

NO. 30059-5-III

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

---

STATE OF WASHINGTON,

Respondent,

v.

RONALD PAYNE PROMINSKI,

Appellant.

**FILED**  
Oct 04, 2012  
Court of Appeals  
Division III  
State of Washington

---

ON APPEAL FROM THE SUPERIOR COURT OF  
Klickitat County, STATE OF WASHINGTON  
Superior Court No. 10-1-00089-7

---

BRIEF OF RESPONDENT

---

LORI LYNN HOCTOR  
PROSECUTING ATTORNEY

JESSICA M. FOLTZ  
DEPUTY PROSECUTING ATTORNEY

Klickitat County Prosecuting Attorney  
205 S. Columbus Avenue, MS-CH-18  
Goldendale, Washington 98620  
(509) 773 – 5838

**TABLE OF CONTENTS**

	PAGE
TABLE OF AUTHORITIES .....	ii-iii
A. STATEMENT OF THE CASE.....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS.....	2
B. ARGUMENT.....	4
1. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN SENTENCING MR. PROMINSKI. ....	4
2. MR. PROMINSKI WAS NOT DENIED EQUAL PROTECTION UNDER THE LAW.....	7
<i>a. Mr. Prominski cannot establish that he is a member of the same "class" as Mr. Keys.....</i>	<i>7</i>
<i>b. The trial judge had a rational basis for imposing disparate sentences on Mr. Prominski and Mr. Keys. ....</i>	<i>10</i>
3. MR. PROMINSKI'S SENTENCE DID NOT VIOLATE THE APPEARANCE OF FAIRNESS DOCTRINE.....	11
C. CONCLUSION.....	12

**TABLE OF AUTHORITIES**

**CASES**

*Marcella v. United States*, 285 F.2d 322 (9th Cir. 1960), *cert. denied*, 366 U.S. 911, 6 L.Ed.2d 235 (1961)..... 7

*State v. Bresolin*, 13 Wn.App. 386, 397, 534 P.2d 1394 (1975), *abrog. rec. on other grounds by State v. Tanberg*, 121 Wn. App. 134, 87 P.3d 788 (2004) ..... 10

*State v. Derefield*, 5 Wn. App. 798, 799-800, 491 P.2d 694 (1971)..... 6

*State v. Handley*, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990)..... 7, 8, 11

*State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) ..... 6

*State v. Langford*, 67 Wn. App. 572, 588, 837 P.2d 1037 (1992), *rev. denied*, 121 Wn.2d 1007, 848 P.2d 1263 (1993)..... 5

*State v. Portnoy*, 43 Wn. App. 455, 465, 718 P.2d 805, *rev. denied*, 106 Wn.2d 1013 (1986)..... 11

*State v. Post*, 118 Wn. 2d 596, 619, 826 P.2d 172, as amended, 118 Wn.2d 596, 837 P.2d 599 (1992)..... 12

*State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004)..... 7

*State v. Strong*, 23 Wn. App. 789, 794, 599 P.2d 20 (1979)..... 6

*U. S. v. Smith*, 464 F.2d 194 (10<sup>th</sup> Cir. 1972), *cert. denied*, 409 U.S. 1066, 93 S.Ct. 566 ..... 7

*U.S. v. Garrett*, 680 F.2d 650, 652 (9th Cir. 1982)..... 10

**STATUTES**

RCW 9.94A.010 ..... 5

RCW 9.94A.535 .....	5
RCW 9A.36.050 .....	5

## A. STATEMENT OF THE CASE

### 1. PROCEDURAL FACTS

Following a jury trial on June 9-10, 2011, Ronald Prominski was convicted of two counts of Vehicular Homicide by Disregard for the Safety of Others and one count of Reckless Endangerment. RP (June 10, 2011) 5-6. The trial judge sentenced him to the maximum, thirty-four (34) months in the state penitentiary on the Vehicular Homicide charges, and three hundred and sixty-five (365) days in jail, to run consecutive to the thirty-four months, on the Reckless Endangerment. RP (June 20, 2011) 23, CP 107-114.

