act." This issue is of substantial public interest because it is necessary to determine a court's sentencing authority in cases involving guilty pleas. RAP 13.4 (b)(3) and (4).

Mr. Norman agreed to an exceptional sentence as part of his plea agreement, but he did not stipulate to any facts that would have formed a statutory basis for such a sentence. *See* CP 18-28.

The sentencing court's findings and conclusions provide only that the "parties stipulate to exceptional sentence" and that the "stipulation is appropriate." CP 42.

Specifically, the court did not find that an exceptional sentence was "consistent with the purposes of the [SRA.]" CP 42. Absent such a finding, however, Mr. Norman's exceptional sentence is outside the bounds of the court's sentencing authority.

Even when an accused person agrees to an exceptional sentence as part of a plea agreement, the sentencing court may not impose such a

sentence without first finding that it is "consistent with the purposes of the Sentencing Reform Act." In re Breedlove, 138 Wn.2d 298, 310, 979 P.2d 417 (1999); RCW 9.94A.535(2)(a). This is because the court is not bound by any sentencing recommendation and must "independently determine that the sentence imposed in appropriate." *Id.* at 309.

Absent an independent finding that an exceptional sentence is consistent with the purposes of the SRA, the court lacks authority to impose a sentence beyond that standard range, even when it is agreed to by the parties. *Id.* at 310; *State v. Gronnert*, 122 Wn. App. 214, 221, 93 P.3d 200 (2004).

The court failed to enter that necessary finding in Mr. Norman's case. CP 42. The court did not have the authority to enter the exceptional sentence without it. *Id*.[3]

A question remains regarding the remedy for this error.

In *Breedlove*, the Supreme Court simply remanded the case for entry of findings of fact and conclusions of law. *Breedlove*, 138 Wn.2d at

---

[3] Whether a sentencing court has exceeded its authority is a question of law, reviewed *de novo*. *Bergen*, 186 Wn. App. at 28. A challenge to a sentence that is "contrary to law" may be raised for the first time on appeal. *State v. Hood*, 196 Wn. App. 127, 138, 382 P.3d 710 (2016).

Mr. Norman agreed to the exceptional sentence in his case. CP 18-28. But an accused person cannot "empower a sentencing court to exceed its statutory authorization." *Gronnert*, 122 Wn. App. at 224–25 (*citing State v. Phelps*, 113 Wn. App. 347, 57 P.3d 624 (2002)). Accordingly, Mr. Norman did not invite this error and – like all sentences beyond the court's authority – the issue may be raised for the first time on appeal. *Id.*

311 (*citing State v. Head,* 136 Wn.2d 619, 624, 964 P.2d 1187 (1998); *Templeton v. Hurtado,* 92 Wn. App. 847, 965 P.2d 1131 (1998)). In that case, however, the sentencing court had not yet entered any findings of conclusions in support of the exceptional sentence at all. *Id.* at 303.

In Mr. Norman's case, the sentencing court *did* enter findings of fact and conclusions of law. CP 42. But the court failed to find that an exceptional sentence was consistent with the purposes of the SRA in Mr. Norman's case. CP 42.

Accordingly, Mr. Norman's case is more like *Gronnert*. In that case, the court of appeals held that the error required remand for resentencing within the standard range. *Gronnert,* 122 Wn. App. at 226. This was true even though Mr. Gronnert had agreed to an exceptional sentence as part of a plea bargain and received the benefit of a reduced charge in exchange. *Id.* at 224-26. The sentencing court's failure to find that the exceptional sentence was consistent with the SRA rendered the exceptional sentence beyond that court's authority, regardless of the agreement. *Id.*

Similarly, in Mr. Norman's case, the court entered findings and conclusions in support of the exceptional sentence but did not find that the sentence was consistent with the SRA. CP 42. Accordingly, the court simply lacked the authority to impose an exceptional sentence, no matter

what Mr. Norman had agreed to. *Id.* Mr. Norman's case must be remanded for resentencing within the standard range. *Id.*

This issue is of substantial public interest because it touches in a court's sentencing authority in numerous cases involving guilty pleas. This Court should grant review pursuant to RAP 13.4(b)(4).

