



No. 305473

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
July 31, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent

v.

ALFRED GALINDO, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

REPLY BRIEF

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I. RESTATEMENT OF ISSUES ON APPEAL

- A. By Misunderstanding The Application Of The Law, The Sentencing Court Failed To Properly Exercise Its Discretion To Impose A Sentence Outside The Standard Range, When There Were Substantial And Compelling Reasons Justifying A Mitigated Exceptional Sentence.

Mr. Galindo incorporates the arguments from appellant's opening brief by reference.

In its Response Brief, the State has framed the issue Mr. Galindo raises as whether the trial court abused its discretion by not exercising its discretion in failing to impose a mitigated exceptional sentence. (Br. of Respondent at 3). The State's answer is "no." However, Mr. Galindo's argument on appeal, is rather that the sentencing court misunderstood its liberty to consider a number of relevant factors, each of which supply *compelling and substantial reasons to impose a mitigated exceptional sentence*. It is the misunderstanding of the applicable law that serves as the basis for abuse of discretion.

II. ARGUMENT

- A. The Crime For Which Mr. Galindo Was Convicted Is Readily Distinguishable From A Typical First Degree

Assault Because Of The Circumstances Of The Crime
And The Absence Of Harm To The Victims.

On remand, this Court recognized the statutory authority of the resentencing court to impose a mitigated exceptional sentence. *State v. Galindo*, 160 Wn. App. 1033 (2011). As part of that statutory authority, the court must adhere to the limits of legislative reasoning for its discretion: that is, the punishment for the criminal offense must be proportionate to the seriousness of the offense and the defendant's criminal history and it must be commensurate with punishment imposed on others committing the same crime. RCW 9.94A.010(1)(3). Courts are authorized to "tailor the sentence- as to both the length and type of punishment imposed- to the facts of the case." *State v. Davis*, 146 Wn. App. 714, 720-721, 192 P.3d 29 (2008), rev. denied, 166 Wn.2d 1033, 217 P.3d 782 (citing to *In re Smith*, 139 Wn. App. 600, 603, 161 P.3d 483 (2007)).

In imposing a sentencing decision, a court may consider mitigating circumstances specified in the SRA, as well as other factors, provided that they are consistent with the purposes of the SRA and are supported by the evidence. *Davis*, 146 Wn. App. at 720. RCW 9.94A.535(1) and (2) provide a nonexclusive list of aggravating and mitigating factors a court may consider. Any

reasons cited by the court outside of these factors must relate to the crime and make the crime more or less egregious from others in the same category. *State v. Akin*, 77 Wn. App. 575, 584, 892 P.2d 774 (1994); *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002); *State v. Gaines*, 122 Wash.2d 502, 509, 859 P.2d 36 (1993) (citing *State v. Grewe*, 117 Wn.2d 211, 216, 813 P.2d 1238 (1991)).

Assault in the first degree is classified as a serious violent offense. RCW 9.94A.030(45)(v). There are hundreds of Washington cases detailing serious violent first-degree assaults that resulted in devastating physical harm to victims. (e.g. See *State v. Wilson*, 125 Wn.2d 212; 883 P.2d 320 (1994): defendant charged and convicted of four counts of first-degree assault for shooting four people, two of whom were severely wounded, received 960 months sentence; See also *State v. Pierre*, 108 Wn. App. 378, 31 P.3d 1207 (2006): defendant beat and kicked a teen into unconsciousness, resulting in lifelong brain injury; received a 160 month sentence).

Here, the court seemed to think it had to equate the fright of the passengers in the car Mr. Galindo pursued with the serious physical harm victims of typical first-degree assault suffer. (RP 29).

The crimes for which Mr. Galindo was convicted are readily distinguished from other first-degree assault crimes: *no one was injured because of his action.*

Equally significant, a sentencing court may appropriately impose an exceptional sentence only when the *circumstances of the crime* distinguish it from other crimes in the same category. *State v. Pennington*, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989) (internal citations omitted)(emphasis added). As argued in Mr. Galindo's opening brief, the circumstances of the crime distinguish it from other crimes in the same category.

Mr. Galindo's actions were based on his very credible belief that his girlfriend had been kidnapped and would suffer untold harm. Mr. Galindo's defense of 'defense of others' could and should have been considered as part of the court's reasoning. The circumstances dictate that Mr. Galindo wanted the car to stop so he could rescue his girlfriend. A sympathetic resentencing court stated that the entire reason for the whole matter occurred because of a misunderstanding- that is a distinguishing factor which the court could and should have relied on to impose a mitigated sentence. (RP 30.)

III. CONCLUSION

Based on the foregoing facts and authorities, Mr. Galindo respectfully requests this Court to remand to the trial court for proper consideration of mitigating factors and for resentencing.

Submitted this 31st day of July, 2012.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Alfred Galindo, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Reply Brief of Appellant was sent by first class mail, postage prepaid on July 31, 2012 to Alfred Galindo, DOC # 892580, Washington State Penitentiary, 1313 N. 13th Ave, Walla Walla, WA 99362; and by email per agreement between the parties to Mark E. Lindsey, Spokane County Prosecutor, at kowens@spokanecounty.org.

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