

No. 79150-3  
COA No. 34484-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint of Daniel C. Mulholland,

STATE OF WASHINGTON,

Petitioner,

v.

DANIEL C. MULHOLLAND,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Karen Strombom, Judge

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ANSWER TO STATE'S MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF ANSWERING PARTY

Respondent Daniel C. Mulholland (petitioner below), through counsel of record, Nielsen, Broman & Koch, requests the relief stated in part II.

II. RELIEF REQUESTED

Mulholland requests this Court to deny the State's motion for discretionary review. In the alternative, if this Court grants the State's motion, Mulholland respectfully requests this Court to also grant review of the constitutional claims in his personal restraint petition left undecided by the Court of Appeals.

III. FACTS AND GROUNDS FOR RELIEF

On August 23, 2006, the Pierce County Prosecutor filed a "Petition for Review" (hereinafter Motion), seeking review of the Court of Appeals unpublished order (Order) of July 24, 2006. That order granted Mulholland's personal restraint petition and remanded for resentencing. Order at 5. By letter dated September 1, 2006, this Court redesignated the State's "petition" as a "motion for discretionary review" in accordance with RAP 16.14(c).

The State argues review is warranted under RAP 13.4(b)(1) & (4), *i.e.*, because the Court of Appeals order allegedly conflicts with decisions of this Court and allegedly involves an issue of substantial public interest. In accord with this Court's letter of September 1st, however, the applicable

criteria are those under RAP 13.5(b), not RAP 13.4(b). The State's failure to present any basis for review under RAP 13.5(b) warrants denial of the State's motion.

Moreover, the Court of Appeals order does not constitute obvious or probable error, nor a departure from the accepted and usual course of judicial proceedings. Therefore, even if evaluated under the correct RAP 13.5(b) criteria, review is not warranted.

1. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW.

The State initially claims review is warranted because the Court of Appeals applied the incorrect standard of review for personal restraint petitions. Motion at 5-11. According to the State, the Court of Appeals order "is devoid of any relevant authority or analysis of the law applicable to collateral attacks on a judgment. The order reads as if the court was determining the case on direct appeal." Motion at 7. The State is wrong.

In the context of a personal restraint petition, to obtain relief for a constitutional violation the petitioner must demonstrate actual prejudice, and to obtain relief for a non-constitutional error the petitioner must demonstrate a fundamental defect that inherently results in a complete miscarriage of justice. In re Cook, 114 Wn.2d 802, 812-13, 792 P.2d 506 (1990); In re Haverty, 101 Wn.2d 498, 504, 681 P.2d 835 (1984). Although the order granting Mulholland's petition did not expressly set forth these standards, the Court of Appeals applied them.

The language of the order shows the Court of Appeals correctly began by evaluating whether it could resolve Mulholland's claims on statutory grounds rather than addressing the constitutional issues.<sup>1</sup> The order is replete with references to and interpretation of the relevant statutory provisions and the concluding footnote expressly shows the Court of Appeals resolved the issue on statutory rather than constitutional grounds. See Order at 5 n.6 ("This resolution makes it unnecessary to reach Mulholland's equal protection and ineffective assistance of counsel claims"). In other words, the court necessarily found non-constitutional error.

And, although the order does not expressly set forth the fundamental-defect-resulting-in-a-complete-miscarriage-of-justice test, the Court of Appeals necessarily found it was met. The "fundamental defect" was a sentencing at which the trial court applied the incorrect interpretation of the law asserted by the prosecutor. See Order at 3 ("The trial court erred in concluding that it had no discretion to [impose a mitigated exceptional sentences]"); Appendix E to Petition at 4-6

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<sup>1</sup> See Isla Verde Intern. Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 752, 49 P.3d 867 (2002) (It is a "fundamental principle that if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues); State v. Speaks, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992) (although Court of Appeals decided constitutional issue, this court declined to reach constitutional issue where case was resolvable on statutory grounds); Tunstall ex rel. Tunstall v. Bergeson, 141 Wn.2d 201, 210, 5 P.3d 691 (2000) ("Where an issue may be resolved

(prosecutor claims court has no discretion but to order consecutive sentences for the assault convictions). The Court of Appeals found a "complete miscarriage of justice" based on the trial court's comments at sentencing<sup>2</sup> indicating "that it would have considered an exceptional sentence downward had it known such a sentence was lawful[.]" Order at 4.

