

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 24, 2014, 4:04 pm
BY RONALD R. CARPENTER
CLERK

89869-3

E CRF
RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON A. GRAHAM,

Petitioner.

SUPPLEMENTAL BRIEF

STEVEN J. TUCKER
Prosecuting Attorney
Spokane County

Andrew J. Metts
Deputy Prosecuting Attorney

Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

 ORIGINAL

INDEX

I. IDENTITY OF RESPONDENT 1

II. COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW..... 1

IV. STATEMENT OF THE CASE 2

V. ARGUMENT..... 2

VI. CONCLUSION..... 11

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE MULHOLLAND, 161 Wn.2d 322,
166 P.3d 677 (2007)..... 6

IN RE TAYLOR, 105 Wn.2d 67,
711 P.2d 345 (1985), *rev. denied*,
160 Wn.2d 1022 (2007)..... 8

SNOW'S MOBILE HOMES, INC. V. MORGAN, 80 Wn.2d 283
494 P.2d 216 (1972)..... 9

STATE V. ARMENDARIZ, 160 Wn.2d 106,
156 P.3d 201 (2007)..... 10

STATE V. CREEKMORE, 55 Wn. App. 852,
783 P.2d 1068 (1989)..... 4

STATE V. GRAHAM, 178 Wn. App. 580,
314 P.3d 1148 (2013)..... 1, 2, 9

STATE V. HALSEY, 140 Wn. App. 313,
165 P.3d 409 (2007)..... 4

STATE V. J.P., 149 Wn.2d 444,
69 P.3d 318 (2003)..... 10

STATE V. OXBORROW, 106 Wn.2d 525,
723 P.2d 1123 (1986)..... 4

STATE V. PASCAL, 108 Wn.2d 125,
736 P.2d 1065 (1987)..... 4

STATE V. ROSS, 71 Wn. App. 556,
861 P.2d 473, 883 P.2d 329 (1993) 4, 11

STATUTES

RCW 9.94A.535 2, 5, 7

RCW 9.94A.535(1)(g).....	4, 6
RCW 9.94A.589(1)(a).....	2, 6, 7, 8, 10
RCW 9.94A.589(1)(b).....	2, 5, 6, 8, 9, 10
RCW 9.94A.535(1)(g).....	5

OTHER AUTHORITIES

DAVID BOERNER, <i>Sentencing in Washington</i> (1985)	9
---	---

I. IDENTITY OF RESPONDENT

Respondent State of Washington asks this court to deny petitioner's motion for review and affirm the decision of the Court of Appeals, Division III.

II. COURT OF APPEALS DECISION

The decision in question is that of the Court of Appeals in *State v. Graham*, 178 Wn. App. 580, 314 P.3d 1148 (2013).

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly decide that the mitigating factor of the "multiple offense policy" as set forth in RCW 9.94A.589(1)(a) and RCW 9.94A.535(1) cannot be applied to the sentencing of "serious violent" crimes under RCW 9.94A.589(1)(b)?
2. Can RCW 9.94A.589(1)(b) be modified by this Court consistent with the rules of statutory construction as put forth by this Court, the plain language of the statute, and the clear legislative intent of the statute?
3. The defendant asked for relief in the form of a ruling from this court regarding the standard that should govern the application of the "multiple offense policy." Is there a

need to define a standard for application of RCW 9.94A.535(1)(g) when this factor does not apply in RCW 9.94A.589(1)(b), the statute used to sentence the defendant?

IV. STATEMENT OF THE CASE

The facts of this case are set forth in the Court of Appeals decision at *State v. Graham*, 178 Wn. App. at 583-86.

V. ARGUMENT

The defendant asks this court to reverse the decision of the Court of Appeals. The Court of Appeals decision was, in turn, based on a decision of the resentencing court following hearing on June 22, 2012.¹ At the June resentencing hearing the defense stated, “[t]he exceptional sentence we’re asking for is 25 years, two and a half times the sentence he’s served thus far. RP 7-8. The defendant asked for an exceptional sentence under the “multiple offense policy” of RCW 9.94A.589(1)(a) despite the fact that he was sentenced under RCW 9.94A.589(1)(b). The request was denied by the resentencing court and also by the Court of Appeals. In order for the defendant’s arguments to function, RCW 9.94A.535 must be transplanted from RCW 9.94A.589(1)(a) to RCW 9.94A.589(1)(b).

