

No. 46421-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

RODREA VONSHON BRADLEY,

Respondent.

On Appeal from the Pierce County Superior Court
Cause No. 14-1-00580-8
The Honorable Ronald E. Culpepper, Judge

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Should this Court treat the trial court's findings of fact as verities on appeal where the State failed to present argument as to why the substance of those findings are not supported by the record, and where the State failed to present a sufficient record with which to determine whether the substance of those findings are supported by the record?
2. Because written findings of fact take precedent over oral rulings, should this court accept the trial court's written finding that Rodrea Bradley's ability to conform his conduct to the requirements of the law was significantly impaired due to uncontrollable circumstances, even though that finding was not specifically adopted in the court's oral ruling?
3. Are the trial court's findings of fact not clearly erroneous when the scant evidence the State provided does include sufficient facts to support the trial court's findings?
4. Are the trial court's reasons for imposing an exceptional sentence below the standard range justified as a matter of law where the reasons are based on the specific circumstances of this case and on Rodrea Bradley's conduct, and where it is well settled that an exceptional sentence is factually and

legally justified when the sentencing court finds the facts of the present offense differ from those typical of other offenses in the same class?

II. STATEMENT OF THE CASE

Respondent Rodrea Vonshon Bradley accepts the Statement of the Case set forth in the State's Opening Brief of Appellant at 1-4. RAP 10.3(b).

III. ARGUMENT & AUTHORITIES

Generally, a court must impose a sentence within the standard sentence range. State v. Fowler, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). It may, however, impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535.

To reverse an exceptional sentence, the reviewing court must find that: (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient. RCW

9.94A.585(4); State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

In this case, the State challenges Bradley's sentence under the first and second prong, but does not assert that Bradley's sentence is clearly excessive or clearly too lenient.

A. THE STATE'S CHALLENGE TO FINDINGS OF FACT 3, 4, AND 5 SHOULD BE REJECTED AND THE FINDINGS SHOULD BE VERITIES ON APPEAL.

Appellate courts ordinarily review a finding of fact to see whether the finding is "clearly erroneous." State v. Estrella, 115 Wn.2d 350, 355, 798 P.2d 289 (1990) (citing State v. Pennington, 112 Wn.2d 606, 608, 772 P.2d 1009 (1989)).

The State assigns error to the trial court's written findings of fact numbers 3, 4, and 5 (Opening Brief at 1), which state:

(3) The defendant's ability to conform his conduct to the requirement of the law was significantly impaired due to the uncontrollable circumstances that he was presented with upon his initial release into the ATC program.

(4) The defendant's offending conduct falls at the low end of the range of offending behavior contemplated by the escape first degree statute.

(5) The standard range for Defendant's conviction would result in a sentence much too long for his actual conduct, would not be a just but overly harsh result, would not make wise use of the State's resources and would not promote respect for Pierce County's system of justice.

(CP 49)

In the body of its brief, however, the State does not argue that the substance of these findings is not supported by sufficient facts in the record that was before the trial court. As to Finding of Fact 3, the State's argument is simply that the trial court did not actually adopt this reason as one of its findings because the judge did not mention it in his oral ruling. (Appellant's Brief at 10-15) However, a trial court's written findings are final and controlling over its oral findings, even when they are contradictory. See State v. Bryant, 78 Wn. App. 805, 812-13, 901 P.2d 1046 (1995) (where an oral decision conflicts with written findings, the written decision controls); State v. Martinez, 76 Wn. App. 1, 3-4 n. 3, 884 P.2d 3 (1994) (oral decision can be used to interpret but not to impeach written findings and conclusions).

The focus of the argument at sentencing was indeed whether the standard range sentence was excessive given the circumstances of this case. The court did press Bradley about his claim that he was unable to report due to uncontrollable circumstances, and expressed some skepticism. (RP 9, 11-13) But that does not prove, as the State claims, that the trial court was not finally persuaded that uncontrollable circumstances were present.

And as to Findings of Fact 4 and 5, the State argues only that these reasons do not provide a sufficient legal basis to impose an

exceptional sentence downward. (Appellant's Brief at 7-10) The State presents no argument that the challenged findings are clearly erroneous and not supported by evidence in the record. By failing to present any such argument, the State has waived its objection to the substance of the challenged findings, and the findings should be treated as factual verities. See State v. Miller, 181 Wn. App. 201, 219, 324 P.3d 791 (2014) ("we consider an assignment of error waived where the party presents no argument and cites to no relevant legal authority on the issue in its brief"); State v. Harris, 164 Wn. App. 377, 389 n. 7, 263 P.3d 1276 (2011) (citing Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986)).

