

64444-1

64444-1

NO. 64444-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
JOSE GUERRERO,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE WILLIAM DOWNING

RECEIVED
JAN 17 2013 PM 1:03
COURT OF APPEALS
DIVISION I

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

SAMANTHA D. KANNER
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ISSUE PRESENTED</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| PROCEDURAL FACTS..... | 1 |
| C. <u>ARGUMENT</u> | 2 |
| THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST FOR WAIVER OF THE STANDARD RANGE AND IMPOSITION OF A FIRST TIME OFFENDER WAIVER | 2 |
| D. <u>CONCLUSION</u> | 7 |

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Garcia-Martinez, 88 Wn. App. 322,
944 P.2d 1104 (1997)..... 3

State v. Grayson, 154 Wn.2d 333,
111 P.3d 1183 (2005)..... 3, 4

State v. Mail, 121 Wn.2d 707,
854 P.2d 1042 (1993)..... 2

State v. Welty, 44 Wn. App. 281,
726 P.2d 472 (1986)..... 2

Statutes

Washington State:

RCW 9.94A.110 2

RCW 9.94A.585 2

RCW 9.94A.650 2, 5

A. ISSUE PRESENTED

Should this court reverse the trial court's discretionary decision to deny appellant's request for a first time offender waiver when the trial court considered appellant's request but found him not to be deserving of the waiver of the standard range sentence?

B. STATEMENT OF THE CASE

PROCEDURAL FACTS

The appellant in this case, Jose Guerrero, hereinafter "appellant," was charged in King County Superior Court with the crimes of Burglary in the First Degree and Felony Violation of a Court Order. CP 1. Pursuant to a plea agreement the first count was amended to Residential Burglary and the court accepted guilty pleas to the amended counts on September 23, 2009. CP 29-30, 7-28. On October 9, 2009, the trial court sentenced appellant on these charges. CP 31-38.

C. ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS
DISCRETION WHEN IT DENIED APPELLANT'S REQUEST
FOR WAIVER OF THE STANDARD RANGE AND
IMPOSITION OF A FIRST TIME OFFENDER WAIVER

Appellant assigns error to the trial court's denial of appellant's request for the court to waive the standard sentencing range and impose a first time offender waiver. Without saying such directly, appellant's argument appears to suggest that any defendant who is eligible under RCW 9.94A.650 for imposition of a first time offender waiver is thereby entitled to such sentence. This reasoning is misplaced. It is within the trial court's discretion to grant or deny a defendant's request for the waiver of the standard range. State v. Welty, 44 Wn. App. 281, 284, 726 P.2d 472 (1986).

As a general rule, a trial court's decision granting a standard range sentence is not subject to appeal. RCW 9.94A.585(1). However, the Washington Supreme Court has held that this prohibition does not preclude a challenge to the procedure by which a standard range sentence is imposed if a court refused to consider mandated information under RCW 9.94A.110 or considers objectionable information without an evidentiary hearing. State v. Mail, 121 Wn.2d 707, 713, 854 P.2d 1042 (1993). Appellant does

not claim that either of the above circumstances is present in this case. Instead, appellant cites State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), for the proposition that the court here relied upon an impermissible basis to deny the defendant's request. Appellant's analysis of the decision in Garcia-Martinez goes further than the court's holding. In Garcia-Martinez, Division One articulated that if a court were to rely upon an impermissible basis such as race, gender or religion, or if a court were to categorically refuse to consider imposing an exceptional sentence in all cases or for all cases involving controlled substances, that would be appealable. Id. at 329-30. The court reasoned that the appeal would be based on the "refusal to exercise discretion or the impermissible basis for the refusal..., not the substance of the decision about the length of the sentence." Garcia-Martinez, 88 Wn. App. at 330. Here, Judge Downing relied on no impermissible basis to deny the defendant's request.

Appellant also relies heavily upon State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005), where the trial court denied defendant's request for a DOSA sentence because the court's understanding was that the program was under-funded and the defendant would not receive the treatment even if the court ordered

it. App. Br. 6, 8. In reversing the trial court, the Washington Supreme Court noted that because the underfunding was the only issue the court articulated for its denial of the DOSA, the trial court had effectively categorically refused to consider the defendant's request at all. Grayson, 154 Wn.2d at 342.

Appellant fails to cite any authority that indicates a court cannot consider a defendant's misdemeanor conviction history when deciding the appropriate sentence within the standard range or in deciding that the appropriate sentence is one within the standard range rather than an alternative sentencing option. In fact, in the plea agreement between the parties, the defendant agreed that the court could consider his previous history when he stipulated to the Probable Cause Certification, Prosecutor's Summary and agreed to the criminal history listed in Appendix B. CP 24. Further, the defense was aware that the reason the State believed an alternative sentence was not appropriate was because he was a "repeat offender against the same victim." CP 28.

Appellant cites the first time offender waiver statute and argues that the legislature has decided that misdemeanors should not preclude an otherwise eligible defendant from receiving a first time offender waiver. App. Br. 8. If that were the intention of the

legislature, it would have mandated that judges must impose a first time offender waiver for an eligible offense if the offender met eligibility criteria. However, the legislature, in enacting RCW 9.94A.650, gave the courts an alternative to a standard range sentence and granted the trial judge the discretion to decide if an offender who met the eligibility criteria was deserving of this alternative to a standard range sentence.

Here, Judge Downing properly acknowledged that legally the defendant was eligible for a first time offender waiver. RP 12. Judge Downing noted that the previous conviction, referred to as 08-1-03846-3, which was a misdemeanor, did not preclude a first time offender waiver. RP 11-12. Further, the court properly considered the defendant's criminal history and information available in the court record, including the Appendix B and the certification for determination of probable cause and prosecutor's summary as well as the conviction documents from the defendant's prior case upon which he was represented by the same defense attorney. RP 11. In this case the Appendix B, the probable cause certification and the prosecutor's summary all referred to the prior offense the defendant committed against the same victim. CP 20-23, 27.

Before the trial court announced its sentence, Judge Downing heard from both the prosecutor and defense counsel, the defendant's father and sister, and the defendant himself. RP 10-24. In reciting its sentence, the court expressed its understanding that the defendant could have avoided this whole situation "by simply doing those things that you promised the judge that you would do when you appeared for sentencing last April." RP 25. The court noted that the defendant "chose not to" and instead committed this offense. RP 25. The court explained that it was imposing a standard range sentence rather than a first time offender waiver because "in *this case* it would undercut the seriousness of all sentencings, and the previous one *in this case in particular*." RP 26 (emphasis added). Contrary to appellant's arguments, this reasoning by the trial court indicates that Judge Downing thoughtfully and meaningfully considered the defendant's request but found it not appropriate and the defendant not deserving of a waiver of the standard range sentence under the facts of this particular case. Rather than impermissibly refusing to exercise its discretion, the court appropriately exercised its discretion when it imposed a standard range sentence.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm the trial court and deny appellant's request for reversal and remand for resentencing.

DATED this 24 day of May, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
SAMANTHA D. KANNER, WSBA #36943
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002