 73359-1

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Court of Appeals
Division I
State of Washington

NO. 73359-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ZULAIN I. ANGELL,

Appellant.

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# BRIEF OF RESPONDENT

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## I. ISSUES

1. Where the sole issue on appeal is a challenge to the trail court not finding grounds for an exceptional sentence downward should this court dismiss the appeal when the defendant has served the entire confinement time imposed by the trial court?

2. Did the trial court err as a matter of law when it rejected the defendant's request for an exceptional sentence based on the facts of the case?

## II. STATEMENT OF THE CASE

The defendant, Zulain Angell, was charged with count 1: second degree assault and count 2: attempting to elude a pursuing police vehicle. 1 CP 87. After a two and a half day trial, the jury found the defendant guilty as charged. The defendant's offender score was determined to be "1." The standard range was 6-12 months confinement on count 1 and 0-90 days on count 2. 1 CP 15-16. The court sentenced the defendant to 6 months confinement on count 1 and 30 days on count 2 to run concurrently. 3RP 7; 1 CP 17. The defendant served her sentence and was released on or about August 4, 2015. 2 CP ___ (sub 54 Return of Commitment Judgment and Sentence).

The defendant now challenges the court's denial of her request for an exceptional sentence downward. The bases the defendant put forth were failed duress defense and totality of the circumstances.

**1. Facts At Trial.**

On December 23, 2013, Deputy Dusevoir of the Snohomish County Sheriff's Office was working as a patrol deputy. At approximately 4:00 p.m. he was dispatched to a mail theft involving a small, light in color passenger car. There was almost no traffic on the roads. Deputy Dusevoir arrived at a well-lit intersection with several lanes of travel. He was driving a 2011 Victoria, black and white with Sheriff in large letters on the side with a star, a full light bar on the top and a spotlight on each side and P.I.T. bumpers. The only other vehicle he had seen on the road was the defendant's vehicle. It was a small, light in color passenger car. 1VRP 22, 23-24, 27, 51.

As the defendant entered the intersection, Deputy Dusevoir, activated his emergency lights and pulled in behind her. There was a large well lit gravel area on the side of the road, but the defendant continued past it. She didn't stop until she was in a dark and secluded area. 1VRP 26-30.

As Deputy Dusevoir approached the vehicle, he noticed the windows were fogged up and he could not see inside. He contacted the defendant. She refused to roll her window down sufficiently and would not put her vehicle in park. Deputy Dusevoir told her she was a suspect in a mail theft and tried to ask her some questions. The defendant was confrontational and obstructive. Because of the defendant's behavior, Deputy Dusevoir became concerned for his safety. He testified that he became concerned that she may have a weapon. He reached in the partially opened window, unlocked the door, and opened it. The defendant began struggling with him and striking at him. The defendant began reaching for something near her seat. A three bladed knife was found in that location later. During her testimony, the defendant testified the knife was a treasured gift from a now deceased brother but claimed to have forgotten it was there when she was reaching in the area. 1VRP 31-32, 34-35, 61; 2VRP 138-139, 241.

Deputy Dusevoir tried to use a number of holds to control the defendant. The defendant was fighting and kicking him. During the struggle, the defendant pulled Deputy Dusevoir partially into the car. The car was still running. The defendant put the car in gear and took off as fast as she could go. The door pillar hit Deputy

Dusevoir in the shoulder and knocked him back into the roadway. 1VRP 37-38

Deputy Dusevoir got into his patrol car, activated his emergency lights and siren and took off after the defendant. He estimated the defendant was traveling about 70 mph in the 35 mph zone. They approached a red light at the intersection of 228th. The defendant didn't stop but attempted to make a right turn. She was traveling so fast she slid across all lanes of travel and landed facing kitty-corner to the curb. The defendant started to go westbound on 228th but Deputy Dusevoir was able to attempt a pursuit intervention technique (P.I.T.). This maneuver turned her car around, but failed to kill the engine. The defendant took off eastbound on 228th. At the intersection of 228th and 9th, Deputy Dusevoir attempted a P.I.T. again. This time it spun the defendant's car around and it landed on a bump of ground. Deputy Dusevoir drove nose to nose with her got out and began giving the defendant commands to show him her hands. The defendant yelled at him to leave her alone. She put her car in reverse and was able to get off the bump of ground and drove off eastbound on 228th. Deputy Dusevoir continued to pursue her. 1VRP 40-41, 46-49.

