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FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON

NO. 62056-8-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JESUS SERJIO JIMENEZ,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

RESPONDENT'S BRIEF

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ORIGINAL

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I. SUMMARY OF ARGUMENT

Jesus Jimenez contends that the exceptional sentence imposed following multiple convictions for drug trafficking was imposed based upon a basis which was not found by the jury. The jury found the aggravating factor of a major violation of the uniform controlled substances act. Contrary to Jimenez's assertion, the trial court imposed an exceptional sentence based upon that factor and not upon rapid recidivism found by the trial court.

Additionally, Jimenez requests remand for entry of CrR 3.5 findings. Although CrR 3.5 findings were not entered prior to the Brief of Appellant being filed, the oral findings were sufficient to permit appellate review. Therefore, remand for entry of findings is unnecessary. In the alternative, this Court could permit supplemental briefing pertaining to any issues raised in the written CrR 3.5 findings.

Therefore, Jimenez's sentence should be affirmed.

II. ISSUES

Where the judgment and sentence and oral findings indicate the trial court imposed an exceptional sentence based upon the aggravating factor found by the jury, did the trial court actually impose an exceptional sentence based upon another factor?

Where oral CrR 3.5 hearing findings were detailed, were written findings necessary to permit appellate review?

Where written CrR 3.5 hearing findings were entered after filing of the Brief of Appellant, is the alternative remedy of allowing briefing upon defense request appropriate?

III. STATEMENT OF THE CASE¹

1. Statement of Procedural History

On October 8, 2007, Jesus Serjio Jimenez was charged with Possession with Intent to Manufacture or Delivery of Methamphetamine with a Firearm Enhancement, Unlawful Possession of a Firearm in the First Degree, six counts of Delivery of a Methamphetamine with a School Zone Enhancement occurring on different days and one count of Maintaining a Vehicle or Premises for Drug Trafficking. CP 1-7.

On May 8, 2008, the trial court found there was insufficient evidence to support the Firearm Enhancement on the Possession of Methamphetamine with Intent to Manufacture or Deliver. CP 33-4.

¹ The State does not provide a summary of the testimony at trial because the trial evidence is not particularly relevant to the issues raised by Jimenez. For the summary of the trial testimony, this Court may choose look to the Brief of Appellant at pages 3-6.

On June 11, 2008, the trial court conducted a hearing on admissibility of statements pursuant to CrR 3.5. 6/11/08 RP 2-29.² The trial court ruled orally. 6/11/08 RP 25-9. The sole disputed fact was that Jimenez claimed not to recall having been read his rights. 6/11/08 RP 27-8. The trial court believed the officer relying in part on the fact that the defendant could not recall whether the rights had been read. 6/11/08 RP 28. The court held statements were admissible. 6/11/08 RP 28-9.

On June 12, 2008, the information was amended to remove the Firearm Enhancement on count 1, but also added a count of Forgery as count 10. CP 35-41, 6/11/08 RP 29-30.

On June 12, 2008, the State filed a Notice of Intent to Seek Exceptional Sentence based upon allegations of a major violation of the uniform controlled substances act, the defendant committing the offenses shortly after release from incarceration and multiple current

² The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

6/11/08 RP	3.5 Hearing
7/7/08 RP	Trial Day 1 (Volume I) (Motions in Limine)
7/8/08 RP	Trial Day 2 (Volume II) (Opening and Testimony)
7/9/08 RP	Trial Day 3 (Volume III) (Testimony)
7/10/08 RP	Trial Day 4 (Volume IV) (Testimony)
7/11/08 RP	Trial Day 5 (Volume V) (Jury Instructions and Closing)
7/23/08 RP	Sentencing Hearing.

offenses and high offender score causing some offenses to go unpunished. CP 154-5.

On July 7, 2008, the information was amended to remove the School Zone Enhancements. CP 53-7. The State also indicated it would agree not to pursue the rapid recidivism basis for the exceptional sentence in the State's case in chief and bifurcate trial on that issue. 7/7/08 RP 8.

On July 11, 2008, the trial court noted again that the rapid recidivism exceptional sentence basis was bifurcated. 7/11/08 RP 9.

