

Court of Appeals No. 38772-7-II

FILED
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BY 

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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

DAVID LEE SANDHOLM,

Defendant/Appellant.

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 08-1-01207-9
The Honorable Thomas P. Larkin, Presiding Judge**

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I. ASSIGNMENT OF ERROR

The sentence imposed for Mr. Sandholm's conviction is disproportionate to the crime he was convicted of committing.

II. ISSUE PRESENTED

Is a sentence of 51 months a disproportionate sentence where the alleged offender has been convicted of second degree burglary for allegedly reaching over a fence to take a garden hose from a thrift store storage lot?

III. STATEMENT OF THE CASE

Factual and Procedural Background

Saint Vincent De Paul is a Catholic thrift store located at 4009 South 56th Street. RP 45-46. The store stocks all sorts of goods, including garden hoses. RP 46-47. In addition to the main store, the Saint Vincent De Paul lot includes a large fenced-in area attached to the building. RP 47-48. The fence surrounding the area is about six feet tall. PR 48. The thrift store keeps items on the ground in the fenced in area, but keeps the items two to three feet away from the fence. RP 60-61. The thrift store keeps gardening items, including hoses, right next to the fence. RP 50.

The thrift store has had a problem with people throwing items over the fence when they aren't being watched and then returning later to retrieve the items. RP 50-51. The thrift store does not have an inventory system to keep track of all the items in the store. RP 51. One employee makes several trips per week to recover items which have been thrown

over the fence. RP 51. At 7 p.m. on a Saturday, the thrift store would have been closed. RP 52.

Larry Rickbeil lives on top of a hill in Tacoma. RP 66-67. The Saint Vincent De Paul thrift store is located down the hill and about 500 feet from Mr. Rickbeil's house. RP 67. Mr. Rickbeil has a view of the Saint Vincent De Paul thrift store from his property. RP 67. On top of the hill, approximately 380 feet above the street, is a deck upon which Mr. Rickbeil spends at least an hour in the morning, and often an hour in the evening. RP 68.

At about 7 p.m. on March 8, 2008, Mr. Rickbeil was on the deck of a friend's house, located at 5701 South Mason, enjoying the last of the sunlight, when he saw a truck parked in the field north of the thrift store. RP 69. Mr. Rickbeil saw a man, later identified to be Mr. Sandholm, leaning down in the center of the field. RP 69. Mr. Rickbeil went back to his house and retrieved a pair of binoculars. RP 69. Mr. Rickbeil returned to the deck with the binoculars and saw Mr. Sandholm kneeling in the field holding a lighter. RP 70. Mr. Sandholm was approximately 30 feet away from the fence of the thrift store. RP 70-71. Mr. Rickbeil saw Mr. Sandholm stand up, take some casing off of wire he was holding, then place the wire in the back of the truck. RP 71. Mr. Sandholm then walked from his truck to the fence. RP 71.

Mr. Sandholm walked to the fence and retrieved a chair from some tall grass. RP 71. Mr. Rickbeil saw Mr. Sandholm place the chair near the fence, stand up on the chair, retrieve a pole lying on the fence, and then lean over the fence with the pole and make a motion as if he were trying to hook something. RP 71-72. From Mr. Rickbeil's view, it appeared that the items in the St. Vincent De Paul yard were stacked right up against the fence. RP 74.

Mr. Rickbeil saw a vehicle pull up and a man get out of the vehicle and speak to Mr. Sandholm. RP 72-73. Mr. Sandholm got off the chair and spoke with the man from the vehicle that had pulled up. RP 73. The man in the vehicle left, and Mr. Sandholm returned to his truck, took two coils of something from his truck, and then hid the coils in the bushes. RP 73. Mr. Sandholm then went back to the chair, retrieved the pole, and tried to acquire something. RP 73. At that time Mr. Rickbeil called police because he assumed that the coils Mr. Sandholm had hid in the bushes were items that he had taken from the thrift store, even though Mr. Rickbeil did not see Mr. Sandholm actually take anything from the thrift store yard. RP 73-74, 90, 93.

