

COURT OF APPEALS
DIVISION TWO

07 OCT 22 11:15 AM '15

NO. 35641-4-II

STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

JACK RAYMOND CARNAHAN,

Appellant.

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

The Honorable Stephen M. Warning

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF CARNAHAN'S PRIOR CONVICTION BECAUSE THE POTENTIAL FOR UNDUE PREJUDICE OUTWEIGHED ITS PROBATIVE VALUE.

The state merely argues that under the plain meaning of ER 609(a), a conviction for a crime of dishonesty is per se admissible without any need for a balancing test. Brief of Respondent (BOR) at 3-5. The state overlooks the fact that admission of Carnahan's conviction for possession of stolen property substantially prejudiced his fundamental right to a fair trial.

The Sixth Amendment insures that criminal defendants shall "enjoy the right to a speedy and public trial, by an impartial jury." This right has been characterized as the right to a fair trial by a panel of impartial, indifferent jurors. Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961). Article I, section 22 of our state constitution contains language similar to that of the Sixth Amendment.

State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

The record substantiates that there is a reasonable probability that evidence of the prior conviction and the emphasis placed on the conviction during the state's closing argument swayed the jury and denied Carnahan his right to a fair trial. See Brief of Appellant (BOA) at 8-14.

Reversal is required because the court erred in admitting evidence of Carnahan's prior conviction.

2. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING PIPES AS EVIDENCE WHEN THE STATE FAILED TO SATISFACTORILY IDENTIFY THE PIPES AS BEING THE SAME PIPES AND IN SUBSTANTIALLY THE SAME CONDITION AS WHEN THEY WERE INITIALLY OBTAINED.

The state argues that "minor discrepancies" go to the weight, not to the admissibility, of physical evidence. BOR at 5-7. The discrepancies in this case, however, were significant. The testimonies of officers Sheridan and Taylor were materially different. Sheridan claimed that Taylor found two pipes, one glass and one plastic. 12RP 28. He also denied that the glass pipe had a bulb. 12RP 45. In contrast, Taylor could not identify the glass pipe and referred to her report, which described the pipe as a glass pipe with a burnt bulb. Her report did not indicate that she found anything else in the van. 12RP 65, 13RP 72-74. Importantly, Taylor was the officer who initially found the evidence and she could not identify the pipes as the pipes obtained from Carnahan's van.

Consequently, reversal is required because the trial court erred in admitting the pipes as evidence. See BOA at 14-18.

3. REVERSAL IS REQUIRED BECAUSE CARNAHAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The state does not dispute that the statements made by Officer Taylor were inadmissible, but argues that “these very minor statements cannot have actually prejudiced the appellant.” BOR at 7-8. To the contrary, the record substantiates that Carahan was prejudiced by Taylor’s testimony because there is a reasonable probability that the jury inferred guilt from his alleged statement that he was sorry. Counsel’s performance was deficient because Carnahan’s credibility was critical to his defense, yet counsel allowed Taylor’s statements which damaged Carnahan’s credibility.

Reversal is required because but for counsel’s error, there is a reasonable probability that the outcome would have been different. See BOA at 18-21.

4. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED CARNAHAN HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The record reflects that an accumulation of errors affected the outcome of Carnahan’s trial: 1) the court erroneously admitted evidence of a prior conviction; 2) the court erroneously admitted the pipes as evidence because the state failed to satisfactorily identify the pipes as being the same pipes and in substantially the same condition as when they

were obtained; and 3) defense counsel erred in allowing prejudicial and inadmissible evidence.

As undisputed by the state, reversal is required because cumulative error denied Carnahan his constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

5. THE TRIAL COURT PROPERLY IMPOSED AN EXCEPTIONAL SENTENCE CONSIDERING THE PARTICULAR FACTS OF THIS CASE.

A trial court may impose an exceptional sentence outside the standard range if it concludes that “there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535; State v. Ermels, 156 Wn.2d 528, 535-36, 131 P.3d 299 (2006). Whenever an exceptional sentence is imposed, the court must set forth reasons for its decision in written findings of fact and conclusions of law. Id. at 536. An appellate court will overturn an exceptional sentence only if the reasons for the sentence are unsupported by the record, the reasons do not justify an exceptional sentence, or the sentence is either clearly excessive or clearly too lenient. State v. Berube, 150 Wn.2d 498, 512, 79 P.3d 1144 (2003). The trial court’s reasoning will be upheld unless it is clearly erroneous. Id.

