

No. 28632-1-III

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

**FILED**

**AUG 19 2010**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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*STATE OF WASHINGTON*

Respondent/Cross-Appellant,

v.

*ALFRED GALINDO JR.,*

Appellant/Cross-Respondent.

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

The Honorable Judge Linda Tompkins

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REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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**TABLE OF CONTENTS**

A. SUMMARY.....1

B. ASSIGNMENT OF ERROR.....1

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....1

D. ARGUMENT.....2

E. CONCLUSION.....7

**TABLE OF AUTHORITIES**

**Washington Supreme Court**

*In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007).....2, 5  
*In re P.R. of Breedlove*, 138 Wn.2d 298, 979 P.2d 417 (1999).....3  
*State v. Ferguson*, 142 Wn.2d 631, 15 P.3d 1271 (2001).....3

**Washington Courts of Appeals**

*State v. Danis*, 64 Wn. App. 814, 826 P.2d 1096,  
*review denied*, 119 Wn.2d 1015 (1992).....5  
*State v. Faagata*, 147 Wn. App. 236, 193 P.3d 1132 (2008).....3  
*State v. Smith*, 124 Wn. App. 417, 102 P.3d 158,  
*aff'd*, 159 Wn.2d 778 (2004).....3, 4  
*State v. Teuber*, 109 Wn. App. 640, 36 P.3d 1089 (2001).....3  
*State v. Zatkovich*, 113 Wn. App. 70, 52 P.3d 36 (2002).....3

**Statutes, Court Rules and Constitutional Provisions**

RCW 9.94A.030(45).....2  
RCW 9.94A.535.....2, 3, 4  
RCW 9.94A.589(1)(b).....2, 4, 5

### **A. SUMMARY OF REPLY**

The State's arguments in response to the Appellant's two presented issues were all addressed in Mr. Galindo's opening brief and, for purposes of judicial efficiency, the arguments on each will not be reiterated here. Rather, Mr. Galindo takes this opportunity to address the State's own assignment of error. To wit, the trial court acted within its discretion, and its actions were supported by law, when it decided to run Mr. Galindo's three first-degree assault convictions concurrently. This exceptional sentence downward was supported by the law, evidence of Mr. Galindo's chemical dependency issues and the fact that consecutive sentences would work an injustice in light of the elevated sentencing scheme for serious violent offenses even where there was only a single violent action involved.

### **B. STATE'S ASSIGNMENT OF ERROR**

1. The trial court erred in ordering that the convictions for three serious violent felonies of first degree assault involving three different victims be served concurrently in contravention of the provisions of RCW 9.94A.589(1).

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether the trial court was justified imposing an exceptional sentence downward based on Mr. Galindo's chemical dependency and/or the multiple offense policy where a single violent action involved several victims.

#### D. ARGUMENT

**Issue 1: Whether the trial court was justified imposing an exceptional sentence downward based on Mr. Galindo's chemical dependency and/or the multiple offense policy where a single violent action impacts several victims.**

The court found that Mr. Galindo's chemical dependency issues contributed to the crime and that the multiple offense policy for serious violent offenses would result in a clearly excessive sentence. Both of these determinations were supported by the record and either of them is sufficient to justify the exceptional, concurrent sentences.

When a person is convicted of multiple serious violent offenses, such as first-degree assault, these offenses are generally required to have consecutive sentences. RCW 9.94A.589(1)(b); RCW 9.94A.030(45). However, a trial court does have discretion to impose concurrent sentences, thereby creating an exceptional sentence downward, pursuant to RCW 9.94A.535. *In re Mulholland*, 161 Wn.2d 322, 330-31, 166 P.3d 677 (2007).

RCW 9.94A.535 provides that an exceptional sentence outside the standard range may be imposed where it is justified by "substantial and compelling reasons...." RCW 9.94A.535. These reasons, or mitigating circumstances, need only be established by a preponderance of the evidence. *Id.* This Court reviews for:

“(1) whether substantial evidence supports the sentencing judge’s reasons [under a clearly erroneous review standard]; (2) whether the reasons, as a matter of law, justify a departure from the standard range [with de novo review]; and (3) whether the court abused its discretion in sentencing the defendant too excessively or too leniently [based on a review for abuse of discretion].”

*State v. Smith*, 124 Wn. App. 417, 435, 102 P.3d 158, *aff’d*, 159 Wn.2d 778 (2004) (citing *State v. Ferguson*, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001)).

RCW 9.94A.535 provides a non-exclusive list of bases for imposing an exceptional sentence downward. “When the court identifies ‘more than one justification for an exceptional sentence and each ground is an independent justification, we may affirm the sentence if one of the grounds is valid.’” *Smith*, 124 Wn. App. at 435-36 (quoting *State v. Zatkovich*, 113 Wn. App. 70, 78, 52 P.3d 36 (2002)).

Here, the trial court orally<sup>1</sup> identified two bases for the exceptional, concurrent sentence: (1) the defendant’s chemical dependency issues; and (2) the multiple offense policy for multiple serious violent offenses.