B. The Supreme Court should accept review and hold that the sentencing court exceeded its authority by entering an exceptional sentence beyond that to which Mr. Norman had agreed as part of his plea deal, absent any statutory basis for doing so. This issue is of substantial public interest because it is necessary to determine a court's sentencing authority in cases involving guilty pleas. RAP 13.4 (b)(3) and (4).

The standard sentencing range for Mr. Norman's offense was 63-84 months of confinement plus 18 months of community custody. RP 9. Accordingly, a standard range sentence would have totaled to 81-102 months of confinement and community custody.

But, as part of his plea deal, Mr. Norman agreed to an exceptional sentence of a total of 108 months: 72 months of confinement and 36 months of community custody. CP 21, 28. But that is not the sentence that the court imposed.

Instead, the court imposed an exceptional sentence over and above that to which Mr. Norman had agreed. RP 16; CP 36-37. The court sentenced Mr. Norman to 78 months of confinement plus 36 months of community custody, for a total of 114 months. RP 16; CP 36-37.

The sentencing court exceeded its authority by sentencing Mr. Norman to an exceptional sentence, longer than the one to which he had agreed, absent any additional statutory basis for doing so.

1. Mr. Norman's agreement to one exceptional sentence did not grant authority upon the court to enter a higher one.

A court's sentencing authority is limited to that granted by statute. *Bergen*, 186 Wn. App. at 28 *(citing State v. Ammons,* 105 Wn.2d 175, 180, 713 P.2d 719 (1986)); *See In re West*, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005).

Second-degree assault is a "violent offense," with a standard community custody period of eighteen months. RCW 9.94A.030(54)(a)(viii); RCW 9.94A.701(2).

A sentencing court may, however, impose a community custody term longer than eighteen months for the offense as part of an exceptional sentence. *See* e.g. *In re Smith*, 139 Wn. App. 600, 605, 161 P.3d 483, 486 (2007), *as amended* (July 13, 2007) (it constitutes an exceptional sentence to impose a community custody term longer than that delineated by statute).

But exceptional sentences are only permissible in a few, statutorily delineated contexts. *See* RCW 9.94A.535(2). In all contexts, the court

must find "substantial and compelling reasons" to justify an exceptional sentence. RCW 9.94A.535; *Breedlove*, 138 Wn.2d at 305.

The legislature has permitted a court to impose an exceptional sentence pursuant to a stipulated plea agreement when:

> The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds *the exceptional sentence* to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

RCW 9.94A.535(2)(a) (emphasis added).

The Sentencing Reform Act (SRA) also "specifically authorizes agreements which recommend sentences outside the standard sentencing range." *Gronnert*, 122 Wn. App. at 219 (*citing Breedlove*, 138 Wn.2d at 309).

Agreement of the parties can constitute the "substantial and compelling reasons" required for the court to impose an exceptional sentence. *Breedlove*, 138 Wn.2d at 309.

Accordingly, the courts of appeals have found that it does not violate the SRA for a court to impose the exceptional sentence that has been agreed upon as part of a plea deal. *See e.g. State v. Dillon*, 142 Wn. App. 269, 275-76, 174 P.3d 1201 (2007); *Breedlove*, 138 Wn.2d at 300; *State v. Poston*, 138 Wn. App. 898, 907, 158 P.3d 1286 (2007); *State v. Chambers*, 176 Wn.2d 573, 586, 293 P.3d 1185 (2013).