The state does not assert that the record does not support the court’s reasons or that Carnahan’s sentence is clearly too lenient, but

argues that the court's reasons do not justify an exceptional sentence. BOR at 8-10. To the contrary, the court's findings of fact and conclusions of law clearly justify an exceptional sentence. CP 56-58.¹ The court found that Carnahan was previously tried, convicted, and erroneously sentenced to 30 days in jail, based on the state's incorrect computation of his offender score. Carnahan appealed and the case was remanded for a new trial due to prosecutorial misconduct. If Carnahan had not appealed and prevailed, his incorrect sentence would not have been noted because the state never sought review of his sentence. CP 56-57. In light of the facts, the court concluded that a "sentence of 12 to 24 months is clearly excessive and there exist substantial and compelling reasons to impose an exceptional sentence below the standard range." CP 58. The court reasoned that "the imposition of a sentence dramatically higher than the original sentence after the defendant has appealed and in which the State did not appeal the sentence imposed would have a chilling affect on the right to appeal." CP 58.

Given the distinguishable circumstances of this case, the trial court properly exercised its discretion and imposed an exceptional sentence for substantial and compelling reasons. The court found that it is "fundamentally unfair to the defendant to impose a sentence 10 times

¹ The court's Findings and Conclusions are attached as an appendix.

greater than the original sentence over two years after the original sentence was already served.” CP 57. Accordingly, this Court should affirm Carnahan’s sentence.

B. CONCLUSION

For the reasons stated, here and in the opening brief, this Court should affirm Mr. Carnahan’s sentence but reverse his conviction.

DATED this 19th day of October, 2007.

Respectfully submitted,


VALERIE MARUSHIGE

WSBA # 25851

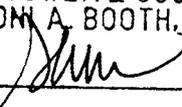
Attorney for Appellant

APPENDIX

FILED
SUPERIOR COURT

2006 NOV 29 P 2:25

COWLITZ COUNTY
ROMA A. BOOTH, CLERK

BY 

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

JACK R. CARNAHAN,
Defendant.

No. 03-1-01029-1

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
EXCEPTIONAL SENTENCE**

This matter having come on now before the undersigned Judge of the above entitled Court for hearing and sentencing and the Court being fully advised now makes the following;

FINDINGS OF FACT

- 1) That the defendant was previously tried and sentenced before this court in the above entitled cause.
- 2) That the defendant was incorrectly sentenced to 30 days in jail based on an incorrect computation of the offender score made by the State
- 3) The defendant thereafter appealed and the Judgment was vacated and

FINDINGS PAGE ONE

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1
2 remanded for a new trial based upon constitutional error committed by the State
3 in the trial, namely that the State commented on the defendant's right to remain
4 silent both in the presentation of evidence and during closing argument
5

6 4) That the State did not complain of the sentence previously imposed on appeal

7 5) Had the State sought review of the sentence previously imposed while on appeal
8 the matter would have been addressed

9 6) If the defendant had not appealed and prevailed due to prosecutorial misconduct
10 the issue of his incorrect sentence would not have been noted and the error after
11 remand would have become the law of the case
12

13 7) It is fundamentally unfair to the defendant to impose a sentence 10 times greater
14 than the original sentence over two years after the original sentence was already
15 served

16 8) It would have a very chilling effect on the right of appeal to impose a sentence 10
17 times greater than the original sentence after the defendant prevailed due to the
18 misconduct of the State

19 9) The original sentence could not and would not have been changed had not the
20 defendant prevailed on appeal.
21

22 10) Both parties to the original sentence were aware of the previous convictions of
23 the defendant but erroneously believed that those convictions had washed in light
24 of Washington Supreme Court rulings.
25

26 FINDINGS PAGE TWO
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CONCLUSIONS OF LAW

- 1) In light of the foregoing Findings of Fact this Court has found that the sentence of 12 to 24 months is clearly excessive and that there exist substantial and compelling reasons to impose an exceptional sentence below the standard range.
- 2) That the imposition of a sentence dramatically higher than the original sentence after the defendant has appealed and in which the State did not appeal the sentence imposed would have a chilling affect on the right of appeal.
- 3) That such a sentence would promote disrespect for the law and would promote piecemeal appeals.
- 4) That the imposition of the original sentence would be commensurate with the objectives of the sentencing reform act.

DONE IN OPEN COURT THIS 27 day of November, 2006

Presented by:


Randolph Furman, WSBA #4206
Attorney for Jack R. Carnahan

Copy Received:

 #35537
Deputy Prosecuting Attorney

FINDINGS PAGE THREE



JUDGE

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to James B. Smith, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

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

DATED this 19th day of October, 2007 in Des Moines, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

10/22/07
COURT OF APPEALS
DIVISION II
07 OCT 22 AM 9:46
STATE OF WASHINGTON
BY _____
DEPUTY