The defendant drove into a lighted strip mall parking lot. Deputy Dusevoir attempted to perform several P.I.T.s in this parking lot. Each time, the maneuver would spin her around, but it did not disable her. The defendant continued to flee. 1VRP 50, 53; 2VRP 152-53.

The defendant drove across the Bothell-Everett Highway and into another parking lot. This lot serviced a QFC, a Bartell's, and a Starbucks among other stores. In this parking lot, Deputy Dusevoir's P.I.T. attempt finally worked stopping the defendant's car right in front of the Starbucks attached to the QFC. Their cars were nose to nose. Her driver's side door was facing the entrance to the QFC. Deputy Dusevoir got out of his car and went to the back of it because the defendant was getting out of her car and rushing at him. Despite his commands to stop, the defendant kept coming at Deputy Dusevoir. 1VRP 54, 56-57, 63; 2VRP 182.

Two Starbuck's employees testified. The defendant got out of her car and quickly came at the officer. He was yelling at her and she kept coming at him. He tried to get ahold of her to get her to stop. It became a wrestling match. The deputy was able to get her down on the ground but she got onto her back and was kicking and hitting the deputy in the face. He tried to spray her with mace.

They ended up on the ground and he was trying to cuff her but he couldn't get ahold of her. She got up and ran away from the Starbucks store and the open QFC and hid between two parked cars. The defendant was finally taken into custody when backup arrived to assist Deputy Dusevoir. 2VRP 200-14.

The defendant testified that she was in the area at approximately 4:00 a.m., on her way to her boyfriend's family house to bring presents for Christmas. On cross-examination she admitted that her boyfriend's house was in Kirkland. Her story then became that his father was in the hospital and she was driving around trying to find his best-friend to find out which hospital. She admitted she had a functioning cellphone in the car. 2VRP 216, 237-39.

Although the defendant testified repeatedly that she was afraid for her life, she gave to reason why and testified it only crossed her mind that Deputy Dusevoir might be a fake cop or a bad cop. The defendant also testified that had there just been another officer, she would have been compliant from the beginning. However, the testimony of the assisting officer was that the defendant continued to fight and resist despite his presence. 2VRP 178, 225, 243.

The jury convicted the defendant after approximately two hours of deliberation including lunch. 1 CP 36-38; 3VRP 329.

**2. Sentencing Facts.**

The sentencing hearing was originally scheduled for March 11, 2015 so the defendant could be screened for work release. At the March 11th hearing, there was a request to continue the sentencing date to April 9, 2015, so the defendant could complete a final exam before potentially serving her sentence. 2CP 91; 3VRP 333-34; 3/11/15 VRP 2-3.

At the sentencing hearing on April 9, 2015, the defendant advised the court that she did not qualify for work release and requested an exceptional sentence downward of one month. The defendant argued two bases for the court to impose an exceptional sentence, duress and totality of the circumstances. The court specifically found on the record, "I can't find...that there's a reason to deviate downward. I don't believe the totality of the circumstances nor the idea of duress fit the facts in this case as I've seen it." The court further explained that, "[T]hey [the legislature] ask me to look at these things, frankly, in a vacuum and try to treat all people basically the same that come in front of me unless there is a legal basis to go up or down. And it's got to be fairly significant,

it's got to be supported by the evidence in order to make those decisions. I just don't see it, frankly, in this case, which is unfortunate." 4/9/15 VRP 6-7. The sentencing court exercised his discretion in determining the facts in this case did not support a deviation from the standard range sentence and sentenced the defendant to the low end of the range of 6 months. 1CP 17, 29-30; 4/9/15 VRP 4, 6-7.

