

No. 40174-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES OSLAKOVIC,

Appellant.

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ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Frederick W. Fleming, Judge

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A. ASSIGNMENT OF ERROR

The sentencing court's imposition of consecutive sentences violated Mr. Oslakovic's state and federal constitutional rights to equal protection.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Were Mr. Oslakovic's equal protection rights violated because allowing a court unlimited discretion to impose consecutive sentences for misdemeanors while mandating that, except in exceptional circumstances, felony sentences are presumptively concurrent does not bear any rational relationship to any legitimate governmental interest?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Charles P. Oslakovic was charged by amended information with vehicular assault and failure to remain at an injury accident. CP 1-2; RCW 46.52.020(1), RCW 46.51.010(4), RCW 46.61.502, RCW 46.61.522(a)(b)(c). On November 5, 2009, he entered Alford¹ pleas to a second amended information which removed the vehicular assault and added a count of gross misdemeanor driving while under the influence of intoxicants, in addition to retaining the felony of failure to remain at an injury accident. RP 3; CP 7-8, 10-18.

On December 4, 2009, Judge Fleming ordered Oslakovic to serve standard-range sentences, to be served consecutively. CP 48-61.

Mr. Oslakovic appealed, and this pleading follows. See CP 62-64.

¹North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

2. Allegations in probable cause statement²

It was alleged in the probable cause statement that Oslakovic was driving a car 70-75 m.p.h. on the highway at 10:30 p.m. one night while the passenger, Amy Roznowski, was standing on the running board outside the vehicle. CP 3-4. Roznowski fell off and was injured and it was alleged that Oslakovic drove away. CP 3-4. Oslakovic was stopped shortly thereafter nearby and said he was on his way back to check on Roznowski at the time. CP 3-4. An officer believed Oslakovic was exhibiting signs of intoxication. CP 3-4.

In his Alford plea, Oslakovic did not concede the state's claims were correct but instead maintained his innocence and said he was taking advantage of the state's offer to avoid higher consequences which could result from trial. CP 15-18.

3. Facts relating to sentencing

The charges to which Oslakovic entered Alford pleas were a gross misdemeanor of driving while under the influence of intoxicants and a class C felony of failure to remain at the scene of an injury accident. CP 7-8.

At sentencing, the prosecutor urged the court to rely on facts other than those admitted as part of the Alford pleas but contained in the "probable cause" statement in imposing the sentence. RP 4. According to the prosecutor, those "facts" included that Oslakovic had been drinking before the incident, that he had been driving at about 70-75 miles per hour

²This information is provided for context only. Oslakovic entered an Alford plea and does not concede to the accuracy of these allegations.

when Roznowski was hanging on the outside of the car, that she had been outside for 1/4-1/2 mile, and that Oslakovic had just continued driving when Rosnowski fell off but “was stopped” later and failed sobriety tests. RP 4-5.

The prosecutor argued that the court should impose high-end sentences of 365 days for the DUI with 185 days suspended on certain conditions and 12 months for the hit and run, to run “consecutive” to the time imposed on the DUI. RP 7-8.

Roznowski’s father told the court about the family’s emotional turmoil and the difficulties Roznowski was suffering as a result of the incident. RP 9-11. A former co-worker testified about Rosnowski’s potential and the effect the incident had on her future. RP 12-13. Roznowski’s mother also told the court about the costs of medical treatment and insurance issues and the impact of the incident on Roznowski and her family. RP 13-18. Finally, Roznowski told the court about the injuries she had suffered, her fear and pain, what she had lost in terms of her future as a result of the incident and the length of time between the accident and the sentencing. RP 28. She told the court that she wanted Oslakovic to be ordered to serve “the full 24 months if not an exceptional sentence.” RP 28.

Counsel pointed out that the degree of injuries described by Roznowski at sentencing was different then what was in the probable cause statement. RP 34-38. He also noted that many of Rosnowski’s other allegations about what happened during the incident were not supported by any evidence, nor were some of her parents’ claims. RP 34.