¹ All citations to the VRP from that hearing will be designated “RP #.”

Before exploring the statutory ramifications of the defendant's arguments, it should be noted that the defendant points to RCW 9.94A.535(1)(g) and presumes the standard range sentence is "clearly excessive." The defendant notes in his briefs that only he was injured in the melee, the shots the defendant aimed at the police officers missed. It would appear that the defendant wishes a lesser sentence based on the fact that he did not hit any police officers. There is nothing in the transcript that indicates a lack of intent on the part of the defendant. Certainly the actual facts of the case are not so "soft" as framed by the defendant. The defendant used an AK-47 rifle to fire at police officers multiple times. RP 13. These do not constitute substantial and compelling reasons for an exceptional sentence.

It is true that at the resentencing hearing, the defendant was able to amass a number of letters from various sources attesting to his large improvement in attitude and progress in various programs.

The Legislature has stated that the SRA was designed to promote several significant interests, including protection of the public, the need for rehabilitation, and the need to make frugal use of State resources. See RCW 9.94A.010(4), (5), (6). The presumptive sentence ranges established for each crime represent the legislative judgment as to how these interests shall best be accommodated. See D. Boerner, § 2.5(b), (c), (d). The trial court's subjective determination that these ranges are unwise, or that they do not adequately

advance the above goals, is not a substantial and compelling reason justifying a departure.

State v. Pascal, 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987).

The defendant takes the position that through the use of RCW 9.94A.535(1)(g), he can show that the standard range sentence is clearly excessive. What the defendant has left out of his arguments is some sort of proof that the standard range sentence is, in fact, excessive. *State v. Halsey*, 140 Wn. App. 313, 325, 165 P.3d 409 (2007) (quoting *State v. Creekmore*, 55 Wn. App. 852, 864, 783 P.2d 1068 (1989)).

A clearly excessive sentence is one that is exercised on untenable grounds or untenable reasons, or is an action that no reasonable person would have taken. *State v. Ross*, 71 Wn. App. 556, 571, 861 P.2d 473, 883 P.2d 329 (1993) (quoting *State v. Oxborrow*, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986)).

The defendant has not presented his reasons why his standard range sentence is “clearly excessive.” When given a chance to speak at the resentencing hearing, the defense pointed out that there were a number of persons present, including at least two grandmothers, various cousins and multiple letters written in support of the defendant. The defense made it quite clear that it felt that the standard range sentence was excessive in light of the defendant’s current situation. RP 6-8. At no point, did the defendant

present argument on the precise legal question of “clearly excessive.” Since the defendant chooses not to show his reasoning on a “clearly excessive sentence” as outlined in *State v. Ross*, *supra*, it may be assumed that he has no argument to make. The defendant must show that the decision to impose a standard range sentence was an action that no reasonable person would have taken. In fact, the sentencing court here *did* make the decision to impose the standard sentencing range. The defendant has made no showing that other courts, faced with similar situations have found the standard range to be “clearly excessive.”

The defendant is seeking to have this court hold that the “Multiple Offense Policy” mitigating factor from RCW 9.94A.535(1)(g) applies to sentences under RCW 9.94A.589(1)(b). The defendant does not explain how he can arrive at his desired sentence of 25 years, even if he prevails on his statutory arguments. The functioning of RCW 9.94A.535(1)(g) when applied in RCW 9.94A.589(1)(a) is to permit consecutive sentences in an otherwise concurrent mandate. The language of RCW 9.94A.535 states: “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).”

