

71368-0

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No. 71368-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SHAYLOR BLACK,

Appellant.

2011 JUN 17 4:31 PM
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENT OF ERROR..... 1

C. ISSUE..... 1

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT 5

 The court’s consideration of race and sex in making a sentencing decision
 violated constitutional guarantees of equal protection and due process,
 requiring reversal and remand for resentencing..... 5

 1. State action premised on race and sex are reviewed under the
 highest levels of scrutiny..... 5

 2. The court’s consideration of race and sex was irrational, fails
 strict scrutiny, and violated Washington sentencing law. 7

 3. The remedy is reversal of the sentence and remand for a new
 sentencing hearing before a different judge. 10

F. CONCLUSION..... 10

TABLE OF AUTHORITIES

United States Supreme Court Cases

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) 6

McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964)..... 6

Oyler v. Boles, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962)..... 6

Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984) 9

Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).. 9

Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948)..... 6

United States v. Virginia, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)..... 7

Washington Supreme Court Cases

Guard v. Jackson, 132 Wn.2d 660, 940 P.2d 642 (1997) 7

Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998)..... 7

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011)..... 10

State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997)..... 10

Washington Court of Appeals Cases

State v. Roberts, 77 Wn. App. 678, 894 P.2d 1340 (1995)..... 8

State v. Williams, 97 Wn. App. 257, 983 P.2d 687 (1999) 8

Constitutional Provisions

Const. Art I, § 12..... 6

Const. Art I, § 3..... 6

Const. art. XXXI, § 1	7
U.S. Const. Amend. XIV.	6

Statutes

RCW 26.50.110(1).....	2
RCW 9.94A.010.....	8
RCW 9.94A.340.....	8
RCW 9A.36.041.....	2
RCW 9A.46.020(1).....	2
RCW 9A.46.020(2)(b)	2

A. INTRODUCTION

In making a sentencing decision, consideration of a defendant's race or sex is impermissible. Shaylor Black, an African-American woman, pleaded guilty to two misdemeanor charges involving domestic violence. Both the State and the defendant recommended no jail time and a period of probation for one year. The court rejected the recommendations and imposed 364 days in jail with two years of probation. Shortly before making this decision, the trial court remarked its decision would be "a no brainer" if Ms. Black were a "white guy." RP 19. The court then explained that it was "going to do what I normally do with someone who isn't of your gender and isn't of your race" RP 20. Because the court's consideration of race and sex was improper, this Court should reverse the sentence and remand for a new sentencing hearing.

B. ASSIGNMENT OF ERROR

In sentencing the defendant to 364 days in jail and two years of the probation, the trial court erred in considering the defendant's race and gender.

C. ISSUE

Under constitutional principles of equal protection and due process, it is impermissible for a sentencing court base a sentence on considerations of race and gender. In deciding what sentence to impose

on Ms. Black, did the sentencing court err in considering race and gender?

D. STATEMENT OF THE CASE

Shaylor Black was initially charged with one count of felony harassment¹ and one count of misdemeanor violation of a court order,² both with domestic violence designations. CP 1-2. The charges stemmed from events that happened on October 20, 2013. CP 1-2. According to the certificate of probable cause, an ex-girlfriend of Black's, who was homeless, stayed overnight with Black. CP 5-6. The next day, Black allegedly threatened her with a knife after they got into an argument. CP 6. Black's grandfather, A.G. Black, who was performing maintenance at the residence that day, witnessed the argument and contacted the police. CP 6. The grandfather also told police that there was a no-contact order between him and his granddaughter, and that she does not always leave the house when he is there working on it.³ CP 6.

Black and the State entered into a plea agreement. CP 19. Black agreed to plead guilty to amended charges of fourth degree assault⁴ and misdemeanor violation of a court order, each with domestic violence

¹ RCW 9A.46.020(1), (2)(b).

² RCW 26.50.110(1).

³ Black's grandfather is the owner of the residence. See RP 15-16.

