

COA No. 64054-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

EDUARDO HALL

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Catherine Shaffer

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Following the 22-year-old defendant's trial on a charge of third degree rape of a child by having sexual intercourse with a complainant who was 15 years old, the trial court abused its discretion in refusing to find the offenses were the same criminal conduct.

2. The trial court abused its discretion at sentencing in failing to properly consider the defendant's request for an exceptional sentence below the standard range.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Multiple concurrent offenses must be counted as a single offense in the defendant's offender score where the offenses constitute the same criminal conduct. Offenses are the same criminal conduct where they are committed against the same victim, occurred at the same time, and shared the same intent. Where proof of many more acts than required was submitted to prove the four counts, the offenses involved the same victim, involved the same intent, and the State failed by special verdicts to prove the acts of intercourse chosen by the jury occurred at different times, did the trial court abuse its discretion in refusing to

find the offenses were the same criminal conduct?

2. Where the defendant requests consideration of an exceptional sentence below the standard range, the trial court must exercise discretion, and must accurately consider the defendant's arguments in relation to the existing law. Where the existence of a "failed defense" at trial is a recognized basis for an exceptional sentence, did the trial court abuse its discretion by rejecting the request for an exceptional sentence on this ground, under the reasoning that every guilty verdict necessarily involves a "failed defense"?

C. STATEMENT OF THE CASE

Eddie Hall, age 22, first became introduced to B.G. (his girlfriend for a time and the mother of his now adopted child) when the two began communicating "on line" with other friends via the MySpace website. 6/16/09RP at 97-99. B.G.'s parents, particularly her father, had imposed strict rules on B.G. with regard to who she was permitted to associate with, and in particular whether she could have a boyfriend at her age (she could not). 6/16/09RP at 14-17. According to B.G.'s mother, however, B.G. was "on it [MySpace] all the time." 6/16/09RP at 75.

Eddie and B.G. met in person, entered into a relationship, and ultimately engaged in digital and penile intercourse on multiple occasions during a period of time intervening between July 1, 2006, and February 4, 2007. 6/16/09RP at 108-10, 123-26. According to the testimony of the complainant and Mr. Hall, the two engaged in digital-vaginal contact amounting to intercourse in July of 2006; however, B.G. stated primarily that she and the defendant regularly “started having sex in December [2006].” 6/16/09RP at 124.

After B.G. realized she was pregnant, she told her parents that she had dated and slept with Eddie, that he was the father of the child, and she claimed that Eddie knew her age had been 15 at that time. 6/16/09RP at 11-19. Mr. G. confronted Eddie, who revealed that he believed and had always believed B.G. was 18 years old, based on her representations. 6/16/09RP at 17-22. Mr. G. admitted he could not say that the defendant knew his daughter was underage. 6/16/09RP at 35. B.G. also admitted that, as Mr. Hall testified, it could have been she who initiated the online meeting with Eddie, by sending him a “friend request” on the MySpace website. 6/16/09RP at 164. B.G.’s online identity, which she used in her MySpace account and also other online social sites

such as the Yahoo website, was "PIMPETTE." 6/16/09RP at 167.

Mr. G. also called the police, and Eddie was ultimately charged with two, then later four counts of intercourse with a person of B.G.'s age pursuant to RCW 9A.44.079.¹ 6/16/09RP at 19-21; CP 36-38. The defense investigator explained at trial that extensive efforts were launched to retrieve the electronic records that would serve as proof that B.G. listed her age as 18, but the MySpace internet company indicated it destroys such records after approximately one year. 6/17/09RP at 88-91.

Mr. Hall explained all the circumstances that actually and reasonably led him to never doubt that B.G. was anything other than the age of 18 that he said she represented herself to be on the MySpace website. 6/17/09RP at 107. B.G. occasionally drove to meet him at Seattle Central Community College, where she was taking classes. 6/17/09RP at 115. She specifically told Eddie that

¹The offense of rape of a child in the third degree under RCW 9A.44.079 is defined as follows:

A person commits the crime of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the person.

RCW 9A.44.079.

she was 18. 6/17/09RP at 106-09. B.G. herself admitted in her testimony that she was taking college classes, and also revealed that she had driven to meet Mr. Hall, illegally, using her Learner's Permit when she was 15 and was supposed to only drive with a licensed adult. 6/17/09RP at 209-11.