Furthermore, "[t]he party presenting an issue for review has the burden of providing an adequate record to establish such error[.]" RAP 9.2(b) And, "[i]f the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding." RAP 9.2(b); State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The State has not provided a transcript of the trial, which was the basis for the trial court's factual findings. The trial court's colloquy during the sentencing hearing is not a record from which this Court can determine whether or not the facts support

a finding that uncontrollable circumstances prevented Bradley from reporting, that Bradley's behavior falls at the low end of the range for offending behavior contemplated by the escape statute, or that the standard range would result in a sentence that would not uphold the purpose of the SRA. (CP 49)

For this reason as well, this Court should decline to consider the State's challenge to Findings of Fact 3, 4, and 5, and should consider the challenged findings to be verities on appeal. Morris v. Woodside, 101 Wn.2d 812, 815, 682 P.2d 905 (1984) (because State failed to provide verbatim report of proceedings which constituted evidence relevant to the disputed findings of fact, court would consider factual findings to be verities on appeal).

What little record the State has provided, however, amply supports the trial court's reasons. Though not evidence, Bradley's memorandum in support of his request for an exceptional sentence contains facts which illuminate why the trial court's findings are not erroneous. Regarding Finding of Fact 3:

As elicited during trial, once Mr. Bradley was released from the Pierce County Jail to the ATC program, he found himself in a position which made it impossible to comply with the rules and guidelines of the ATC program. Mr. Bradley testified that he found himself evicted from the only residence he had, with all of his belongings thrown about in the yard. He testified

that he did not have access to transportation, making it impossible for him to get from the eastside of Tacoma, to downtown Tacoma on a daily basis. He testified he was unemployed, without any source of income, further exasperating his situation. He also testified he was the sole provider for his two minor daughters, and that he spent the time he was in the community trying to secure safe and stable housing for his family.

(CP 25-26) And regarding Findings of Fact 4 and 5:

At the time of the offending behavior, Mr. Bradley was serving a six month alternative to confinement (ATC) sentence for an unranked, nonviolent drug offense— Attempted UPCS. . . .

Additionally, Mr. Bradley escaped from an ATC sentence—an alternative to confinement program that would have allowed Mr. Bradley to serve his sentence in the community. Mr. Bradley did not escape, nor attempt to escape, from actual physical confinement, nor did he display resistance or disrespect to any correctional officer or law enforcement officer during the offense. His offense did not interrupt a court proceeding, put anyone in danger, nor encourage others to escape. His offense did not interrupt or impede the safe operation of the ATC program or [a]ffect the participation of any other participants of the ATC program. His offense did not affect the “public peace, health, or safety.”

Mr. Bradley was ultimately returned to jail on 1/18/14, thus he was absent from the jurisdiction of the ATC program for only two weeks. . . .

At the time Mr. Bradley was released to the ATC program, he had 96 more days remaining on his sentence. . . . His standard range as determined by the SRA is 63-87 months. A sentence at the low end of the range would be a sentence 19.6 times the sentence he had remaining on the ATC program; a sentence at the high end of his range would be a sentence in excess of 27 times the sentence he had remaining on the ATC program.

(CP 27-28)

For all of these reasons, this Court should reject the State's challenge to Findings of Fact 3, 4, and 5, uphold the findings, and treat the findings as verities on appeal. Morris, 101 Wn.2d at 815; State v. Nordby, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986).

B. THE REASONS SUPPLIED BY THE TRIAL COURT JUSTIFY A DEPARTURE FROM THE STANDARD RANGE.

The second prong requires the appellate court to independently determine, as a matter of law, whether the reasons given by the trial court justify the imposition of an exceptional sentence. State v. Pascal, 108 Wn.2d 125, 135-36, 736 P.2d 1065 (1987); Nordby, 106 Wn.2d at 518. The trial court's reasons must be "substantial and compelling", and may not take into account factors already considered in computing the presumptive range for the offense. RCW 9.94A.120(2); Nordby, 106 Wn.2d at 518; State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995).

The SRA sets forth a number of nonexclusive "illustrative" factors which the court may consider in exercising its discretion to impose an exceptional sentence, including:

The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or

her conduct to the requirements of the law, was significantly impaired.

