

**FILED**  
Sep 27, 2013  
Court of Appeals  
Division III  
State of Washington

No. 31281-0-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Appellant,

vs.

JOSE JAVIER PERALTA MARTINEZ,

Respondent.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT  
Honorable Richard H. Bartheld, Judge

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BRIEF OF RESPONDENT

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**A. APPELLANT’S 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)**

**B. RESPONDENT'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.**

1. Where the crime of felony hit and run requires proof that a vehicle driven by Mr. Peralta Martinez was involved in an accident resulting in the death of the victim passenger, was the court's conclusion that to a significant degree the victim was an initiator, a willing participant, aggressor or provoker of the accident supported in the record and does the reason justify a departure from the standard range?

2. Is the reason given by the trial court for imposing a mitigated sentence, that the victim passenger was an initiator, a willing participant, aggressor or provoker of the incident resulting in the driver's conviction of felony hit and run, supported by the record and does it justify a sentence outside the standard range where the sentence is not clearly too lenient?

**C. STATEMENT OF THE CASE**

The Respondent does not dispute the Appellant's Statement of the Case. RAP 10.3(b). The following additional facts are relevant.

At sentencing, the court considered testimony of relatives of the victim and Mr. Peralta Martinez, argument of counsel, and evidence from the probable cause/SIR narrative written by Washington State Patrol Detective Pat Ditter. CP 12. The court entered the following findings of

fact and conclusions of law in support of an exceptional sentence below the standard range:

### **FINDINGS OF FACT**

I. On or about December 18, 2011, the defendant drove a motor vehicle with 6 other passengers in a vehicle equipped to seat 5 passengers in the Sunnyside, Washington area. They had left a party where most of the individuals including the defendant had consumed alcohol. The victim and owner of the vehicle, Nicholas Marez, was initially driving the vehicle. At one point, another passenger, Gabriella Chavez, was sitting on his lap and steering the vehicle.

II. One of the witnesses/passengers told the prosecutor and defense counsel that the defendant egged on the victim and wanted to drive the vehicle. Others in the vehicle do not recall this and it is disputed by the defendant. Another witness/passenger told the prosecutor and defense counsel that when the defendant was driving, he was speeding and eventually the vehicle drifted on to the shoulder and left the roadway and rolled down. Other witnesses do not confirm excessive speed and this is disputed by the defendant also. The deceased was among the passengers in the back seat [who] were thrown out of the car. As a result of the incident, the victim, Nicholas Marez was killed. Another passenger, Ivan Chiprez suffered a broken back. Another passenger, Gabriella Chavez suffered a dislocated right knee.

III. According to the witnesses interviewed by the prosecutor and defense counsel, one of the passengers wanted to summon assistance and requested to use the defendant's cell phone. After attempting to dial 911 for help, the defendant grabbed the phone from her and refused to let her use it again. The others went to find help and the defendant left the scene on his own power without attempting to render

reasonable assistance to either Nicholas Marez or the other two injured passengers.

IV. The defendant was charged with one count of Hit and Run Fatality involving Nicholas Marez, one count of Hit and Run Injury involving Ivan Chipres and one count of Hit and Run Injury involving Gabriella Chavez. On August 20, 2012, the defendant pled guilty to one count of Hit and Run Fatality. Sentencing was continued. In the agreement on plea of guilty, the defense was allowed to argue for a First Time Offender Waiver Sentencing Alternative while the state was going to argue for 33 months (Standard Range for an offender score of 0 is 31-41 months). The request for restitution is currently set at \$58,649.87.

V. The defendant does not have any criminal convictions. He has a prior speeding violation and two other infractions for driving with no insurance. At sentencing, the court heard that the family of the deceased was opposed to the First Time Offender Waiver Sentencing Alternative. The defendant stated that he was employed as a full time employee. The defense argued that the standard sentence would not impose community custody conditions.

VI. Had the defendant entered a plea to a Vehicular Homicide based upon reckless driving charge, the standard range of sentencing would have been less time than the standard range for sentencing for Hit and Run Fatality.

### **CONCLUSIONS OF LAW**

I. The Court has jurisdiction over the parties and the subject matter herein.

II. Based on the incident and the resulting fatality of the deceased, the First Time Offender Waiver Sentencing Alternative is denied. Because RCW 9.94A.535 allows for

the court to consider mitigating circumstances, the court sentenced the defendant to an exceptional sentence down from the standard range of 31-41 months to 16 months.

III. The mitigating circumstances are based on the following reasons: 1) The sentence would allow the defendant to pay the full restitution in this case because the amount is significant; 2) To 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; 3) The defendant has no prior criminal history and his driving record shows one infraction for speeding in the past five years; 4) The type of crime that the defendant has been convicted of does not allow for any community supervision but the exceptional sentence would impose 24 months of community custody to include standard conditions based on the crime and facts alleged.