For trial, the State added a special allegation to the final amended information, alleging that the defendant had impregnated B.G., see RCW 9.94A.535(3)(1), warranting the presentation of trial witnesses who testified about "DNA" and various other procedures that scientifically proved that the defendant had necessarily engaged in intercourse with B.G. 6/17/09RP at 78-89 (testimony of forensic scientist Amy Smith). This was a matter that was never in dispute. At sentencing, however, after regaling the jury at trial with the account of the defendant causing a minor to become pregnant, see 6/18/09RP at 46 ("he knew darn well that she was pregnant with her child"), the State decided not to request additional incarceration based on the special verdict after all, since the quadrupling of the charged counts resulted in offender scoring that required standard terms of 60 months, already the statutory maximum. 7/24/09RP at 3; see also RCW 9.94A.525(16).

At sentencing, the court denied the defense motion to score the counts as the same criminal conduct. 7/24/09RP at 10-11, 38.

Mr. Hall also requested an exceptional sentence below the standard range, in part based on the fact of his failed defense of reasonable belief as to the complainant's age. 7/24/09RP at 10. The trial court denied the request, reasoning that every criminal case involves a failed defense. 7/24/09RP at 24.

Mr. Hall appeals. CP 94-95.

D. ARGUMENT

1. THE COURT ABUSED ITS DISCRETION IN FAILING TO FIND THE OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT.

At sentencing, Mr. Hall moved the court to find the three counts were the same criminal conduct since there was no way to determine from the evidence or verdict forms that the instances of intercourse relied on by the jury did not occur at the same time. 7/24/09RP at 10-11.

The trial court denied the motion, which it termed one requesting "merger" of the counts of conviction, and counted each conviction separately, reasoning that there was testimony of

multiple separate instances of intercourse, and that the jury had been given a unanimity instruction. 7/24/09RP at 38.

a. Where multiple current offenses constitute the same criminal conduct the trial court must count them as a single offense. A person's offender score may be reduced if the court finds two or more of the criminal offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct “means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” Id. The State has the burden to prove the crimes did not occur as part of a single incident. State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996) (“If the time an offense was committed affects the seriousness of the sentence, the State must prove the relevant time.”). The trial court's “same criminal conduct” determination is reviewed for an abuse of discretion or misapplication of the law. Id. at 364.

The “same criminal intent” element is determined by looking at whether the defendant's objective intent changed from one act to the next. Dolen, 83 Wn. App. at 364-65. The mere fact that distinct methods are used to accomplish sequential crimes does

not prove a different criminal intent. State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). The “same time” element does not require that the crimes occur simultaneously. State v. Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); Dolen, 83 Wn. App. at 365. Individual crimes may be considered same criminal conduct if they occur during an uninterrupted incident. Porter, 133 Wn.2d at 185-86; Dolen, 83 Wn. App. at 365. As is the case here, multiple sequential instances of intercourse in the same incident are the same criminal conduct. State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1983) (court found a defendant's convictions for second degree rape and attempted second degree rape, committed by forcing the victim to submit to oral and attempted anal intercourse during one continuous incident, to be same criminal conduct)).

The Dolen court looked at the evidence presented (six different incidents in which Mr. Dolen engaged in sexual intercourse and/or sexual contact with a child) and determined it was unclear from the record whether the jury convicted him of the two offenses in a single incident or in separate incidents. Dolen, 83 Wn. App. at 365. The Court reasoned that if Mr. Dolen had been

convicted of two offenses from a single incident, then they would have encompassed the same criminal conduct. Id. The court held: “the State failed to prove that [Mr.] Dolen committed the crimes in separate incidents[,] [c]onsequently, the trial court's finding that the two convictions did not constitute the same criminal conduct is unsupported.” Id.

b. The four offenses shared the same intent, were committed at the same time, and involved the same victim.

The four acts of which Mr. Hall was convicted involved the same intent, and involved the same victim, B.G. Thus they all constituted the same criminal conduct. See State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999) (multiple offenses against the same victim constitute the “same criminal conduct.”).

Mr. Hall's case is similar to Dolen. The testimony showed multiple incidents of intercourse between Mr. Hall and B.G. beginning in late 2006 that could have formed the basis for the four counts, but were not differentiated in terms of time or in the verdict forms. B.G. stated that the two began having the traditional intercourse type of “sex more” and had intercourse “[e]very time” they saw each other. 6/16/09RP at 133. They had intercourse less

than 20 times but more than 10 times. 6/16/09RP at 134.

Without a special verdict setting out the specific times and places, it is impossible to find the State had proven the acts all occurred at different times. The fact the Court gave the unanimity instruction does not provide assurance that the offenses occurred at separate times, only that they were distinct for purposes of unanimity. State v. Petrich, 101 Wn.2d 566, 572-73, 683 P.2d 173 (1984).

