



28843-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

NOEL GARCIA, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

RESPONDENT'S BRIEF

Janet G. Gemberling
Attorney for Respondent

GEMBERLING & DOORIS, P.S.
3030 S. Grand Blvd. #132
Spokane, WA 99203
(509) 838-8585



28843-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

NOEL GARCIA, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

RESPONDENT'S BRIEF

Janet G. Gemberling
Attorney for Respondent

GEMBERLING & DOORIS, P.S.
3030 S. Grand Blvd. #132
Spokane, WA 99203
(509) 838-8585

INDEX

A. ISSUES1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT4

 1. THE REASONS FOR THE EXCEPTIONAL
 SENTENCE ARE SUBSTANTIAL AND
 COMPELLING4

 2. THE LENGTH OF THE SENTENCE WAS
 WITHIN THE COURT’S DISCRETION7

E. CONCLUSION.....8

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BERUBE, 150 Wn.2d 498, 79 P.3d 1144 (2003).....	5
STATE V. FOWLER, 145 Wn.2d 400, 38 P.3d 335 (2002).....	5
STATE V. GAINES, 122 Wn.2d 502, 859 P.2d 36 (1993).....	5
STATE V. HA'MIM, 132 Wn.2d 834, 940 P.2d 633 (1997).....	5
STATE V. HOUF, 120 Wn.2d 327, 841 P.2d 42 (1992).....	5
STATE V. HUTSELL, 120 Wn.2d 913, 845 P.2d 1325 (1993).....	5
STATE V. JEANNOTTE, 133 Wn.2d 847, 947 P.2d 1192 (1997).....	7
STATE V. LAW, 154 Wn.2d 85, 110 P.3d 717 (2005).....	5
STATE V. PASCAL, 108 Wn.2d 125, 736 P.2d 1065 (1987).....	7
STATE V. RANDOLL, 111 Wn. App. 578, 45 P.3d 1137 (2002).....	6
STATE V. RITCHIE, 126 Wn.2d 388, 894 P.2d 1308 (1995).....	7
STATE V. SULEIMAN, 158 Wn.2d 280, 143 P.3d 795 (2006).....	5
STATE V. VANDERPOOL, 99 Wn. App. 709, 995 P.2d 104, <i>review denied</i> , 141 Wn.2d 1017, 10 P.3d 1072 (2000).....	6, 7

STATUTES

RCW 9.94A.535..... 4
RCW 9.94A.535(1)..... 5
RCW 9A.44.130..... 6

OTHER AUTHORITIES

13B SETH A. FINE & DOUGLAS J. ENDE, Washington Practice:
Criminal Law § 3801, at 370 (2d ed.1998)..... 5
DAVID BOERNER, *Sentencing in Washington* 9-23 (1985) 5

B. ISSUES

1. Did circumstances beyond Mr. Garcia's control, which made it difficult if not impossible for him to comply with his obligation as a homeless person to check in with the sheriff in a timely manner every week, along with his substantial efforts at compliance, including attempting to turn himself in at the jail less than thirty minutes after the deadline, constitute substantial and compelling reasons for imposition of an exceptional sentence below the standard range?
2. Did the court abuse its discretion in imposing a sentence of 364 days' incarceration for the offense of failing to register as a sex offender?

C. STATEMENT OF THE CASE

Part of Sandee Deel's job is to register sex offenders at the Yakima County Sheriff's Office. (RP 405) On June 30, 2009, Noel Garcia checked in with her at the sheriff's office as he was required to do. (RP 8) Because he was homeless, he was required to check in again one week later, on July 7. (RP 9)

Mr. Garcia has no vehicle and no permanent residence. (RP 22) He lives in Sunnyside because that is where he is required to check in with his Department of Corrections probation officer every day, Monday through Friday. (RP 22, 31) The local sheriff's station burned down so there is no way for him to check in except in Yakima. (RP 22) Mr. Garcia depends on friends to give him a ride to get from Sunnyside to Yakima every week. (RP 23, 32)

On July 7, Mr. Garcia had arranged with a friend named Angie Jensen to drive him to Yakima. (RP 36) Ms. Jensen works in Selah, and Mr. Garcia expected her to meet him after work at 4:00, but by the time she picked him up it was already 10 minutes to five. (RP 36-37)

When Ms. Deel returned to her office after lunch on July 7, she received a message from Mr. Garcia or his probation officer that said Mr. Garcia was planning on turning himself in on a Department of Corrections warrant and would be checking in with her at the same time. (RP 12, 22) But at 4:50 p.m. Mr. Garcia called Ms. Deel and told her that he had been unable to get to the sheriff's office and he was now on his way to the county jail to turn himself in. (RP 13) He asked whether there would be an additional warrant for his arrest if he failed to make it to the sheriff's office that day. (RP 12-13) Ms. Deel told him that if he was incarcerated, that would be a valid reason for failing to check in because then his

location would be known. (RP 14) According to Ms. Deel, if an offender is not physically able to check in he would not be in violation of his registration requirement. (RP 19-20)

Before leaving the office, Ms. Deel faxed a copy of the DOC warrant to the Yakima jail, and called the sergeant's desk to let them know Mr. Garcia was on his way. (RP 20) Mr. Garcia had had problems turning himself in the past because the race shown on his warrant could differ from the race entered in the computer for a warrant search. (RP 20, 25) Ms. Deel wanted to be sure there was no mistake this time and he should be taken into custody. (RP 20)