## III. ARGUMENT

### A. WHETHER THE COURT ERRED IN RULING THERE WAS NOT BASIS FOR AN EXCEPTIONAL SENTENCE DOWNWARD IS MOOT.

The defendant has already served her entire sentence. 3 CP __ (sub 54 Return of Commitment Judgment and Sentence). Even if this court were to find that the trial court erred by concluding the facts and circumstances of this case did not provide a basis for an exceptional sentence downward and that decision resulted in a reduced term of confinement, that result would provide the defendant no effective relief where she has already served the entire sentence under the standard range. Thus this court can provide the defendant with no effective relief, and the issue is therefore moot. Orwick v. Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). Generally a court will decline consideration of issues

that are moot. State v. Gentry, 125 Wn.2d 570, 616-17, 888 P.2d 1105, cert denied, 516 U.S. 843 (1995).

The defendant has not addressed why this court should nonetheless consider her moot claim. Although an issue is moot, the court does have the discretion to consider a moot issue if it presents matters of continuing and substantial public interest. Seattle v. Johnson, 58 Wn. App. 64, 67, 791 P.2d 266 (1990). The criteria for determining whether an issue falls within this category are (1) the public or private nature of the question, (2) the need for future guidance of public officers, and (3) the likelihood that the issue will recur. Id.

Using these criteria the court should decline consideration of the defendant's factually based request for an exceptional sentence. The law respecting exceptional sentences is well defined by the appellate courts already. This case involves only the application of that well developed law to the specific facts of this case. The determination of the court with regard to application of the facts and circumstances of this case not providing a legal basis for the court to deviate from a standard range sentence are specific to this case. It is highly unlikely that another defendant will have the same fact pattern upon which to claim a failed duress defense.

Thus it cannot be said with any certainty that the specific issue in this case would recur.

**B. THE TRIAL COURT PROPERLY MADE A FACTUAL DETERMINATION THAT THIS CASE DID NOT SUPPORT AN EXCEPTIONAL SENTENCE.**

The defendant challenges the trial court's determination that based on the facts and circumstances of her case there was not a basis for an exceptional sentence downward. Exceptional sentences are authorized under RCW 9.94A.535. The defendant requested the court find the mitigating factor of duress as set forth in RCW 9.94A.535(1)(c) and the totality of the circumstances. 1 CP 29-30. The sentencing court considered these bases for granting an exceptional sentence and found that they were not supported by the evidence in this case.

As for duress as a basis for an exceptional sentence, the defendant's claim that her internal belief, unsupported by the evidence, that the deputy was possibly a fake or bad cop does not support this mitigating factor. "[W]e hold as a matter of law that duress, as a factor in mitigation of an presumptive sentence, cannot be established by evidence of internal emotional and psychological stress." State v. Rogers, 112 Wn.2d 180, 184, 770 P.2d 180, 182 (1989).

Also, the totality of the circumstances as a mitigating factor would only apply if the defendant's version of events was found to be compelling. In this case, the evidence shows the defendant was willfully defiant, non-cooperative, attempted to flee, and when given the opportunity to run to the safety of an open grocery store, ran in the opposite direction. She attempted to flee from the officers, fought with them, and was finally taken into custody. The sentencing court properly found that these facts do not under the totality of the circumstances support an exceptional sentence downward.

## IV. CONCLUSION

For the foregoing reasons the State asks the court to dismiss the defendant's appeal as moot.

Respectfully submitted on March 7, 2016.

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| THE STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ZULAIN I. ANGELL,<br><br>Appellant. | No. 73359-1-I<br><br>DECLARATION OF DOCUMENT FILING AND E-SERVICE |

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 8th day of March, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Oliver Davis, Washington Appellate Project, oliver@washapp.org; and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of March, 2016, at the Snohomish County Office.

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