So, even if this court were to agree with the defendant and apply RCW 9.94A.535(1)(g) to the defendant's RCW 9.94A.589(1)(b) sentence, *and* assuming the next resentencing court were to find that the standard range sentence was "clearly excessive," the defendant could theoretically ask that his serious violent offenses be run concurrently. Even if a new resentencing court chooses to run the defendant's multiple "serious violent" offenses concurrently, the defendant *still* could not reach his desired 25 year sentence. Something else would have to intervene in order to get the defendant's sentence down to 25 years. The defendant is *actually* seeking the ability to argue a "clearly excessive sentence" that would allow the sentencing court to bypass the mandatory consecutive sentencing provisions of RCW 9.94A.589(1)(b). The defendant actually seeks the ability to pursue an unfettered exceptional sentence. The defendant desires an exceptional sentence in which he can attempt to use other factors to create his arguments.

The defendant relies heavily on *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007) as a basis for his arguments regarding applying RCW 9.94A.535(1)(g) to RCW 9.94A.589. It is important to distinguish the holding in *Mulholland* from the arguments proposed by the defendant. The defendant would have this Court hold that the mitigating factor of "clearly excessive" from RCW 9.94A.535(1)(g) applies equally to both RCW 9.94A.589(1)(a) and RCW 9.94A.589(1)(b). *Mulholland* agrees with

the defendant on that point. However, the holding in *Mulholland* applies to *consecutive or concurrent* sentences. The defendant asks this court (both directly by mentioning his 25 year request to the trial court and inferentially by not mentioning what he means by “exceptional sentence”) for approval of a wholesale abandonment of the sentencing structure of RCW 9.94A.589(1)(b).

This Court’s holding in *Mulholland* is deeply flawed. In the beginning of the *Mulholland* decision, this Court stated: “The question with which we are confronted is whether, *notwithstanding the language of this statute*, a sentencing court may order that multiple sentences for serious violent offenses run concurrently as an exceptional sentence if it finds there are mitigating factors justifying such a sentence. *Mulholland*, 161 Wn.2d at 327-28 (emphasis added). The State respectfully submits that this Court decided at the outset that the Legislature’s provisions in the SRA were going to be ignored.

Further, this Court undertook to take a provision from RCW 9.94A.589(1)(a), *i.e.* the inclusion of RCW 9.94A.535, and place that provision into a completely separate statute, RCW 9.94A.589(1)(b). Despite this Court’s positions that both RCW 9.94A.589(1)(a) and (b) are essentially the same thing, they are not. The plain language of RCW 9.94A.589(1)(a) specifically deals with general crimes in an offender score and

provides a presumption that multiple crimes will run concurrently. RCW 9.94A.589(1)(a). RCW 9.94A.589(1)(b) specifically contains plain language that addresses sentencing of the narrow category of serious violent offenses. RCW 9.94A.589(1)(b).

By applying the provision of RCW 9.94A.589(1)(a) regarding exceptional sentences (RCW 9.94A.535) to RCW 9.94A.589(1)(b), this Court violated the well known rule of statutory construction that a specific statute controls over the general statute. A specific statute prevails over a general statute where the two statutes are concurrent. *In re Taylor*, 105 Wn.2d 67, 70, 711 P.2d 345 (1985), *rev. denied*, 160 Wn.2d 1022 (2007). The State maintains the two statutes in question are *not* concurrent, so the statutory rule would not apply. However, the Court in *Mulholland* did treat the statutes as concurrent. It cannot be both, either RCW 9.94A.589(1)(a) and (b) are not concurrent and therefore clearly different statutes, or they are concurrent and the *Mullholland* Court erred in having a general statute prevail over a specific statute. In either case, the *Mullholland* decision was flawed.

Also, the opinion in *Mulholland*, for all intents and purposes, told the legislature that it does not know how to draft a sentencing statute. The plain language of RCW 9.94A.589(1)(b) shows a legislative intent to punish serious violent crimes more severely than other crimes. The *Mulholland*

decision effectively “guts” RCW 9.94A.589(1)(b). Under *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 288, 494 P.2d 216 (1972) courts must interpret statutes so that “no portion ... is superfluous, void, or insignificant”. RCW 9.94A.589(1)(b) calls for consecutive sentences. The *Mulholland* Court pulled the mandatory consecutive sentence language and rendered it “superfluous, void, or insignificant.”