On July 11, 2008, the jury returned verdicts finding Jimenez guilty on all counts and the aggravating factor of a major violation of the uniform controlled substances act. CP 106-122.

On July 23, 2008, Jimenez was sentenced by the trial court to 150 months which was 30 months above the top of the standard range of 120 months. CP 133, 135. As detailed below, the trial court based the exceptional sentence upon the jury's determination of a major violation of the uniform controlled substances act. CP 133, 143-9, 151. The trial court also specifically indicated in the judgment and sentence that the aggravating factor relied upon was the one found by the jury. CP 133.

On July 23, 2008, Jimenez timely filed a notice of appeal. CP 151-3.

On May 29, 2009, the trial court entered findings pertaining to the 3.5 hearing.

2. Statement of Facts Pertaining to Court's Imposition of Exceptional Sentence

On June 12, 2008, the State filed a Notice of Intent to Seek Exceptional Sentence based upon allegations of a major violation of the uniform controlled substances act under RCW 9.94A.535(3)(e), the defendant committing the offenses shortly after release from incarceration under RCW 9.94A.535(3)(t) and multiple current offenses and high offender score causing some offenses to go unpunished under RCW 9.94A.535(2). CP 154-5.

On July 7, 2008, the State indicated it would agree not to pursue the rapid recidivism basis for the exceptional sentence in the State's case in chief and bifurcate the jury trial on that issue. 7/7/08 RP 8.

On July 11, 2008, at trial the trial court noted again that the rapid recidivism exceptional sentence basis was bifurcated before the jury. 7/11/08 RP 9.

At trial, the court only submitted the aggravating circumstance to the jury of a major violation of the Uniform Controlled Substances Act. CP 94-105. Instruction No. 32-40), 7/11/08 RP 27-33.

On July 11, 2008, the jury returned verdicts finding Jimenez guilty on all counts and the aggravating factor of a major violation of the uniform controlled substances act. CP 116-122.

The State filed a sentencing memorandum in which the State argued for an exceptional sentence based upon the aggravating factor found by the jury as well as the additional factor available to the court of other current offenses going unpunished. CP 159-60. The State presented no request for an exceptional sentence based upon rapid recidivism. CP 156-65.

At the sentencing hearing, the prosecutor indicated to the trial court that it was seeking an exceptional sentence based upon the jury's finding of a major violation of the uniform controlled substances act as well as current offenses going unpunished due to high criminal history. 7/23/08 RP 3-4. The standard range was 60 to 120 months. CP 133.

Jimenez was sentenced by the trial court to 150 months which was 30 months above the top of the standard range of 120 months. 7/23/08 RP 28-9, CP 133, 135. The trial court explained the basis for

application of the exceptional sentence based upon Jimenez's placement in the drug hierarchy.

I think we have a fairly good picture that occasionally, once a month or thereabouts, you make a trip by yourself and get between a half a pound or a pound of meth, bring it back, and deliver it yourself. You're supplying oftentimes user amounts and occasionally supplying to other dealers who are then supplying these street amounts to the users and the addicts.

I believe after hearing the testimony that's a fair assessment of your position in the drug hierarchy, but you've chosen each time you've come out prison to go right back to that style.

The jury did make decisions due to the aggravating factors, the jury doesn't see what your attorney and Ms. Johnson see every day, so they have nothing to compare your activity with in terms of other dealers. In some senses you are a mid- to upper-mid-level dealer in this Court's opinion, but when the really large dealers get caught it seems those become Federal Cases, not usually County Cases.

In looking at your priors, your refusal to change your lifestyle, the quantities, at least at the end of law enforcement's transactions with you and your own statements about how much you're bringing in would seem to be consistent with the evidence obtained, and balance that with the standard range, this Court finds that the[re] is, in fact, a basis to exceed the standard range and declare an exceptional sentence upward based on those factors, the aggravating factors, and your unwillingness to change your lifestyle despite two prior rather significant terms in prison.

However, the Court still feels the need to leave an upper end of the range if and when those persons bringing in far larger quantities than you have to our County come from before this court. I do not believe

you represent the worst of the worst or the top the range by any means, but I do think you need to get the very clear message that should you decide once again to come out of prison and reopen your business that each and every time you come to this Court the punishment will be significantly higher.