CP 12–15.

In its oral ruling, the Court offered the following backdrop for its ultimate decision to impose a mitigated sentence:

### **ORAL RULING - Background**

... For the Court to impose a first offender finding in this case is basically to ignore the fact that as a result of this incident we have an individual who lost his life and we have two other individuals that were injured, one more seriously than the other one. There's a good reason why the legislature determines a hit and run fatality (inaudible) hit and run injury more severely than a vehicular homicide or vehicular assault because of that lack of responsibility to step up and take responsibility. You're right, Mr. [defense counsel], if [the defendant] was charged with vehicular homicide, the standard range would be less than what he's looking at now.

There's a variety of factors that the Court has to take into consideration, and the important factors to this Court were the defendant's driving record, the victim's family's position on sentencing, which carries a lot of weight with this Court, and the other thing is the defendant's financial obligations to pay restitution.

This Court reviewed the six-page affidavit of probable cause in this case, and that report filed by Detective [Ditter] of the Washington State Patrol was fairly comprehensive. It indicated that seven people were at a party and they were consuming alcohol earlier that evening at the home of Guadalupe Venturas (phonetic), Ivan's mother. Now, when she got home and discovered at 2:00 in the morning that Ivan had decided to have a party that day or that evening, she ordered them out of the house and told them to leave, and all seven of them piled into an automobile owned by [the victim].

If somebody should be blamed responsible maybe that person should take some responsibility by sending seven under-age children out into an automobile that had consumed alcohol.

... All of these individuals left in the same automobile. The police reports indicate that at one point [the victim] was seated ... in the driver's seat and that he was partially operating this motor vehicle with the six other occupants in it and with Gabriella Chavez sitting on his lap and steering driving down the road.

At some point in time this situation changed and the defendant took over driving responsibilities. The police reports from the statements taken from the individuals in the automobile indicated that Ms. Chavez indicated that [the defendant] was driving in excess of the speed limit. The reports also indicated that there was a strong odor of intoxicants on her breath when interviewed by the police officer.

Another individual in the car indicated that [the defendant] just simply lost control of the vehicle. There was no indication of speeding. And those are statements taken at

the time of the investigation. It was a while after the defendant took over the driving responsibilities, and while driving toward Sunnyside the vehicle drifted onto the shoulder of the road. This vehicle overturned and crashed because [the defendant] over-corrected. And those were the ... conclusions based upon the physical evidence of the State Patrol that investigated this accident.

10/17/12 RP 24–26.

### **ORAL RULING**

Based upon the facts, the court declined to approve a first time offender waiver. 10/17/12 RP 26. The court continued:

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[t] into an automobile and they all made those choices voluntarily. This accident could have taken place just as easily with Gabriella Chavez sitting on [the victim's] lap as it did when the vehicle drifted off to the shoulder of the road and [the defendant] over-corrected, and for that reason the Court finds that there is a basis and so finds based upon those comments, that this does justify an exceptional sentence below the standard range..

In this particular circumstance, I will impose 16 months and give credit for time served in this particular case. ... I have selected 16 months for the following reasons. Number one, there is significant restitution that's going to have to be paid in this case. And the only way that you can pay that restitution is to be out working. Number two, I've taken into consideration that you are working and that you had been working in this particular circumstance. And number

three, I'm going to give you one last opportunity to prove that you are a responsible individual.

Unfortunately, this particular circumstance, what could have been simply a tragic accident has now resulted in a felony conviction because you failed to remain at the scene. Where it was a lapse of judgment or an attempt on your part to avoid criminal prosecution, it certainly didn't (inaudible). The point is—is that in this case you're right. It's time to step [up] and accept responsibility and for the reasons that I have indicated, I've chosen the 16 months in this case. ...

10/17/12 RP 26–27.

The Judgment and Sentence contains the court's finding of the mitigating circumstance that “to a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident”. CP 18 at ¶2.6. Based on the mitigating circumstance, the court imposed an exceptional sentence of “16 months, which is below the standard range of 31–41 months” and to include “24 months of Community Custody”. CP 19 at ¶3.3 and 4.B.1.

#### **D. ARGUMENT**

**The mitigated sentence should be affirmed because the court's reasons have a factual basis, at least one of them is a valid mitigating factor as a matter of law and the sentence is not “clearly too lenient”.**

1. Unchallenged findings are verities on appeal. Unchallenged findings of fact are verities on appeal and an appellate court reviews only

those facts to which the appellant has assigned error. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). A finding of fact is an assertion that evidence shows something occurred or exists, independent of an assertion of its legal effect, while a conclusion of law is the determination made by a process of legal reasoning from the facts. The court reviews findings of fact that are improperly called conclusions of law as findings of fact. Lanzce G. Douglass, Inc. v. City of Spokane Valley, 154 Wn. App. 408, 417–18, 225 P.3d 448 (2010). Herein, since the State has not assigned error to any of the trial court's findings, the unchallenged findings are verities on appeal.