In sum, “the record [here] does not tell us whether the jury convicted [Mr. Hall] of committing the two offenses in a single incident or in separate incidents.” Dolen, 83 Wn. App. at 365. “[T]he State [then] failed to prove that [Mr. Hall] committed the crimes in separate incidents.” Id. Thus, the trial court erred in failing to count Mr. Hall’s four convictions as the same criminal conduct.

c. Mr. Hall is entitled to reversal of his sentence and remand for resentencing with the convictions being counted as same criminal conduct. Where the trial court’s conclusion the three offenses were committed in separate incidents is unsupported, the resulting sentence must be reversed and

remanded for resentencing. Dolen, 83 Wn. App. at 365. Mr. Hall is entitled to reversal of his sentence and remand for resentencing.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO CONSIDER THE MITIGATING FACTOR OF A “FAILED DEFENSE” IN DENYING MR. HALL’S MOTION FOR AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE.

In general, the trial court must apply the correct law and when it does not do so, the court’s discretion has been abused. State v. Haddock, 141 Wn.2d 103, 110 P.3d 377 (2000); see State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); see also Ryan v. State, 112 Wn. App. 896, 899, 51 P.3d 175 (2002) (discretion is abused where a court bases its decision on an incorrect understanding of the law) (citing Junker, at 12).

In the present case, the trial court erred as a matter of law at sentencing in its analysis of the statutory mitigating factors proffered by Mr. Hall as warranting an exceptional sentence below the standard range on the four counts of statutory rape.

Had the trial court interpreted the statutory requirements correctly, it would have found that they supported exceptional terms below the standard range on the counts of which Mr. Hall was

convicted.

a. Mr. Hall sought exceptional sentences below the standard range. On July 24, 2009, the parties appeared before the trial court, the Honorable Catherine Shaffer, for sentencing. 7/24/09RP at 4.

Mr. Hall's counsel sought an exceptional sentence below the standard range on each count, arguing that mitigating factors merited such a sentence. Specifically, the defense argued that terms below the standard range were warranted based on:

1. The willing participation of the victim, B.G.;
2. The failed defense of RCW 9A.44.030(3)(c); and
3. The multiple offense doctrine and a "clearly excessive" sentence.

7/24/09RP at 10. The trial court rejected the request for exceptional terms, concluding, variously, that there was no evidence that B.G. initiated the relationship with Mr. Hall, that the jury had rejected the defense of reasonable belief as to age, and that the defendant had been in control of whether multiple commissions of the crime occurred. 7/24/09RP at 39-44. As will be shown, the court misconstrued the legal requirements of the most critical of the mitigating factors proffered by Mr. Hall - and

therefore failed to give the request for an exceptional sentence the proper consideration to which it was entitled.

b. The defendant may appeal because the trial court's basis for refusing to impose an exceptional sentence was a legal error of misapprehension of the requirements of the "failed defense" mitigating factor. As a general rule, under the rule of RCW 9.94A.585, when the sentence imposed on a convicted defendant is within the standard range (correctly calculated based on the defendant's criminal history), there is no right to appeal the sentence in order to argue that an exceptional sentence below that range should have been imposed instead. State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719, 718 P.2d 796 (1986); see RCW 9.94A.585.

Thus, if a trial court has contemplated, but declined to impose an exceptional sentence, and the court has concluded correctly that there is no legally applicable basis for an exceptional term, or that there is no factual basis adequate to satisfy the legal requirements of the mitigating factor(s) proffered in support of the exceptional sentence sought, such court has exercised its discretion, and the defendant may not appeal that ruling or the

sentence. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

However, review of the imposition of a standard range sentence may be granted where the sentencing judge has refused to exercise discretion (i.e., has refused to review proffered factual grounds). State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

In addition, RCW 9.94A.585's prohibition on appeal of standard range terms will not preclude an appellate challenge to a standard range sentence where the party takes issue with the procedure by which a court determines not to impose an exceptional sentence, i.e., where the court has relied on an impermissible or incorrect legal basis for refusing to impose an exceptional sentence. State v. Schloredt, 97 Wn. App. 789, 801-02, 987 P.2d 647 (1999); Garcia-Martinez, 88 Wn. App. at 330; State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); Ammons, 105 Wn.2d at 183.