Having declared an exceptional sentence upward I'm going to impose on those counts involving delivery or manufacturing 150 months in the Department of Corrections.

7/23/08 RP 27-9. There was no finding made by the trial court of either rapid recidivism or current offenses going unpunished due to high criminal history. The hand written findings on the exceptional sentence use similar language.

I. FINDINGS OF FACT

Based upon the jury's findings, the defendant's actions and the defendant's criminal history and unwillingness to change the court finds a basis to impose an exceptional sentence on counts 1 and 3 - eight.

II. CONCLUSIONS OF LAW

The court finds substantial + compelling reasons to impose a sentence above the standard range on counts one and three through eight.

CP 130.

IV. ARGUMENT

- 1. The trial court properly based the exceptional sentence upon the jury's determination that the offense was a major violation of the uniform controlled substances act**

On appeal Jimenez claims that the trial court based the exceptional sentence on a determination of "rapid recidivism." Appellant's Opening Brief at page 10-11. Jimenez uses the one term used by the trial court of "unwillingness to change" to infer that the trial court made a determination of rapid recidivism and therefore improperly imposed an exceptional sentence. Brief of Appellant at page 11.

Contrary to that assertion, the judgment and sentence indicates that the aggravating factor which was the basis for the exceptional sentence was the one found by the jury. CP 133. The trial court was simply explaining the decision where to place the defendant within the possible range of an exceptional sentence and was not making a determination of "rapid recidivism." Given the judgment and sentence finding and the entire record, the trial court did not base the exceptional sentence on "rapid recidivism" but based upon jury's determination the offense was a major violation of the uniform controlled substances act and the defendant's placement in the drug hierarchy. The facts of the case support this conclusion.

Prior to trial, the State notified Jimenez that the exceptional sentence would be requested based upon a major violation of the uniform controlled substances act under RCW 9.94A.535(3)(e), the

defendant committing the offenses shortly after release from incarceration under RCW 9.94A.535(3)(t) (rapid recidivism) and multiple current offenses and high offender score causing some offenses to go unpunished under RCW 9.94A.535(2). CP 154-5. However, on the first day of trial the State indicated it would agree not to pursue the rapid recidivism basis for the exceptional sentence in the guilt phase of the trial. 7/7/08 RP 8. Prior to jury instructions, defense counsel renewed the motion that all aggravating factors be presented to the jury after any verdict on the underlying charges. 7/11/08 RP 8-9. The trial court denied that motion, noting that only one aggravating factor, rapid recidivism, was going to be bifurcated and heard by the jury at a later time. 7/11/08 RP 9.

Although there is no transcripts provided of any proceedings after jury instruction or trial, the State did not pursue the rapid recidivism factor after trial.³

The State filed a sentencing memorandum in which the State argued for an exceptional sentence based upon the aggravating

³ The State believes there may be an additional transcript on this issue. The reading of the verdicts and setting of the sentencing date was not included in the transcripts provided. These are usually recorded. The deputy prosecutor handling the matter at trial believes that she indicated on the record the decision not to pursue the additional aggravating factor of rapid recidivism shortly after verdicts. I have contacted the court reporters to determine if there is additional relevant transcript and will provide that to this Court and counsel upon receipt.

factor found by the jury and the additional factor available to the court of other current offenses going unpunished. CP 159-60. The State presented no request for an exceptional sentence based upon rapid recidivism. CP 156-65.

At the sentencing hearing, the prosecutor indicated to the trial court that it was seeking an exceptional sentence based upon the jury's finding of a major violation of the uniform controlled substances act as well as current offenses going unpunished due to high criminal history. 7/23/08 RP 3-4. The trial court heard extensively from both the prosecutor and defense counsel at the sentencing hearing. 7/23/08 RP 2-24.

The trial court's findings at the time of the imposition of the exceptional sentence explain how the trial court came up with the exceptional sentence of 150 months which was 30 months above the top of the range.