Mr. Garcia did not arrive at the jail in Yakima until close to 5:30. (RP 39) There, he was told that he would not be permitted to turn himself in because it was after 5:00 p.m. (RP 39-40) He was told that his warrant had been confirmed but that he could only be admitted to the jail if an officer brought him in. (RP 40)

On July 8, Ms. Deel verified that Mr. Garcia had not been incarcerated in the county jail on July 7. (RP 14) A month later the State charged him with failing to register as a sex offender. (CP 43) His defense was that he did not knowingly fail to register in that he was physically unable to register on July 7 because, under the circumstances, which were beyond his control, he did not know how to do so. (RP 56)

The court found Mr. Garcia failed to comply with the statute in that he knew of his obligation to register on July 7, and failed to do so. (RP 59) But the court entered findings respecting Mr. Garcia's transportation difficulties, his obligations to register with two different government agencies located approximately 40 miles apart, and his communication with the sheriff's office about his ongoing effort to comply with his obligation. (CP 2) Based on those findings, the court concluded that an exceptional sentence below the standard range was justified, and imposed 364 days in the county jail with credit for time served. (CP 3-4) The State appealed.

D. ARGUMENT

1. THE REASONS FOR THE EXCEPTIONAL SENTENCE ARE SUBSTANTIAL AND COMPELLING.

A trial court may impose a sentence outside the standard sentencing range if it finds that substantial and compelling reasons justify an exceptional sentence. RCW 9.94A.535. The State does not challenge the court's findings, but rather argues that those findings do not justify an exceptional sentence. Whether a court's stated reasons are sufficiently substantial and compelling to support an exceptional sentence is a question of law, which we review *de novo*. *State v. Suleiman*, 158 Wn.2d 280,

291 n. 3, 143 P.3d 795 (2006); *State v. Berube*, 150 Wn.2d 498, 512, 79 P.3d 1144 (2003).

Courts have never provided a comprehensive definition of what constitutes a “substantial and compelling reason,” but generally the reason must relate to the circumstances of the crime or the defendant’s culpability. 13B Seth A. Fine & Douglas J. Ende, *Washington Practice: Criminal Law* § 3801, at 370 (2d ed.1998) (citing *State v. Houf*, 120 Wn.2d 327, 331, 841 P.2d 42 (1992)); *see also* RCW 9.94A.535(1) (nonexclusive list of mitigating factors, all related to the offense); *State v. Law*, 154 Wn.2d 85, 94-95, 110 P.3d 717 (2005); *see State v. Ha’ mim*, 132 Wn.2d 834, 846, 940 P.2d 633 (1997).

“Allowing variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant’s conduct from that normally present in that crime is wholly consistent with the underlying principle. . . .” *State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993) *quoting* with approval David Boerner, *Sentencing in Washington* 9-23 (1985).

The reasons relied on for deviating from the standard range must “distinguish the defendant’s crime from others in the same category.” *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002) (citing *State v. Gaines*, 122 Wn.2d 502, 509, 859 P.2d 36 (1993)). Valid

mitigating factors are those “not necessarily considered by the Legislature in defining the crime and setting the standard range.” *See State v. Randoll*, 111 Wn. App. 578, 584-585, 45 P.3d 1137 (2002).

The reasons cited by the judge in the present case related directly to the circumstances of Mr. Garcia’s failure to register and his culpability.

Although Mr. Garcia knew he was required to register, the court found facts that showed that his failure to do so was the result of circumstances beyond his control, and therefore less blameworthy: the requirement that he reside in Sunnyside and check in with his community corrections officer every day, and also be in Yakima on that particular day; the distance from Sunnyside to Yakima; and his lack of access to reliable transportation. The court also found facts establishing Mr. Garcia’s significant efforts to comply with the statutory requirements: his call to the sheriff’s office when he discovered he would be late and his attempt to turn himself in at the jail. These circumstances are sufficiently unusual that they were probably not considered by the legislature in setting the standard range.

Substantial compliance is not a defense to failure to give the written notice required by RCW 9A.44.130. *State v. Vanderpool*, 99 Wn. App. 709, 712, 995 P.2d 104, *review denied*, 141 Wn.2d 1017, 10 P.3d 1072 (2000). The Court held that allowing substantial compliance

as a defense would defeat the statute's legislative purpose, which is to make sex offenders easy to locate. *Vanderpool*, 99 Wn. App. at 712. Here, the court found that Mr. Garcia attempted to turn himself in at the Yakima jail, after notifying the sheriff of his intent to do so. These actions effectively accomplished the purpose of the registration statute by making it easy to locate him. Although they are insufficient to establish a defense, under the circumstances of this case they provide a compelling justification for imposing a sentence below the standard range.

2. THE LENGTH OF THE SENTENCE WAS WITHIN THE COURT'S DISCRETION.

The State argues that even if an exceptional sentence were justified as a matter of law, the sentence in this case was clearly too lenient. The length of an exceptional sentence is reviewed under the abuse of discretion standard. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). A sentence is "clearly too lenient" only if no reasonable person would have imposed it. *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).

In light of the reasons the court gave as justification for imposing an exceptional sentence, 364 days' incarceration was not an abuse of discretion.

E. CONCLUSION

The exceptional sentence is supported by substantial and compelling reasons, its length does not reflect an abuse of discretion, and accordingly this court should affirm the judgment and sentence.

Dated this 28th day of October, 2010.

GEMBERLING & DOORIS, P.S.


Janet G. Gemberling #13489
Attorney for Respondent