RCW 9.94A.535(1)(e). The trial court listed this as one reason justifying a downward departure in this case. (CP 49)

As noted above, the State does not specifically argue that this reason does not support an exceptional sentence, or that the trial court's reliance on this factor is not justified as a matter of law. Regardless, it is clear that this statutory mitigating factor is a legitimate basis for an exceptional sentence and was properly relied upon in this case because, as the court found, Bradley was faced with several obstacles outside his control that significantly impaired his ability to conform to the requirements of the law. (CP 49)

Even if this Court agrees with the State that "the trial court did not actually rely on this factor as a reason for justifying a downward departure" (Appellant's Brief at 11), this Court should still affirm Bradley's sentence based on the trial court's remaining conclusion, that "[t]he underlying purposes of the SRA would be furthered by the imposition of a downward departure in this case, i.e. [the] punishment proportionate to the seriousness of the crime."¹ (CP 49)

¹ If the reviewing court is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing. State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

The State contends that this finding is actually based on the trial court's disagreement with the Legislature's presumptive sentence range for the crime of escape. (Appellant's Brief at 7-10) The State is correct that a trial court's subjective determination that the standard ranges are unwise, or that they do not adequately advance the goals of the SRA, is not a substantial and compelling reason justifying a departure from those ranges. Pascal, 108 Wn.2d at 137-38.

But the SRA expressly permits departure from the standard range when the trial court finds, "considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. And a sentence below the standard range may be justified by "factors or circumstances related to the defendant's commission of a crime that make the commission of the crime less egregious." State v. Hodges, 70 Wn. App. 621, 626, 855 P.2d 291 (1993).

For example, in Alexander, the defendant approached an undercover police officer and asked the officer if he wanted some "cocoa" (cocaine). The officer indicated that he did, and asked for \$20 worth. 125 Wn.2d at 719. Alexander then led the officer to a donut shop and walked around for some time before contacting a

third party for the cocaine. 125 Wn.2d at 719. The officer attempted to hand the third party the \$20, but the money was intercepted by Alexander, who kept \$5 and gave the third party \$15 in exchange for a bindle of cocaine, which Alexander then passed to the officer. 125 Wn.2d at 719. The cocaine was later estimated to weigh .03 grams, and was too small in quantity to remeasure. 125 Wn.2d at 719.

Alexander was subsequently convicted of unlawful delivery of a controlled substance following a jury trial. 125 Wn.2d at 719-20. The Washington Supreme Court affirmed the downward departure, holding that the trial court's findings that the amount of controlled substance was extraordinarily small and that Alexander exhibited a low level of involvement or sophistication in committing the crime were sufficient substantial and compelling reasons to legally justify the departure. 125 Wn.2d at 723. In so holding, the Alexander court noted,

[W]e permit sentencing judges to distinguish between crimes typical of a defined class and those which are truly distinguishable as "extraordinary". By permitting judges to tailor the sentence in this manner, we also promote proportionality between the punishment and the seriousness of the offense and respect for the law.

125 Wn.2d at 727-28.

Likewise, other courts have recognized that the legislative intent of the SRA's exceptional sentence provision was "to authorize courts to tailor the sentence—as to both the length and the type of punishment imposed—to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid." State v. Smith, 139 Wn. App. 600, 603, 161 P.3d 483 (2007) (citing State v. Bernhard, 108 Wn.2d 527, 741 P.2d 1 (1987)).

That is what the trial court did in this case: the court considered the specific facts of Bradley's case, and the purposes of the SRA, and tailored the length of the sentence to more accurately and proportionately punish his conduct.² (RP 16-17; CP 49) The trial court was swayed by the fact that Bradley's conduct did not rise to the level of behavior usually associated with the crime of escape

² The purpose of the SRA is:

...to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

- (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 himself 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.

because he simply failed to report while completing the final four months of his sentence in the community for a minor non-violent drug crime. (RP 13, 16) The trial court believed that his conduct did not warrant a five to seven year sentence, and that such a lengthy sentence under the circumstances would not further the goals of the SRA. (CP 49; RP 14, 16-17)

The trial court concluded that the standard range punishment in this case was not proportionate to the seriousness of Bradley's conduct, and therefore: "The standard range for Defendant's conviction would result in a sentence much too long for his actual conduct, would not be a just but overly harsh result, would not make wise use of the State's resources and would not promote respect for Pierce County's system of justice." (CP 49)

The trial court did not base its decision on a disagreement with the Legislature's sentence range for the crime of escape, but rather on the specific facts of this case, and its conclusion that those facts presented a substantial and compelling reason to impose a sentence below that standard range.

The trial court's assessment that Bradley's case fell below the norm for this class of offense is alone a sufficient basis for departure.

The trial court's reasons for imposing an exceptional sentence were therefore justified as a matter of law.

IV. CONCLUSION

The trial court's findings of fact and reasons for imposing an exceptional sentence downward are factually and legally justified, and this Court should affirm Bradley's sentence.

DATED: January 7, 2015



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