

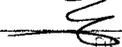
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COURT OF APPEALS
DIVISION II

NO. 39837-1-II

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

MAYSO PICKINS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 08-1-03459-5

Brief of ~~Appellant~~ *Respondent*

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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR.

1. Whether the defendant's appeal of his sentence should be dismissed where that sentence was within the correct standard range, the trial court had no duty to impose a first-time offender waiver, the trial court decided that this waiver was inappropriate, and the defendant has raised no issue of Constitutional magnitude.

B. STATEMENT OF THE CASE.

1. Procedure

On July 28, 2008, the defendant was charged, by information, with count I, attempting to elude a pursuing police vehicle, count II, driving under the influence of intoxicants, and count III, driving while in suspended or revoked status in the second degree. CP 77-79. The State filed an amended information on December 30, 2008, that retained the same charges, but added an allegation that "the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer", which added "additional time to the presumptive sentence as provided in RCW 9.94A.533". CP 1-3; RP 2-3.

On June 10, 2009, the matter was called for trial, a jury was selected, and a Criminal Rule 3.5 hearing was held. RP 1-56. During that hearing, Lakewood Police Officer Skeeter Manos and the defendant

testified. RP 1-55. The Court then ruled the defendant's statements were admissible. RP 53-55.

At trial, the State took the testimony of Officer Manos and Sergeant Shadow and rested on June 11, 2009. RP 58-133; RP 133-153. The defendant testified the same day, and the defense rested thereafter. RP 159-181. Jury instructions were read and closings given that afternoon. RP 183-215.

On June 12, 2009, the jury returned verdicts of guilty as charged in counts I through III of the amended information, and answered a special verdict in the affirmative, indicating that the defendant committed the crime of attempting to elude while endangering one or more persons other than himself or the pursuing law enforcement officer. RP 216-18; CP 4-8.

A sentencing hearing was held on September 25, 2009. RP 222-231. The State recommended a sentence on the attempting to elude a pursuing police vehicle count, at the high end of the standard range and suspended sentences on counts II and III. RP 222-23. The defense asked the court to grant the first-time offender waiver under RCW 9.94A.650. RP 224-26.

At sentencing, the Court noted that the defendant's driving "was pretty egregious", that "there was substantial testimony as to what other drivers were doing to kind of get out of his way", and that the defendant

“certainly put other people at risk, including law enforcement officers that were pursuing him.” RP 227-28. The Court then went on to state that “even if I were to believe that he could simply be treated as a first time offender, I don’t think I would do that under these circumstances in any event.” RP 227-28. The Court indicated that the defendant did not have any criminal history and sentenced the defendant to 12 months and one day in total confinement, the low end of the standard range on count I. RP 228; CP 54-74. The Court imposed suspended sentences on the remaining two counts. RP 228-31.

2. Facts

On July 25, 2008, at about 10:11 p.m., Lakewood Police Officer Manos was on patrol in a fully-marked Lakewood Police patrol car with his partner, Officer Shawn Noble. RP 65-66. He said that they were traveling northbound on Interstate 5 in the area of Gravelly Lake when he observed the defendant traveling on a motorcycle in his rear-view mirror. RP 66-67. Manos indicated that he was driving his patrol car at the posted speed limit of 60 miles per hour (mph) when the defendant’s motorcycle, which was traveling at about 70 mph, passed him. RP 67-68; RP 76. Officer Manos noted that the defendant was weaving within his lane as he drove the motorcycle. RP 68. The officer drove behind the defendant and

began “pacing” him. RP 68. Officer Manos read the license plate of the defendant’s motorcycle and a records check indicated that the registered owner of that motorcycle, who was the defendant, had a driver’s license which was suspended in the second degree. RP 69; 108-09. The defendant then made three rapid lane changes to pass slower vehicles, and Officer Manos activated his patrol car’s overhead lights and siren. RP 70-72. Manos indicated that he himself could see the lights and hear the siren and that the defendant “looked back at us and then accelerated” to 80 to 85 mph. RP 72; RP 76.

Lakewood Police Sergeant Karin Shadow, who was at the State Route 512 overpass over Interstate 5, saw the defendant travel under the overpass, swerving in the lanes. RP 138-39. She saw Manos’ patrol car following behind, with lights and siren activated. RP 138-39.

