

No. 86018-1

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SUPREME COURT  
STATE OF WASHINGTON  
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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LOWELL FINSTAD, Petitioner Pro Se

v.

WASHINGTON STATE, Respondent.

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FROM THE COURT OF APPEALS, DIVISION II - No. 41877-1-II  
CLARK COUNTY SUPERIOR COURT CAUSE No. 06-1-01137-6,  
06-1-02072-3, 07-1-00611-7, 07-1-01996-1

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REPLY FOR ANSWER FOR DISCRETIONARY REVIEW

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Lowell Finstad  
Larch Correction Center  
15314 NE Dale Valley RD  
Yacolt W.A 98675-9531

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I. IDENTITY OF PETITIONER

Lowell Finstad, Petitioner Pro Se files this Reply to the Answer filed by the State's attorney to his petition for Discretionary Review filed under Supreme Court Case Number 86018-1. This Reply is made in good faith and is based upon the facts and circumstances surrounding this case and the laws of this State.

II. FACTS RELEVANT TO REPLY

On November 9, 2007 Mr. Finstad plead guilty to possession of a Controlled Substance, with Intent to Deliver Meth; and Possession of a Controlled Substance, with Intent to Deliver Cocaine, under Cause No. 06-1-01137-6 (Appendix A attached to Petitioner's Motion for Discretionary Review); Delivery of a Controlled Substance, Meth, under Cause Number 06-1-02072-3 (Appendix B attached to Petitioner's Motion for Discretionary Review); Witness Intimidation, under Cause Number 07-1-00611-7 (Appendix C attached to Petitioner's Motion for Discretionary Review); and Attempted Arson in the First Degree, under Cause Number 07-1-1996-1 (Appendix D attached to Petitioner's Motion for Discretionary Review)

Included within this global plea agreement, was a stipulation that the time Mr. Finstad received following a jury trial under cause number 06-1-01073-6 (Appendix E attached to Petitioner's Motion for Discretionary Review) would run consecutive to cause numbers 06-1-1137-6 and 06-1-02072-3. (See Appendixes A and B attached to Petitioner's Motion for Discretionary Review) Mr. Finstad does not assign error to this portion of the consecutive sentence.

On November 14, 2007 Mr. Finstad was sentenced under each respective cause number, broke down as follows:

1. Cause Number 06-1-01137-6, forty months on each count ordered to run concurrent to each other, but consecutive with Cause Number(s) 06-1-02072-3 and 06-01073-6 (Appendix E attached to Petitioner's Motion for Discretionary Review)
2. Cause Number 06-1-02072-3, forty months, ordered to run concurrent with 07-1-00611-7 and 07-1-01996-1, but consecutive to 06-1-01137-6 and 06-1-01073-6 (Appendix F attached to Petitioner's Motion for Discretionary Review)
3. Cause Number 07-1-00611-7, forty months, ordered to run concurrent with all incorporated cause numbers, including cause number 06-1-01073-6 (Appendix G attached to Petitioner's Motion for Discretionary Review)
4. Cause Number 07-1-01996-1, thirty-six months, ordered concurrent with all incorporated cause numbers, including cause number 06-1-01073-6 (Appendix H attached to Petitioner's Motion for Discretionary Review)

Mr. Finstad's plea agreement resulted in the improper imposition of consecutive terms of confinement under cause numbers 06-1-00137-6 and 06-1-02072-3. The only appropriate and lawful consecutive portion of this global agreement was regarding cause number 06-1-01073-6, being ordered consecutive to 06-1-00137-6 and 06-1-02072-3.

### III. ARGUMENT

In the State's response, they concede two points. First, that Mr. Finstad's instant petition is not time barred. Secondly, that Mr. Finstad's motion for discretionary review should be granted, albeit for a different purpose than that requested by Mr. Finstad.

Following these concessions, the State argues two points. First, it is argued that "The defendant is not entitled to relief because the judgment and sentence did not constitute a fundamental defect that resulted in a complete miscarriage of justice." Secondly, it was argued that "The defendant's cases should be remanded to the sentencing court for entry of findings in support of an exceptional sentence."

Both arguments fail under relevant law.