In each of those cases, the court imposed an exceptional sentence that was either exactly what the accused had agreed to or that constituted less time than the agreed sentence. *Dillon*, 142 Wn. App. at 275; *Breedlove*, 138 Wn.2d at 300; *Poston*, 138 Wn. App. at 90; *Chambers*, 176 Wn.2d at 586. In that context, those courts held that the accused cannot agree to a certain sentence and then later claim on appeal that that same sentence (or a lower sentence) had no valid basis. *Id.*

But that is not what happened in Mr. Norman's case. Instead, Mr. Norman agreed to one sentence and the court imposed a *harsher* exceptional sentence. CP 21, 28, 36-37.

Absent some other statutory basis for the exceptional sentence, the court had no authority to impose the actual sentence ordered in Mr. Norman's case. But Mr. Norman did not stipulate to any facts that would have supported an exceptional sentence beyond that to which he agreed. *See* CP 18-28. The trial court erred by imposing an exceptional sentence which was not supported by agreement of the parties or by any other statutory authority.

The sentencing court exceeded its authority by imposing the exceptional sentence in Mr. Norman's case, which was not supported by agreement of the parties or by any other statutory authority. *Bergen*, 186

Wn. App. at 28. Mr. Norman's sentence must be vacated and his case must be remanded for resentencing within the court's authority.

Again, this issue is of substantial public interest because a decision on this matter is necessary to determine the bounds of a sentencing court's authority in countless cases involving guilty pleas. This Court should grant review pursuant to RAP 13.4(b)(4).

VI. CONCLUSION

The issue here is of significant public itnerest because it could impact a large number of criminal cases. The Supreme Court should accept review pursuant to RAP 13.4(b) (4).

Respectfully submitted April 9, 2021.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Gabriel Norman/DOC#819817
Monroe Corrections Center
PO Box 777
Monroe, WA 98272

and I sent an electronic copy to

Cowlitz County Prosecuting Attorney
appeals@co.cowlitz.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on April 9, 2021.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

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

STATE OF WASHINGTON, Respondent, v. GABRIEL HARLEN NORMAN, Appellant.	)	No. 82069-9-I UNPUBLISHED OPINION

BOWMAN, J. — Gabriel Harlen Norman pleaded guilty to one count of domestic violence second degree assault and agreed to a standard-range sentence of 72 months' confinement and an exceptional term of 36 months' community custody. The court imposed a standard-range sentence of 78 months' confinement and the agreed exceptional term of 36 months' community custody. Norman appeals, claiming the court exceeded its sentencing authority. We affirm.

FACTS

The State charged Norman with four counts of domestic violence second degree assault of a three-month-old child with aggravating factors that Norman knew or should have known the victim "was particularly vulnerable or incapable of defense" and that the victim's injuries "substantially exceed the level of bodily

harm necessary to satisfy the elements of the offense." Norman agreed to plead guilty to one count of domestic violence second degree assault. Based on an offender score of 24, Norman's standard-range sentence was 63 to 84 months' confinement and 18 months of community custody. The parties agreed to recommend to the court a standard-range sentence of 72 months' confinement. But the parties stipulated to an exceptional term of 36 months' community custody. The prosecutor explained to the court that Norman "clearly suffers from a meth[amphetamine] problem" and that the agreed 36 months of community custody "will ensure that [for] [3] years he is watched and forced to comply with what DOC[1] recommends."

The trial court accepted Norman's plea and sentenced him to 78 months of confinement. It then imposed the agreed exceptional term of 36 months of community custody. The parties stipulated to findings of fact and conclusions of law in support of the exceptional term of community custody, which the court found to be "appropriate."

Norman appeals his sentence.

ANALYSIS

Norman argues that the court exceeded its authority "by entering an exceptional sentence beyond that to which [he] had agreed" and without first finding that the sentence was "consistent with the purposes of the" Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. We disagree.

[1] Department of Corrections.

Standard-Range Sentence

Norman contends that he agreed to "an exceptional sentence of 72 months of confinement and 36 months of community custody, for a total of 108 months," but "the court imposed an exceptional sentence over and beyond that to which [he] had agreed" of 114 months. The State argues that Norman agreed to a standard-range term of confinement and an exceptional term of community custody. It contends that Norman cannot appeal his standard-range sentence of 78 months. We agree with the State.

