

FILED  
June 20, 2013  
Court of Appeals  
Division III  
State of Washington

No. 312810

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Appellant,

vs.

JOSE JAVIER PERALTA MARTINEZ,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE RICHARD BARTHELD, JUDGE

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	ii
I. ASSIGNMENTS OF ERROR .....	1
II. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF FACTS .....	3
IV. STANDARD OF REVIEW .....	6
V. ARGUMENT .....	7
VI. CONCLUSION .....	11

TABLE OF AUTHORITIES

PAGE

**Cases**

Olmstead v. Dept. of Health, 61 Wn. App. 888, 812 P.2d 527 (1991)..... 9

State v. Grewe, 117 Wn.2d 211, 813 P.2d 1238 (1991) ..... 8

State v. Ha'min, 132 Wn.2d 834, 940 P.2d 633 (1997)..... 6,10

State v. Hinds, 85 Wn. App. 474, 936 P.2d 1135 (1997) ..... 10

State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003) ..... 7

State v. Jeannotte, 133 Wn.2d 847, 947 P.2d 1192 (1997)..... 6, 8, 11

State v. Law, 154 Wn.2d 85, 110 P.3d 717 (2005)..... 8

State v. Pascal, 108 Wn.2d 125, 736 P.2d 1065 (1987)..... 8, 11

State v. Pennington, 112 Wn.2d 606, 772 P.2d 1009 (1989)..... 7

**Statutes**

RCW 9.94A.535 ..... 7

RCW 9.94A.535(1)(a) ..... 7

RCW 9.94A.585(2) ..... 7

RCW 9.94A.585(4) ..... 6, 8

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

1. The reason given by the trial court in support of an exceptional sentence below the standard range, that the victim of the crime of felony hit and run was an initiator, a willing participant, aggressor or provoker of the incident, was clearly erroneous as it was not supported by the record. **(CP 12-16)**

2. As a matter of law, the court's conclusion that, to a significant degree, the victim was an initiator, a willing participant, aggressor or provoker of the incident, does not justify a departure from the standard range for the offense of felony hit and run. **(CP 15)**

3. As a matter of law, the trial court erred in concluding that the lack of criminal history on the part of the defendant justified a departure from the standard range. **(CP 15)**

4. The reasons given in support of the exceptional sentence were not substantial and compelling. **(CP 15)**

5. The trial court abused its discretion when it imposed an exceptional sentence, as it was clearly too lenient. **(CP 12-16)**

## **II.**

### **ISSUES RAISED BY THE ASSIGNMENTS OF ERROR**

1. Was a passenger, who was killed as a result of a motor vehicle crash, a willing participant, aggressor or provoker of the crime of hit and run, when the driver of the vehicle left the scene after the crash, failing to remain and identify himself or render reasonable assistance to those injured?
2. As a matter of law, can a deceased passenger be a willing participant, aggressor or provoker of the crime of felony hit and run?
3. As a matter of law, is the lack of prior criminal history a substantial and compelling reason to justify a sentence below the standard range?
4. Is a mitigated sentence on a conviction for felony hit and run clearly too lenient, when the court bases its conclusions upon conduct of the deceased passenger which occurred prior to the fatal crash?

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

Jose Javier Peralta Martinez was charged by information with one count of hit and run – fatality, and two counts of hit and run – injury, under Yakima County Superior Court cause number 11-1-01858-5.

**(CP 1-2)**

Pursuant to a plea agreement with the prosecution, he entered a plea of guilty to the single count of hit and run – fatality. **(CP 3-11)**

In his statement, he acknowledged that:

On or about December 18, 2011, in the state of Washington, I drove a motor vehicle I knew was involved in an accident resulting in the death of Nicholas Marez, and I failed to immediately stop my vehicle at the scene of the accident; and/or stop my vehicle as close as possible to and return to the scene of the accident; and /or remain at the scene of the accident; and/or I failed to give my name, address, insurance company, insurance policy number, and the vehicle license number, and failed to exhibit my vehicle driver's license to any survivors; and/or I failed to render reasonable assistance to Nicholas Marez, including the carrying of or making of arrangements for the carrying of Nicholas Marez to a physician or hospital for medical treatment when it was apparent that treatment was necessary on behalf of the injured person; and I was not injured or incapacitated by the accident to the extent of being physically incapable of the above.

**(CP 3)**

Pursuant to the agreement, the State would request a standard range sentence of 33 months, but Mr. Peralta Martinez could argue for a first time offender waiver. **(CP 5)** He had no prior criminal history. **(CP 4)**

At sentencing on October 17, 2012, the court reviewed the facts of the case. Prior to the crash, the victim, Mr. Marez was at one point driving the vehicle with a female passenger seated on his lap. Mr. Peralta Martinez took over driving, and while headed toward Sunnyside, the vehicle drifted off the road and overturned. Mr. Marez lost his life, and two other passengers were injured. One of the injured passengers possessed an odor of intoxicants on her breath when she spoke to investigating officers. **(10-17-12 RP 25-26)**

Based upon those facts, the court declined to approve a first time offender waiver, but:

. . . I also find it very difficult looking at the defendant's criminal history, which is none, his driving history which is a speeding ticket and all of the other factors in this case to impose a prison sentence of 33 to – actually I can impose it up to 41 months, which is three and half years. Whatever sentence I impose, this Court understands that I can't bring Nicolas back . . .

