

**FILED**

AUG 06 2012

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

NO. 300595

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

RONAL PAYNE PROMINSKI

Appellant.

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

The Honorable Brian Altman

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APPELLANT'S OPENING BRIEF

---

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it ordered the gross misdemeanor sentence to run consecutively with the felony sentences.

2. The trial court erred when it imposed disparate sentences for the exact same crimes.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did Mr. Prominski receive equal protection under the law when the trial court imposed a harsher sentence against him than it imposed against his co-defendant for the exact same crimes?

C. STATEMENT OF FACTS

One evening, 18 year-old Ronald Payne Prominski, (Mr. Prominski) and friends, 19 year-old Levi Sanchez (Levi), 16 year-old Dylan Johnson (Dylan), and 16 year-old Allan Burke (Allan) decided to go for a ride around town. 6/9/11 RP 79; 6/9/11 RP 45. Levi sat in the front passenger seat of Mr. Prominski's car, while Allan and Dylan sat in the back. 6/9/11 RP 47-48. They eventually met up with mutual friends, 18 year-old Christina Staples (Christina), who was driving around with her cousin, and 21 year-old Jonas Keys (Keys) and his passenger, 17 year-old Travis Atchley (Travis). 6/9/11 RP 60; 6/9/11 RP 80; 6/9/11 RP 36; 6/9/11 RP 58.

Keys and Christina had been playing *car follow the leader*. 6/9/11 RP 19. *Car follow the leader* is a mix between *cat and mouse* and *follow the leader*. It is game where one car is designated the leader. The driver

of that car speeds up to hide somewhere, while the other driver tries to find him. Once the lead car is found, the drivers switch roles and continue on. 6/9/11 RP 18.

Mr. Prominski joined in the game. 6/9/11 RP 62. At first, Keys and Travis were in the lead. 6/9/11 RP 62. Christina was in the middle and Mr. Prominski was in the rear. At some point, Mr. Prominski made his way in front of Christina. 6/9/11 RP 36; 6/9/11 RP 64. And he eventually caught up to Keys. 6/9/11 RP 81. He merged into the opposite lane to pass; but Keys kept speed. 6/9/11 RP 69-70. Mr. Prominski accelerated, lost control of his car, hit the guardrail, and crashed into a tree. CP 3-5; 6/9/11 RP 82.

Keys and Travis lost sight of Mr. Prominski's car and pulled off the road. 6/9/11 RP 70-72. When Christina caught up to them, they all turned around to look for Mr. Prominski. They found his car, on fire, over the embankment, a few feet from a river's edge. 6/8/11 RP 143; 6/8/11 RP 168.. 6/9/11 RP 72; 6/9/11 RP 37-38.

Christina left the scene to get help. 6/9/11 RP 39. Travis climbed down the embankment to help Mr. Prominski and Levi pull Allan and Dylan out from the backseat. 6/9/11 RP 72; 6/9/11 RP 83. Both Allan and Dylan were unresponsive. Mr. Prominski and Levi tried to resuscitate them with CPR. 6/9/11 RP 84. By the time help arrived, Allan had already passed away. 6/9/11 RP 153-155. Dylan was airlifted to hospital, where he later died. 6/8/11 RP 155.

The State charged Mr. Prominski and Keys with two counts vehicular homicide and two counts reckless endangerment. CP 63-65; CP 28-30. The State moved to consolidate the cases, but the trial court ordered the cases to remain severed. 1/18/11 RP 9.

Keys elected to have a bench trial. CP 31-32. The court found him guilty on both vehicular homicide counts for the deaths of Dylan and Allan. CP 36-44; CP (KEYS) 59-65. The trial judge concluded that because Keys was not the “driver of the car in which the two youths were killed, and because Keys was not the driver who attempted the bad pass on a curve in the middle of the night at high speeds,” Keys was guilty of disregard for the safety of others which is “one notch down from reckless driving.” 3/7/11 RP (KEYS) 536-537; CP (KEYS) 59-65. With that, the court found him guilty of two counts reckless endangerment for creating a substantial risk of death or serious physical injury for his passenger Travis and for Mr. Prominski’s surviving passenger, Levi. CP (KEYS) 59-65.

The court sentenced Keys to the low end of the standard range, 26 months on both vehicular homicide counts. The State recommended the court impose one year for each reckless endangerment count. 3/17/11 RP (KEYS) 539. Instead, the court imposed 6 months on the reckless endangerment counts and ordered Keys’ sentences to run concurrently. CP (KEYS) 36-44.

Unlike Keys, Mr. Prominski invoked his right to jury trial. A jury convicted him of two counts vehicular homicide for the deaths of Dylan

and Allan, and one count reckless endangerment for creating a substantial risk of death or serious harm for Levi. CP 102-106.

The same trial judge sentenced Mr. Prominski to the maximum range, 34 months on both vehicular homicide counts and 365 days for reckless endangerment. And, he ordered Mr. Prominski's reckless endangerment sentence to run consecutively to the 34 months. CP 107-114; 6/20/11 RP 23.