After counsel objected that consecutive sentences were not “part of the negotiations,” the court then read the plea agreement language which said, “[o]pen recommendation with respect to jail sanctions within standard range. Mandatory minimum.” RP 30. The prosecutor said he wanted consecutive sentences and that it was “open season on the gross misdemeanor, because the SRA does not control misdemeanors.” RP 30-31. The prosecutor also said “the law allows that imposition of sentence and it’s not an extraordinary sentence.” RP 31. Counsel disagreed, arguing that because the SRA included the DUI as part of the offender score even though it was a gross misdemeanor, the court could not order greater than 6-12 months total in the case without it being an exceptional sentence. RP 32.

Counsel also urged the court to impose a first-time offender sentence because Oslakovic had no prior criminal history, had three children, had made all of his court appearances and was eligible for such a sentence. RP 36. Counsel asked that any incarceration time be converted to community service or served on electronic home monitoring or a work-release situation. RP 36-37. The prosecutor conceded Oslakovic was “[l]egally” qualified for such a sentence but argued that it should not be imposed because of the conduct alleged in the case. RP 9.

Oslakovic told the court of his compassion and concern for Roznowski and hoped she would one day be healed. RP 39. He said he would continue keeping her and her family in her prayers. RP 39. He asked the court to allow him to serve a first-time offender sentence so he could continue to provide for his family. RP 39.

The court said that Oslakovic had “sole control” over the two offenses, as well as over whether he had stopped when “somebody is maybe not exercising good judgment and was attempting to get out of the car.” RP 40. The court ordered the sentences as argued by the prosecution, including running the two sentences consecutive to each other. RP 41-45.

D. ARGUMENT

APPELLANT’S EQUAL PROTECTION RIGHTS WERE VIOLATED

Both the state and federal constitutions provide citizens with the right to equal protection under the law. State v. Osman, 157 Wn.2d 474, 139 P.2d 334 (2006); Fourteenth Amend.; Wa. Const. Art. 1, § 12. Because the Washington and federal equal protection clauses are “substantially identical,” the same analysis is used for each. See, State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

Under both clauses, equal protection means that persons similarly situated with respect to the legitimate purpose of a law are treated alike. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). While identical treatment is not required in all circumstances, equal protection does require that “a distinction made have some relevance to the purpose for which the classification is made.” Baxstrom v. Herold, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966).

In this case, this Court should reverse, because Mr. Oslakovic’s state and federal rights to equal protection were violated by the court’s order that the sentences be served consecutively.

The first step in any equal protection challenge is to determine the proper level of scrutiny to be applied to the question of whether the defendant's right to equal treatment was violated. See Gausvik v. Abbey, 126 Wn. App. 868, 882, 107 P.3d 98, review denied, 120 P.3d 577 (2005). This is determined by looking at the nature of the interest affected or the characteristics of the class created. See State v. Garcia-Martinez, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998).

Although there is a liberty interest involved whenever a person is in custody, the Washington Supreme Court has held that the "rational relationship" test applies when physical liberty is affected unless there is a semi-suspect class also involved. Coria, 120 Wn.2d at 170. There is no "rational relationship" between an infringement and the impact on the liberty interest if the infringement "rests on grounds wholly irrelevant to achievement of legitimate state objectives." State v. Schaaf, 109 Wn.2d 1, 17, 743 P.2d 240 (1987) (citations omitted). Further, even a valid law will violate equal protection if it is administered in a manner that unjustly discriminates between similarly situated people. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990).

In general, disparity in sentencing of codefendants does not implicate equal protection principles because of the differences in facts and circumstances relevant to the sentencing of each individual. Handley, 115 Wn.2d at 287. This does not mean, however, that sentencing issues are not subject to the mandates of equal protection. Here, the issue is not the disparate sentences imposed on codefendants but rather the disparate

treatment of defendants being sentenced for multiple offenses, some of which enjoy the protections of RCW 9.94A.589(1) and some of which, like Oslakovic, have been deprived of those protections even though that deprivation serves no rational relationship to any legitimate governmental interest.