The defendant began passing other vehicles, which were traveling at about the speed limit, and “cutting off numerous cars” by making “rapid lane changes”. RP 74. Several drivers went into another lane to avoid a collision. RP 74; RP 140-41. When traffic got heavier, the defendant drove “between two vehicles that were traveling in side-by-side lanes” with only about five feet between them. RP 76-77; RP 141.

The defendant then went off onto the shoulder and continued driving at a high speed before taking the exit to 56th Street. RP 77-78; RP 141. The defendant was traveling at such a high speed that he was unable to negotiate the turn; he went over the grass median, across all lanes of 56th Street, and then up into a grassy area, where his motorcycle apparently stalled out and “went onto the ground.” RP 78-79; RP 142. The defendant then got up and started running. RP 83; RP 142-43.

Officer Manos parked about 100 feet away and, firearm drawn, ordered the defendant, who was running towards him, to stop and get on the ground. RP 83-85. The defendant did not stop. RP 84. He slowed to walk and continued to come towards the officers. RP 84. Officer Manos holstered his firearm and used a taser, one probe of which struck the defendant in the upper chest and the other in the thigh area, but it had no effect on the defendant. RP 85-86; RP 143. Sergeant Shadow, who had arrived shortly after the other officers, then used her taser, causing the defendant to fall to his back. RP 88; RP 143-44. The defendant was then ordered to get on his stomach, but refused to do so. RP 89-90. Officer Noble then rotated the defendant onto his stomach and the defendant was handcuffed. RP 90-91; RP 145-46. Officer Manos and Sergeant Shadow, the only officers to testify, both indicated that they noticed an odor of intoxicants coming from the defendant. RP 91; RP 147.

The defendant was then taken to the patrol car, where he was “advised of his rights” and asked how much he had to drink. RP 92. The defendant thereafter stated, in “very slurred speech, two beers.” RP 92. The defendant’s eyes were “very bloodshot and watery”, he exhibited “very poor coordination”, “was having a hard time standing up on his own two feet,” and was suffering a series of mood swings. RP 93; RP 105; RP 147-48.

Officer Manos asked the defendant why he had failed to stop, to which the defendant responded, “My license is suspended.” RP 94. The officer then asked the defendant if he had failed to stop because he had been drinking and the defendant said, “Yeah, I got scared.” RP 94.

Officers called the fire department, which transported the defendant to the hospital, apparently due to “an accelerated heart rate.” RP 95. Consequently, field sobriety tests were not given. RP 106. Once at the hospital, the defendant was again read “his constitutional rights” as well as “the implied consent warning for blood.” RP 97-100. The defendant indicated that he understood this warning and refused to take a blood test, saying, “I ain’t giving no blood.” RP 101-02.

Officer Manos, who had undergone specialized training in detecting whether a person is under the influence of alcohol, formed the opinion that the defendant was “highly intoxicated.” RP 61-64; RP 107.

C. ARGUMENT.

1. THE DEFENDANT’S APPEAL OF HIS SENTENCE SHOULD BE DISMISSED BECAUSE THAT SENTENCE WAS WITHIN THE CORRECT STANDARD RANGE, THE TRIAL COURT HAD NO DUTY TO GRANT A FIRST-TIME OFFENDER WAIVER, THE TRIAL COURT DECIDED THAT A THIS WAIVER WAS INAPPROPRIATE, AND THE DEFENDANT HAS RAISED NO ISSUE OF CONSTITUTIONAL MAGNITUDE.

The defendant received a sentence within the correct standard range. *See* RP 227-29; CP 54-74; RCW 9.94A.530. A sentence within the correct standard range is not subject to appeal, RCW 9.94A.585(1), because “[a]s a matter of law, there can be no abuse of the trial court’s discretion if it imposes a sentence that falls within the standard range.” *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993) (citing *State v. Ammons*, 105 Wn.2d 175, 182, 713 P.2d 719, 718 P.2d 796, *cert. den.*, 479 U.S. 930, 107 S. Ct. 398, 93 L.Ed.2d 351 (1986)).

While a defendant cannot challenge a standard-range sentence, a defendant “can challenge the procedure by which a sentence within the standard range was imposed.” *State v. Watkins*, 86 Wn. App. 852, 854, 939 P.2d 1243 (1997)(citing *State v. Ammons*, 105 Wn. 2d at 183). That said, in order for such an appeal to be allowed, “it must be shown that the sentencing court had a duty to follow some specific procedure required by the SRA [Sentencing Reform Act, RCW 9.94A], and that the court failed to do so.” *Mail*, 121 Wn.2d at 712, 854 P.2d 1042.