Police were dispatched in response to a suspected burglary to the field behind the thrift store and came into contact with Mr. Sandholm around 7:05 or 7:08 p.m. RP 96-97. When police arrived, Mr. Sandholm

was halfway between the fence and his truck and was walking towards the truck. RP 99. In the bed of Mr. Sandholm's truck, police observed two black rubber garden hoses, approximately 50 feet in length which were attached to the truck. RP 100. The hoses were extended straight from the tailgate of the truck. RP 100.

The police detained Mr. Sandholm, searched the area near the fence, and discovered a chair and a pole with some pliers fastened to the end of it like a hook. RP 100-101. The pliers were fastened to the pole with Phillip's-head screws. RP 106. On the opposite side of the fence, close enough to be reached with the pole, were black hoses identical to the ones running from Mr. Sandholm's truck. RP 101. However, nothing about the hoses identified them as having come from the thrift store. RP 112.

Police observed that blackberries ran the length of the fence. RP 102, 111. Police also observed another man at the scene, later identified as Mr. Bosarg. RP 99.

The police arrested Mr. Sandholm. RP 104. In Mr. Sandholm's pocket, police found a Phillip's-head screwdriver. RP 106. Mr. Sandholm told police that the hoses in his truck had come from the blackberry bushes and that he had been looking for scrap hose and hose fittings to use around

his house. RP 264. Mr. Sandholm told police that he had used the stick to remove the hose from the blackberries. RP 265.

Mr. Sandholm's truck was released to Mr. Bosarg at Mr. Sandholm's request. RP 106-107.

On March 10, 2008, Mr. Sandholm was charged with one count of second degree burglary in violation of RCW 9A.52.030. CP 1-2.

Jury trial on the charge began on November 5, 2008. RP 45.

At trial, Mr. Bosarg testified that he knew Mr. Sandholm from junior high because Mr. Bosarg grew up around Mr. Sandholm's brothers. RP 164. Mr. Bosarg testified that March 8, 2008, was the first time he had seen Mr. Sandholm in a long time. RP 165. On March 8, 2008, Mr. Bosarg's truck broke down across the street from the Saint Vincent de Paul thrift store around 6:30 p.m. RP 165. After his truck broke down, Mr. Bosarg walked down the street next to the thrift store, sat down to have a cigarette, saw Mr. Sandholm working on his truck, but did not recognize him at first. RP 165-166. Mr. Bosarg testified that he watched Mr. Sandholm for half an hour or long enough to consume two cigarettes. RP 166-167. During this time, Mr. Bosarg observed Mr. Sandholm working on something at the back of his truck and also observed Mr. Sandholm pull two hoses out of the blackberry bushes near the fence to

the thrift store and put them in his truck. RP 167-168. Mr. Bosarg did not see Mr. Sandholm reach over the fence or use a pole. RP 168.

The jury found Mr. Sandholm guilty of second degree burglary. RP 344, CP 52.

Mr. Sandholm stipulated that his offender score was 12, including one point for being on community custody at the time of the alleged burglary. CP 57-59.

Mr. Sandholm received a sentence of 51 months. CP 87-99.

Notice of appeal was timely filed on January 16, 2009. CP 123.

IV. ARGUMENT

Mr. Sandholm's sentence of 51 months is disproportionate to the crime he allegedly committed.

The Eighth Amendment to the United States Constitution provides a right to be free from cruel and unusual punishment, while article I, section 14 of the Washington Constitution prohibits the imposition of cruel punishment. *State v. Morin*, 100 Wn.App. 25, 29, 995 P.2d 113, *review denied* 142 Wn.2d 1010, 16 P.3d 1264 (2000). "Punishment is cruel and unusual if it is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness." *State v. Grenning*, 142 Wn.App. 518, 545, 174 P.3d 706, *review denied* 164 Wn.2d 1026, 196 P.3d 137 (2008).

The Washington Constitution provides greater protection than its federal counterpart. *Morin*, 100 Wn.App. at 29, 995 P.2d 113. (citing *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996)). It follows that if the state provision is not violated, a sentence violates neither constitution. *Morin*, 100 Wn.App. at 29, 995 P.2d 113.

“A sentence violates article I, section 14 of the Washington State constitution when it is grossly disproportionate to the crime for which it is imposed.” *Morin*, 100 Wn.App. at 29, 995 P.2d 113. In determining whether a sentence is disproportionate, we consider “(1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment imposed for other offenses in the same jurisdiction.” *Morin*, 100 Wn.App. at 29, 995 P.2d 113; *see also State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980) (setting forth these factors). These are only factors to consider and no one factor is dispositive. *State v. Gimarelli*, 105 Wn.App. 370, 380-81, 20 P.3d 430, *review denied* 144 Wn.2d 1014, 31 P.3d 1185 (2001).

“Fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and subject only to constitutional provisions against excessive fines and cruel and inhuman punishment.” *State v. Thorne*, 129 Wn.2d

736, 767, 921 P.2d 514 (1996) (quoting *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937)). Only punishment that is grossly disproportionate to the gravity of the offense violates constitutional protections against cruel and unusual punishment. *State v. Farmer*, 116 Wn.2d 414, 433, 805 P.2d 200, 812 P.2d 858 (1991). Punishment is grossly disproportionate only if it is “clearly arbitrary and shocking to the sense of justice.” *State v. Smith*, 93 Wn.2d 329, 344-45, 610 P.2d 869, *cert. denied*, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980).

1. The nature of Mr. Sandholm’s offense.

Mr. Sandholm was convicted of second degree burglary, a class B felony. CP 52, RCW 9A.52.030. Under RCW 9A.52.030, “A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.” However, it is difficult to imagine a more innocuous second degree burglary or class B felony than a second degree burglary committed in the manner in which the State alleged Mr. Sandholm committed this one.

The alleged burglary involved no harm or threat to any person or property. The property taken by Mr. Sandholm was used garden hoses,

collectively valued at \$4.¹ Finally, Mr. Sandholm never even bodily entered the property of the thrift store- the hose was taken by use of a pole with a makeshift hook on the end.

Thus, the evidence at trial indicates that Mr. Sandholm burgled \$4 worth of garden hoses from an open-air fenced-in area and neither caused nor threatened injury to any other person or damage to any other property during the completion of this crime. In the universe of second degree burglaries or class B felonies, Mr. Sandholm's actions clearly rank low on any scale of measurement of the seriousness of the crime.

2. The legislative purpose behind the statute.

The legislative purpose behind the statute defining and criminalizing second degree burglary was to deter burglary. However, RCW 9A.52.030, the second degree burglary statute, is not at issue here. The statutes at issue in this case are the statutes contained in RCW Chapter 9.94A, the Sentencing Reform Act of 1981 (SRA), which set the standard ranges sentence for crimes committed in Washington. Specifically, RCW 9.94A.510, the sentencing grid, and RCW 9.94A.515, the crimes included within each seriousness level.

¹ Mr. Sandholm's stepfather, Mr. Knadle, testified that on March 15, 2008, one week after the burglary, he stopped in at the Saint Vincent de Paul thrift store and purchased the best garden hose the store had in stock. RP 185. The hose was comparable to the one allegedly stolen by Mr. Sandholm in that it was 50 feet long, the same length as the ones

Mr. Sandholm was convicted of second degree burglary, a crime which has a seriousness level of 3 under RCW 9.94A.515. Mr. Sandholm also stipulated that his offender score was 12, resulting in a sentencing range of 51-68 months under RCW 9.94A.510. It is this sentence range which is cruel and unusual considering the facts of this case, thus, it is the legislative purpose behind the SRA which is at issue in this case.

The purposes of the SRA include:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve him or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

allegedly taken by Mr. Sandholm. RP 100, 185. Mr. Knadle testified that he was charged \$2 for the hose. RP 185.

Imposing a sentence of 51 months on Mr. Sandholm for burgling \$4 worth of garden hose from a thrift store in a manner which neither caused nor threatened to cause injury or damage to any other person or property serves none of the purposes of the SRA.

a. Proportionality of Mr. Sandholm's punishment to the seriousness of the offense and his criminal history.

As stated above, the "burglary" Mr. Sandholm allegedly committed is as de minimis a burglary as is imaginable in both the crime intended when Mr. Sandholm "entered" the property and the harm which was inflicted on other persons or property. Additionally, second degree burglary carries a seriousness level of 3 out of a possible 16, further establishing the relatively harmless nature of the crime.