2. Standards of review. The trial court "may impose a sentence outside the standard sentence range for an offense, if it finds ... that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. An appellate court may reverse only if it finds, [1] using a clearly erroneous standard, "that the reasons supplied by the sentencing court are not supported by the record which was before the judge"; [2] using a *de novo* standard, "that those reasons do not justify a sentence outside the standard sentence range for that offense"; or, [3] using an abuse of discretion standard, "that the sentence imposed was clearly ... too lenient." RCW 9.94A.585(4); State v. Solberg, 122 Wn.2d 688, 705, 861

P.2d 460 (1993). When the sentencing court identifies more than one ground for justification for an exceptional sentence, the reviewing court may affirm if one independent ground is valid. State v. Zatkovich, 113 Wn.App. 70, 78 52 P.3d 36 (2002).

An exceptional sentence below the standard range may be imposed if the court finds that mitigating circumstances are established by a preponderance of the evidence. RCW 9.94A.535(1). The statute's list of mitigating circumstances are "illustrative only and are not intended to be exclusive reasons for exceptional sentences." Id.

3. The record supports the trial court's factual findings. The court found that to a significant degree the victim was "an initiator, willing participant, aggressor, or provoker" in the vehicle accident. Seven underage individuals who had been drinking were booted out of the host house by an adult. They willingly piled into a car designed to hold five occupants. The victim began driving his car away and then partially operated the car while allowing the girl sitting on his lap to steer the car. At some point the defendant took over as driver. It was a while before the car drifted onto the shoulder of the road, then overturned and crashed. The Washington State Patrol report found no evidence of excessive speed, and concluded the defendant had simply over-corrected. Based on the facts,

the court found “all of the individuals in this automobile that night were willing participants from the standpoint that they were intoxicated. They all go[t] into an automobile and they all made those choices voluntarily. This accident could have taken place just as easily with Gabriella Chavez sitting on [the victim’s] lap as it did when the vehicle drifted off to the shoulder of the road and [the defendant] over-corrected, and for that reason the Court finds that there is a basis and so finds based upon those comments, that this does justify an exceptional sentence below the standard range.” 10/17/12 RP 26.

The facts of the incident are found in the record and they are unchallenged on appeal. Substantial evidence supported the court’s finding that the victim was a willing participant in the evening’s incident. The court’s reason was not clearly erroneous.

4. The court’s reason that the victim was a willing participant or provoker in the incident, as a matter of law, justifies a sentence outside the standard range<sup>1</sup>. The second step in the court's review of an exceptional sentence is to determine whether, as a matter of law, the trial court's reasons justify a departure from the standard range. State v. Jeannotte, 133

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<sup>1</sup> The State is correct that lack of criminal history is not *by itself* a valid mitigating factor because it is already factored into the offender score. State v. Freitag, 127 Wn.2d 141, 142, 896 P.2d 1254, 905 P.2d 355 (1995); *see* Brief of Appellant at 10.

Wn.2d 847, 856, 947 P.2d 1192 (1997). The reasons must (1) take into account factors other than those necessarily considered in computing the standard range and (2) be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. Id.; State v. Law, 154 Wn.2d 85, 95, 110 P.3d 717 (2005), *citing* State v. Ha'mim, 132 Wn.2d 834, 840, 940 P.2d 633 (1997).

RCW 9.94A.535(1)(a) lists as a mitigating factor that “[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” Here, because the Legislature has specifically identified this as a valid mitigating factor, the trial court's reason for imposing an exceptional sentence downward is valid as a matter of law. *See* Jeannotte, 133 Wn.2d at 857; State v. Nelson, 108 Wn.2d 491, 499, 740 P.2d 835 (1987).

But the State contends this mitigating circumstance may never be applied to the offense of hit and run—fatality: “[t]here 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”, *citing* State v. Hinds, 84 Wn.App. 474, 482, 936 P.2d 1135 (1997). Brief of Appellant at 9–10. The decision in

the Hinds case, however, has no application to the offense of hit and run—fatality. The crime in Hinds was vehicular homicide. The essential elements (as charged against Mr. Hinds) were recklessly driving a vehicle which proximately caused the death of a person. Hinds, 84 Wn.App. at 478; RCW 46.51.520(1); 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 90.02 (3d Ed). The court appeared to extend comparative negligence principles to the statutory sentence mitigator of “willing participation by the victim” by holding the factor may be applicable in sentencing for vehicular homicide where the victim provided alcohol to an eighteen-year-old and allowed him to drive her automobile and a causal connection is found between the victim's conduct and the defendant's recklessness. Hinds, *supra*. This holding may be appropriate where elements of the offense required both reckless driving and proximate causation of the death.