Division III, Court of Appeals noted that Professor David Boerner states that “In particular, the addition by the Legislature of special provisions governing multiple ‘serious violent’ crimes is clear evidence of its belief that just punishment for such offenders required significant terms of confinement.” David Boerner, *Sentencing in Washington*, 9-32 (1985).

Certainly the operation of RCW 9.94A.589(1)(a) and (b) are completely different. The State maintains that this premise is unassailable. In its opinion in this case, Division III holds that the “...trade-off in RCW 9.94A.589(1)(a) is nonexistent when sentencing serious violent offenses under RCW 9.94A.589(1)(b).” *State v. Graham*, 178 Wn. App. at 589.

The errors appearing in *Mulholland* apply to the arguments made by the defendant in this case. RCW 9.94A.589(1)(b) specifically instructs the sentencing court to run the defendant’s “serious violent” offenses consecutively. There are no “escape clauses” in the plain language of the

statute. The defendant wishes this court to ignore the plain language of the statute as written by the legislature by grafting some of the language from RCW 9.94A.589(1)(a) into (1)(b). The legislature clearly was aware of the use of RCW 9.94A.535. The legislature included the use of RCW 9.94A.535 in RCW 9.94A.589(1)(a). One paragraph later, the legislature specifically wrote a statute to ensure the “serious violent” offenses would be sentenced consecutively *without* an ability to declare an exceptional sentence.

This Court will violate its own opinion in *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) if it thwarts the intent of the legislature. This Court held in *State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201 (2007), “...that the goal of statutory interpretation is to *discern and implement the legislature's intent.*” *Armendariz, supra* at 110 (emphasis added). “In interpreting a statute, this court looks first to its plain language. *State v. Armendariz, supra* (citing *J.P. supra*). “If the plain language of the statute is unambiguous, then this court's inquiry is at an end.” *Id.* The statute is to be enforced in accordance with its plain meaning.” *Id.* RCW 9.94A.589(1)(b) contains no ambiguities. The legislative purpose of the statute is plain. If this Court continues to allow exceptional sentences when a defendant is being sentenced under RCW 9.94A.589(1)(b) this Court will be violating its own rules and failing to follow clear legislative intent.

The defendant has not explained how his sentence was "clearly excessive" except for arguments regarding how the current sentence affects him personally and how he has improved himself while in prison. The defendant does not discuss how the police officers must have felt when the defendant "cut loose" with an AK-47. The defendant fails to put forth legal arguments following the rules as stated in *Ross, supra*. The State maintains that the defendant cannot reach his goal of a 25 year sentence without even more generous interpretations of the defendant's arguments than are warranted.

VI. CONCLUSION

The State respectfully requests that this court deny the defendant's request to allow a new sentencing court to declare an exceptional downward departure sentence based solely on a claim of "clearly excessive" pertaining to his current sentence.

Dated this 23rd day of June, 2014.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578

Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) No. 89869-3
 v.)
) CERTIFICATE OF MAILING
 JASON A. GRAHAM,)
)
 Petitioner,)

CERTIFICATE

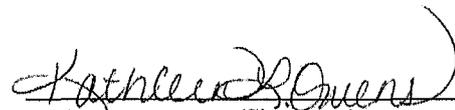
I certify under penalty of perjury under the laws of the State of Washington, that on June 24, 2014, I mailed a copy of the State's Supplemental Brief in this matter, addressed to:

Steven Witchley
Attorney at Law
705 - 2nd Ave, Ste 401
Seattle, WA 98104

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

6/24/2014
(Date)

Spokane, WA
(Place)


(Signature)

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, June 24, 2014 4:04 PM
To: 'Owens, Kathleen'
Subject: RE: Graham 89869-3

Rec'd 6-24-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Owens, Kathleen [mailto:KOWens@spokanecounty.org]
Sent: Tuesday, June 24, 2014 4:01 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Graham 89869-3

Attached is the State's Supplemental Brief regarding Jason Graham #89869-3 with service.

Kathleen Owens, Legal Assistant
for Mark E. Lindsey
Sr. Deputy Prosecutor
for Spokane County