Mr. Sandholm does have nine prior convictions: one for growing marijuana; four for simple possession of methamphetamine; one for attempted unlawful possession of a controlled substance; one for possession of a controlled substance; one for second degree burglary; and one for second degree theft. CP 57-59. Clearly, Mr. Sandholm's criminal history establishes that Mr. Sandholm is an individual with a drug addiction problem. However, his criminal history does not establish that Mr. Sandholm is a danger to the community. None of Mr. Sandholm's prior convictions indicate that Mr. Sandholm ever committed a crime where

another person was threatened. Mr. Sandholm's criminal history establishes nothing more than that he is a drug addict who sometimes engages in petty theft.

A sentence of 51 months is not proportionate to Mr. Sandholm's crime, given the largely harmless nature of the burglary and the nature of Mr. Sandholm's prior convictions.

b. Mr. Sandholm's sentence does not promote respect for the law as a just sentence.

"Imposing a penalty which is within the standard range but unduly harsh, considering the circumstances of a case, does not '[p]romote respect for the law by providing punishment which is just.'" *State v. Nelson*, 108 Wn.2d 491, 502, 740 P.2d 835 (1987), *citing* RCW 9.94A.010(2).

When asked, it is highly likely that no member of the public would ever guess that someone could go to jail for over four years for a burgling a \$4 garden hose. A sentence of 51 months for the burgling of such a low-value item in such a harmless manner would strike all but the most vindictively-minded persons as absurd, excessive, and contrary to any system of justice which provides a just sentence for the crime committed. Such sentences do not promote respect for the law and, in fact, promote disrespect for the law as arbitrary and unnecessarily punitive. This is precisely the sort of sentence which has led to beliefs such as "you get as

much justice as you can afford” and that lower income individuals can’t get fair treatment in a court of law.

c. Mr. Sandholm’s sentence is not commensurate with the punishment imposed on others committing similar offenses.

It is not disputed that Mr. Sandholm received a sentence which is the low end of the standard sentencing range. However, had Mr. Sandholm taken the hoses in another manner, his sentence would have been much less. Mr. Caldwell, an employee of the thrift store, testified that the thrift store had an ongoing problem of people stealing from the thrift store by throwing items over the fence into the field and then retrieving the items. RP 50-51. Had Mr. Sandholm stolen the hoses by throwing them over the fence and retrieving them, he would have been guilty of third degree theft, a gross misdemeanor. RCW 9A.56.050. Gross misdemeanors may not be punished by a period of confinement of more than one year. RCW 3.66.060; RCW 9A.20.021(2); RCW 9.92.020; RCW 9.95.210(2). Thus, persons who steal garden hoses from the Saint Vincent de Paul thrift store by throwing them over the fence and then retrieving them would be committing essentially the same crime as Mr. Sandholm, but would receive a sentence less than one-quarter of Mr. Sandholm’s conviction. In this case, the manner in which the hoses were allegedly taken by Mr. Sandholm does not differ in any material way from

someone throwing the hoses over the fence. Thus, Mr. Sandholm's sentence is not commensurate with the punishment imposed on others who commit similar offenses.

d. Mr. Sandholm's sentence will not protect the public.

As discussed above, neither the current crime nor Mr. Sandholm's criminal history indicate that he is a threat to the public. Incarcerating him for 51 months will not serve to protect the public in any way. In fact, incarcerating Mr. Sandholm for 51 months will actually endanger the community since the money spent incarcerating Mr. Sandholm will be drawn from the budget spent on providing police services and on incarcerating other, more violent criminals, who pose a real threat to society.

e. Mr. Sandholm's sentence will not offer Mr. Sandholm the opportunity to improve himself.

As stated in Mr. Sandholm's motion for an exceptional sentence below the standard range, at the time of sentencing, Mr. Sandholm was caring for his ill mother and was gainfully and lawfully employed. CP 102-122. Mr. Sandholm's sentence will deprive him of his job, will deprive him of the opportunity to gain skills which could help him cope with his drug addiction, and will force him to spend four years in an

environment that will do nothing to encourage him to change his lifestyle upon release.

f. Mr. Sandholm's sentence does not make frugal use of the State's resources.

As this court is undoubtedly aware, the State of Washington is experiencing a serious budget shortfall while at the same time suffering from an overburdened criminal justice system. Sentencing Mr. Sandholm to 51 months in prison for such a minor and harmless offense is antithetical to a frugal use of the State's resources. Mr. Sandholm is not a violent criminal and has not committed any heinous crime. It simply does not make fiscal, legal, or moral, sense for the taxpayers of this State to be forced to pay the costs of incarcerating Mr. Sandholm for 51 months for such a petty crime.

g. Mr. Sandholm's sentence will not reduce the risk of his reoffending in the community.