In the present case, it cannot be shown that the sentencing court failed to comply with any duty imposed by the SRA. Although the defendant argues that he was eligible for the first-time offender waiver, “[t]he trial court has broad discretion in sentencing a defendant under the first-time offender option or in refusing to grant this option”. *State v. Johnson*, 97 Wn. App. 679, 988 P.2d 460 (1999)(citations omitted). Even if a defendant meets the criteria for a first-time offender waiver, a sentencing court is not required to grant such a waiver. *State v. Boze*, 47 Wn. App. 477, 735 P.2d 696 (1987); RCW 9.94A.650. Consequently, the trial court in this case had no duty to impose a first-time offender waiver even if the defendant had been eligible for it. Therefore, the trial court could not have failed to follow some specific procedure required by the SRA.

Moreover, the trial court did not fail to exercise its discretion. It never explicitly found that that the defendant was ineligible for the first-time offender waiver, but concluded that, regardless of his eligibility, the first-time offender waiver was inappropriate. The trial court specifically held that “even if I were to believe that [t]he [defendant] could simply be treated as a first time offender, I don’t think I would do that under these circumstances in any event” and went on to impose a standard-range sentence of twelve months and a day. RP 227-28; CP 80-92.

“Outside of the SRA, the only other possible limitation on the judge’s discretion might be found in the provisions of our state and federal constitutions.” *Mail*, 121 Wn.2d at 712. The defendant did not raise any issues of Constitutional magnitude. *See* Brief of Appellant, p. 1-15.

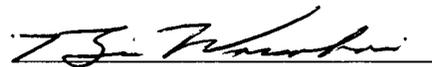
Therefore, the defendant has no ground to challenge either the standard-range sentence imposed, or the procedure by which it was imposed and the defendant’s appeal of his sentence must be dismissed.

D. CONCLUSION.

The defendant may not appeal his sentence because it was within the correct standard range, the trial court had no duty to grant him a first-time offender waiver, the trial court explicitly decided that this waiver was inappropriate, and the defendant has raised no issues of Constitutional magnitude. Therefore, the defendant’s appeal must be dismissed.

DATED: March 17, 2010.

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DIVISION III

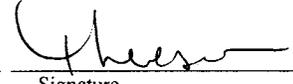
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STATE OF WASHINGTON

BY 
DEPUTY

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.

3-17-10 
Date Signature

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STATE OF WASHINGTON

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No. 39837-1-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MAYSO PICKINS,
Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

When the Superior Court Imposed Sentence Under the Erroneous Belief it Lacked Authority to Exercise its Discretion to Impose a Sentence Pursuant to the First Time Offender Waiver Provision of RCW 9.94A.650, This Court should Remand for Resentencing

As an initial matter, Mr. Pickins notes that the State does not take issue with his legal analysis as to the merits of this appeal, only with his right to bring the appeal. See Brief of Appellant (sic) (State's Brief). Accordingly, it implicitly concedes Mr. Pickins's analysis of the law is correct. Thus, if this appeal may be heard, Mr. Pickins's sentence should be remanded. For the reasons below, the Court may hear this appeal and should remand for resentencing.

A. The Court may hear this appeal.

RCW 9.94A.585(1) does not prevent this Court from hearing this appeal.¹ That statute is not an absolute prohibition to an appeal. *State v. Herzog*, 112 Wn.2d

1. "A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed. For purposes of this section, a sentence imposed on a first-time offender under RCW 9.94A.650 shall also be deemed to be within the standard sentence range for the offense and shall not be appealed." RCW 9.94A.585(1).

419, 423, 771 P.2d 739 (1989) (discussing predecessor statute, RCW 9.94A.210(1)). Instead, it merely prevents a defendant from appealing the length of a standard-range sentence. *State v. Ammons*, 105 Wn.2d 175, 182-83, 713 P.2d 719 (1986) (predecessor statute); *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997) (quoting *Herzog*, 112 Wn.2d at 423).