In looking at your priors, your refusal to change your lifestyle, **the quantities, at least at the end⁴ of law enforcement's transactions⁵ with you and your own statements about how much you're**

⁴ The initial quantities involved approximately 1.7 to 1.8 grams. In the later dealings, the amounts involved one to two ounce quantities (27.4, 55.5 and 27.5 grams). 7/8/08 RP 38-51, 63-67, 73-99, 7/10/08 RP 51-80.

⁵ The Brief of Appellant omits the reference "law enforcement's" from their citation to the transcript. Brief of Appellant at page 14.

bringing in⁶ would seem to be consistent with the evidence obtained, and balance that with the standard range, this Court finds that the[re] is, in fact, a basis to exceed the standard range and declare an exceptional sentence upward based on those factors, the aggravating factors, and your unwillingness to change your lifestyle despite two prior rather significant terms in prison.

However, the Court still feels the need to leave an upper end of the range if and when those persons bringing in far larger quantities than you have to our County come from before this court. I do not believe you represent the worst of the worst or the top the range by any means, but I do think you need to get the very clear message that should you decide once again to come out of prison and reopen your business that each and every time you come to this Court the punishment will be significantly higher.

Having declared an exceptional sentence upward I'm going to impose on those counts involving delivery or manufacturing 150 months in the Department of Corrections.

7/23/08 RP 27-9. The oral ruling expresses that the trial court was considering that Jimenez's transactions were significant quantities, in light of the trial court's determination that Jimenez was treating dealing as a business.

You have served two prior sentences for drug dealing, and you continue to come back to this business. For you it is a business. It's clear you do not use these drugs. You apparently are bright enough to operate your own legal business, if you chose to, but you choose for probably logical reasons

⁶ Testimony included statements by Jimenez to officers about obtaining pound quantities on multiple occasions from out of state to deal. 7/8/08 RP 74, 83, 94-5.

to make your money, more money by dealing in drugs.

...

You truly approached this from a businessman point of view. I believe you balanced the risk, the potential penalties with the reward in terms of money and lifestyle. What I don't think you do Mr. Jimenez is balance the cost in terms of damage to families in this community because while you're in the parking lot doing your business, I sit here on this bench watching families, children, parents all affected by the drugs that they consume.

7/23/08 RP 25-6.

Also significant is what is not included in the sentencing transcript. There was no finding made by the trial court of either rapid recidivism or current offenses going unpunished due to high criminal history. There was also no mention of the statutory basis for rapid recidivism under RCW 9.94A.535(3)(t). There was also no objection made by the defense indicating that the defense counsel believed that the trial court was imposing an exceptional sentence other than upon the aggravating factor found by the jury.

Most importantly, the judgment and sentence specifically indicated that the exceptional sentence was imposed based upon the aggravating factor found by jury. CP 133. It reads at section 2.4:

Aggravating factors were
stipulated by the defendant found by the
court after the defendant waived jury trial

found by the jury by special interrogatory, attached.

Findings of fact and conclusion of law are attached in Appendix 2.4 [X] Jury's special interrogatory is attached.

CP 133.

The trial court sentenced Jimenez based upon the aggravating factor found by the jury on seven of the counts. It is not alleged by Jimenez that the jury's determination was incorrect or flawed.

Generally, the jury must find the facts supporting an aggravated sentence beyond a reasonable doubt. See former RCW 9.94A.535(2)-(3); former RCW 9.94A.537(2), (5) (2005); Blakely v. Washington, 542 U.S. 296, 301-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008); State v. Suleiman, 158 Wn.2d 280, 292-93, 143 P.3d 795 (2006). If the jury unanimously finds the alleged aggravating circumstances beyond a reasonable doubt, then the trial court may sentence the defendant under RCW 9.94A.535 to an exceptional sentence "if it finds ... that the facts found are substantial and compelling reasons justifying an exceptional sentence." Former RCW 9.94A.537(5).

The Legislature requires that whenever the trial court imposes a sentence outside the standard range, it "shall set forth the reasons for its decision in written findings of fact and conclusions of law." Former RCW 9.94A.535. The Legislature also established that if the trial court imposed a sentence outside the standard range, then "the sentence is subject to review only as provided for in RCW 9.94A.585(4)." ^{FN3} Former RCW 9.94A.535.