The state seems to base its position on a misreading of the facts in In re Breedlove, 138 Wn.2d 298, 979 P.2d 417 (1999). At page 11 of the State's answer they state:

In Breedlove, pursuant to a plea agreement, the State agreed to allow the defendant to plead guilty to reduced charges in exchange for the sentences on each count being served consecutively. Breedlove, 138 Wn.2d at 301-02. At sentencing, the parties advised the court the defendant was pleading to the statutory maximum on each current offense and that each offense would be served consecutively. The sentencing court ordered this sentence; however, it did not make findings that it was ordering an exceptional sentence. Breedlove, at 302. In a subsequent Personal Restraint Petition, the defendant did not challenge the validity of his plea and he did not seek to withdraw his plea. Further, the defendant did not allege he did not understand the terms or consequences of his plea. Breedlove, at 304. Rather, the defendant claimed he should be resentenced to concurrent sentences because an exceptional sentence based solely on the stipulation of the parties was not statutorily authorized. Id.

By the use of the above artful language, the State is able to imply that the facts found in Breedlove are identical to those found in Mr. Finstad's case. That however is not the case. As pointed out by this Court, the facts surrounding Breedlove's plea were as follows:

Before the second trial, the State offered to settle the criminal action. Breedlove, acting pro se but with standby counsel available, agreed. Under the terms of the settlement, Breedlove agreed to plead guilty to reduced charges of (1) first degree manslaughter for the death of Atkins; (2) unlawful imprisonment of the teenager he forced to stay during the killing of Atkins; and (3) third degree assault of the second teen who escaped when he chased her. As part of the plea agreement, Breedlove stipulated to an exceptional sentence. Breedlove's Stipulation to Exceptional Sentence provides, in pertinent part:

5. The defendant is willing to stipulate to an exceptional sentence consisting of the statutory maximum sentences for each count, and that the sentences shall run consecutively, for a total sentence of twenty years.
6. The basis for the exceptional sentence is that it is part of the settlement of this case, and that the defendant, by stipulating to this sentence is thereby avoiding the substantial risk of conviction and a sentence to a greater term of confinement.
7. The defendant acknowledges that an agreement to an

exceptional sentence is not one of the enumerated illustrative bases for an exceptional sentence as found in RCW 9.94A.390. However, the defendant acknowledges that under In re Barr, 102 Wash.2d 265, 684 P.2d 712 (1984), and State v. Hilyard, 63 Wash.App. 413, 819 P.2d 809 (1991), he may settle his case under certain terms and conditions, including a stipulated exceptional sentence, provided this is acceptable to the Court; even if the facts and standard sentence associated with the amended charges would not ordinarily be the same as what is being agreed to in his case.

8. The defendant is willing to enter into the stipulated sentencing agreement described herein in part because he believes and understands that a twenty year sentence would be the maximum allowable sentence under law. The State of Washington likewise acknowledges and agrees that a twenty year sentence would be the maximum allowable sentence under law for the offenses.

Breedlove, 979 P.2d 417, 420-21, 138 Wash.2d 298 (1999). There was no such stipulation in the present case. In fact, nowhere within any of the Plea Agreements which Mr. Finstad entered into, can the State point to anything therein which would support a finding that an exceptional sentence was stipulated to, other than the fact that the sentence imposed would only be lawful if imposed under the conditions of an exceptional sentence provided under RCW 9.94A.535.

The law in this state is clear, and this "court has often reaffirmed that a sentence in excess of statutory authority is subject to challenge, and the defendant is entitled to be resentenced. For example, in In re Pers. Restraint of Carle, 93 Wash.2d 31, 604 P.2d 1293 (1980) the defendant pleaded guilty to first degree armed robbery while armed with a deadly weapon, and his sentence included a deadly weapon enhancement. Subsequent to defendant's sentencing, this court held in another case that the deadly weapon enhancement was not applicable in the same circumstances. The court concluded in Carle that the trial court had accordingly imposed an erroneous, and that "[w]hen a sentence has been imposed for which there is no authority in law, the trial court has

the power and duty to correct the erroneous sentence, when the error is discovered." Carle, 93 Wash.2d at 33, 604 P.2d 1293 (emphasis omitted) (quoting McNutt v. Delmore, 47 Wash.2d 563, 565, 288 P.2d 848 (1955), overruled in part on other grounds by State v. Sampson, 82 Wash.2d 663, 513 P.2d 60 (1973); see also State v. Palmer, 73 Wash.2d 462, 475, 438 P.2d 876 (1968). The court held that under this rule the petitioner was entitled to relief under RAP 16.4, and the matter was remanded for resentencing. Carle, 93 Wash.2d at 34, 604 P.2d 1293. The court observed, however, that its holding did not effect the finality of the portion of the judgment and sentence that was correct and valid when sentence was imposed. Id. at 34, 604 P.2d 1293.