Mr. Prominski objected to the disparity. 6/20/11 RP 8-10. The court overruled the objection and found there was not a compelling reason to sentence Keys to the maximum because the differences were not that great. "Keys was not driving the car in which two young men died; he was just there." 6/20/11 RP 23-22. This appeal timely followed. CP 118.

D. ARGUMENT

THE TRIAL COURT VIOLATED MR. PROMINSKI'S RIGHT TO EQUAL PROTECTION UNDER THE LAW AND COMPROMISED HIS DUE PROCESS RIGHTS WHEN IT IMPOSED A HARSHER SENTENCE AGAINST HIM THAN IT IMPOSED AGAINST HIS CO-DEFENDANT FOR THE SAME CRIMES.

a. The trial court abused its sentencing discretion. A court's sentencing authority is statutory. State v. Phelps, 113 Wash.App. 347, 354-55, 57 P.3d 624 (2002). Under the statutes applicable to misdemeanors and gross misdemeanors, a trial court has the discretion to impose concurrent or consecutive sentences. See RCW 9.92.080(2)-(3). However, a trial court can abuse that discretion if its decision is "manifestly unreasonable, or exercised on untenable grounds, or for

untenable reasons.” State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

b. Mr. Prominski’s sentence was manifestly unreasonable and invokes equal protection concerns. Under the equal protection clause of the fourteenth amendment of the United States Constitution, and article I, section 12 of the Washington Constitution, “persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.” In re Knapp, 102 Wash.2d 466, 473, 687 P.2d 1145 (1984); State v. Phelan, 100 Wash.2d 508, 512, 671 P.2d 1212 (1983); State v. Caffee, 117 Wash.App. 470, 480, 68 P.3d 1078 (2002) citing State v. Manussier, 129 Wash.2d 652, 672, 921 P.2d 473 (1996) (citation omitted); State v. Handley, 115 Wash.2d 275, 289, 796 P.2d 1266 (1990).

In the context of sentencing co-defendants, courts apply two tests for equal protection purposes: (1) Has the defendant established that he or she is the member of the same “class” as the co-defendant, and (2) is the defendant a member of a suspect class? State v. Handley, 115 Wash.2d at 290-91, 796 P.2d 1266 (1990). We analyze the facts here under this two-part test below.

(1) Mr. Prominski was a member of the same “class” as Keys. State v. Handley is a leading case in our jurisdiction on “class” membership under equal protection. In that case, the defendant claimed that his right to equal protection of the law was violated because he received an exceptional sentence when his co-defendant received a

standard range sentence. Our Supreme Court declined to reach the defendant's equal protection claim because he failed to establish that he and his co-defendant were similarly situated and treated differently. It found a "class" of co-defendants is established in the rare case where the co-defendants were at the scene of the offense, participated in the same set of criminal circumstances, and were charged with many of the same crimes. Handley, 115 Wash.2d at 290, 796 P.2d 1266. Unlike his co-defendant, the defendant was not present at the scene. Moreover, the crimes the defendant was charged with were different from the crimes that his co-defendant was charged with. Handley, 115 Wash.2d at 291-92; see also State v. Sanchez, 69 Wash.App. 195, 209, 848 P.2d 735, review denied, 121 Wash.2d 1031 (1993) (holding that equal protection analysis was inappropriate where the defendant failed to demonstrate that he was similarly situated with his codefendant).

Unlike the facts in Handley, the facts here prove Mr. Prominski and Keys were members of the same "class." Mr. Prominski and Keys were both present at the accident scene. They both participated in the same set of criminal circumstances that contributed to the accident-playing car games while driving at speeds that exceeded the limits. And they were both charged with and convicted of the same crimes. The trial court even commented on how rare it was to have two very precise, identical sets of facts with co-defendants who have been convicted via different mechanisms. 6/20/11 RP 23.

(2) Mr. Prominski received the harshest sentences for the same crimes as Keys. Sentencing decisions are subjected to equal protection scrutiny if basic equal protection principles are implicated. Stone v. Chelan Cy. Sheriff's Dep't, 110 Wash.2d 806, 811, 756 P.2d 736 (1988). A denial of equal protection may occur when a valid law is administered in a manner that unjustly discriminates between similarly situated persons. Stone v. Chelan Cy. Sheriff's Dep't, 110 Wash.2d at 812, citing, Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1072-73, 30 L.Ed. 220 (1886). Unequal enforcement will violate equal protection rights if deliberately or purposefully based upon an unjustifiable standard such as race, religion or other arbitrary grounds. Id., citing, Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962); State v. Judge, 100 Wash.2d 706, 713, 675 P.2d 219 (1984);

