

NO. 41133-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES DOUGLAS,

Appellant.

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

The Honorable Brian Tollefson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THERE IS NO STATUTORY AUTHORITY FOR DOUGLAS' EXCEPTIONAL SENTENCES.

The State does not dispute Douglas' argument that RCW 9.94A.537(2) describes the only circumstance in which a defendant can be resentenced to an exceptional sentence. And it seems to concede the statute's prerequisites for resentencing are not met here. Instead, the State argues that Douglas was not resentenced; he was retried after this Court vacated his convictions and, therefore, RCW 9.94A.537(2) does not impose any limitation in his case. Brief of Respondent, at 21-22.

The State is mistaken. The statute does not distinguish between resentencings where only the sentence was vacated (what the State defines as a resentencing) and resentencings where the underlying conviction *and* sentence were vacated (Douglas' situation). Instead, the statute applies "where a new sentencing hearing is required." RCW 9.94A.537(2). A new sentencing hearing was required in Douglas' case following his convictions in the second trial and resulted in a 419-month increase over the original, vacated sentences. 41RP 2377; CP 804, 815-816.

Had the Legislature intended to limit RCW 9.94A.537(2) to cases in which only the defendant's sentence, but not his conviction, was vacated, it could have enacted the statute with different language. Rather than aiming the statute at any case "where a new sentencing hearing is required," the statute could have been limited to cases "where *only* a new sentencing hearing is required." It is not this Court's role to rewrite statutes or assume the presence of missing language. State v. Delgado, 148 Wn.2d 723, 727-728, 63 P.3d 792 (2003).

Because Douglas was resentenced, because RCW 9.94A.537(2) describes the only situation in which a defendant can be resentenced to an exceptional sentence, and because Douglas' circumstances do not satisfy the statute's procedural requirements, there was no statutory authority for his exceptional sentences. They must be vacated.

2. DOUGLAS WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL.

Citing the extended colloquy between Judge Tollefson and Douglas, the State argues that Douglas' request for the assistance of counsel during the trial's sentencing phase was not error

because Douglas "still expected to put forth his own case." Brief of Respondent, at 25. The record does not support this assertion.

As discussed in Douglas' opening brief, the only condition he placed on the appointment of counsel was an insistence on competent representation, which he had every constitutional right to demand. At no time did he indicate an unwillingness to turn over tactical control of the case or, as the State now claims, an expectation that he would put on his own case. See brief of Appellant, at 20-22 (citing 40RP 2145-2155).

Whether this Court follows those federal courts holding it is per se error to deny requested counsel for sentencing or, instead, evaluates the circumstances, Judge Tollefson erred when he denied Douglas' request for help prior to sentencing. Because sentencing was a critical stage of trial, the exceptional sentences must be vacated. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); State v. Heddrick, 166 Wn.2d 898, 909-910, 215 P.3d 201 (2009).

3. DOUGLAS' EXCEPTIONAL SENTENCE COULD NOT BE BASED ON DELIBERATE CRUELTY BECAUSE CRUELTY IS INHERENT IN THE CRIME.

Citing State v. Tierney¹ and State v. Goodman,² the State argues that Douglas' "conduct went beyond the malice or cruelty usually associated with arson." Brief of Respondent, at 30. But Douglas' actions in this case, including ensuring no one was home at the time and, despite the opportunity, not harming the family dog, do not approach the circumstances in Tierney and Goodman.

The State relies primarily on the amount of gasoline used in the house and, in particular, the amount used in Alyssa's crib, which was located in the bedroom where Debra was staying. Brief of Respondent, at 30. But this is conduct inherent in the crime. To commit arson in the first degree, the defendant must cause a fire or an explosion that is manifestly dangerous to human life. And the conduct must be malicious, meaning done with an evil intent to vex, annoy, or injure. CP 682-683.

¹ State v. Tierney, 74 Wn. App. 346, 872 P.2d 1145 (1994), cert. denied, 513 U.S. 1172, 115 S. Ct. 1149, 130 L. Ed. 2d 1107 (1995).

² State v. Goodman, 108 Wn. App. 355, 30 P.3d 516 (2001), review denied, 145 Wn.2d 1036 (2002).

The large amount of gasoline used in the Pederson home was intended to create, and did create, a fire and an explosion. And it was done with malice. This is what made the crime a first-degree arson. It is not grounds for an exceptional sentence. See State v. Pockert, 53 Wn. App. 491, 496-497, 768 P.2d 504 (1989).

The State also points to Douglas' defense theory: that the Pedersons had actively provoked his reactions and may have set fire to their own home. Brief of Respondent, at 31. While the Pedersons undoubtedly believed this failed trial theory untenable – and perhaps even a bit irritating – it does not begin to approach the defendants' conduct in Tierney and Goodman.

4. THE CONVICTIONS FOR ARSON AND VIOLATION OF A COURT ORDER ARE THE "SAME CRIMINAL CONDUCT" FOR PURPOSES OF DOUGLAS' OFFENDER SCORES.

The State concedes both crimes involved the same time and place, but argues they did not involve the same victims or intent. Brief of Respondent, at 32-35.

Regarding victims, the State argues the only victims of the court order violation were the Pedersons, whereas – because Debra and Alyssa Douglas also lived in the Pederson home – they

and the Pedersons were victims of the arson. Brief of Respondent, at 32.

But if Debra and Alyssa were victims of the arson, they also were victims of the court order violation. "Victim" means "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(40). The arson was only possible because of the violated court order, a violation that continued while Douglas was in the home. Debra and Alyssa – like the Pedersons – sustained emotional, psychological, and financial injury as a direct result of both crimes.

Regarding intent, the State argues, "There was a temporal break after defendant completed the first crime where he got out of his truck and entered the house, giving him time to form a new criminal intent to commit the second offense." Brief of Respondent, at 34. The State also cites to rape cases, analogizing to a situation where the rapist sexually assaults a victim, takes a break, and then sexually assaults the victim again. Brief of Respondent, at 33-34.

The problem with this argument is that it ignores the evidence in this case. Taking the State's evidence as true, Douglas drove to the Pederson home with one goal in mind: to set

fire to the home. The crime took substantial planning, including selecting a time when no one was home and transporting a significant amount of gasoline. See 26RP 20 (Douglas knew the Pedersons' schedule); 28RP 467-513 (several gasoline cans plus model airplane fuel brought to house). This is not a situation where Douglas decided to violate the court order and then, later, decided to commit arson.

Because Douglas' intent was always to commit arson, because both crimes were part of the same plan, and because one crime clearly furthered the other, they involved the same intent under RCW 9.94A.589(1)(a). See State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994); State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 51 (1990); State v. Calvert, 79 Wn. App. 569, 577-578, 903 P.2d 1003 (1995).

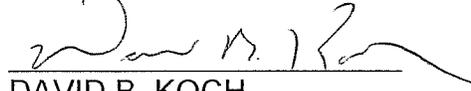
B. CONCLUSION

For the reasons discussed in Douglas' opening brief and above, this Court should reverse.

DATED this 3rd day of February, 2012.

Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

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[X] JAMES DOUGLAS
DOC NO. 891542
CLALLAM BAY CORRECTIONS CENTER
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SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF FEBRUARY 2012.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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