

**NO. 46106-4-II**

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**RUSSEL A. FORD,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

The trial court violated RCW 9.94A.589(1)(a) when it ordered consecutive terms for multiple current offenses.

### ***Issues Pertaining to Assignment of Error***

Under RCW 9.94A.589(1)(a), does a court err if it orders consecutive terms for multiple current offenses that do not qualify for consecutive terms under RCW 9.94A.589(1)(b) or RCW 9.94A.589(1)(c)?

## STATEMENT OF THE CASE

On March 17, 2014, the defendant Russel Ford pled guilty under a Second Amended Information before the Honorable Gordon Godfrey of the Grays Harbor County Superior Court to two counts of felony eluding and three counts of theft of a motor vehicle. CP 16-18, 19-27; RP 3/17/14 3-11<sup>1</sup>. The Second Amended Information did not allege any aggravating facts for any of the charges. CP 16-18, Pursuant to a plea bargain both sides acknowledged that the defendant's range was 3 to 8 months each on the felony eluding charges and 43 to 57 months each on the theft of a motor vehicle charges. CP 31. Under the plea bargain the state agreed to recommend 8 months each on the felony eluding charges and 50 months each on the theft of a motor vehicle charges with all sentences to run concurrently. CP 28-34. Following acceptance of the plea the court put the matter over one week for sentencing. RP 3/17/14 11.

On March 24, 2014, the parties appeared for sentencing. RP 3/24/14 3-15. At that time the state recommended 8 months on counts I and II (the felony eluding charges) and 50 months on counts III, IV and V (the theft of a motor vehicle charges) with all sentences to run concurrently. RP 3/24/14 2-8. The defense then requested more time in order to obtain a DOSA

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<sup>1</sup>The record on appeal includes two volumes of verbatim reports of five separate hearings. They are referred to herein as "RP [date] [page #]."

evaluation for the court to consider. RP 3/24/14 7-8. After allowing the defendant time for his colloquy, the court imposed sentences of 8 months each of Counts I and II consecutive to each other but concurrent to the sentences in the remaining counts, and 24 months each on Counts III, IV and V consecutive to each other but concurrent to the sentences in Counts I and II. CP 54; RP 3/24/14 8-9. Thus, the court imposed an actual sentence of 72 months total confinement. CP 54.

After the court orally declared its sentence the defendant's attorney informed the court that the defendant refused to sign the judgment and sentence. RP 3/24/14 11-13, 13-15. The court then informed the defendant that it would not give him credit for his time served from that day on until he signed the judgment and sentence. *Id.* The court reconvened on three consecutive days with the defendant refusing to sign on the first two and finally signing on the third. RP 3/25/14 16-18; RP 3/26/14 20-21; RP 3/27/14 12-14. The court then signed the document after which the defendant filed a notice of appeal. CP 59-60. Although the defendant did appeal from the sentences imposed, the state did not. CP 1-77; RP 3/27/14 12-14.

## ARGUMENT

### **THE TRIAL COURT VIOLATED RCW 9.94A.589(1)(a) WHEN IT ORDERED CONSECUTIVE TERMS FOR MULTIPLE CURRENT OFFENSES.**

Under RCW 9.94A.589(1)(a) a trial court, with two exceptions, must impose concurrent terms for multiple felony offenses sentenced on the same day unless the court declares an exceptional sentence under RCW 9.94A.535.

Subsection (1)(a) of RCW 9.94A.589 states:

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. *Sentences imposed under this subsection shall be served concurrently.* Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

RCW 9.94A.589(1)(a) (emphasis added).

Subsection (b) of part one of this statute allows for consecutive sentences for serious violent offenses. It does not apply in the case at bar. Subsection (c) of part one of this statute allows for consecutive sentences for multiple convictions for theft or illegal possession of a firearm. It does not

apply in the case at bar.

As part one of the statute explicitly states: “Consecutive sentence may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.” This limitation also applies to a trial court’s imposition of consecutive standard range sentences, which thus results in the imposition of an exceptional sentence. *State v. Jones*, 137 Wn.App. 119, 151 P.3d 1056 (2007).

In this case Judge Godfrey did not claim to be imposing a sentence under RCW 9.94A.535 and he did not enter findings or conclusions in support of an exceptional sentence. Rather, his statement at the time of sentencing simply reveals that either (1) he did not understand the clear language of RCW 9.94A.535(1)(a) or (2) he did not feel himself bound by that provision. The following is his statement on this issue:

I’m going to give the lawyers a little quiz here, unless they change the statute. You know, the difference between what they call concurrent sentences and consecutive is if they happen to be the same crime, the same time, with the same thought process going on. Okay. You have three separate matters on three separate days. They’re not the same crimes. And so the issue of concurrent is not in my vocabulary when it come down to him.

RP 3/24/14 8.

After Judge Godfrey made this statement the prosecutor disputed Judge Godfrey’s interpretation of the law. RP 3/24/14 9. The following is that colloquy with Judge Godfrey’s reply.

MR. WALKER: . . . As far as consecutive or concurrent, because I am - they are all separate. I amended - part of the agreement was that I would amend his information to add the motor vehicle thefts so he wouldn't double up on the legal financial obligations and cause a lot of court [] congestion, filing this cause for no reason.

As far as consecutive or concurrent, because they count against one another, in other words because he's getting an extra point for every count that I - that I added on to this - to this charge, they are presumptively concurrent.

THE COURT: I'm not bound by that. On each one of the eludings, eight months consecutive. On the other charges, 24 months consecutive.

RP 3/24/14 9.

In this case Judge Godfrey violated the plain language of RCW 9.94A.589(1)(a) when he imposed consecutive sentences in this case because the statute mandated concurrent sentences. As a result, this court should vacate that portion of the judgment and sentence that orders consecutive sentences and remand with instructions to enter an order that the sentences run concurrently.

