

original

NO. 36598-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

JOSEPH BERLANGA, RESPONDENT

FILED
CLERK OF COURT
JAN 11 2011
TACOMA, WA
BY: [Signature]

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No. 06-1-05449-2

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred in sentencing the defendant to an exceptional sentence downward of 12 months on electronic home monitoring because the court did not have the discretion to impose electronic home monitoring on a drug offense and when an exceptional sentence was not warranted.

2. The State assigns error to the court's Findings of Fact Numbers II and III, and Conclusions of Law I, II, and III.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court err in sentencing the defendant to an exceptional sentence downward of 12 months on electronic home monitoring when the trial court did not have the discretion to impose electronic home monitoring on the defendant's case?

2. Did the trial court err in sentencing the defendant to an exceptional sentence downward when the sole basis for the exceptional sentence was a medical condition?

C. STATEMENT OF THE CASE.

On November 20, 2006, JOE EDDIE BERLANGA, hereinafter "defendant," was charged with unlawful possession of a controlled

substance with the intent to deliver while being armed with a firearm, and unlawful possession of a firearm in the second degree. CP 3-4. On May 7, 2007, the defendant entered pleas of guilty to unlawful possession of a controlled substance with the intent to deliver, and unlawful possession of a firearm in the second degree. CP 6-7, 9-12. By amended information, the State dismissed the firearm sentencing enhancement on the possession of a controlled substance with the intent to deliver charge. CP 6-7, 8.

On May 7, 2007, sentencing was continued until June 4, 2007.

5/7/07¹ RP 14. On June 4, 2007, the State represented to the court that the plea paperwork had been filled out incorrectly, and the defendant agreed to enter a new plea of guilty. 6/4/07 RP 3-4. At the time of the June 4th plea, the State recommended that the court sentence the defendant to a standard range sentence of 12 months and one day in custody. 6/4/07 RP 10. The defendant requested that the court impose a sentence of electronic home monitoring. 6/4/07 RP 16. The State objected to such a sentence. 6/4/07 RP 17. The court sentenced the defendant to 14 months of electronic home monitoring. 6/4/07 RP 19; CP 27-39.

¹ There are three volumes of verbatim reports of proceedings which are each numbered independently. For convenience of reference the State will be referring to each volume by date.

On June 27, 2007, both parties again appeared before the court to address the court's sentence. 6/27/07 RP 4. The State asserted that the court's sentence of 14 months of electronic home monitoring was not authorized by statute. 6/27/07 RP 4; CP 42-44. The State also indicated that it considered the defendant's medical conditions in its resolution of the case. 6/27/07 RP 5. The defendant argued that RCW 9.94A.533 allowed the court to impose electronic home monitoring if he qualified. 6/27/07 RP 6-7. The court then made the following oral ruling:

I've gone over again the Statement of Defendant on Plea of Guilty, the Declaration for Determination of Probable Cause in this matter. As I stated earlier, I also reviewed the briefing submitted by both the defendant and the State as well as the documents filed by the defendant I believe it was on June 4th.

RCW 9.94A.535 allows the court to depart from the guidelines under certain circumstances. Specifically under paragraph (1) of that statute it states that the court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. It then goes forth to set out certain circumstances, but it expressly states that "The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences."

In this case, the range, the standard sentencing range, is 12 months plus one date to 20 months on I believe Count 1 and three to eight months on Count 2.

I'm going to find that the severe medical condition of Mr. Berlanga is a mitigating circumstance in this case. If I recall correctly, Mr. Berlanga stated on the record at the time of sentencing when the court asked him if he had anything to say before sentencing—my recollection is he gave a reason, and the reason—What we're dealing with, in reviewing this file, is we're not dealing with large quantities. We're dealing with small quantities. And the gun that he was not supposed to be possessing was in an attic of his home at the time the warrant was served.

Under the circumstance, I think I'm going to be imposing an exceptional sentence of 12 months, which will allow him to serve that on electronic home monitoring.

6/27/07 RP 8-9.

On the same day as the sentencing, the court entered findings of fact and conclusions of law. CP 55-57. The findings of fact include the following:

- II. The mitigating factor of a medical condition (liver failure and other gastrointestinal problems) is applicable to Counts I and II. The evidence of this mitigating factor is the documents provided to the court regarding the defendant's medical condition and continuing need for multiple surgeries over an extended period of time. The legislature did not consider this factor in determining the standard range.
- III. Because of the presence of the above mitigating factor, and considering the purposes of the Sentencing Reform Act, sentencing with the standard range is not an appropriate sentence.

Imposing no further incarceration in the Department of Corrections is an appropriate sentence on Counts I and II.

CP 55-57.

The court entered the following conclusions of law:

- I. That there are substantial and compelling reasons justifying an exceptional sentence outside the standard range.
- II. Defendant JOE EDDIE BERLANGA, should receive no further incarceration in the Department of Corrections on Counts I and II.
- III. An exceptional sentence below the standard range of 12 months on Electronic Home Monitoring is appropriate in this case.

CP 55-57.

On July 20, 2007, the State filed a timely notice of appeal. CP 73-90.

D. ARGUMENT.

1. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO A TERM OF ELECTRONIC HOME MONITORING WHEN UNDERLYING CHARGE WAS A DRUG OFFENSE.

RCW 9.94A.734 provides, in relevant part, as follows:

- (1) Home detention may not be imposed for offenders convicted of:

...

(c) Any drug offense;

...