FN3. RCW 9.94A.585(4) provides:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

State v. Hale, 146 Wn. App. 299, 304-305, 189 P.3d 829 (2008).

Jimenez also does not allege that the reason of a major violation of the uniform controlled substances act does not merit a sentence outside the standard range or was clearly excessive. In the absence of such claims, and given the trial court's proper reliance the exceptional sentence was properly imposed.

Therefore, Jimenez's claim that the trial court sentenced him based upon rapid recidivism must be denied and the motion to remand for a new sentencing hearing denied.

2. The CrR 3.5 findings have been entered on this case.

The CrR 3.5 written findings were not entered until just recently. CP ____ (Sub No. 106 Findings of Fact and Conclusions of Law in 3.5 Hearing filed May 29, 2009). The oral findings of the trial court are substantially similar to the written findings that have been entered. 6/11/08 RP 259

CrR 3.5 provides: "After the hearing, the court shall set forth in writing: ...)." Those findings were not signed by the trial court until recently.⁷ The purpose of written findings is to permit appellate review. Generally written findings are needed. However, failure to enter written findings is harmless error if the oral findings are sufficient to permit appellate review.

The trial court did not enter written findings of fact and conclusions of law following the CrR 3.5 hearing. The rule provides the court must state in writing: "(1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor." CrR 3.5(c). Nonetheless, "failure to enter findings required by CrR 3.5 is considered harmless error if the court's oral findings are sufficient to permit appellate review." State v. Cunningham, 116 Wn. App. 219, 226, 65 P.3d 325 (2003) (*citing State v. Smith*, 67 Wn. App. 81, 87, 834 P.2d 26 (1992)), *aff'd*, 123 Wn.2d 51, 864 P.2d 1371 (1993). Here, the trial court's oral findings are sufficient.

State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008), see also, State v. Holmes, 135 Wn. App. 588, 594, 145 P.3d 1241 (2006), *citing State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998) *citing State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994).

⁷ The deputy prosecutor for trial prepared CrR 3.5 findings before trial. However, the judge handling the CrR 3.5 hearing was not the trial judge. 6/11/08

The State believes that the oral findings would have been sufficient to raise any issues pertaining to the trial court's decision to admit the statements. Here the trial court's oral findings were four pages in length and included findings of fact, resolution of a dispute fact as well as the trial court's conclusion of law. 6/11/08 RP 25-29. This was not a ruling without factual support.

A trial court's decision to admit statements in a CrR 3.5 hearing is reviewed to determine whether substantial evidence supports the trial court findings of fact and whether the trial court derived proper conclusion of law. State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008). There is no indication in the Brief of Appellant that there were unsupported oral findings or improper conclusions of law. Review could have been taken from the oral findings.

Should this Court believe that review could not have been made from the oral findings, this Court should apply a remedy applicable to the situation since findings have now been entered. Since the purpose of written findings is to facilitate appellate review, allows appellants to focus on issues supported by the record and avoid issues lacking merit, this Court should permit Jimenez to

RP 1, 7/7/08 RP 1. Due to oversight, findings were not entered until the issue was

provide a supplemental brief addressing issues pertaining to the CrR 3.5 hearing should he believe there are issues of merit therein. State v. Head, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998) (“Written findings and conclusions also enable an appealing defendant to focus on issues arguably supported by the record and avoid pursuing issues obviously lacking merit.”)

V. CONCLUSION

For the foregoing reasons, the exceptional sentence imposed by the trial court must be affirmed.

DATED this 5th day of June, 2009.

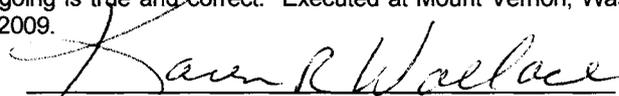
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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:
I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Andrew Peter Zinner, addressed as Nielsen Broman & Koch, PLLC, 1908 E Madison Street, Seattle, WA 98122 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 5th day of June, 2009.


KAREN R. WALLACE, DECLARANT

brought to the State's attention due to the Appellant's Opening Brief.