In this case the only issue before this court is set out in Appellant's assignment of error. That assignment states:

The trial court violated RCW 9.94A.589(1)(a) when it ordered consecutive terms for multiple current offenses.

Admittedly Judge Godfrey also committed another error in this case. That error occurred when he imposed 24 months each on Counts III, IV and V because (1) the standard range was 43 to 57 months on each count, and (2)

the defense did not argue any mitigating facts, the state did not concede any mitigating facts and the court did not find any mitigating facts. However, there is a difference between Judge Godfrey's error in ordering that Counts III, IV and V run consecutively and his error in setting the term of each count at 24 months, which was below the standard range of 43 to 57 months. The difference is this: the defense appealed from the imposition of the consecutive sentences and the state did not appeal from the imposition of the terms below the standard range. The following addresses this issue.

Under the RAP 2.4(a), a respondent in an appeal may only seek affirmative relief from those portions of a trial court's final decision that the respondent designates in a timely notice of appeal. Subsection (a) of this rule states as follows:

(a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e), in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. ***The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.***

RAP 2.4(a) (emphasis added).

For example, in *State v. Aumick*, 73 Wn.App. 379, 869 P.2d 421

(1994), a defendant convicted of first degree burglary and attempted first degree rape appealed those convictions arguing that the trial court had erred when it (1) refused to instruct the jury that fourth degree assault was a lesser included offense to attempted first degree rape, and (2) failed to inform the jury that an attempt is not proven unless the state proves both a criminal intent as well as the existence of a substantial step toward the completion of a criminal act. In its Brief of Respondent, the state countered both of these arguments. The state then claimed that the trial court had erred when it instructed the jury on voluntary intoxication, even though the state did not file a notice of cross-appeal on this latter issue.

Ultimately, the Court of Appeals agreed with the appellant's argument and remanded the case for a new trial. However, under RAP 2.4(a), the court refused to consider the state's argument that the trial court had erred when it gave an instruction on voluntary intoxication because this argument requested affirmative relief for the state without the state first having filed a notice of cross-appeal. The court held: "Because the State has failed to file a notice of cross appeal, we need not address whether the court erred in instructing the jury on voluntary intoxication. RAP 2.4(a)." *State v. Aumick*, 73 Wn.App at 385.

The decision in *State v. Sims*, 171 Wn.2d 436, 256 P.3d 285 (2011), also illustrates this legal principle. In that case the defendant appealed from

one of the conditions the trial court imposed as part of its decision to grant a SOSSA sentence. The contested condition was the defendant's banishment from the county except to appear in court. On appeal the defense argued that the trial court erred when it imposed a banishment condition that was not narrowly tailored to meet the specific needs of the case. In fact, at sentencing the trial court explicitly stated that but for its ability to impose that banishment condition it would not have granted the defendant's request to use the SOSSA option.

Although the state did not cross-appeal the trial court's decision to impose the SOSSA sentence, it none the less argued that the Court of Appeals should vacate the sentence and remand for sentencing within the standard range. The state argued that this result was appropriate because (1) the banishment condition was improper as the defense argued, but (2) it was clear the trial court would not have granted the SOSSA option had it understood that it could not legally impose that condition. The Court of Appeals agreed, vacated the sentence and remanded for imposition of a sentence within the standard range.

On further review the Washington Supreme Court reversed, holding as follows:

The proper remedy in this case is resentencing for the limited purpose of narrowly tailoring the geographic condition of Sims's SSOSA sentence that currently banishes him from Cowlitz County.

A broader remedy was not properly before the Court of Appeals because such a remedy is affirmative relief for the State, for which the State did not file a cross appeal and which is not demanded by the necessities of the case. We remand to the trial court for resentencing for the purpose of making the vacated banishment condition constitutionally sound.

*State v. Sims*, 171 Wn.2d at 449.

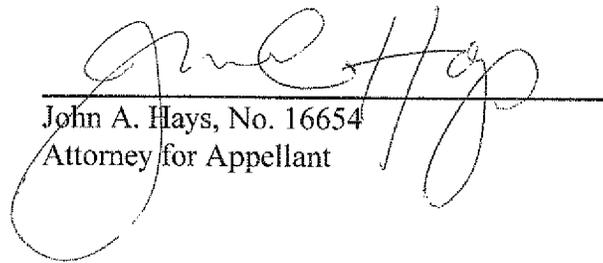
Similarly, in the case at bar, any argument by the state that this court should reverse the trial court's decision to impose 24 months each on Counts III, IV and V and remand for imposition of sentences within the standard range would constitute a grant of affirmative relief for the state that it did not request by filing a cross-appeal. As a result, in this case, the appropriate remedy given the state's failure to cross-appeal is to simply vacate that portion of the judgment and sentence that orders the counts to run consecutively and remand for entry of an order clarifying that the sentences shall run concurrently.

## CONCLUSION

The trial court erred when it imposed consecutive sentences in this case. As a result this court should remand this case to the trial court with instructions to enter an order clarifying that the sentences shall run concurrently.

DATED this 14<sup>th</sup> day of October, 2014.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

## APPENDIX

### RCW 9.94A.589

#### Consecutive or Concurrent Sentences

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

#### **RAP 2.4(a)**

(a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e), in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

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

**STATE OF WASHINGTON,**  
**Respondent,**

**NO. 46106-4-II**

**vs.**

**AFFIRMATION  
OF SERVICE**

**RUSSEL A. FORD,**  
**Appellant.**

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The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 14<sup>th</sup> day of October, 2014, at Longview, WA.

  
\_\_\_\_\_  
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## HAYS LAW OFFICE

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