Here, Mr. Pickins is not appealing the length of his sentence but the sentencing court's erroneous determination regarding his eligibility under RCW 9.94A.650. In a case directly on point, Division 2 permitted appeal under analytically identical circumstances. *State v. Stately*, 152 Wn. App. 604, 607, 216 P.3d 1102 (2009).

In *Stately*, the appeal was brought by the State, which argued the sentencing court made an erroneous determination as to the defendant's eligibility for first time offender status. This Court began its analysis by acknowledging the appeal bar of RCW 9.94A.585(1) and holding that the statute's limiting language "does not, however, preclude our review of

whether the sentencing court had legal authority to impose a first-time offender waiver." *Id.* at 607. The Court went on to uphold the sentencing court's determination that the defendant was eligible for first time offender treatment. Under *Stately*, then, this appeal may be heard. See also, *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (holding appellate courts may hear argument that sentencing court relied on an impermissible basis for refusing to impose a sentence outside the standard range).

When this appeal is premised on the sentencing court's erroneous statutory interpretation, *State v. Mail*, 121 Wn.2d 707, 854 P.2d 1042 (1993), is inapposite. See State's Brief at 7-8. In that case, the defendant sought to challenge the sentencing court's use of certain information in imposing a sentence at the top of the standard range. *Id.* at 709. Unlike the instant case, the defendant did not argue that the sentencing court had incorrectly interpreted a provision of the RCW, just that it considered information in addition to the information specifically

permitted by statute. *Id.* at 710. The Supreme Court ruled that when the defendant did not have a statutory basis for the appeal, the predecessor statute to RCW 9.94A.585(1) barred appeal. *Id.* at 713.

Here, by contrast, Mr. Pickins's appeal is strictly statutory-based. He argues that the sentencing court misinterpreted RCW 9.94A.650 and RCW 9.94A.533(11) in holding that an increase to his standard range pursuant to RCW 9.94A.533(11) prohibited first time offender status. See Appellant's Brief at 8-14. Accordingly, the Supreme Court's decision in *Mail* does not prevent this appeal.

Indeed, in the analogous context of exceptional sentences, the Supreme Court has stated, "while no defendant is entitled to an exceptional sentence . . . every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *In re Personal Restraint of Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007) (quotation and internal quotation marks omitted). Under the same reasoning, Mr. Pickins was entitled to

have the trial court actually consider application of the first time offender waiver and remand is required.

For all of these reasons, the Court may hear this appeal.

B. The sentencing court erroneously interpreted RCW 9.94A.650 and RCW 9.94A.533(11) in holding Mr. Pickins ineligible for first time offender status.

The sentencing court incorrectly interpreted RCW 9.94A.650 and RCW 9.94A.533(11). The court speculated that it was "the intent of the legislature" that a defendant subject to an enhancement under RCW 9.94A.533(11) is not eligible for the first time offender waiver provision of RCW 9.94A.650. It apparently reached this conclusion because Mr. Pickins's standard sentence range was 0-90 days without the RCW 9.94A.533(11) enhancement and would have been 0-90 days with the enhancement if RCW 9.94A.650 applied. Thus, the court believed application of RCW 9.94A.650 would contravene the legislature's intent in

enacting RCW 9.94A.533(11). RP at 227-28; see CP 54-74.²

But the sentencing court was required simply to follow the plain meaning of the statute, not speculate as to legislative intent. Legislative intent is the key focus, but to determine legislative intent, a court "begins with the statute's plain language and ordinary meaning." *State v. Mandanas*, 168 Wn.2d 84, 87, 2010 Wash. LEXIS 67 (2010). When "the plain language of a

2. Contrary to the State's argument, State's Brief at 8, the court expressly held the "statutory scheme" denied it authority to impose a first-time offender sentence:

Well, I think the intent of the legislature was that if the jury returned a special verdict finding that more than one person was endangered by a defendant's actions, then they wanted an enhanced sentence. I don't think their intent was to simply have that finding made, go through the extra work of submitting that question to the jury, and then ignoring it, basically.

. . .
So I am not inclined to grant or deviate from what I think is the statutory scheme, and that's to require the 12 months and a day.