. . .

The Court finds, however, that based upon the circumstances of this case and specifically that to a significant degree all of the individuals in this automobile that night were willing participants from the standpoint that they were intoxicated. They all go into an automobile and they all made those choices voluntarily. This accident could have taken place just as easily with Gabriella Chavez sitting on Mr. Morez's (sp) lap as it did when the vehicle drifted off to the shoulder of the road and Mr. Peralta overcorrected, and for that the reason the Court finds that there is a basis and so finds upon those comments that this does justify an exceptional sentence below the standard range.

**(10-17-12 RP 25-26)**

The court sentenced Mr. Peralta Martinez to 16 months of confinement, below the standard range. **(CP 19)**

The court also entered findings of fact and conclusions of law consistent with its oral findings, including, among the reasons justifying the exceptional sentence, the fact that “[t]o a significant degree, the victim was an initiator, a willing participant, aggressor or provoker of the incident as were the other occupants in the vehicle”.

**(CP 15)**

The State timely appealed the sentence. **(CP 25-28)**

**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), State v. Jeannotte, 133 Wn.2d 847, 855-56, 947 P.2d 1192 (1997).

V.  
ARGUMENT

**1. The mitigating factors found by the court were not supported by the record, and the reasons given were clearly erroneous.**

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).

If it is substantial and compelling, a court may justify an exceptional sentence on the mitigating factor that a victim was “an initiator, willing participant, aggressor or provoker” of the incident. RCW 9.94A.535(1)(a)

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.

In applying the “clearly erroneous” standard in reviewing a trial court’s reasons for imposing an exceptional sentence, the Washington Supreme Court has held that “we will reverse the trial court’s findings only if not substantial evidence supports its conclusions. State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991), *quoted in* Jeannotte, 133 Wn.2d at 856; State v. Pascal, 108 Wn.2d 125, 138, 736 P.2d 1065 (1987). Substantial evidence has been defined as “evidence in sufficient quantum to persuade a fair-minded person of the truth of

the declared premises.” Olmstead v. Department of Health, 61 Wn. App. 888, 893, 812 P.2d 527 (1991).

Here, the court’s finding that the victim, Mr. Marez, was a willing participant or provoker was clearly erroneous. It is apparent that the court was convinced that Mr. Marez, and the other occupants of the vehicle, contributed to the unsafe manner in which the vehicle was operated, and thus contributed to the *cause of the crash*. However, Mr. Peralta Martinez was not charged with vehicular homicide or vehicular assault. The sole charge to which he pled guilty, and for which he was sentenced, was *leaving the scene* of a fatal accident in which he had been the driver. Mr. Marez could not possibly have been a willing participant to the crime of failing to abide by the requirements of RCW 46.52.020, as he had either succumbed to his injuries, or was about to die.

**2. The reasons given did not justify the exceptional sentence.**

Similarly, the State would submit that as a matter of law, a deceased passenger could not provoke, or be a willing participant in, the crime of hit and run. Indeed, in order for the trial court to conclude that the victim was a provoker or willing participant, it must find a causal connection between the victim’s conduct and the defendant’s

offense. State v. Hinds, 85 Wn. App. 474, 482, 936 P.2d 1135 (1997).

There simply can be no causal connection between the deceased victim's conduct and the crime of hit and run – fatality, and the State is unable to find any case law which would support such a conclusion.

Further, the Supreme Court has held that a lack of criminal history is an insufficient basis for sentencing below the standard range, and may not be used as a mitigating factor, since the Legislature specifically considered criminal history when establishing standard ranges. Ha'Mim, 132 Wn.2d at 841, *quoting* State v. Rogers, 112 Wn.2d 180, 770 P.2d 180 (1989).

### **3. The court abused its discretion.**

Here, the court did not identify how the circumstances of the hit and run were distinguishable from other violations of that statute. Thus the reasons given for the mitigated sentence were not substantial and compelling. The court abused its discretion, then, in imposing a sentence of 16 months, which was clearly too lenient in light of the failure of Mr. Peralta Martinez to remain at the scene of a serious crash, and to attempt to get aid for his grievously injured friend, Mr. Marez. Indeed, no reasonable person would have imposed such a

sentence on these facts. Jeannotte, 133 Wn.2d at 858; Pascal, 108 Wn.2d at 139.

As the court did not identify whether any of the remaining stated reasons for the downward departure would have been sufficient independently, remand for resentencing within the standard range 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 20<sup>th</sup> day of June, 2013.

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***Certificate of Service***

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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Dated at Yakima, WA this 20<sup>th</sup> day of June, 2013.

/s/ Kevin G. Eilmes