

FILED

MAY 03 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 282996

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Appellant,

vs.

MIZAEL MAGANA,

Respondent/Cross-Appellant

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred in sentencing the defendant/respondent by sentencing him outside the standard range for each first degree assault convictions without a sufficient factual basis or a clear legal basis under RCW 9.94A.535.

2. The trial court erred in using the multiple offense policy under RCW 9.94A.535(1)(g) as a basis for a mitigated sentence when it sentenced the defendant/respondent to a term of confinement below the standard range for one offense contrary to established case law.

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Whether the trial court erred by sentencing the defendant/respondent to a mitigated sentence based upon the factor that the presumptive sentence that is clearly excessive in light of the SRA's purpose under RCW 9.94A.535(1)(g), when the sentence imposed is less than the bottom of the range for a single offense.

STATEMENT OF THE CASE

Mizael Magana was tried on charges of first degree assault (counts 1 and 2) with firearm enhancements, and drive by shooting (count 3). (CP 108-109). After waiving his right to a trial by jury, the trial court found

found him guilty as to the charges of first degree assault and drive by shooting, as well as the firearm enhancement allegation. [CP 35-39].

The defense sought a mitigated sentence. The trial court agreed and sentenced Mr. Magana to consecutive 24 month sentences in the two first degree assault convictions, well below the standard range sentence. (CP 24-31). The Petitioner filed a timely notice of appeal. [CP 13].

ARGUMENT

A. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO A SENTENCE BELOW THE STANDARD RANGE FOR EVEN ONE OFFENSE BASED UPON THE MULTIPLE OFFENSE POLICY.

1. Standard of Review.

Appellate review of a sentence outside the standard range is governed by former RCW 9.94A.210(4) (2000). Under that statute, the appellate court is to engage in a three-part analysis. First, the court must determine if the record supports the reasons given by the sentencing court for imposing an exceptional sentence. As this is a factual inquiry, the trial court's reasons will be upheld unless they are clearly erroneous. *Id.* at 517-18. The appellate court must next determine, as a matter of law, whether the reasons given justify the imposition of an exceptional sentence. *Id.* at 518. The sentencing court's reasons must, as we observed above, be

"substantial and compelling." Former RCW 9.94A.120(2). Finally, the court is to examine whether the sentence [**339] is clearly excessive or clearly lenient under the "abuse of discretion" standard. Former RCW 9.94A.210(4); State v. Jeannotte, 133 Wn.2d 847, 855-56, 947 P.2d 1192 (1997) (citing State v. Allert, 117 Wn.2d 156, 163, 815 P.2d 752 (1991)). State v. Fowler, 145 Wn.2d 400, 405-406, (2002).

2. Argument.

“A court must generally impose a sentence within the standard sentence range established by the SRA for the offense. RCW 9.94A.120(1). However, there are some exceptions to this general rule. RCW 9.94A.120. The SRA authorizes judges to impose sentences outside the standard range if, considering the purposes of the SRA, "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.120(2); State v. Ritchie, 126 Wash. 2d 388, 391, 894 P.2d 1308 (1995).” State v. Ha'Mim, 132 Wn.2d 834, 839-840, 940 P.2d 633 (1997).

In this case the defense sought a mitigated sentence at the sentencing hearing. Defense counsel suggested that the basis for an exceptional sentence could be that operation of the multiple offense police of RCW

9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purposes of the Sentencing Reform Act. [07-06-09 RP 9]. That is the basis the court gave for the downward departure. [07-06-09 RP 9-10; CP 25].

“Appellate review of an exceptional sentence is governed by RCW 9.94A.210(4). An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:

1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion. RCW 9.94A.210(4); State v. Branch, 129 Wash. 2d 635, 645-46, 919 P.2d 1228 (1996); State v. Allert, 117 Wash. 2d 156, 163, 815 P.2d 752 (1991).

The focus in this case is on the second question above, that is, whether the reasons given youth and lack of a prior criminal or juvenile record justify departure. Therefore, our review is de novo.” State v. Ha'Mim, 132 Wn.2d 834, 840 (1997).

In the case at hand the court was advised of the standard range for each count of first degree assault, and for the count of drive by shooting, which involved placing the baby of Yessenia Bravo in danger. [07-06-09 RP 5]. Seeking a basis for the departure, the defense counsel suggested the multiple offense policy results in a presumptive sentence that is clearly excessive. Based upon that mitigating factor, the court sentenced the defendant to a sentence of 24 months consecutive for each count of first degree assault. [07-06-09 RP 5; CP 25].

“In determining whether a factor legally supports departure from the standard sentence range, this Court employs a two-part test: first, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range; second, the asserted aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. State v. Alexander, 125 Wash. 2d 717, 725, 888 P.2d 1169 (1995).” State v. Ha'Mim, supra 840.

In sentencing the defendant to a sentence of 48 months, the trial court disregarded the presumptive range for even one count of first degree assault, and sentenced the defendant to a sentence concurrent with the drive by shooting count. In State v. Bridges, 104 Wn. App. 98, 15 P.3d 1047 (2001), this court rejected just such reasoning. In Bridges, the court

stated: “essentially arguing the sentence is “clearly too lenient,” the State contends the Sanchez reasoning supports an exceptional sentence only if the sentence imposed is at least as great as the standard range for a single offense. The State is correct. In Sanchez, for example, the sentence imposed was greater than the presumptive sentence for a single delivery. Sanchez, 69 Wn. App. at 261. see Fitch, 78 Wn. App. at 554 (sentence at minimum of standard range for single offense); Hortman, 76 Wn. App. at 458 (sentence at high end of standard range for single offense). The distorting effect of the multiple offense policy does not justify a sentence below the standard range for a single offense.” Bridges, supra at 104.

Here, the sentence of 24 months for one count of first degree assault is well below the range of 93-123 months for a single count of first degree assault for a person without criminal history. The matter is clearly controlled by State v. Bridges, supra, which prohibits using the multiple offense policy as a basis for a mitigated sentence if the resulting sentence is less than the low end of the standard range for a single count of the charged offense.

CONCLUSION

Based upon the foregoing argument, this Court should remand the case back to the trial court for resentencing within the standard range.

Respectfully submitted this 28th day of April, 2010.



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