Mr. Prominski's co-defendant, Jonas Jackson Keys, IV, was tried by the bench on February 9, 10, 14, and 22, 2011. CP (KEYS) 36. He was convicted of two counts of Vehicular Homicide by Disregard for the Safety of Others and two counts of Reckless Endangerment. *Id.* He was sentenced to twenty-six (26) months in the state penitentiary on the Vehicular Homicides and six months in jail on the Reckless Endangerment charges, all to be run concurrently. CP (KEYS) 39.

At the sentencing of both Mr. Prominski and Mr. Keys, the trial judge noted the differences in their behavior. "[Mr. Keys was] not the driver that -- that first of all attempted the bad pass, and then [he was] not the driver that made the bad pass just before ice house on a curve in the

middle of the night, wet roads, at high speeds, and a pass that was illegal. [Mr. Keys wasn't] that driver." CP (KEYS March 7, 2011) 537. "[Mr. Keys] was not in the car in which the two young men died. He was, as [his attorney] argued very persuasively, just there. RP (June 20, 2011) 22. He may have been speeding, but he was not doing anything other than that that was illegal on its face . . . Mr. Prominski was the driver of the vehicle in which the two young men died and it was ultimately his determination that he could make that pass and that it was acceptable or safe or whatever was going through his mind, which ended in the tragedy." RP (June 20, 2011) 22-23.

Mr. Prominski appeals his sentence on numerous grounds, in part alleging that his right to equal protection was violated when he received a harsher sentence than his co-defendant, Jonas Jackson Keys, IV.

## 2. SUBSTANTIVE FACTS

In the wee, small, damp hours of February 13 and 14, 2010, two cars were killing time in the little town of Klickitat, Washington, playing "car games" such as "car tag" and "follow the leader." RP (June 9, 2011) 18, 32. In one car were Gretchen Parson and Christina Staples. RP (June 9, 2011) 16-17. Ms. Staples was driving. *Id.* In the other car were Jonas Jackson Keys, IV, and his passenger, Travis Atchley. RP (June 9, 2011)

17-18. They drove around town, at times heading a ways out of town and back again. RP (June 9, 2011) 19. As she followed Mr. Keys out of town in the early hours of February 14, 2010, Ms. Staples noticed Ronald Prominski coming up fast behind them. RP (June 9, 2011) 34. In the car with Mr. Prominski were Levi Sanchez in the front and Dylon Earl Johnson and William Alan Blake in the rear. RP (June 9, 2011) 47-48. Mr. Prominski came up fast behind Ms. Staples and began moving into the oncoming lane, “challenging her” to pass. RP (June 9, 2011) 35-36, 41. Ms. Staples slowed to allow Mr. Prominski to pass and he roared around her, closing the distance between his vehicle and that of Mr. Keys. RP (June 9, 2011) 23-24, 36-37.

Mr. Prominski caught up with Mr. Keys on a straight stretch and almost immediately made an unsuccessful attempt to pass him going into the first Ice House curve. RP (June 9, 2011) 64-66. About halfway into the last Ice House curve, in a no passing zone, Mr. Prominski moved into the oncoming lane in either a second attempt to pass, or, as Travis Atchley described it, to “keep speed” with Mr. Keys. RP (June 9, 2011) 51, 69-70. Coming out of the curve, Mr. Prominski accelerated, still traveling in the oncoming lane and trying to either pass or keep speed with Mr. Keys. RP (June 9, 2011) 69-70, 82. Mr. Keys passed over a dip in the road without incident, but Mr. Prominski was not so lucky. When he sped over the dip,

his suspension bottomed out, causing him to lose control of his vehicle. RP (June 9, 2011) 81-82. The car spun around, ricocheted off of the guardrail on the opposite side of the road and careened backwards off a steep embankment, slamming into a tree which impacted the back end of the vehicle by thirty-six inches. RP (June 9, 2011) 116-117. Alan Blake and Dylon Johnson, the two passengers in Mr. Prominski's rear seat, died shortly afterward from injuries sustained in the collision. CP 68.