The latter circumstance is presented in Mr. Hall's appeal, because the trial court failed to apply the correct law in considering each of the mitigating factors that were offered in support of the

sentencing request. Because this was the reason for the court's refusal to impose exceptional sentences, in favor of imposition of a standard range term, Mr. Hall may appeal his sentences despite RCW 9.94A.585. See Herzog, at 423; Ammons, at 183; Schloredt, at 802; Garcia-Martinez, at 330.

c. The trial court erred in ruling that the mitigating factor of a "failed defense" categorically could never apply in a statutory rape case where the jury's verdict indicates a rejection of the defendant's affirmative defense. RCW 9.94A.535(1) includes a list of "illustrative," not exclusive, factors that may mitigate in favor of a lesser sentence. The SRA recognizes that even when such defenses do not or would not have prevailed at trial, the circumstances may still justify distinguishing the person's behavior from that of others convicted of the offense, for purposes of sentencing. Put another way, the SRA allows "variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime." State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993) (citing with approval, D. Boerner, Sentencing in Washington, § 9-23

(1985)). Factors favoring the mitigation of the standard range need be established only by a preponderance of evidence. RCW 9.94A.535(1).

In the present case, Eddie Hall raised a very viable affirmative defense under RCW 9A.44.030(3)(c). Third degree rape, the offense with which Mr. Hall was charged four times, requires proof of the prohibited age of the complainant and the difference in age between the complainant and the accused. RCW 9A.44.079; see State v. Sivins, 138 Wn. App. 52, 155 P.3d 982 (2007). However, according to Washington statute, Mr. Hall was entitled to acquittal on such charge if he could prove by a preponderance of the evidence that he reasonably believed that B.G. was at least sixteen years old. The statutory affirmative defense provides as follows:

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.

(3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:

* * *

(c) For a defendant charged with rape of a child in the third degree, that the victim was at least sixteen, or was less than forty-eight months younger than the defendant[.]

(Emphasis added.) RCW 9A.44.030(2) and (3)(c) (formerly RCW 9.79.160); Laws 1988 ch. 145 § 20; 1975 1st ex. sess. ch. 14 § 3. As stated, the accused's belief must be supported by "declarations as to age" made by the complainant. State v. Shuck, 34 Wn. App. 456, 461, 661 P.2d 1020 (1983).

Here, B.G.'s representations to Mr. Hall, both express and by implication, all qualify as the "explicit assertion" of age by the complainant that is required under the defense. State v. Bennett, 36 Wn. App. 176, 181-82 and n. 4, 672 P.2d 772 (1983) (defining "declaration" pursuant to the Third New International Dictionary as an "act of declaring, proclaiming or publicly announcing; explicit assertions; formal proclamation").

At sentencing, Mr. Hall pointed out the significant instances of trial evidence that strongly supported his claim that B.G. had misrepresented her age. 7/24/09RP at 13-14. The admitted facts

that the complainant (1) drove a car to meet the defendant, and (2) was taking college courses, in and of themselves supported his belief that she was 18, as she claimed, and of course much of the trial centered around a sharp, viable factual dispute as to whether she had in fact represented her age as 18 on her "PIMPETTE" MySpace account. 6/16/09RP at 164-67; 6/17/09RP at 106-09, 115, 209-11. Notably, in further plain example of a failed defense, a genuine effort was made to obtain electronic records that would have conclusively proved this fact, but the time frame to do so had passed and as a result the 22-year-old defendant is now a convicted "rapist" with an obligation to register as such for the rest of his life. 6/17/09RP at 88-91.

In addition, counsel noted that in post-verdict discussions with jury members, it became clear that the jury's reasoning in reaching guilty verdicts was based on a belief that B.G. had indeed misrepresented her age, but a concern that the defendant could or should have figured this out over time. CP 66 (Presentence Report); 7/24/09RP at 13-14.

Indeed, these facts might well serve as a model for the occasional instance in which a failed defense does indeed warrant

a sentence below the standard range - and at the very least, the defendant was entitled to expect the trial court to assess the proffered mitigator with a correct understanding of the law.

After a vigorous defense was raised under these facts at trial, and after thorough legal briefing by counsel and reasoned argument at sentencing in support of the mitigating factor, the trial court's response at sentencing was simply this:

They [the jurors] all considered his defense, and they all found that, in fact, at the time of the events on which they convicted him, he was aware of her age. That's the only way they could have reached the verdict that they [did].

7/24/09RP at 41. The trial court rejected Mr. Hall's proffer of the "failed defense" mitigating factor because the defense failed at trial, perhaps prompted by the State's similarly specious argument at sentencing that "in any case that goes to trial, there's some sort of failed defense typically." 7/24/09RP at 25.

