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NO. 66848-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VICTORIA SMITH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY YU

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

AMANDA S. FROH
Deputy Prosecuting Attorney
Attorneys for Respondent

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

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT -6 PM 12:59

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A. ISSUE PRESENTED

At sentencing, Ms. Smith requested an exceptional sentence below the standard range for the crime of Escape in the First Degree because she escaped only four days before the end of the sentence, was captured ten days after her escape, and was facing the maximum standard range given her offender score of 12. Did the court recognize its discretion to impose such a sentence under RCW 9.94A.535(1), and properly exercise that discretion in denying the defendant's request, where multiple times in its oral ruling the court expressed an affirmative understanding of its discretion and stated facts and circumstances supporting the denial of the request?

B. STATEMENT OF THE CASE

Defendant Victoria Smith was charged by information on October 14, 2010, with one count of Escape in the First Degree. CP 1; RCW 9A.76.110. This charge was based on allegations that on October 5, 2010, Ms. Smith walked away from Work Release while serving a sentence for a previous felony conviction, a drug offense to which she had pled guilty on August 18, 2010, and had been sentenced to four months in the King County Jail and Work

Release. CP 3-4. Having waived jury, Ms. Smith was convicted as charged by Judge Mary Yu following the presentation of evidence at a bench trial. 1RP 9-80. Judge Yu entered Findings of Fact and Conclusions of Law supporting her verdict, which are not challenged on appeal. 1RP 77-80; CP 8-10.

A sentencing hearing was held before Judge Yu on March 4, 2011. At that hearing, the State presented evidence of Ms. Smith's prior convictions, which included twelve prior felonies encompassing one prior conviction for escape from work release and eleven prior drug convictions between 1994 and 2010.

CP 161. Given her offender score of 12, the standard range for the crime of Escape in the First Degree was 63 to 84 months. 2RP 3; CP 156. The State recommended the low end of the standard range. 2RP 3.

At the sentencing hearing, Ms. Smith's counsel, Mr. Newcomb, requested an exceptional sentence downward of eight months for Ms. Smith. He argued that because she walked away from Work Release only four days before the conclusion of her sentence, and was captured only six days later, an exceptional sentence downward was justified. 2RP 4. He likened the facts to a

situation where a mitigating sentence is imposed for possessing a small amount of drugs. 2RP 8.

The court rejected these arguments and imposed the low end of the standard range. 2RP 10. Judge Yu's justifications for denying the request, despite personal reservations, were as follows¹:

Mr. Newcomb and Ms. Smith, I want to say this is the kind [of] case that at the end of the day I don't feel good always about what I do. Is this a case that might be the example that your attorney is talking about? It may be but I have to just say I can't find within statutory provisions the ability to find that there are mitigating circumstances that would allow this Court to depart from the standard sentencing range. I don't like what I have to do today because I don't think in the big picture that it may be fair, but this is not about what Judge Yu personally thinks. I have to apply the law, and I don't do it in a way that's like a machine. I mean obviously there is discretion here, but I don't find this to fit in the same way that Counsel has just explained in terms of the small amount of drugs.

Ms. Smith, you walked away, you had signed conditions, you knew that you couldn't[,] and because it's a small amount of time doesn't necessarily in my mind go to why it is I should excuse you or me from following what the law requires and I just simply can't. The end result may not be what I like or what you like[,] but I just cannot intellectually be honest about

¹ Having been present at the hearing, the undersigned counsel has taken the liberty to adjust the transcriptionist's punctuation and several words to make the court's ruling more easily understandable (adjustments noted with brackets). Because it is important to this argument to read the entire ruling in context rather than parsed in bits and pieces, it is reproduced here.

this and do anything else other than impose a sentence within the standard range[.] [A]nd I will do so at the very bottom of that range but I cannot go outside the standard range in this case. So I will be imposing a sentence of 63 months. I will [waive all nonmandatory] costs and fees.

There was the opportunity and there was a lot of discussion and this Court is aware of all [the] discussions, all of the pleading, everything that was done to try to get Ms. Smith to look at treatment and alternatives[,] and Ms. Smith knew and made a choice to reject that[,] which this Court does respect because you're entitled to make that choice. And, here we are today[,] which is the direct result of that choice.

2RP 9-10.

Mr. Newcomb then asked for clarification of the ruling as follows:

You – your honor, uh, just a simple minor modification. Uh, is your Honor ruling, um, that, um, this situation does not fit, uh, the exceptional parameters where the Court can't do it or that you discretion yourself not to do it?

2RP 10. In response the Court stated as follows:

I don't believe I have the power to do it, number one. And then, in exercising that discretion whether to look for some justifiable reason to depart, I don't find that I can do that in this case either.

Id.

Ms. Smith appeals only the sentence imposed, claiming that the court failed to recognize that it had discretion to impose an

exceptional sentence below the standard range. She timely appeals. CP 163.

C. ARGUMENT

THE TRIAL COURT AFFIRMATIVELY RECOGNIZED ITS AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE AND PROPERLY EXERCISED ITS DISCRETION TO DENY THE REQUEST FOR A MITIGATED EXCEPTIONAL SENTENCE.

In this case, the trial court judge, though remorseful about the length of the standard range, clearly expressed her understanding that she had discretion to impose an exceptional sentence downward, and properly evaluated the facts to support her rejection of the defendant's request.