Testimony at trial established that the two vehicles were traveling at speeds of sixty-five to seventy miles per hour. RP (June 9, 2011) 31, 65. Shortly after the collision, Mr. Prominski told Sergeant Joe Riggers that he had been driving too fast and lost control of his vehicle while trying to pass Mr. Keys. RP (June 8, 2011) 170. He denied that he and Mr. Keys were racing but told Sgt. Riggers "it was more like cat and mouse." RP (June 8, 2011) 171.

## **B. ARGUMENT**

### **1. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN SENTENCING MR. PROMINSKI.**

Mr. Prominski argues that his sentence is improper for several reasons. First, he claims that the trial court abused its sentencing discretion by ordering that his sentence for the gross misdemeanor of Reckless Endangerment be run consecutive to his sentence on the two

counts of Vehicular Homicide.

The Sentencing Reform Act of 1981, RCW 9.94A, et seq., provides that felons must be sentenced within a range determined by the seriousness level of the crime and the criminal history of the defendant. The SRA applies only to the sentencing of felony offenders. RCW 9.94A.010.

Under the SRA, imposition of a consecutive sentence is considered exceptional and requires justification. RCW 9.94A.535. Because the SRA does not apply to gross misdemeanors, the sentencing court has discretion to run a sentence for a misdemeanor or gross misdemeanor consecutively without justification. *State v. Langford*, 67 Wn. App. 572, 588, 837 P.2d 1037 (1992), *rev. denied*, 121 Wn.2d 1007, 848 P.2d 1263 (1993). Because Reckless Endangerment, RCW 9A.36.050, is a gross misdemeanor offense, the SRA does not apply and the court acted within its discretion in ordering that the three-hundred and sixty-five day jail sentence run consecutively to Mr. Prominski's prison sentence.

Secondly, Mr. Prominski claims that the trial court was imposed a manifestly unreasonable sentence by sentencing him to the maximum, a sentence harsher than that given his co-defendant, Mr. Keys.

Appellate courts review a trial court's imposition of sentence for

abuse of discretion. “Discretion is abused only when it can be said no reasonable person would adopt the view which was adopted by the trial court.” *State v. Derefield*, 5 Wn. App. 798, 799-800, 491 P.2d 694 (1971).

Action is excessive if it “goes beyond the usual, reasonable, or lawful limit.” *State v. Strong*, 23 Wn. App. 789, 794, 599 P.2d 20 (1979). Thus, for action to be clearly excessive, it must be shown to be clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken. *Id.*

The trial court has the discretion to sentence an individual within the range set forth by law. *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). The standard range for Mr. Prominski was twenty-six to thirty-four months on the Vehicular Homicide Charges and zero to three hundred and sixty-five days in jail on the Reckless Endangerment. RP (June 20, 2011) 3, CP 107-114. Mr. Prominski was sentenced to the maximum: thirty-four months in the state penitentiary on the Vehicular Homicide charges and three hundred sixty-five days in jail on the Reckless Endangerment charge. RP (June 20, 2011) 23, CP 107-114. Because his sentence was within the standard range set forth by law for his offender score and convictions, it was not manifestly unreasonable and the trial court did not abuse its discretion in imposing it.

2. MR. PROMINSKI WAS NOT DENIED EQUAL PROTECTION UNDER THE LAW.

Mr. Prominski's third challenge to his sentence is his allegation that he was denied equal protection of the law when he was sentenced more harshly than his co-defendant, Mr. Keys. Because Mr. Prominski cannot establish that he is a member of the same "class" as Mr. Keys and because, even if he could, there is a rational basis for the difference in sentence, this argument is unpersuasive.

Equal protection condemns arbitrary and invidious discrimination but does not require exact equality, even for criminal defendants. *U. S. v. Smith*, 464 F.2d 194 (10<sup>th</sup> Cir. 1972), *cert. denied*, 409 U.S. 1066, 93 S.Ct. 566; *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). It instead guarantees that the law will be applied equally to persons "similarly situated." *State v. Handley*, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). A disparity in the sentences imposed upon codefendants does not by itself indicate that the sentencing judge has abused his discretion or that a review is required. *Marcella v. United States*, 285 F.2d 322 (9th Cir. 1960), *cert. denied*, 366 U.S. 911, 6 L.Ed.2d 235 (1961);