Generally, a defendant cannot appeal a standard-range sentence. RCW 9.94A.585(1); State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). And a sentencing court is not bound by any recommendations in a plea agreement. State v. Harrison, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003). Judges are afforded "nearly unlimited discretion" in determining an appropriate sentence within the standard range. State v. Mail, 121 Wn.2d 707, 711 n.2, 854 P.2d 1042 (1993).

Here, Norman conflates his agreement to a standard-range sentence of confinement with his agreed exceptional term of community custody. In his plea paperwork, Norman acknowledged that his standard range was 63 to 84 months of confinement and that his statutory term of community custody was 18 months. Norman agreed to a recommendation of 72 months' confinement. He also agreed to an additional 18 months of community custody and an "exceptional sentence to permit the additional [community custody]." The trial court chose not

to follow the agreed recommendation of 72 months of confinement and imposed 78 months instead. Because Norman's term of confinement falls within the proper presumptive sentencing range set by the legislature, "there can be no abuse of discretion as a matter of law as to the sentence's length." Williams, 149 Wn.2d at 146-47.[2]

Exceptional Term of Community Custody

Norman argues that the sentencing court exceeded its authority by entering an exceptional sentence "without first finding that doing so was 'consistent with the purposes of the [SRA].' " In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 310, 979 P.2d 417 (1999). We disagree.

Under the SRA, a trial court may impose an exceptional sentence if it finds, considering the purposes of the SRA, that there are "substantial and compelling reasons" to justify punishment beyond the standard range. RCW 9.94A.535; State v. Gaines, 121 Wn. App. 687, 697, 90 P.3d 1095 (2004). This includes an exceptional term of community custody. In re Postsentence Petition of Smith, 139 Wn. App. 600, 604, 161 P.3d 483 (2007). A stipulation by the parties is a substantial and compelling reason justifying an exceptional sentence. State v. Dillon, 142 Wn. App. 269, 277, 174 P.3d 1201 (2007); see Breedlove, 138 Wn.2d at 309-10. And "[w]here the parties agree that an exceptional sentence is justified, the purposes of the SRA are generally served by accepting

[2] Because we conclude that the court sentenced Norman to confinement within the standard range, we do not reach his argument that his "offender score cannot form the basis for his exceptional sentence because he did not stipulate that a standard[-]range sentence would have been 'clearly too lenient' " under RCW 9.94A.535(2)(d).

the agreement as a substantial and compelling reason for imposing an exceptional sentence." Breedlove, 138 Wn.2d at 309. The trial judge knows the facts of the incident and the negotiating parties, and "the law provides protection to the defendant and to the public to ensure that a plea agreement is consistent with the interests of justice" and the SRA. Breedlove, 138 Wn.2d at 310.

Norman agreed to an exceptional term of community custody in exchange for a reduction in charges from four counts of second degree assault of a child to one count of assault in the second degree. The parties stipulated to findings of fact in support of the exceptional community custody term. The court found Norman made his plea of guilty "knowingly, intelligently and voluntarily" and approved the parties' stipulation to the exceptional term of community custody as "appropriate." As a result, the court's sentence served the purposes of the SRA.

Norman disagrees. Citing State v. Gronnert, 122 Wn. App. 214, 221, 93 P.3d 200 (2004), he argues that "[a]bsent an independent finding that an exceptional sentence is consistent with the purposes of the SRA," the court lacks authority to impose a sentence beyond the standard range, "even when it is agreed to by the parties." In Gronnert, the defendant agreed to plead guilty to a reduced charge of possession of ephedrine with intent to manufacture. Gronnert, 122 Wn. App. at 218. He had an offender score of 0 but stipulated to a 60-month exceptional sentence if he violated the terms of his temporary release. Gronnert, 122 Wn. App. at 224, 218. Gronnert violated the terms of release and the court imposed a 60-month sentence. Gronnert, 122 Wn. App. at 218. We "consider[ed] the context of the plea" and concluded that it did not serve the

purposes of the SRA because Gronnert's exceptional sentence was disproportionate to his crime and offender score and not commensurate with the punishment imposed on others for similar offenses. Gronnert, 122 Wn. App. at 223-24.

