62629-9

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NO. 62629-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TROY MCLEOD,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

THE TRIAL COURT'S UNTENABLE MISAPPLICATION OF THE LAW GOVERNING EXCEPTIONAL SENTENCES REQUIRES REVERSAL AND REMAND FOR A NEW SENTENCING PROCEEDING

The prosecution claims McLeod lacks any ability to appeal from the court's refusal to impose a sentence below the standard range because at the sentencing hearing, the court did not expressly state that it categorically refused to consider such a sentence. Contrary to the extreme position advocated by the prosecution, a court's sentencing decision, including the refusal to impose a sentence below the standard range, may be appealed based on a claim of legal error in determining the applicability of a sentencing provision. Such is the case at bar.

As the Supreme Court ruled, "it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies." State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003) (citing State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999); State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); State v. Channon, 105 Wn.App. 869, 876, 20 P.3d 476 (2001)). An appellate court will review a standard range sentence resulting from

constitutional error, procedural error, an error of law, or the trial court's failure to exercise its discretion. See e.g., Williams, 149 Wn.2d at 147; State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993); State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 71 (1986); State v. Watson, 120 Wn.App. 521, 527, 86 P.3d 158 (2004), aff'd on other grounds, 155 Wn.2d 574 (2005); State v. McGill, 112 Wn.App. 95, 100, 47 P.3d 173 (2002); State v. Sandefer, 79 Wn.App. 178, 181, 900 P.2d 1132 (1995). "[T]rial judges have considerable discretion under the SRA, [but] they are still required to act within its strictures and principles of due process of law." State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005).

1. The court misapplied the criteria permitting an exceptional sentence based on failed self-defense. The prosecution supplies a skimpy recitation of facts and then quotes a portion of the court's ruling refusing to impose an exceptional sentence. The court's ruling cannot be viewed only in the vacuum presented in the prosecution's brief.

McLeod was so significantly mentally ill that he could not understand the proceedings against him and was incompetent to stand trial during a year and one-half. His mental illness is not

merely an undercurrent in his behavior, but the critical factor prompting his actions in the case at bar, because it caused him to be unrealistically and extremely paranoid. The sentencing judge had no familiarity with McLeod's case prior to the sentencing hearing, and was not the judge who entered the guilty plea. The court did not possess a body of information for which its discretion is owed great deference.

The proper legal question for the sentencing court in evaluating McLeod's request for an exceptional sentence based on "failed" self-defense is whether McLeod's actions, or mental state, distinguish his blameworthiness from that normally present in that crime. State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993) (citing with approval, D. Boerner, Sentencing in Washington, § 9-23 (1985)). But the sentencing court did not evaluate whether McLeod's perception he was acting in self-defense distinguished his conduct from others even if he would not have prevailed at trial on a self-defense claim.

Instead, the court focused on its belief that McLeod's self-defense claim would not have succeeded at trial, without considering whether McLeod's paranoia, triggered by his schizophrenic disconnect from reality, caused him to misperceive

his need to act in self-defense and thus distinguished his blameworthiness from others. The court's improperly failed to consider the correct legal criteria of whether McLeod's paranoid delusions precipitated an incorrect belief he was acting in self-defense, and thus distinguished his behavior form others without regard for whether his self-defense claim would have succeeded at trial. This legal error is contrary to the dictates of the S.R.A. and requires a new sentencing hearing.

2. The court misapplied the law governing "failed" mental defenses. Similarly, the court acknowledged McLeod's significant mental health problems but refused to find him eligible for an exceptional sentence because he did not present a strong enough claim that his mental illness provided a complete defense to the charged crime. Again, the court ruled without considering the legal criteria of whether McLeod's uncontested and well-documented mental illness distinguished his behavior from others even if his

mental illness would not have resulted in an acquittal at trial. RCW 9.94A.535(1)(e).[1]

The court rested its ruling on whether McLeod would have succeeded in a mental defense at trial. A psychiatric expert, Dr. McClung, said McLeod appeared capable of goal-directed behavior at the time of the incident, but he also said he lacked sufficient information to decide whether McLeod was capable of forming the necessary intent at the time of the offense. The court fundamentally erred in its legal analysis because it did not consider the legal question of whether McLeod's mental illness, that plainly contributed to and caused his out-of-character, violent response to what he perceived as a threat from the decedent, significantly distinguished his blameworthiness from others convicted of the same offense.

In fact, the court displayed its misunderstanding of the legal question by acknowledging that most people it sees convicted of second degree murder "don't have a diagnosed mental illness," like

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[1] Under RCW 9.94A.535(1)(e), the court properly imposes an exceptional sentence below the standard range if it finds by a preponderance of evidence that, "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired" for a reason other than drugs or alcohol, and this presents a substantial and compelling reason for a non-standard range sentence.

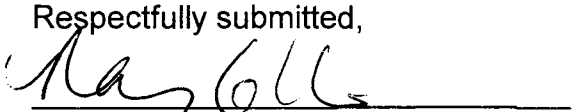
McLeod, and McLeod's very serious mental illness would therefore at least distinguish him from most people convicted of murder. 10/31/08RP 35. Yet the court either misunderstood or did not know that the very question it must ask when evaluating a request for a lesser sentence is whether the individual defendant's circumstances distinguish this person from others convicted of the same offense. See Hutsell, 120 Wn.2d at 922-23. The court found McLeod was in a far different position from most people convicted of second degree murder because of his mental illness but never applied that critical distinction to the legal question of whether he should receive a sentence less than the standard range. Accordingly, reversal is required for a new sentencing hearing.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. McLeod respectfully requests this Court remand the case for a new sentencing hearing.

DATED this 21st day of August 2009.

Respectfully submitted,



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DIVISION I

STATE OF WASHINGTON Respondent	)	CoA No. 62629-9
v.	)	
TROY MCLEOD, Appellant.	)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 21ST DAY OF AUGUST, 2009, A COPY OF **APPELLANT'S REPLY BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL ADDRESSED AS FOLLOWS:

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SIGNED IN SEATTLE, WASHINGTON, THIS 21ST DAY AUGUST, 2009

x Ann Joyce