*a. Mr. Prominski cannot establish that he is a member of the same "class" as Mr. Keys.*

Where codefendants have received different sentences, a court will

exercise equal protection analysis only after a defendant “can establish that he or she is similarly situated with another defendant by virtue of near identical participation in the same set of criminal circumstances[.]” *Handley*, 115 Wn.2d at 290. “Then, only if there is no rational basis for the differentiation among the various class members will a reviewing court find an equal protection violation.” *Id.* Mr. Prominski is unable to establish that he is similarly situated to Mr. Keys because his participation in the criminal circumstances cannot be construed as “nearly identical” to that of Mr. Keys. Although Mr. Prominski and Mr. Keys were both present at the scene and were charged with the same crimes, their participation was notably different.

The testimony at trial established that prior to Mr. Prominski joining the caravan of vehicles leaving Klickitat, the game of “car tag” or “follow the leader” played between Mr. Keys’ and Ms. Staples’ vehicles consisted of driving around town, out of town, and back at speeds slightly over the speed limit. RP (June 9, 2011) 17-19, 32-34. When Mr. Prominski joined them, the game changed into an aggressive speed contest that Mr. Prominski referred to as “cat and mouse.” RP (June 8, 2011) 171.

Mr. Prominski came up fast behind Ms. Staples and began moving into the oncoming lane, “challenging her” to pass. RP (June 9, 2011) 35-36, 41. Ms. Staples slowed to allow Mr. Prominski to pass and he roared

around her, closing the distance between his vehicle and that of Mr. Keys. RP (June 9, 2011) 23-24, 36-37. Mr. Prominski caught up with Mr. Keys on a straight stretch and almost immediately made an unsuccessful attempt to pass him going into the first Ice House curve. RP (June 9, 2011) 64-66. About halfway into the last Ice House curve, in a no passing zone, Mr. Prominski moved into the oncoming lane in either a second attempt to pass, or, as Travis Atchley described it, to “keep speed” with Mr. Keys. RP (June 9, 2011) 51, 69-70. Coming out of the curve, Mr. Prominski accelerated, still traveling in the oncoming lane in a no passing zone, trying to either pass or “keep speed” with Mr. Keys. RP (June 9, 2011) 69-70, 82. Witnesses testified that the two vehicles were traveling at speeds of sixty-five to seventy miles per hour. RP (June 9, 2011) 31, 65.

It is easily discernible from these facts who was “cat” and who was “mouse” in what became a deadly game. As the trial court noted at sentencing, “[Mr. Keys] was not in the car in which the two young men died. He was, as [his attorney] argued very persuasively, just there. RP (June 20, 2011) 22. He may have been speeding, but he was not doing anything other than that that was illegal on its face . . . Mr. Prominski was the driver of the vehicle in which the two young men died and it was ultimately his determination that he could make that pass and that it was acceptable or safe or whatever was going through his mind, which ended

in the tragedy.” RP (June 20, 2011) 22-23.

Mr. Prominski’s participation in the events leading up to the crash was not nearly identical to that of Mr. Keys. Mr. Prominski was the “cat,” the pursuer. The facts of the case demonstrate that his behavior was more aggressive, more determined, and more dangerous. The trial court’s comments at sentencing indicate that it found him to be more culpable than Mr. Keys. Because of this, he is unable establish membership in a class with Mr. Keys and equal protection scrutiny cannot be invoked.

*b. The trial judge had a rational basis for imposing disparate sentences on Mr. Prominski and Mr. Keys.*

Even if Mr. Prominski was in the same class as Mr. Keys, the aforementioned difference in participation between them provides the necessary rational basis for the disparate sentences.