With all respect to the trial court, this dismissal of the defendant's legal argument is shocking. Under the SRA, a "failed defense" may certainly constitute a mitigating factor that justifies a sentence below the standard range. State v. Jeanotte, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997).

The “failed defense” situation is a well-accepted mitigating factor that may be cited in support of an exceptional term below the standard range. Indeed, RCW 9.94A.535(1)’s entire list of “illustrative” mitigating factors expressly includes factors that, had they been established at trial, would have justified or excused the accused person’s behavior. In State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993), our Supreme Court noted, “[t]he mitigating circumstances enumerated in RCW 9.94A.390 represent failed defenses,” and cited with approval the noted sentencing law authority Professor David Boerner, as follows:

The Guidelines contain a number of mitigating factors applicable in situations where circumstances exist which tend to establish defenses to criminal liability but fail. In all these situations, if the defense were established, the conduct would be justified or excused, and thus would not constitute a crime at all. The inclusion of these factors as mitigating factors recognizes that there will be situations in which a particular legal defense is not fully established, but where the circumstances that led to the crime, even though falling short of establishing a legal defense, justify distinguishing the conduct from that involved where those circumstances were not present. Allowing variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant’s conduct from that normally present in that crime is wholly consistent with the underlying principle. Certainly the fact that the substantive law treats these

circumstances as complete defenses establishes the legitimacy of their use in determining relative degrees of blameworthiness for purposes of imposing punishment.

(Emphasis added.) Hutsell, 120 Wn.2d at 921-22 (citing Boerner, Sentencing in Washington 9-23 (1985)).

The trial court in Mr. Hall's case rampantly abused its discretion by off-handedly dismissing Mr. Hall's viable argument in support of mitigation in the manner that it did. The court's reasoning, if applied to other cases, would require rejection at sentencing of all consideration of "failed defenses," including self-defense, duress, mental conditions not amounting to insanity, and entrapment. See former RCW 9.94A.390(1)(a) (victim was aggressor), RCW 9.94A.390(1)(c) (defendant acted under duress or compulsion insufficient to constitute a complete defense), RCW 9.94A.390(1)(d) (defendant, with no apparent predisposition to do so, was induced by another to participate in the crime); and RCW 9.94A.390(1)(e) (capacity to appreciate wrongfulness of conduct was significantly impaired). See Jeanotte, 133 Wn.2d at 851-52.

In this case, instead of a reasoned analysis, the trial court rejected the defense argument in a manner that cannot be

construed as anything other than a complete misunderstanding of the nature of this viable mitigating factor. In these circumstances, the trial court's refusal to impose an exceptional sentence below the standard range requires reversal because the court "relied on an impermissible basis for refusing to impose an exceptional sentence." State v. Khanteechit, 101 Wn. App. 137, 138, 5 P.3d 727 (2000); RCW 9.94A.585. The sentencing court also abused its discretion by using the wrong legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)); see also State v. Tili, 139 Wn.2d 107, 124, 985 P.2d 365 (1999) (court's failure to articulate a viable basis to find the offender's conduct "separate and distinct" is an abuse of discretion).

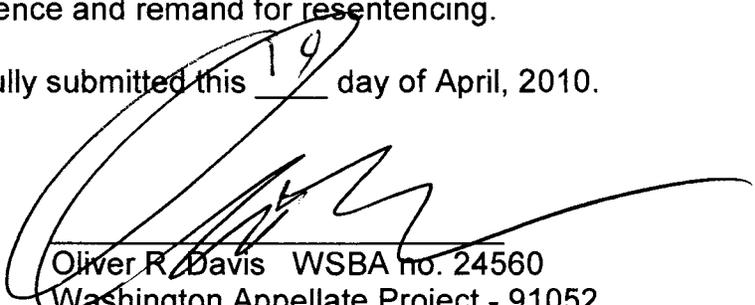
On this basis alone, Mr. Hall's sentence must be reversed and the case remanded for actual and proper consideration of his sentencing contentions. Given these facts, appellate review of the imposition of the standard range sentence in Mr. Hall's case must be granted where the sentencing judge abused its discretion and outright failed to consider the proffered legal grounds for the

request for an exceptional sentence. State v. Garcia-Martinez,
supra, 88 Wn. App. at 330.

E. CONCLUSION

Based on the foregoing, Mr. Hall requests that this Court
reverse his sentence and remand for resentencing.

Respectfully submitted this 19 day of April, 2010.



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