

33642-5-III
COURT OF APPEALS
DIVISION III

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Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

JASON GRAHAM, RESPONDENT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

In support of the the trial court’s exceptional downward departure, the respondent relies on the trial court’s finding that “[t]he court noted that the only offense which yields such a lengthy standard range sentence is murder. Mr. Graham was not charged or convicted of a murder.”¹

Actually, he was convicted of *two* attempted first degree murders in addition to other serious violent offenses. The legislature has determined that one attempted murder is to be scored at 75% of the completed crime. RCW 9.94A.595, formerly RCW 9.94A.410. Any *one* additional serious violent conviction arising from distinct criminal conduct to this attempted crime of murder will *always* yield a sentence longer than would be imposed for a single completed crime of murder by operation of RCW 9.94A.589(1)(b). The trial court’s rationale on this point subjects any operation of RCW 9.94A.589(1)(b) in an attempted murder case to the whim of the sentencing court.

The respondent’s statement that the weapon enhancements “are part and parcel of Mr. Graham’s sentence”² and therefore it is

¹ Respondent cites to CP 246.

² Resp’t Br. at 14.

“disingenuous for the State to claim that his sentence is only ten years”³ avoids the stark reality of the Court’s Conclusion of Law No. 5 that an exceptional sentence of 120 months (ten years) was imposed on each of the attempted first degree murder counts (II & III), each to run concurrently for a total of 120 month or ten years. CP 247. The respondent did not seek a cross-appeal on any finding.

Perhaps the trial court was dissatisfied with the legislative mandate that required it to impose consecutive sentences on the weapon enhancements, for a total of 13 years.⁴ Feasibly to offset this, the trial court imposed a ten-year determinate sentence⁵ on the twelve felony counts, six of which were serious violent offenses. To this end, the trial court imposed an exceptional sentence, departing downward, finding that the operation of the multiple current serious violent offenses scored under the operation of RCW 9.94A.589(1)(b) resulted in a standard range that was clearly excessive. CP 246-47.

However, the trial court’s sentence of 10 years, or 120 months on the attempted murder conviction is less than the 180-240 months standard

³ *Id.*

⁴ *State v. DeSantiago*, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003)

⁵ Excluding the mandatory deadly weapon enhancements which start to run at the end of the determinative sentence.

range applicable to an offender on that offense with an offender score of *zero* - without any current offenses.⁶ Because the standard range increases/decreases are set by the legislature for this crime and other crimes by an algorithmic formula, the 120-month sentence imposed would correspond to an offender score of *negative 10 to negative 12*.

Score	1st Murder		96% Average			Attempted	
	Low	High	Range	% Change	Low/High %	Low	High
9	411	548	137	0.900	0.750	308.25	411
8	370	493	123	0.914	0.751	277.5	369.75
7	338	450	112	0.923	0.751	253.5	337.5
6	312	416	104	0.933	0.750	234	312
5	291	388	97	0.966	0.750	218.25	291
4	281	374	93	0.964	0.751	210.75	280.5
3	271	361	90	0.963	0.751	203.25	270.75
2	261	347	86	0.958	0.752	195.75	260.25
1	250	333	83	0.960	0.751	187.5	249.75
0	240	320	80	0.958	0.750	180	240
-1	230	306	76	0.961	0.752	172.5	229.5
-2	221	294	73	0.959	0.752	165.75	220.5
-3	212	282	70	0.958	0.752	159	211.5
-4	203	270	67	0.961	0.752	152.25	202.5
-5	195	260	65	0.959	0.750	146.25	195
-6	187	249	62	0.963	0.751	140.25	186.75
-7	180	240	60	0.961	0.750	135	180
-8	173	230	57	0.960	0.752	129.75	172.5
-9	166	221	55	0.958	0.751	124.5	165.75
-10	159	212	53	0.962	0.750	119.25	159

⁶ At the top of CP 228, count 3, attempted first degree murder is scored as a *zero* and the resulting sentence range is 180-240 months.