Here, the offense of hit and run—fatality has elements that are significantly distinct from those at issue in Hinds, and the court’s analysis of whether a mitigating circumstance exists must begin with the particular crime at hand. The gravamen of the hit and run offense consists of a vehicle accident, in which someone is injured or dies, and the driver fails to remain at the scene or render assistance. To prove a person guilty of

felony hit and run under RCW 46.52.020, the State must prove: (1) a motor vehicle was driven in Washington; (2) the vehicle was involved in an accident; (3) injury or death resulted from the accident; and (4) the driver failed to immediately stop and identify himself or render reasonable assistance to those injured. State v. Silva, 106 Wn.App. 586, 590, 24 P.3d 477, 480 (2001), *citing* State v. Komoto, 40 Wn.App. 200, 206, 697 P.2d 1025, *rev. denied* 104 Wn. 2d 1009 (1985), *cert. denied*, 474 U.S. 1021, 106 S.Ct. 572, 88 L.Ed.2d 556 (1985); RCW 46.52.020(1), (3), (4); *accord* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 97.02 (3d Ed). If any one of the elements is missing or unproven, there is no crime. If the elements are proven, a defendant may stand convicted of the offense. If convicted of the offense, the Legislature has provided that the court may consider mitigating circumstances.

The trial court correctly considered the nature of the crime at hand – hit and run–fatality – when considering whether a mitigating circumstance existed. The Legislature has provided a victim’s willing participation as a valid mitigating factor for purposes of sentencing. RCW 9.94A.535(1)(a). RCW 46.52 (which categorizes miscellaneous reports and duties owed concerning Accidents–Reports–Abandoned Vehicles, and defines related offenses, their defenses and provides for sentencing) does

not preclude application of RCW 9.94A.535(1)(a) in cases involving felony hit and run. The Legislature has the ability to preclude such an application of mitigating factors, but has not done so.

Here, one can infer<sup>2</sup> from the court's thorough oral ruling and written findings that the circumstances of this case were distinguishable from the circumstances of other hit and run incidents.<sup>3</sup> Where all of the underage participants were intoxicated and voluntarily riding in the car, and there was no evidence of speeding or unsafe driving by defendant, and the crash was purely accidental, the fact that Mr. Peralta Martinez was the driver at the time of the accident was but a twist of fate. These findings amply support the court's conclusion that, by a preponderance of the evidence, the victim was a willing participant in the incident.

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The State is correct that the court below did not specifically identify how the circumstances of the hit and run incident were distinguishable from other violations of that statute. Brief of Appellant at 10. If this Court chooses not to infer whether the trial court's findings support its conclusions, it may be appropriate to remand for clarification of the findings. *See State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995) (remand proper remedy where findings of fact and conclusions of law do not state ultimate facts, existence of which are apparent from record).

<sup>3</sup> Undersigned counsel found no Washington cases that evaluate similar mitigating factors used by the trial court here in the context of hit and run–fatality (or injury) sentencing.

5. The sentence is not “clearly too lenient”. The trial court’s reduction of Mr. Peralta Martinez’ sentence from a standard range minimum of 31 months to an exceptional downward sentence of 16 months plus the imposition of a 24 month period of community custody was not clearly too lenient under the facts of this case. *Cf. State v. Moore*, 73 Wn.App. 789, 800, 871 P.2d 642 (1994) (27 months downward not clearly too lenient).

#### **E. CONCLUSION**

The willing participation of the victim circumstance merely provides some evidence regarding the culpability<sup>4</sup> of the defendant for sentencing purposes; it does not excuse the acts of the defendant. The trial court’s conclusion that the victim was a willing participant in the incident did not affect Mr. Peralta Martinez’ conviction for hit and run—fatality. But the Legislature intended to maintain the sentencing court’s discretion when mitigating circumstances exist at sentencing. The Sentencing Reform Act of 1981 provides:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing

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<sup>4</sup> “While the statutory mitigating factors listed are “illustrative” only it should be noted that all the examples relate directly to the crime or the defendant’s culpability for the crime committed.” *State v. Law*, 154 Wn. 2d 85, 94-95, 110 P.3d 717, 721 (2005).

a system for the sentencing of felony offenders which structures, *but does not eliminate*, discretionary decisions affecting sentences....

(Italics added.) RCW 9.94A.010.

This is particularly true when the Legislature expressly enumerates as a mitigating factor the very reason upon which the trial court rested its decision. The trial court's findings were not clearly erroneous, its application of the statutory mitigating factor was substantial and compelling as a matter of law, and its 15-month reduction of the standard range sentence together with imposition of a 24-month period of community custody was not unreasonable.

Respectfully submitted on September 27, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 27, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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