

**FILED**

JUL 29 2010

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

No. 288439

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Appellant,

vs.

NOEL GARCIA,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE C. JAMES LUST, JUDGE

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BRIEF OF APPELLANT

---

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**I.**  
**ASSIGNMENTS OF ERROR**

1. The trial court's conclusion that an exceptional sentence below the standard range was justified under RCW 9.94A.535(1), was error as a matter of law. **(CP 33, Conclusion of Law No. 6)**

2. The trial court abused its discretion when it imposed a mitigated sentence, as it was clearly too lenient. **(CP 33, Conclusion of Law No. 6; CP 20-21)**

**II.**  
**ISSUES**

1. Are the identified mitigating factors of difficulty in traveling to the sheriff's office to check in as a registered sex offender, an after-hours attempt on the part of the defendant to report to the county jail, and the *de minimis* nature of the violation, substantial and compelling reasons to depart from the standard sentencing range?

2. Is a mitigated sentence clearly too lenient, such that the sentencing court abuses its discretion in imposing such a sentence, where the defendant was well familiar with his reporting requirements, and he had two prior convictions for failing to register as a sex offender?

**III.**  
**STATEMENT OF THE CASE**

The defendant, Noel Garcia, had been convicted in Franklin County of the offense of rape of a child in the third degree in 2005. **(Ex.**

**1)** As a result of that conviction, he was required to register as a sex offender with the Yakima County Sheriff's Office, and was given notification of that requirement. As he was a transient, he was required to report every seven days with that office, and filled out a check-in sheet every time he did so. **(Ex. 2-6)**

On June 30, 2009, Mr. Garcia checked in with Sandee Deel of the sheriff's office, and signed a check-in sheet with his next report date of July 7, 2009. **(RP 9; Ex. 2)**

Mr. Garcia did not check in on July 7<sup>th</sup>. Instead, he first left word with Ms. Deel that he would come in to the office, check-in, and turn himself in on an outstanding bench warrant from the Department of Corrections. Then, he called the sheriff's office at ten minutes to 5:00, short before they closed, and asked if there would be a warrant for his arrest if he did not report. **(RP 12)** He was told that he had had all day to report to the sheriff's office, but that if he were taken into custody on the warrant, there would be no violation of his registration requirement, but a warrant would be issued if he did neither. He informed Ms. Deel that

wouldn't make it to her office, but would turn himself in on the warrant at the Yakima County jail. **(RP 13)**

Mr. Garcia was not taken into custody at the jail on July 7<sup>th</sup>, and he testified at trial that the jail would not take him, as the individual upon whom he was dependent for a ride was late, and he arrived at the jail after 5:00 PM. **(RP 37-39)**

As a result of the failure to report, Mr. Garcia was charged with a single count of failure to register as a sex offender, RCW 9A.44.130, under Yakima County Superior Court cause number 09-1-01501-1. **(CP 43)** He was convicted after a bench trial which was held between December 30, and December 31, 2009. **(CP 30-34)** Garcia's standard range for this offense was 33-43 months, but the trial court elected to impose an exceptional sentence of 364 days, below the standard range. **(CP 20-29)** The court identified the factors justifying the exceptional sentence as follows: "the defendant's difficulty with travel between Sunnyside and Yakima, his documented attempt to contact the Yakima County Sheriff's Office, and his attempt to turn himself in to the Yakima County Jail, and the de minimus nature of the violation . . ." **(CP 33)** The State timely appealed the sentence. **(CP 4-19)**

#### IV. STANDARD OF REVIEW

Appellate review of an exceptional sentence is governed by RCW 9.94A.585(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 question is abuse of discretion.

State v. Ha'mim, 132 Wn.2d 834, 840, 940 P.2d 633 (1997),  
(citations omitted)

#### V. ARGUMENT

**1. The mitigating factors were not substantial and compelling, and did not justify the exceptional sentence.**

An exceptional sentence above or below the standard range may be imposed for substantial and compelling reasons. RCW 9.94A.535; State v. Jackson, 150 Wn.2d 251, 273, 76 P.3d 217 (2003). Generally,

however, an “exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category.” State v. Pennington, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989).

A sentence outside the standard range is subject to appeal by either the defendant or the state. RCW 9.94A.585(2). To reverse a sentence which falls outside the standard range, a reviewing court must find: “(a) either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.” RCW 9.94A.585(4)

It is well-established that a reviewing court is to engage in a two-part test in order to determine if a sentencing departure is justified as a matter of law. First, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard range. Second, the aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. State v. Law, 154 Wn.2d 85, 95, 110 P.3d 717 (2005), *citing* Ha’mim, 132 Wn.2d at 840.

Here, the court did not identify how the circumstances surrounding Garcia's violation of the registration requirements were substantial and compelling, thus distinguishing this crime from other similar violations of 9A.44.130. Mr. Garcia was well aware of his obligations, and the procedure he had been following with the sheriff's office regarding his weekly check-ins. (RP 44) He was aware of the outstanding warrant, as well, and was told that if he were in custody on July 7<sup>th</sup>, there would be no violation. It is also apparent from the record that Garcia did not have to turn himself in at the Yakima County jail; he could have turned himself in Sunnyside or at any number of other agencies in Yakima Valley, and it was his choice not to do so. (RP 25; 38) In light of this, the attempt to report to the county jail is not a compelling mitigating factor, and the reporting violation cannot be fairly described as *de minimis*, as it was Garcia's responsibility to get himself to Yakima on time.

**2. The sentence was clearly too lenient.**

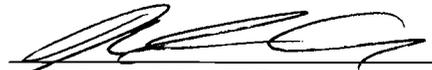
The court abused its discretion in imposing a mitigated sentence in light of Mr. Garcia's prior history of two convictions for failure to register as a sex offender, as well as the events of July 7<sup>th</sup>. Again, Mr. Garcia was well aware of his obligations, and did not follow through. As the deputy prosecutor stated at sentencing, it was he who made his bed by making the decisions he did, and he should not have been so rewarded. Indeed, no

reasonable person would have imposed such a sentence on these facts. State v. Jeannotte, 133 Wn.2d 847, 858, 947 P.2d 1192 (1997); State v. Pascal, 108 Wn.2d 125, 139, 736 P.2d 1065 (1987). The presumptive standard range, taking into account Garcia's prior criminal history, including two prior convictions for this offense, is appropriate

**VI.**  
**CONCLUSION**

For all of the foregoing reasons, this appeal should be granted, the sentence vacated, and this matter remanded to the trial court for resentencing within the standard range.

Respectfully submitted this 29 day of July, 2010.



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