⁴ RCW 9A.36.041.

designations. CP 8, 19. The prosecutor agreed to recommend a suspended sentence of 364 days in jail less credit for time served suspended on each count with a period of probation for one year. CP 11-12, 19. The conditions of probation were that Black have no-contact with the ex-girlfriend and grandfather, and commit no violations of the law. CP 11-12, 19.

On November 26, 2013, Black pleaded guilty to the amended charges.⁵ CP 10-18; RP 7. The court, the Honorable Jean A. Rietschel presiding, accepted her plea. CP 18; RP 1, 8.

One month later, on December 26, Black appeared before the sentencing court, the Honorable Catherine D. Shaffer presiding. RP 10. The court immediately asked the State why charges had been reduced, why it recommended credit for time served, and where the victim input

⁵ In Black's written statement, she admitted to grabbing her former girlfriend and to knowingly violating a no-contact order in favor of her grandfather:

On October 20th, 2013, I grabbed Dominique Trice in order to prevent her from leaving 5002 S. Rose Street in King County, Washington. Ms. Trice is a former intimate partner of mine and this grab was unwanted. I also knowingly violated a valid domestic violence no-contact order on the same date and location by knowingly coming within 500 feet of my grandfather A.G. Black.

CP 17.

was. RP 10. The State informed the court that there were “fairly significant evidentiary issues in the case,” that there had not been much contact with the victims, that the ex-girlfriend had a warrant out for her arrest, and that there was no evidence Black was under the influence at the time of the offenses. RP 11-12.

The court informed Black that it was unhappy with her record and the underlying facts. RP 12, 18. Black, through her counsel, told the court that her relationship with her ex-girlfriend was over, that she did not want to see her, that she did not threaten her with a knife, and that the violation of the no-contact order was a result of her failure to leave her grandfather’s place when he came over. RP 15-16, 18-19. Black argued that while these facts did not excuse her conduct, they were mitigating factors. See RP 15-19.

Next, the court explained that if Black were “a white guy,” the court’s decision would be easy:

THE COURT: Okay. All right. Well Ms. Black, here’s my problem, okay? **If I were looking at you and you were a white guy**, which is most of the people I see who come before me for domestic violence offenses, this would be no brainer because you have an unacceptable history of being assaultive and having weapons in your possession.

RP 19 (emphasis added). The court then decided to confine Black in jail for 12 months. In making this decision, the court informed Black that this

is what the court would generally do for someone who is not a woman and for someone who is not of Black's race:

I'm either thinking about sentencing you to jail time so that I know that Ms. Trice and your grandfather are safe from you for the period that you're incarcerated, or I'm thinking about putting you in domestic violence treatment. And I'm not convinced that you're amenable to domestic violence treatment. I'm not really seeing much acknowledgement here at all that there's an issue that needs to be addressed here.

So I'm going to do what I would normally do with someone who isn't of your gender, and isn't of your race, which is impose a 12 month sentence; 12 months, all imposed, running concurrently as to each count. I'm waiving all non-mandatory financial obligations. I'm convinced that Ms. Black is indigent. I am requiring no contact for two years, which I believe I have authority to do, with either your grandfather or Ms. Trice.

RP 19-20 (emphasis added). The court informed the parties she was adding the term of confinement and a period of unsupervised probation of two years to the judgment and sentence. RP 22-23; CP 20-21.

E. ARGUMENT

The court's consideration of race and sex in making a sentencing decision violated constitutional guarantees of equal protection and due process, requiring reversal and remand for resentencing.

1. State action premised on race and sex are reviewed under the highest levels of scrutiny.

Under the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV. Similar guarantees are provided by the Washington Constitution. Const. Art I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”); Const. Art I, § 12 (“No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”).

Under equal protection principals, all persons stand equal before the laws of the States and no discrimination may be made based on a person’s color. Shelley v. Kraemer, 334 U.S. 1, 21, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). Classifications cannot be made arbitrarily. McLaughlin v. Florida, 379 U.S. 184, 190, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964). Classifications based on race are arbitrary. Oyler v. Boles, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962). All classifications based on race are subject to strict scrutiny. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). Under strict scrutiny, classifications must be narrowly tailored and must further a compelling governmental interest to be constitutional. Id.