RP 227-28.

statute is subject to only one interpretation," then the inquiry ends. *Id.*

Here, the relevant statutes are straightforward enough to require interpretation according solely to their plain meaning. The adjustment to Mr. Pickins's sentence required by the special jury finding increased his standard sentence range by 12 months and one day. RCW 9.94A.533(11). RCW 9.94A.650(2) allows waiver of the standard sentence range, whatever that range is. RCW 9.94A.650(2). Thus, his new standard sentence range of 12 months and one day plus the original 0 to 90 days could be waived under RCW 9.94A.650(2). Accordingly, and for the additional reasons sent forth in Appellant's Brief, the superior court erred in its interpretation of the relevant law and this Court should remand.

C. When this Court cannot say that the sentencing court would have imposed the same sentence had it known a first-time offender waiver was available, remand is required.

Finally, when it is possible that the superior court would have imposed a different sentence under a correct reading of the law, remand is necessary. See

Mulholland, 161 Wn.2d 322 at 334. In *Mulholland*, the defendant, a veteran of the military, had been found guilty of six counts of first degree assault, while armed with a firearm in each case, and one count of drive-by shooting. The trial court believed it lacked discretion to impose exceptional, concurrent sentences.

Holding that it did have such discretion, the Supreme Court found remand necessary when there was the mere possibility that a different sentence would have been imposed under a correct reading of the law. Significantly, in *Mulholland*, the Court ordered remand in the context of a Personal Restraint Petition, where the defendant faced drastically heightened standards to get relief. *Id.* at 331-32 (in reviewing a PRP, appellate court must determine if defendant was actually and substantially prejudiced by a violation of his constitutional rights or that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice).

Under these circumstances, the Supreme Court held that an appellate court must remand even if it is not

certain the result would have been different had the sentencing court known the correct law. Instead, remand is necessary when the record indicates a different result was possible:

The record does not show that it was a certainty that the trial court would have imposed a mitigated exceptional sentence if it had been aware that such a sentence was an option. Nonetheless, the trial court's remarks indicate that it was a possibility. In our view, this is sufficient to conclude that a different sentence might have been imposed had the trial court applied the law correctly. Where the appellate court "cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option," remand is proper.

Id. at 334 (quoting *McGill*, 112 Wn. App. 95, 100-01).

In *Mulholland*, the Court found the possibility of a different sentence existed because of the sentencing court's expression of sympathy toward the defendant for his former military service. *Id.* at 333.

In Mr. Pickins's case, too, the record indicates the possibility that the trial court would have imposed a first time offender sentence had it realized it had such authority. Although the court said it did not "think" it would have imposed such a sentence, it did

not unequivocally state that it would not: "I don't think this is a case -- even if I were to believe that he could simply be treated as a first time offender, I don't think I would do that under these circumstances in any event." RP at 228. These remarks are equivocal enough to leave open the possibility that if the court knew it could have imposed a first time offender sentence it would have considered the matter differently.

Moreover, the court's remarks were premised on its misunderstanding of the law. The court believed application of RCW 9.94A.650 contravened the legislature's intent in enacting RCW 9.94A.533(11). RP at 227-28. But if the court realized instead that the plain meaning of the two statutes made Mr. Pickins eligible for first time offender status, and that this result effectuated, rather than contravened legislative intent, it might have chosen that option. See Part B.

Indeed, the court showed what leniency it could, given the standard sentence range, in that it imposed a sentence at the bottom of that range:

As to the -- and, you know, I am mindful that Mr. Pickins doesn't have any other history that I am aware of. I think he generally is a law-abiding individual. I hope that this is an aberration; I hope the alcohol issue is not a significant problem. But I think the low end is I think reasonable here.

RP at 228. Accordingly, the court seemed inclined to leniency and there is a possibility that it would have imposed a first time offender sentence if it knew it had the authority. Under these circumstances and the law of *Mulholland*, this Court should remand for resentencing.

CONCLUSION

For these reasons and the reasons sent forth in Appellant's Brief, Mayso Pickins respectfully requests this Court to remand his case for resentencing.

Dated this 24th day of March, 2010.

Respectfully submitted,



Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 24rd day of March, 2010, I caused the original and a true and correct copy of Appellant's Brief to be served by hand on:

The Court of Appeals
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950 Broadway, Suite 300
Tacoma, WA 98402-4454;

and one copy of the attached brief to:

Mr. Brian Wasankari
Pierce County Deputy Prosecuting Attorney
930 Tacoma Avenue South
Tacoma, Washington 98402-2102
Respondent's Attorney; and

one copy of the attached brief by U.S. mail to:

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