A complete miscarriage of justice results when a trial court imposes sentence without a correct understanding of the law and when both the court and at least one of the crime victims indicated leniency was justified. See Petition at 5-7 (setting forth relevant sentencing statements of victim Jeannine Tullar and the court); In re the Personal Restraint of Johnson, 131 Wn.2d 558, 568-69, 933 P.2d 1019 (1997) (where sentencing court indicated it intended to impose a low-end standard range sentence, a fundamental defect resulting in a complete miscarriage of justice occurred when the trial court imposed a sentence within the correct standard range, but with an incorrect understanding of what the low-end of the standard range was).

Thus, the unpublished order is fully consistent with the correct legal standards. Therefore, the Court of Appeals did not commit obvious or probable error, nor depart from the accepted and usual course of judicial

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on statutory grounds, the court will avoid deciding the issue on constitutional grounds").

<sup>2</sup> See Order at 3 (setting forth trial court's comments).

proceedings in its legal analysis of Mulholland's petition such that review would be warranted under any of the criteria set forth in RAP 13.5(b). To the contrary, the Court of Appeals acted correctly in granting the petition.

2. THE COURT OF APPEALS CORRECTLY INTERPRETED RCW 9.94A.535 & RCW 9.94A.589.

As it did below, the State argues a trial court has no authority to mitigate a standard range sentence by ordering to run concurrently those sentences that are presumptively consecutive under RCW 9.94A.589(1)(b). Motion at 13-16; State's Response to Personal Restraint Petition at 8-9. Once again, the State is wrong.

First degree assault is a "serious violent offense." RCW 9.94A.030(40)(v).<sup>3</sup> When a standard range sentence is imposed for two or more serious violent offenses, the SRA generally requires those sentences be served consecutively:

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to

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<sup>3</sup> Mulholland's offenses were committed in November, 2001. The sentencing statutes in effect at that time are applicable to the issues raised herein. RCW 9.94A.345. The current version citations are used here, however, as there is no material difference in the relevant provisions from November, 2001 to present.

(a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

RCW 9.94A.589(1)(b).

Where mitigating circumstances exist, however, a court has authority to exercise discretion to depart from the presumptive requirement for consecutive standard range sentences:

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

RCW 9.94A.535 (emphasis added).

RCW 9.94A.535 specifically lists as a "Mitigating Circumstance" that, "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purposes of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g). The plain and unambiguous language of this statute gives the trial court authority to not impose consecutive sentences. State v. Hale, 65 Wn. App. 752, 758, 829 P.2d 802 (1992) (interpreting earlier version of statute); see State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (where a statute is unambiguous its meaning is derived from its language alone).

The State's argument ignores the unambiguous language in RCW 9.94A.535 authorizing departure from the presumptive consecutive sentences under RCW 9.94A.589(1)(b) & (c). The State argues, without citation to authority, that RCW 9.94A.535(1)(g) only authorizes a court to mitigate the sentence *length* for each *individual* offense, and not to run concurrent those sentences that are presumptively consecutive.

As noted in Mulholland's reply below, however, a review of RCW 9.94A.589 reveals that the only mitigation that can arise from application of RCW 9.94A.535(1)(g), is ordering concurrent those sentences that would otherwise be served consecutively (subsections (1)(b) & (c)), or reducing a sentence for which the standard range is made excessive by counting each of several current offenses against each other for scoring purposes (subsection (1)(a)). See State v. Hortman, 76 Wn. App. 454, 463-64, 886 P.2d 234 (1994), review denied, 126 Wn.2d 1025, 896 P.2d 64 (1995); State v. Sanchez, 69 Wn. App. 255, 260-62, 848 P.2d 208, review denied, 122 Wn.2d 1007, 859 P.2d 604 (1993). The State's interpretation simply makes no sense, and is not grounded in authority or reason.

