IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID MAI, Appellant.	No. 77250-3-I DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2019

MANN, J. — David Mai was sentenced to 100 months confinement after he pleaded guilty to one count of theft in the first degree and stipulated to a major economic offense aggravator. Mai challenges the sentence as clearly excessive. We affirm.

I.

Mai worked as Diagnos Tech's accountant and Chief Financial Officer for many years. During a large portion of his employ, Mai cashed checks against the company's petty cash, used company checks to pay personal bills, and transferred company funds to pay off his personal credit card without authorization. The total amount of funds that Mai embezzled remains unknown, but is in excess of $1,000,000. On May 2, 2015, Mai

was arrested when he attempted to board a plane to Vietnam. Mai was arrested with a large amount of money and numerous digital storage devices. Mai pleaded guilty to theft in the first degree with aggravating circumstances, and stipulated that his conduct constituted a major economic offense justifying an exceptional sentence. Mai also stipulated to a $2,655,335.79 restitution.

The State recommended an exceptional sentence of 100 months based in part on its belief that Mai still possessed and refused to return much of the stolen funds. Mai acknowledged that he deserved an exceptional sentence but argued that a 354-day sentence was appropriate given his lack of prior offenses, his standard sentencing range of 0 to 90 days, and his large restitution obligation. The sentencing court accepted the State's recommendation and sentenced Mai to 100 months of incarceration plus the $2.6 million restitution.

II.

Our review of an exceptional sentence is governed by the Sentencing Reform Act (SRA), chapter 9.94A RCW; State v. Ritchie, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). The sentencing court "may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. We may reverse an exceptional sentence if we find that the sentence is "clearly excessive." RCW 9.94A.585(4).

A.

Mai first argues that the sentencing court considered improper facts in imposing the excessive sentence. The SRA provides that "[t]he facts supporting aggravating

circumstances shall be proved to a jury beyond a reasonable doubt . . . . If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts." RCW 9.94A.537(3); Blakely v. Washington, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). See also RCW 9.94A.535 ("Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.").

Mai stipulated to the facts underlying the major economic offense aggravator. Specifically, Mai admitted that between January 1, 2002, and February 19, 2015, he wrongfully obtained United States currency belonging to Diagnos Techs in a series of transactions which were part of a criminal episode. He further stipulated to "intentionally embezzl[ing] money from Diagnos Techs by writing multiple checks over a long period of time against the accounts of Diagnos Techs without permission for [his] own personal financial benefit exceeding over $1,000,000," and that his conduct "constitutes a major economic offense or series of offenses under RCW 9.94A.535(3)(d)."

The State's primary argument in favor of a 100-month sentence was based on its assumption that Mai retained a large amount of the stolen money and, notwithstanding the $2.6 million restitution order, refused to return it to Diagnos Tech. In its sentencing memorandum, the State argued that "[b]ecause Mai has transferred $1,249,693.99 of the stolen money to the bank accounts of friends and family members, transferred $100,000 to a bank in Singapore, and spent the rest Diagnos-Tech has been unable to recovery any of their money." The State argued that "this [case] is different" because in an ordinary case, the defendant spends the stolen money, while here "a large amount of the money that Mr. Mai took is still missing." "[A]bout [$]1.2 million . . . was transferred

to other bank accounts, friends and family. And then there's the $100,000 that went to an account in Singapore." None of these facts were stipulated to by Mai.

The State also alluded at sentencing to their theory that Mai was attempting to steal proprietary information from Diagnos Tech. The State noted that Mai was arrested trying to board a plane to Vietnam with hard drives and 33 thumb drives. Further, "the people at Diagnos-Tech discovered that a lot of those files belonged to them, and they were very concerned that they contained personal patient medical information that [Mai] somehow downloaded." The State concluded, "I think [Mai] was trying to start a business in Vietnam or someplace in Southeast Asia."

The State also asserts in its briefing to this court that there are additional facts that support the sentencing court's imposition of a 100-month sentence. The State points to the fact that over $1,000,000 was transferred to Mai's friends and family, and $100,000 was transferred to a Singaporean bank. The State continues that "[i]t appears [Mai] was also attempting a massive theft of intellectual property from Diagnos-Tech" because he was arrested with digital storage devices.

Mai argues that because these facts were not stipulated to the State's arguments were improper under Blakely. 542 U.S. at 296. See also State v. Hagar, 158 Wn.2d 369, 374, 144 P.3d 298 (2006) ("[E]xceptional sentences violate Blakely when they are based on facts not stipulated to by the defendant or found by a jury beyond a reasonable doubt."). But the sentencing court did not consider unstipulated facts in imposing Mai's exceptional sentence because Mai stipulated that the major economic offense aggravator applied. RCW 9.94A.537(3) only prohibits the sentencing court from considering unstipulated or unproven facts in support of an exceptional sentence. See

Blakely, 542 U.S. at 302 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be . . . proved beyond a reasonable doubt . . . . [T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional facts."). While the sentencing court may have considered unstipulated facts in determining the length of Mai's exceptional sentence, that is not a Blakely violation.

In Hagar, the Supreme Court reversed an exceptional sentence after determining that the sentencing court committed a Blakely violation. 158 Wn.2d at 371. There, the defendant pleaded guilty to three counts of first degree theft but did not stipulate to the major economic offense aggravator. Hagar, 158 Wn.2d at 371-72. The court imposed an exceptional sentence "based on its finding that [the defendant] had committed a major economic offense." Hagar, 158 Wn.2d at 374. But that violated Blakely "because the exceptional sentence was predicated on an unstipulated fact that was not found by a jury beyond a reasonable doubt." Hagar, 158 Wn.2d at 374.