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<sup>1</sup> The State notes, although does not assign error to, the fact that the trial court did not enter formal findings of fact or conclusions of law. Ordinarily, such findings and conclusions must be entered when an exceptional sentence is imposed, or this Court remands for entry of such findings. RCW 9.94A.535; *In re Personal Restraint of Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). However, Appellant asserts that this Court can adequately review the sentencing issue in this case based on the trial court’s oral ruling at IRP 246-48. *State v. Teuber*, 109 Wn. App. 640, 646, 36 P.3d 1089 (2001) (oral ruling can supplement inadequate written findings); *State v. Faagata*, 147 Wn. App. 236, 242, 193 P.3d 1132 (2008) (trial court’s oral opinion provided sufficient basis for appellate review).

First, as to the chemical dependency issue, the State argues that there was no evidence to support the court's determination that Mr. Galindo had a contributing chemical dependency issue. State's Brief, pg. 12-13. But this is not correct. Defense counsel spoke at sentencing on behalf of his client's addiction to drugs (1RP 234), Mr. Galindo's girlfriend and brother testified about the defendant's addiction and need for drug help (1RP 237-28; CP132-33), and the court was provided copies of past drug-related convictions leading up to the underlying offense that established a spiraling drug-related problem (CP 56). The court's inference that this event was likely fueled by methamphetamine (1RP 247) was supported by the record.

Regardless, this Court need only find that one of the bases relied upon by the trial court is justified in order to affirm the exceptional sentence. And the multiple offense policy in this case clearly justified the exceptional sentence downward.

A concurrent sentence may be imposed where "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g). This policy has often justified concurrent, exceptional sentences where a single violent action impacted multiple victims. *See e.g. Smith*, 124 Wn. App. at 437-38

(finding that the trial court had broad discretion to decrease a sentence pursuant to the multiple offense policy where the defendant was convicted of three counts of second-degree assault after firing a single bullet into a vehicle occupied by three individuals). *See also State v. Danis*, 64 Wn. App. 814, 821-22, 826 P.2d 1096, *review denied*, 119 Wn.2d 1015 (1992) (lesser sentence could be imposed where two victims were in the same vehicle and were “necessarily hurt by one impact...”, reasoning that “one is less culpable in hitting one car, even though two victims are in the car, than in hitting two cars...”) *And see In re Mulholland*, 161 Wn.2d at 330-31, 166 P.3d 677 (2007) (holding that, where defendant shot into a house occupied by six people and was convicted of six counts of first-degree assault, the trial court had discretion to consider a concurrent, exceptional sentence downward).

Here, the trial court imposed a concurrent sentence because the effect of the multiple offense policy in RCW 9.94A.589(1)(b) would result in a sentence that was clearly too excessive. The trial court stated:

“The circumstances surrounding these types of incidents where a large number of victims may be concentrated in a small area and a large number of people can be injured from just one...action... does call into question the Court’s judgment and does require a bit more discretion in my view as it relates to consecutive sentences... the overall environment was three victims in one car and one car was used as a violent weapon... And the multiple impact for the three victims, when added together, results in a sanction that is clearly beyond, in the balance, punishment and falls outside of what reason would suggest would even be a retribution.”

(1RP 247)

Mr. Galindo never had intent to inflict great bodily harm on any person, let alone each particular victim that was in the car that night. Given that Mr. Galindo's single violent action involved multiple victims, and that the resulting standard range sentence would have been clearly excessive at 324 to 430 months, the trial court's decision to impose concurrent sentences was not in error.

Finally, the State argues that the exceptional sentence did not provide justice to each victim. It points out that, had Mr. Galindo been convicted of a non-serious violent offense, his offender score would have been higher to account for each victim. State's Brief, pg. 13.

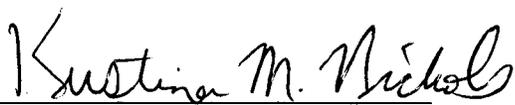
First of all, the trial court's imposition of concurrent sentences without any amendment to offender scores was consistent with the above caselaw where multiple convictions arose out of a single violent action against multiple victims. Regardless, application of the State's theory would still be more beneficial to Mr. Galindo than the State. If Mr. Galindo were convicted, as the State suggests, of the non-serious violent offenses of second-degree assault, for example, his standard sentencing range when counting the extra points for each victim would still have only been 63-84 months rather than the exceptional sentence actually imposed of 138 months. Interestingly, this is the same sentence Mr. Galindo

suggested he should have received, assuming the jury had been properly instructed on the crime of second-degree assault and then convicted of that lesser-degree offense.

**E. CONCLUSION**

As Mr. Galindo set forth in his opening brief, his conviction should be reversed based on the inadequate jury instructions or insufficient evidence. However, if this Court affirms, the exceptional sentence should also be affirmed because the trial court's imposition of concurrent sentences was justified by the law and the record in this case.

Respectfully submitted this 18 day of August, 2010.

  
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Attorney for Appellant

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Plaintiff/Respondent/	)	
Cross Appellant	)	
vs.	)	COA NO. 28632-1-III
	)	
ALFRED GALINDO JR.	)	PROOF OF SERVICE
Defendant/Appellant	)	
Cross Respondent	)	
_____	)	

I, Kristina M. Nichols, do hereby certify under penalty of perjury that on August 18 2010, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of Mr. Galindo's Reply Brief to:

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Dated this 18 day of August, 2010.

  
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