Moreover, if there are mitigating circumstances, the court may, in addition to ordering concurrent sentences, impose terms of incarceration for each individual offense below the standard ranges. RCW 9.94A.535; Hale, 65 Wn. App. at 758; but see State v. Flett, 98 Wn. App. 799, 806-07, 992 P.2d 1028 (2000) (sentences for multiple counts of first degree assault must be consecutive).<sup>4</sup> Thus, if the court finds mitigating circumstances as to any or all Mulholland's offenses, it may impose exceptional sentences below the standard range, provided that for the assaults, the sentences may not be less than 60-months each. RCW 9.94A.540(1)(b) (requiring 5-year minimum sentence for first degree assault).

The State has failed to articulate a basis for why this Court should grant review of the well-reasoned and logical interpretation of the interplay between RCW 9.94A.535 and RCW 9.94A.589(1)(b) by the Court of Appeals. There being no obvious error, probable error, or departure from the accepted and usual course of judicial proceedings, review should be denied.

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<sup>4</sup> The inapplicability of Flett to Mulholland's situation is discussed in detail in his petition at 12-16.

3. IN RE GRISBY<sup>5</sup> DOES NOT APPLY.

The State argues that under Grisby, Mulholland's petition should have been denied because even if the trial court imposed the minimum sentence for each count of assault, Mulholland's sentence would still be 600 months (50 years). The State speculates that given his age (55 at sentencing), there is virtually no possibility he will survive such a sentence. Motion at 11-13. This argument is based on the State's misinterpretation of the relevant sentencing statutes discussed above. When properly interpreted, it is clear Mulholland could received a mitigated exceptional sentence as low as 420 months (35 years), i.e., 5-year concurrent mitigated sentenced for each offense, served consecutively to six consecutive 5-year firearm enhancements. Even without earned early release, this sentence does not exceed Mulholland's potential lifetime.

Furthermore, this Court has expressly recognized that an erroneously imposed sentence is a fundamental defect that results in a complete miscarriage of justice. See e.g., Johnson, 131 Wn.2d at 568-69; In re the Personal Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005). This Court has never looked to lifespan actuarial tables to guess whether an offender may not outlive a lengthy sentence. The State has given this Court no good reason to start now.

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<sup>5</sup> 121 Wn.2d 419, 853 P.2d 901 (1993).

4. IF THIS COURT GRANTS THE STATE'S MOTION, IT SHOULD ALSO GRANT REVIEW OF THE CONSTITUTIONAL CLAIMS LEFT UNADDRESSED BY THE COURT OF APPEALS.

Having decided Mulholland's petition based on non-constitutional error, the Court of Appeals did not address the constitutional claims. Order at 5, n.6. If this Court finds reason to grant the State's motion for discretionary review, the constitutional claims should be addressed. These claims, as set forth in the petition and reply filed below, and incorporated herein by reference, warrant remand for resentencing. Petition at 9-21; Reply at 1-10. Therefore, Mulholland respectfully requests that if this Court grants the State's motion, it should also review his constitutional claims. RAP 13.7(b); State v. Korum, \_\_\_ Wn.2d \_\_\_, 141 P.3d 13, 27 (2006).

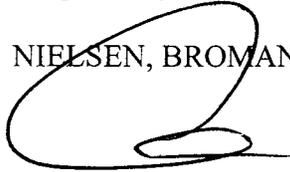
IV. CONCLUSION

The State's motion for discretionary review should be denied. If this Court grant's the State's motion, however, it should also accept review of Mulholland's constitutional claims.

DATED THIS 27~~th~~ day of September, 2006.

Respectfully submitted,

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