It is clear from Mr. Sandholm's criminal history that his criminal behavior is directly linked to his drug addiction. Thus, sentencing him to over four years in prison actually increases the likelihood Mr. Sandholm will reoffend since he will be unable to receive treatment and experience living drug free in an uncontrolled environment while he is in prison. When Mr. Sandholm is released from prison he will be just as likely, or even likelier, to commit drug crimes or other petty crimes. Further, he

will have lost his lawful employment and will have increased difficulty in obtaining employment, raising the likelihood that he will resort to criminal activity to support himself.

Thus, Mr. Sandholm's sentence does not serve any of the legislative purposes of the SRA.

3. The punishment Mr. Sandholm would receive in other jurisdictions.

a. *Oregon.*

Oregon Revised Statute (ORS) 164.215 defines the crime of burglary in the second degree. Under ORS 164.215, "a person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime therein...Burglary in the second degree is a Class C felony."

Under ORS 161.605, the maximum term of punishment for a class C felony is 5 years, but the sentencing scheme in Oregon is still indeterminate sentencing. ORS 137.700 provides for mandatory minimum sentences of certain crimes, but burglary is not one of them. ORS 137.717 establishes a presumptive sentence of 18 months for a conviction for second degree burglary. Thus, in Oregon, Mr. Sandholm would have had a presumptive sentence of 18 months with a potential maximum sentence of five years. However, given the nature of Mr. Sandholms offense, it is

likely that the length of the sentence imposed would have been 18 or fewer months.

b. Idaho.

Idaho's Code section 18-1401 defines burglary as entry into "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, vehicle, trailer, airplane or railroad car, with intent to commit any theft or any felony." Idaho Code section 18-1403 provides that "Burglary is punishable by imprisonment in the state prison for not less than one (1) nor more than ten (10) years." Again, given the nature of Mr. Sandholm's crime, it is likely that the court would have imposed a sentence of one year.

c. California.

California Penal Code section 459 defines burglary as the entry into

any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel...floating home...railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach...house car...inhabited camper...vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony...

California Penal Code section 460 defines the degrees of burglary as follows:

(a) Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.

(b) All other kinds of burglary are of the second degree.

California Penal Code section 461 mandates that second degree burglary shall not be punished by imprisonment in the state prison or in the county jail for a term exceeding one year. Therefore, had Mr. Sandholm been sentenced in California, he would have been sentenced to no more than one year confinement in jail.

Thus, at least in Oregon, Idaho, and California, Mr. Sandholm would have received a considerably shorter sentence, closer to one year in length.

4. The punishment for other crimes in Washington.

Because of the manner in which sentence ranges are calculated in Washington, numerous other crimes potentially carry the same sentence as does second degree burglary when the offender has an offender score of 12. However, of all the crimes in Washington, the crime closest to second degree burglary is third degree theft. As stated above, had Mr. Sandholm obtained the hoses by entering the thrift store during business hours and throwing them over the fence, he would have been guilty of third degree

theft, a gross misdemeanor, and would have received a sentence no longer than one year.

V. CONCLUSION

Mr. Sandholm's sentence is grossly disproportionate to the crime he has been convicted of committing. A sentence of 51 months for a non-violent burglary of \$4 worth of garden hoses shocks the conscience and violates the principles of fundamental fairness. This court should vacate Mr. Sandholm's sentence and remand for resentencing for a period of incarceration in the county jail of less than one year.

DATED this 10th day of August, 2009.

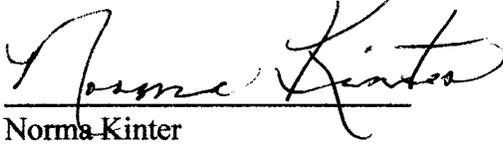
Respectfully submitted,



Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on August 10, 2009, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue Tacoma, Washington 98402, and by United States mail appellant, David Lee Sandholm, 6806 44th Avenue East, Tacoma, Washington 98443, true and correct copies of this Brief. 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 August 10, 2009.


Norma Kinter

2009 AUG 10 10:04 AM
COMM-FBI
BY: 