(3) Participation in a home detention program shall be conditioned upon:

(a) The offender obtaining or maintaining current employment or attending a regular course of school study at regularly defined hours, or the offender performing parental duties to offspring or minors normally in the custody of the offender;

(b) Abiding by the rules of the home detention program; and

(c) Compliance with court ordered legal financial obligations. The home detention program may also be available to offenders whose charges and convictions do not otherwise disqualify them if medical or health-related conditions, concerns, or treatment would be better addressed under the home detention program, or where the health and welfare of the offender, other inmates, or staff would be jeopardized by the offender's incarceration. Participation in the home detention program for medical or health-related reasons is conditioned on the offender abiding by the rules of the home detention program and complying with court-ordered restitution.

(emphasis added).

Home detention is defined as “a program of partial confinement available to offenders wherein the offender is confined to a private residence subject to electronic surveillance. RCW 9.94A.030(27).

RCW 9.94A.030(21) defines drug offense as:

- (a) Any felony violation of chapter 69.50 RCW except possession of a controlled substance (RCW 69.50.4013) or forged prescription for a controlled substance (RCW 69.50.403);
- (b) Any offense defined as a felony under federal law that relates to the possession, manufacture, distribution, or transportation of a controlled substance; or
- (c) Any out-of-state conviction for an offense that under the laws of this state would be a felony classified as a drug offense under (a) of this subsection.

In the present case, the defendant entered a plea to the amended information charging him with unlawful possession of a controlled substance, cocaine, with the intent to deliver, contrary to RCW 69.50.401(1)(2)(a), and unlawful possession of a firearm. CP 6-7. The charge of unlawful possession of cocaine with the intent to deliver is a drug offense under 9.94A.030(21)(a). Therefore, under the clear language of RCW 9.94A.734, home detention, or electronic home monitoring, may not be imposed.

The defendant asserted below that he had a medical condition that warranted a sentence of home detention. 6/4/07 RP 15. It is clear, however, under RCW 9.94A.734(3)(c), that home detention is only available to offenders on medical or health-related reasons if they are not “otherwise disqualified.” In this case, the defendant is “otherwise disqualified” because he was convicted of a drug offense.

In State v. Fuller, 89 Wn. App. 136, 947 P.2d 1281 (1997), the defendant was charged with assault in the third degree with a deadly weapon. Id. at 138. The trial court imposed a sentence of six months and allowed the defendant to serve the sentence on home detention. Id. The trial court then reconsidered its sentence and, concluding that home detention was statutorily prohibited when the underlying charge was assault in the third degree, and modified the sentence from a home detention sentence to a work release sentence. Id. The defendant appealed, asserting that home detention was permissible because his impending back surgery would make total confinement burdensome. Id. at 139. The court concluded that the defendant could not be sentenced to a term of home detention.² Id. at 139-140. The court held:

² The court relied on the language of RCW 9.94A.185, which was recodified under RCW 9.94A.734 in 2000. The recodification did not alter the language of the statute that is at issue in this case, and therefore the analysis is still applicable. See Laws of Washington 2000 c. 28 § 30.

After reviewing the statute, we conclude the Legislature clearly and unambiguously intended that offenders convicted of certain crimes, including third degree assault, be prohibited from serving their sentences on home detention. An offender serving a sentence on home detention must either (1) obtain or maintain regular employment, (2) attend a regular course of school study, or (3) perform parental duties. Home detention may also be available to offenders “whose charges and convictions do not otherwise disqualify them” if they have a medical condition. A conviction for third degree assault disqualifies an offender from home detention. This statute is unambiguous.

Id. at 140 (internal citations omitted).

The present case is analogous to Fuller. In Fuller, the defendant was disqualified from home detention, even though he asserted he had a medical condition, because the crime of which he was convicted was specifically excluded from home detention by statute. Similarly, the defendant in the case at bar is specifically precluded from a home detention sentence, regardless of a medical condition. As the court in Fuller held, to allow defendants who were specifically excluded by statute to participate in home detention would allow first degree murderers with health problems to qualify for home detention. Id. at 141. The court found that it was not the intent of the legislature, and that the medical condition exception only applies if the offender is not otherwise disqualified from home detention. Because the defendant in the present

case was disqualified from home detention by the nature of his conviction, the court erred in sentencing the defendant to home detention.

2. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO AN EXCEPTIONAL DOWNWARD SENTENCE ON THE BASIS OF A MEDICAL CONDITION WHEN RCW 9.94A.734 STATES THAT A MEDICAL CONDITION DOES NOT QUALIFY A DEFENDANT FOR HOME DETENTION IF THE UNDERLYING CHARGE IS A DRUG OFFENSE.

As argued above, the trial court committed error when it sentenced the defendant to home detention. The trial court further erred in finding that the legislature did not consider the mitigating factor of a medical condition when determining the standard range. It is clear that the legislature did consider medical conditions when they excluded certain crimes from home detention.

Furthermore, it appears that the court imposed an exceptional downward sentence in order to avoid the requirements of RCW 9.94A.190(1), which requires that sentences of over one year be served in a state facility. Because RCW 9.94A.190(1) would have precluded the defendant from home detention, the court imposed an exceptional downward sentence, but still did not apply the requirements of RCW 9.94A.734. The trial court's exceptional downward sentence is inextricably linked to the court's improper home detention sentence. The

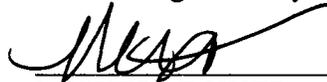
reasons provided by the trial court do not justify a departure from the standard range. See, State v. Allert, 117 Wn. 2d 156, 815 P.2d 752 (1991). This court should therefore remand for a new sentencing.

E. CONCLUSION.

The State respectfully requests that the trial court's sentence be vacated, and that this court remand for a new sentencing.

DATED: October 10, 2007.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.10.07 
Date Signature