Classifications based on sex are subject to “intermediate scrutiny” under the Fourteenth Amendment. United States v. Virginia, 518 U.S. 515, 531, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Under the Equal

Rights Amendment to the Washington Constitution, however, classifications based on sex are subject to scrutiny even greater than strict scrutiny. Guard v. Jackson, 132 Wn.2d 660, 664, 940 P.2d 642 (1997); Const. art. XXXI, § 1 (“Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.”). Under this provision, differential treatment of the sexes must be based upon actual differences. Guard, 132 Wn.2d at 664.

Additionally, arbitrary or irrational state action violates due process. Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 970, 954 P.2d 250 (1998). “Irrational” means unreasonable, foolish, illogical, or absurd. Id.

2. The court’s consideration of race and sex was irrational, fails strict scrutiny, and violated Washington sentencing law.

In making its ruling, the court pointed out that Black was not a white man and that its decision would have been easy if she were. RP 19. The court then stated it was still going to sentence Black as she would sentence someone who was not of Black’s race and sex, and imposed 364 days in jail and two years of probation. RP 20.

In deciding what sentence Black deserved, there was no compelling governmental interest served by the court’s consideration of race and sex. The court’s reasoning was irrational. Thus, the court’s

decision violated equal protection, due process, and the Equal Rights Amendment.

Constitutional concerns aside, race or sex is not a relevant consideration when making sentencing decisions, as the Sentencing Reform Act indicates. See RCW 9.94A.340 (sentencing guidelines apply “equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant.”); State v. Roberts, 77 Wn. App. 678, 683, 894 P.2d 1340 (1995) (agreeing that race must not enter into the selection of an appropriate sentence). While the Sentencing Reform Act does not apply to misdemeanors,⁶ there is no indication that lawmakers intended the courts to consider race or sex when sentencing defendants for misdemeanors. Accordingly, the trial court lacked authority to consider race or sex in making its sentencing decision.

The court’s statements appear to have expressed a preference to treat white male perpetrators of domestic violence more harshly than similarly situated non-white male perpetrators of domestic violence. RP 19-20. One could thus argue that Black, as an African-American woman, was not actually discriminated against and suffered no prejudice.

⁶ RCW 9.94A.010; State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999).

This argument is properly rejected. See Shaw v. Reno, 509 U.S. 630, 651, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993) (“racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.”). The use of race simply has no place when a judge is making a sentencing determination. Further, in considering whether or not to sentence Black to jail and whether she should have two years of probation rather than one, Black’s sex was also irrelevant. While Black is obviously not a “white guy,” the court seems to have determined that her past conduct made her sufficiently similar to white men and that she should receive a harsher sentence because she was more like a “white guy.” See RP 19-20. This was impermissible.

A hypothetical clarifies the issue. If, in sentencing a white woman, a court said it was imposing a harsher sentence because the white woman was like an African-American man, an appellate court would (hopefully) not hesitate in reversing the sentence. Such reasoning is not only irrational, it is indicative of a racial or sexist bias, which is impermissible. Palmore v. Sidoti, 466 U.S. 429, 432-33, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”); State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011) (prosecutor’s appeal to racial bias impermissible). The same is true here.

3. The remedy is reversal of the sentence and remand for a new sentencing hearing before a different judge.

Because the sentence is impermissibly tainted by improper considerations of race and sex, this Court should reverse and remand for a new sentencing hearing. Resentencing should be before a different judge because the judge in this case has already expressed a view of what sentence was appropriate. See State v. Sledge, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997) (remanding before a new judge in light of the trial court's already-expressed views on the disposition).

F. CONCLUSION

Considerations of race and sex should not factor into a sentencing decision. The court's references to race and gender were improper and tainted the sentence. To ensure that the sentence is free of any consideration of race or sex, this Court should reverse and remand for a new sentencing hearing before a different judge.

DATED this 17th day of June, 2014.

Respectfully submitted,



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STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 71368-0-I
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SHAYLOR BLACK,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> SHAYLOR BLACK (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF JUNE, 2014.

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