The test for determining whether a disparity in sentencing violates equal protection is whether a rational basis exists for differentiation between the defendants. *State v. Bresolin*, 13 Wn. App. 386, 397, 534 P.2d 1394 (1975), *abrog. rec. on other grounds by State v. Tanberg*, 121 Wn. App. 134, 87 P.3d 788 (2004). “It is well within the discretion of the sentencing judge to impose disparate sentences upon the codefendants if the circumstances so require.” *U.S. v. Garrett*, 680 F.2d 650, 652 (9th Cir. 1982). A trial court is justified in imposing disparate sentences to

codefendants based on relative culpability, criminal record, rehabilitation potential, cooperation with law enforcement, and differences in pleas. *Handley*, 115 Wn.2d at 292 (citing *People v. Centanni*, 164 Ill.App.3d 480, 493, 517 N.E.2d 1207 (1987)). For example, the court in *State v. Portnoy*, 43 Wn. App. 455, 465, 718 P.2d 805, *rev. denied*, 106 Wn.2d 1013 (1986), determined that although one defendant in an assault held the pistol used in the crime, his co-defendant was more dangerous and more deserving of imprisonment because he provided the pistol and ordered that the pistol be raised. As stated above, the judge's comments at the sentencing of both co-defendants make it clear that he found Mr. Prominski to be significantly more culpable than Mr. Keys. Because there was a rational basis for the disparate sentences, Mr. Prominski's equal protection claim cannot stand.

3. MR. PROMINSKI'S SENTENCE DID NOT VIOLATE THE APPEARANCE OF FAIRNESS DOCTRINE.

Mr. Prominski's final ground for appealing his sentence is that it "yields the appearance of unfairness" and therefore denies him due process under the law. (Amended Brief of Appellant at 10). Evidence of a judge's actual or potential bias is a threshold requirement for application of the appearance of fairness doctrine: "[w]ithout evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit."

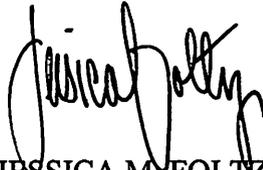
*State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, as amended, 118 Wn.2d 596, 837 P.2d 599 (1992). Mr. Prominski has not shown any evidence of actual or potential bias on the part of the trial judge. For this reason, he cannot succeed on his claim that the appearance of fairness doctrine was violated. Additionally, because the trial judge gave a rational basis for Mr. Prominski's sentence being different than that of Mr. Keys, not even an appearance of unfairness occurred.

**C. CONCLUSION**

For the foregoing reasons the State respectfully requests that this Court affirm the sentence of the Klickitat County Superior Court.

Respectfully submitted this 4 day of October, 2012.

LORI LYNN HOCTOR  
Prosecuting Attorney



JESSICA M. FOLTZ  
WSBA No. 41866  
DEPUTY PROSECUTING ATTORNEY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

COURT OF APPEALS OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

RONALD PAYNE PROMINSKI,

Appellant.

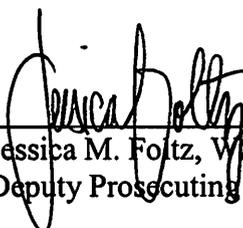
COURT OF APPEALS NO. 30059-5-III

DECLARATION OF MAILING

I, Jessica M. Foltz, state that on October 4, 2012, I sent a copy of the Brief of Respondent in this matter to: Tanesha La Trelle Canzater at canz2@aol.com. Email service was per agreement.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4 day of October, 2012.

  
\_\_\_\_\_  
Jessica M. Foltz, WSBA No.41866  
Deputy Prosecuting Attorney

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

COURT OF APPEALS OF WASHINGTON  
DIVISION III

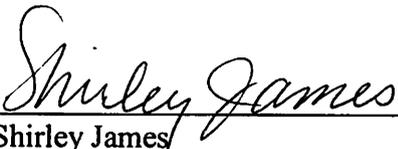
STATE OF WASHINGTON,  
  
Plaintiff,  
  
v.  
  
RONALD PAYNE PROMINSKI,  
  
Defendant.

COURT OF APPEALS NO. 30059-5 III  
  
DECLARATION OF MAILING

I, Shirley James, state that on October 4, 2012, I deposited in the United States mails by first class mail, proper postage affixed a copy of the State's Brief of Respondent to: RONALD PAYNE PROMINSKI, WASHINGTON STATE PENITENTIARY, 1313 N. 13<sup>TH</sup> AVENUE, WALLA WALLA, WASHINGTON 99362.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4 day of October, 2012.

  
\_\_\_\_\_  
Shirley James  
Administrative Assistant to  
Jessica M. Foltz, Deputy Prosecuting Attorney