In contrast, Norman received a significant benefit from his stipulation to an exceptional term of community custody. The State first charged Norman with four counts of assault of a child in the second degree with domestic violence designations and multiple allegations of aggravating circumstances. The State warned Norman that it planned to seek an exceptional sentence based on the aggravating factors. But recognizing Norman's methamphetamine addiction, the State reduced the charges to a single count of second degree assault with an exceptional term of 36 months' community custody. The State explained to the court:

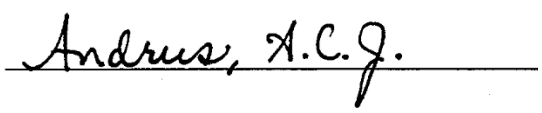
> The Defendant's range for assault of a child in the second degree, which is essentially the same type of crime as what he is pleading to, is 120 months. There would be no possibility of community custody based on that. In reviewing the case, and with the proposed recommendation from Defense, our office, including myself as well as my boss, sat down and considered the idea of additional community custody in this matter.

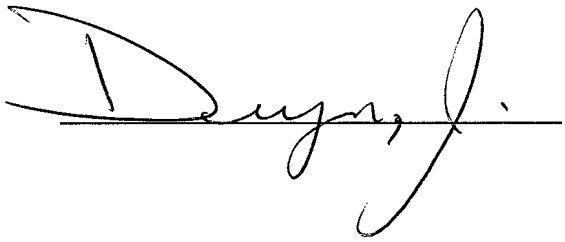
Ultimately, the parties agreed that the exceptional term of community custody would "ensure that . . . [Norman] is watched and forced to comply with what DOC recommends." Indeed, Norman's attorney represented to the court that "being on DOC supervision for an additional period of time is a good idea for all concerned, certainly for Mr. Norman and for the community." The trial court

did not exceed its authority by imposing the agreed exceptional term of 36 months of community custody.[3]

Affirmed.

WE CONCUR:





[3] Neither does Norman's combined 114 months of incarceration and community custody exceed the 120-month statutory maximum for the class B felony of assault in the second degree. RCW 9A.36.021(2)(a); RCW 9A.20.021(1)(b). "As long as the confinement and the community placement do not exceed the statutory maximum sentence, there is no error." In re Application for Relief from Pers. Restraint of Caudle, 71 Wn. App. 679, 680, 863 P.2d 570 (1993).

LAW OFFICE OF SKYLAR BRETT

April 09, 2021 - 10:44 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82069-9
Appellate Court Case Title:	State of Washington, Respondent v. Gabriel H. Norman, Appellant
Superior Court Case Number:	19-1-00732-7

The following documents have been uploaded:

- 820699_Other_20210409104025D1609064_2442.pdf
  This File Contains:
  Other - Div 2 transittal letter,Div 2 transmittal letter
  The Original File Name was 20210406172140D2430715-trans_ltr.pdf
- 820699_Petition_for_Review_20210409104025D1609064_7558.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Norman PETITION FINAL - to Div 1.pdf

A copy of the uploaded files will be sent to:

- LaurineJ@co.cowlitz.wa.us
- appeals@co.cowlitz.wa.us

Comments:

The petition for review was mistakenly filed under the prior Div 2 case on 4-6-21. My apologies. Please let me know if there is anything further you need from me.

Sender Name: Valerie Greenup - Email: valerie.skylarbrett@gmail.com
Filing on Behalf of: Skylar Texas Brett - Email: skylarbrettlawoffice@gmail.com (Alternate Email: valerie.skylarbrett@gmail.com)

Address:
PO Box 18084
Seattle, WA, 98118
Phone: (206) 494-0098

Note: The Filing Id is 20210409104025D1609064