Under RCW 9.94A.589(1), when a court sentences a defendant for multiple current offenses which are not serious violent offenses or certain firearm crimes, the sentences “shall be served concurrently” and can only be ordered to be served consecutively as part of an exceptional sentence. See State v. Smith, 74 Wn. App. 844, 852-53, 875 P.2d 1249 (1994). Further, to impose such an exceptional sentence, the trial court must find aggravating factors which support it. State v. Vance, __ Wn.2d __, __ P.3d __ (2010 WL 1795609) (May 6, 2010) (trial court may make the findings necessary to support consecutive sentences without violating the right to trial by jury under recent U.S. Supreme Court precedent).

In State v. Langford, 67 Wn. App. 572, 587-88, 837 P.2d 1037 (1992), review denied, 121 Wn.2d 1007 (1993), cert. denied, 510 U.S. 838 (1993), and State v. Whitney, 78 Wn. App. 506, 517, 897 P.2d 374, review denied, 128 Wn.2d 1003 (1995), Division Three held that these protections and the presumption of concurrence of RCW 9.94A.589(1) do not apply to misdemeanors. RCW 9.94A.589 is part of the Sentencing Reform Act, the Court reasoned, which by definition does not apply to misdemeanors. See Langford, 67 Wn. App. at 587-88; Whitney, 78 Wn. App. at 517; RCW 9.95A.010. Thus, those who are being sentenced for multiple felonies are entitled to a presumption of concurrent sentences

which can only be overcome by satisfying the requirements for imposing an exceptional sentence. Those who are being sentenced for the lesser acts amounting to misdemeanors, however, or for only one felony and a misdemeanor, as Oslakovic was, are given no such protection.

There is no legitimate governmental interest which can be served by treating people in exactly the same situation - being before a court for sentencing for multiple offenses - so differently. Allowing those whose conduct was more serious and thus felonious the protections of presumptively concurrent sentences while at the same time providing no such protection for those who have committed at least some less serious conduct is clearly unequal treatment of persons similarly situated. And the result is that people like Oslakovic face consecutive sentences and thus more time in custody relative to the normal sentence than those who commit multiple felonies. Yet those who commit multiple felonies are at least arguably more dangerous and more in need of lengthy incarceration than those who commit acts the Legislature has deemed relatively less serious i.e., misdemeanors, or commit a single felony and a misdemeanor, as Oslakovic had here.

There is thus a “purely arbitrary” distinction in the law between the defendants who have committed multiple felonies and those who have committed multiple misdemeanors or a felony and a misdemeanor and that distinction ensures disparate, imbalanced treatment. See Coria, 120 Wn.2d at 172. Further, these classifications are “wholly irrelevant” to the achievement of any legitimate state objectives. Indeed, if anything, the defendants who have committed multiple felonies should be the ones

subject to the imposition of the harsher, more lengthy terms of incarceration through imposition of exceptional sentences, both for punishment and for protection of society against our worst offenders. Compare, Coria, 120 Wn.2d at 172-73 (upholding school bus route stop sentence enhancements because it furthers the legitimate purposes of keeping drug dealers away from children and in particular from children actually at bus stops heading to school).

Allowing imposition of consecutive sentences on Oslakovic in this case, and on misdemeanants in general, while at the same time providing a presumption of concurrent sentences and requirements that exceptional sentencing procedures are followed for consecutive sentences to be imposed on felons, violates the mandates of equal protection. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 7th day of June, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Charles Oslakovic, Pierce County Jail, BKG # 2009338050,
910 Tacoma Ave. S., Tacoma, WA. 98402.

DATED this 12th day of June, 2010.



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