Score	1st Murder		96% Average			Attempted	
	Low	High	Range	% Change	Low/High %	Low	High
-11	153	204	51	0.961	0.750	114.75	153
-12	147	196	49	0.959	0.750	110.25	147
-13	141	188	47	0.957	0.750	105.75	141
-14	135	180	45	0.963	0.750	101.25	135
-15	130	173	43	0.954	0.751	97.5	129.75

It is of import that the sentence imposed by the trial court, based upon the trial court's invocation of the safety valve provision⁷ designed to adjust sentences that become clearly excessive by operation of the multiple offense policy⁸ results in a sentence that is far lower than the sentence would be if the effects of the multiple offense policy were eliminated altogether. For instance, we can eliminate any effect of the operation of .589 by not counting *any* of the current serious violent offenses in the offender score and by eliminating their consecutive sentences altogether. By totally eliminating any effect of .589, the defendant would be left with only one serious violent offense (attempted first degree murder), and an offender score of 7 as follows: 2 points for the prior first degree burglary, two points for the current second degree assault (count 1), one point each for a total of three points for the first degree

⁷ RCW 9.94A.535(1)(g) (allows departure where effects of multiple serious violent offense under .589 result in clearly excessive sentence).

⁸ RCW 9.94A.589(1) & (2) (defines consecutive operation of serious violent offenses, but mitigates them by counting them at zero offender score).

unlawful possession of a firearm (count 9), first degree possession of stolen property (count 11), and taking a motor vehicle (count 12). In other words, if the other serious violent offenses were not counted at all, as if not committed,⁹ Mr. Graham would have a standard range sentence of 253-337 months (75% of 338-450 months), which would be more than double what actually was imposed.

In effect, by *totally eliminating* the effects of RCW 9.94A.589, Mr. Graham would have received a longer sentence than he currently received. The trial court's sentence departure is, therefore, clearly too lenient because the sentence imposed is less than the standard range for a *single* completed serious violent offense. As this Court has stated, "[t]he distorting effect of the multiple offense policy does not justify a sentence below the standard range for a single offense." *State v. Bridges*, 104 Wn. App. 98, 104, 15 P.3d 1047 (2001).¹⁰ The trial court's downward

⁹ Other than for the mandatory weapon enhancements.

¹⁰ In reaching this decision, this Court examined other cases, and, after noting the State's argument, agreed with it as follows:

However, essentially arguing the sentence is "clearly too lenient," the State contends the *Sanchez* reasoning supports an exceptional sentence only if the sentence imposed is at least as great as the standard range for a *single* offense. The State is correct. In *Sanchez*, for example, the sentence imposed was greater than the presumptive sentence for a single delivery. *Sanchez*, 69 Wn. App. at 261,

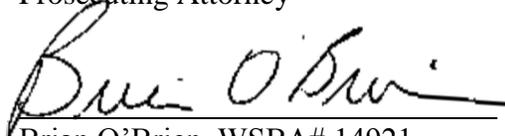
departure in this case relied solely on the safety valve for relief from the consecutive requirements of RCW 9.94A.589. As shown above, the elimination of these effects still results in a longer sentence than the actual sentence imposed. This is unjustified and clearly erroneous. As in *Bridges*, here the sentence is clearly too lenient and an abuse of the sentencing court's discretion.

II. CONCLUSION

For the reasons stated above, this court should reverse the trial court's sentence and remand for further proceedings.

Dated this 17 day of May, 2016.

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848 P.2d 208; *see Fitch*, 78 Wn. App. at 554, 897 P.2d 424 (sentence at minimum of standard range for single offense); *Hortman*, 76 Wn. App. at 458, 886 P.2d 234 (sentence at high end of standard range for single offense).

Bridges, 104 Wn. App. at 104.

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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 17, 2016, I e-mailed a copy of the Reply Brief of Appellant in this matter, pursuant to the parties' agreement, to:

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5/17/2016

(Date)

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(Signature)