Here, however, the sentencing court did not impose Mai's exceptional sentence based on unstipulated facts. Instead, the court imposed Mai's exceptional sentence based on Mai's stipulation to the major economic offense aggravator. While the court may have increased the duration of Mai's exceptional sentence based on the State's assertion of unstipulated facts, that is a distinction that makes all the difference. The court did not violate Blakely—and therefore RCW 9.94A.537(3)—because, as Hagar indicates, a violation occurs when the sentencing court relies on unstipulated facts to impose an exceptional sentence but not when relying on such facts to determine the

appropriate duration of an exceptional sentence. See also State v. Flores, 164 Wn.2d 1, 20-21, 186 P.3d 1038 (2008) (emphasis added) ("when the trial court is left to draw any inference from the facts in determining the existence of an aggravating factor, the aggravating factor is not a valid ground for an exceptional sentence).

B.

Mai argues next that the trial court abused its discretion because his 100-month exceptional sentence is clearly excessive. We disagree.

We review whether a sentence is clearly excessive for an abuse of discretion, State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). An exceptional sentence is clearly excessive if it shocks the conscience. See State v. Vaughn, 83 Wn. App. 669, 681, 924 P.2d 27 (1996); Ritchie, 126 Wn.2d at 396. A sentence shocks the conscience if "no reasonable person would adopt [it]." State v. Halsey, 140 Wn. App. 313, 324-25, 165 P.3d 409 (2007). In determining whether a sentence is clearly excessive, we are prohibited from comparing the underlying sentence with other cases for proportionality. Ritchie, 126 Wn.2d at 392. Instead, we "compare the purposes of the SRA against the reasons given" for the exceptional sentence but "not for the duration of the sentence" imposed. State v. Hutsell, 120 Wn.2d 913, 923, 845 P.2d 1325 (1993).

Mai stipulated that the major economic offense aggravator applied to his case. The SRA provides that if the current offense was a major economic offense or series of offenses, it supports a sentence above the standard range. RCW 9.94A.535(3). A major economic offense is "identified by a consideration of any of the following factors:"

> (i) The current offense involved multiple victims or multiple incidents per victim;

> (ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;
>
> (iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or
>
> (iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

RCW 9.94A.535(3)(d). The presence of any one of the above listed factors justifies a sentencing court imposing an exceptional sentence. RCW 9.94A.535(3).

Mai stipulated that his "conduct constitutes a major economic offense . . . because there were multiple incidents of theft against the victim, the monetary loss is substantially greater than typical for a single count of first-degree theft, [his] offenses occurred over a long period of time, and [he] used [his] position of trust to facilitate the commission of the current offense." Further, Mai acknowledged that he deserved an exceptional sentence. Accordingly, Mai does not ask us to hold that the sentencing court abused its discretion in imposing an exceptional sentence. Mai instead argues that the sentencing court abused its discretion in imposing a clearly excessive exceptional sentence.

As support, Mai points to three cases that he contends indicate a smaller sentence was appropriate: State v. Bowen, No. 46069-6-II (Wash. Ct. App. Sept. 22, 2015) (unpublished) (48-month sentence for one count of first degree theft overturned on appeal as clearly excessive); State v. Dockens, 156 Wn. App. 793, 236 P.3d 211 (2010) (45-month sentence affirmed on appeal); and State v. Hagar, 158 Wn.2d 369, 144 P.3d 298 (2006) (30-month sentence affirmed on appeal). But neither Dockens nor Hagar addressed whether the sentences were clearly excessive, Dockens, 156 Wn. App. at 793 (about credit for presentence time served under house arrest), Hagar, 158 Wn.2d at 369 (about Blakely, 542 U.S. 296, violations), and the theft at issue in Bowen

was substantially smaller than the one at issue here. Bowen, 190 Wn. App. at 1013.[1] Therefore none of these cases offer Mai the support he claims.

By way of contrast, in State v. Oxborrow, our Supreme Court affirmed a 10-year sentence after the defendant pleaded guilty to first degree theft for a Ponzi scheme that defrauded investors of over $1,000,000. 106 Wn.2d 525, 526-28, 723 P.2d 1123 (1986) In State v. Branch, the Supreme Court concluded that a 48-month sentence was not clearly excessive after the defendant embezzled $400,000 from his company. 129 Wn.2d 635, 639, 919 P.2d 1228 (1996). In State v. Knutz, 161 Wn. App. 395, 398-403, 253 P.3d (2011), the court affirmed a 5-year sentence after the defendant stole $340,000 from an elderly man.

While we do not consider these cases as proportionally dictating the holding here, they do demonstrate that reasonable sentencing courts, facing similar situations as the sentencing court below, have concluded that similar sentences were appropriate and did not shock the conscience. We conclude that the sentencing court did not abuse its discretion in sentencing Mai to a 100-month confinement for his crime.

We affirm.

Mann, J.

WE CONCUR:

Appelwick, C.J.

[1] The precise amount of the theft does not appear in the Bowen opinion, but Mai asserts that the restitution awarded there was $137,000, while here Mai admitted to embezzling over $1 million dollars.