A trial court is justified in imposing disparate sentences to co-defendants based on relative culpability, criminal record, rehabilitation potential, cooperation with law enforcement, and differences in pleas. State v. Handley, 115 Wash.2d 275, 290-91, 796 P.2d 1266 (1990) (citing People v. Centanni, 164 Ill.App.3d 480, 493, 517 N.E.2d 1207 (1987)). "Relevant distinctions need not pertain only to the co-defendants' relative culpability or to the pleas to which they agreed, but may pertain to anything which provides a rational basis for the disparate sentences." State v. Handley, 115 Wash.2d at 292 (quoting State v. Clinton, 48 Wash.App. 671, 680, 741 P.2d 52 (1987) (emphasis added). Whether a

disparity in co-defendants' sentences violates equal protection, however, depends on " 'whether there is a rational basis for the differentiation.' "

State v. Clinton, 48 Wash.App. at 679, 741 P.2d 52 (1987), (*quoting State v. Turner*, 31 Wash.App. 843, 847, 644 P.2d 1224, *review denied*, 97 Wash.2d 1029 (1982)); State v. Bresolin, 13 Wash.App. 386, 397, 534 P.2d 1394 (1975), *review denied*, 86 Wash.2d 1011 (1976).

For example, in State v. Turner, the Court found there was a rational basis for distinguishing the sentences because one of the co-defendants entered a plea of guilty, agreed to testify, and agreed to pay restitution in exchange for a lenient sentence. Turner, 31 Wn.App. at 847.

In State v. Portnoy, the Court determined that an assault defendant who held the pistol could have rationally been found to be less dangerous and less deserving of imprisonment than his codefendant, who had provided the pistol and ordered that the pistol be raised. Portnoy, 43 Wn.App. 455, 465, 718 P.2d 805, *review denied*, 106 Wn.2d 1013 (1986),

In State v. Conners, this Court found the factors used to differentiate between the co-defendants were sufficient to rationally justify their disparate sentences. In that case, the defendant argued that her equal protection rights were violated when she received a standard range sentence but her co-defendant received an exceptional sentence downward. The sentencing court found the co-defendant's exceptional sentence was based on a finding that he was not the "kingpin" in the drug operation and that the defendant directed him to commit crimes. The co-

defendant also cooperated with the prosecution and pleaded guilty.

Conners, 90 Wash.App. 48, 52, 950 P.2d 519 (1998).

Here, there was no rational basis for the trial court to impose a harsher sentence against Mr. Prominski that it imposed against Keys. Neither had criminal histories the trial court could use to justify the disparate sentencing. CP 107-114; CP (KEYS) 36-44. They both engaged in the same high-risk behavior that led to them to the same criminal convictions. And they both contributed to the deaths of Dylan and Allan.

The trial court relied on the fact Mr. Prominski drove the car in which Dylan and Allan died to justify imposing a maximum sentence. 6/20/11 RP 23. However, this finding is not a rational basis for the differentiation, particularly when both Mr. Prominski and Keys contributed to the hazardous conditions that caused Dylan and Allan's deaths.

In addition to equal protection principles, our Supreme Court and the United States Supreme Court have found due process principles implicated in sentencing. State v. Handley, 115 Wash.2d 275, 290, 796 P.2d 1266 (1990) citing E.g., Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 2068, 76 L.Ed.2d 221 (1983); State v. Herzog, 112 Wash.2d 419, 426, 771 P.2d 739 (1989). Article I section 3 of the Washington Constitution and the Fifth Amendment of the United States Constitution provide, "No person shall be deprived of life, liberty, or property, without due process of law." The Fifth Amendment is applicable to the states

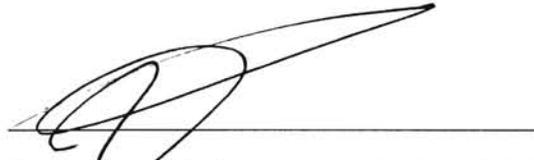
through the Fourteenth Amendment. U.S. Const. amend V; U.S. Const. amend XIV; Wash. art. I § 3. Any action taken by the sentencing court that fails to meet constitutional due process requirements is impermissible. State v. Herzog, 112 Wash.2d at 426, 771 P.2d 739. Whereas the equal protection inquiry asks why similarly situated individuals are treated differently, the due process inquiry asks whether the complained of treatment is so arbitrary or unfair so as to amount to a denial of due process. Bearden, 461 U.S. at 665 n. 8, 103 S.Ct. at 2069 n. 8.

Here, if nothing more than for the reasons above, Mr. Prominski's sentence yields the appearance of unfairness. "Even where there is no actual bias, justice must satisfy the appearance of fairness." In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The law goes farther than requiring an impartial judge, it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised. State v. Madry, 8 Wash.App. 61, 70, 504 P.2d 1156 (1972).

E. CONCLUSION

For the reasons set forth above, Mr. Prominski respectfully asks this Court to remand his case to the trial court for re-sentencing.

Respectfully submitted this 2<sup>nd</sup> day of August, 2012



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