Under RCW 9.94A.535, the court has the discretion to impose an exceptional sentence outside the standard range if it finds, considering the purposes of the Sentencing Reform Act (SRA), that there are substantial and compelling reasons justifying that departure. Stated purposes of the SRA include, in part, to ensure that the punishment is proportionate with the seriousness of the offense and the defendant's criminal history; to promote respect for the law by providing punishment which is just; to impose punishment commensurate with the punishment imposed on others

committing similar offenses; and to offer the offender an opportunity to improve him or herself. RCW 9.94A.010(1), (2), (3), and (5).

While the legislature offers a number of mitigating and exceptional factors a court may consider in exercising its discretion to impose an exceptional sentence below or above the standard range, the lists are not exclusive. RCW 9.94A.535(1), (2). A sentencing court has the discretion to determine whether or not factual circumstances warrant an exceptional sentence downward. State v. Korum, 157 Wn.2d 614, 637, 141 P.3d 13, 25-26 (2006).

A defendant may not appeal a standard range sentence unless the sentencing court “has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). A court refuses to exercise its discretion if, for example, it categorically states that it would never impose a sentence below the standard range under any circumstances. Garcia-Martinez, 88 Wn. App. at 330. An impermissible basis would be, for example, declining to impose an exceptional sentence or refusing to consider the request based on the defendant’s race, sex, or religion. Id. Where a trial court has

considered facts and circumstances and has concluded that there is no basis for an exceptional sentence, it has exercised its discretion properly. Id.

Garcia-Martinez is directly on point with our case. In that case, the co-defendant, Enriquez, was convicted of delivery of cocaine where he participated as an accomplice in an undercover buy-bust. Id. at 325. His standard range for that crime was 87 to 116 months. Id. at 325, n.2. The defense requested an exceptional sentence below the standard range of 48 months, arguing that the defendant's involvement in the transaction was minimal and the amount of cocaine delivered was small. Id. at 325. The trial court rejected the defense arguments and imposed a standard range sentence of 87 months, observing that factually the amount of drugs was "pretty standard for a street deal" and that the defendant's involvement was "pretty typical." Id. The trial court also expressed serious remorse as to the length of the sentence, but held that the facts did not support anything but a standard range sentence. Id. The appellate court summed up the trial court's assessment as follows:

In other words, the court just disagreed with Enriquez that the facts warranted entry of the findings Enriquez sought. Without an adequate factual or legal basis to

permit it to step outside the standard range, the court decided it could not impose a sentence other than one within the standard range. This is an appropriate exercise of sentencing discretion.

Id. at 330-31.

In contrast, In re Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007), dealt with a situation where the court erroneously believed that it had no discretion to impose a certain sentence. In that case, the defense asked court to impose an exceptional sentence downward by imposing concurrent, rather than consecutive, sentences for six counts of first degree assault. Mulholland, 161 Wn.2d at 325. The court found that the mandatory language in RCW 9.94A.589(1)(b) that serious violent crimes “shall” run consecutively required the court to impose consecutive sentences, superseding any discretion provided by RCW 9.94A.535. Id. at 326. The court stated multiple times its erroneous belief that it had no discretion to impose concurrent sentences, and that the law mandated consecutive sentences. Id. at 326, n.1.

Like Garcia-Martinez, in our case Judge Yu was clearly remorseful about the length of the standard range sentence she would impose, but found that under the facts of this case, she did not believe that an exceptional sentence downward was warranted.

She disagreed with the defense as to whether the “mitigating” facts justified a departure from the standard range, and properly exercised her sentencing discretion by denying the request. She did not at any time refuse to exercise discretion or state that she believed that she lacked discretion (unlike the court in Mulholland) to depart from the standard range.

In fact, multiple times Judge Yu specifically stated her understanding that there was discretion to impose a sentence below the standard range. Judge Yu stated, “I mean, obviously there is discretion here, but I don’t find this to fit in the same way that Counsel has just explained in terms of the small amount of drugs.” 2RP 9. She went on to say that she didn’t find the fact that the escape involved “a small amount of time” as a reason to “excuse you or me from following what the law requires...” Id. In these statements, she clearly recognizes that there can be reasons to depart from the standard range that are not the enumerated mitigating factors of RCW 9.94A.535(1), but this case is not one of them.

After being pressed by defense counsel to clarify her ruling as to whether she is finding that she “can’t do it” or is exercising her discretion to not impose an exceptional sentence downward, Judge

Yu makes two apparently contradictory statements: "I don't believe I have the power to do it, number one. And then in exercising that discretion whether to look for some justifiable reason to depart, I don't find that I can do that in this case either." 2RP 10. Given the entire context of her ruling, the first statement is best construed not as a statement expressing a belief that she lacks discretion to impose an exceptional sentence or believes she cannot go beyond the enumerated list of mitigating factors, but rather as a finding that the facts of this case do not provide mitigating circumstances that are substantial and compelling reasons to justify an exceptional sentence downward. The second statement is clearly an expression of discretion.

D. CONCLUSION

The Appellant's claims that Judge Yu failed to recognize that she had discretion to impose an exceptional sentence downward because of a misconception that she was limited to only considering listed mitigating factors of RCW 9.94A.535, and would have imposed a mitigated exceptional sentence but for this misconception, are not supported in the record when the court's ruling is read as a whole. Because the court properly recognized

and exercised its discretion in denying Ms. Smith's request for an exceptional sentence below the standard range, the Court should affirm her sentence.

DATED this 5th day of October, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
AMANDA S. FROH, WSBA #34045
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002