The same rule has been applied in cases involving negotiated plea agreements, and this court has consistently rejected arguments that a defendant must be held to the consequences of a plea agreement to an excessive sentence. For example, in the same year Carle was decided, the court also decided In re Personal Restraint of Gardner, 94 Wash.2d 504, 617 P.2d 1001 (1980). There pursuant to a negotiated plea bargain the defendant pleaded guilty to first degree possession of stolen property and second degree burglary, and the prosecution dropped additional burglary charges. The court imposed a sentence including restitution for victims of the uncharged crimes, although the relevant statute then allowed for restitution only for victims of crimes of which the defendant was convicted. This court remanded the matter for imposition of restitution in accord with the statutory authority. Importantly, the court rejected the State's argument that the restitution that had been imposed was a result of a plea agreement and therefore should be enforced. The court said, "a plea bargaining agreement cannot

exceed the statutory authority given to the courts. Gardner, 94 Wash.2d at 507, 617 P.2d 1001.

Based on the above citations, as well as many others, this court in In Re Goodwin, surmised as follows:

We take this opportunity to clarify the law. In keeping with long-established precedent, we adhere to the principles that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based upon a miscalculated offender score (miscalculated upward), and that a defendant cannot agree to punishment in excess of that which the Legislature has established.

In this case, while Mr. Finstad did stipulate that cause numbers 06-1-1137-6 and 06-1-02072-3 would run consecutive to each other and to 06-1-01073-6, he did not stipulate to the imposition of an exceptional sentence, nor did he stipulate to facts in support of the imposition of an exceptional sentence. Thus, under RCW 9.94A.589 (1)(a), cause numbers 06-1-1137-6 and 06-1-02072-3 must run concurrent with each other.

As demonstrated above, this court has repeatedly held that 'an individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law. In re Pers. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004); see also Goodwin, 146 Wn.2d at 870, (a plea bargaining agreement cannot exceed the statutory authority given to the courts) (quoting In re Pers. Restraint of Gardner, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980)).

A defendant simply 'cannot empower a sentencing court to exceed its statutory authorization.' State v. Eilts, 94 Wn.2d 489, 495-95, 617 P.2d 993 (1980). Thus, the fact that a defendant agreed to a particular sentence does not cure a facial defect in the judgment and sentence where the sentencing court acted outside its authority.

In this case, the sentencing court was bound by RCW 9.94A.589,

which provides in pertinent part:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score; PROVIDED that if the Court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.

The Sentencing court in Mr. Finstad's case did not invoke the provisions of RCW 9.94A.535, nor did Mr. Finstad stipulate the the invocation thereof.

True, nothing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, the state is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding. See Apprendi, 530 U.S. at 488, 120 S.Ct. 2348; Duncan v. Louisiana, 391 U.S. 145, 158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). If, and only if appropriate waivers are procured, states may continue to offer judicial fact finding as a matter of course to all defendants who plead guilty. This however did not occur. Mr. Finstad did not stipulate to the imposition of an exceptional sentence; what he did do was erroneously stipulate to the imposition of an unlawful sentence, something he does not have the power to do. See again In re Pers. Restraint of Hinton, 152 Wn.2d at 861, 100 P.3d 801 (2004).

#### IV. CONCLUSION

As the facts in Mr. Finstad's case are different than those in Breedlove's, in as much as Mr. Finstad did not stipulate to the imposition of an exceptional sentence, which was the case in Breedlove,

this court is requested to remand this matter back to the sentencing court with explicit instructions to resentence Mr. Finstad to concurrent terms under both 06-1-1137-6 and 06-1-02072-3 in accordance with RCW 9.94A.589(1)(a).

Respectfully Submitted this 10<sup>th</sup> day of October, 2011

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