

66475-1

66475-1

NO. 66475-1

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

STATE OF WASHINGTON

Respondent

v.

JOHN A. JONES, III

Appellant

2011 JUN 23 AM 10:23

COURT OF APPEALS
STATE OF WASHINGTON
CLERK OF COURT

BRIEF OF RESPONDENT

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I. ISSUES

1. Was there sufficient evidence presented at sentencing to conclude the defendant's prior conviction for murder and two counts of attempted murder were comparable to those crimes in Washington?

2. Did the trial court err in imposing an exceptional sentence when it relied on the jury findings to support an exceptional sentence but cited other facts in its findings to support the length of the sentence?

II. STATEMENT OF THE CASE

The defendant John Jones was convicted of one count of Second Degree Assault on September 18, 2008. The jury found one aggravating factor had been proved. Based on that aggravating factor the court imposed an exceptional sentence of 120 months confinement. 1 CP 190-203.

The defendant appealed his conviction and sentence. This Court affirmed the defendant's conviction but remanded for resentencing. 1 CP 180-189. The trial court had failed to determine the defendant's actual criminal history prior to imposing the exceptional sentence because it found his offender score was "at least 6." This Court remanded because it was not clear that had

the trial court correctly determined the defendant's offender score that it would have imposed the same sentence. 1 CP 195. This Court directed the trial court to make appropriate findings of fact and conclusion of law supporting an exceptional sentence. 1 CP 195.

The trial court re-sentenced the defendant on December 13, 2010. At the re-sentencing hearing the State produced additional evidence to support the defendant's out of state criminal history. 1 CP 32-131. The State again argued for re-imposition of the 120 month exceptional sentence. RP 5; 1 CP 34.

After hearing argument the court found the defendant's offender score was 7. It then re-imposed the original 120 month sentence. In support of the exceptional sentence the court entered the following findings of fact and conclusions of law:

FINDINGS OF FACT

The jury found beyond a reasonable doubt that the crime occurred within sight or sound of the victim's or the defendant's minor child or children under the age of 18 years.

The defendant has prior criminal history that includes crimes of violence; specifically murder, attempted murder and assault, which he boasted about to the victim

The defendant has a prior history of domestic abuse

CONCLUSIONS OF LAW

The court finds that, considering the purpose of the sentencing reform act, there are substantial and compelling reasons to impose a sentence above the standard range.

Crime was committed within sight or sound of minor child under 18 years (victim).

1 CP 27-28.

III. ARGUMENT

A. THE COURT PROPERLY INCLUDED THE MURDER AND ATTEMPTED MURDER CONVICTIONS FROM CALIFORNIA IN THE DEFENDANT'S OFFENDER SCORE.

The defendant's prior criminal history included convictions for one count of murder and two counts of attempted murder from Alameda County, California, and one count of possession of a controlled substance, cocaine from San Francisco County, California. 1 CP 51-64, 70-131. The State argued that those convictions were comparable to Washington murder, attempted murder, and possession of controlled substance offenses. The State calculated the defendant's offender score as 7. 1 CP 33, 173-177.

The defendant argues the murder and attempted murder convictions should not have been included in his offender score. He argues those crimes are not legally comparable to Washington

offenses. He claims that the evidence which the court was permitted to consider did not show the offenses were factually comparable to Washington offenses.

A defendant's conviction from another state is included in his offender score if it is comparable to the definition and sentence for an offense in Washington. RCW 9.94A.525(3). To classify an out of state conviction the court first looks to the statute under which the defendant had been convicted to determine if the elements of the offense were comparable to a Washington crime. State v. Morely, 134 Wn.2d 588, 605-606, 952 P.2d 176 (1998). If the elements are comparable to a Washington crime then that crime counts toward the defendant's offender score. Id. if the elements are not identical, or the foreign statute is broader than Washington's definition of the crime then the court may look at the defendant's particular conduct. Id.

When determining whether a foreign conviction is comparable to a Washington offense the court may look to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between the judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of that information. Shepard v.

United States, 544 U.S. 13, 28, 125 S.Ct. 1254, 1263, 161 L.Ed.2d 205 (2005), State v. Moncrief, 137 Wn. App. 729, 154 P.3d 314 (2007).

California Penal Code § 187 defines murder as “the unlawful killing of a human being, or fetus, with malice aforethought.” Malice may be express or implied. § 188

It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought.

§188

California has interpreted malice to include acts which provoke a deadly response from another, thereby killing a third person. People v. Gilbert, 63 Cal.2d 690, 704-05, 408 P.2d 365 (1966), vacated on other grounds, Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). “When the defendant or his accomplice, with conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the

defendant is guilty of murder.” Id. at 704-05. California refers to this as the “provocative acts murder.” People v. Concha, 47 Cal.4th 653, 218 P.3d 660, 101 Cal. Rptr.3d 141 (2009). That doctrine applies even when the defendant’s conduct results in the death of an accomplice. Id. This doctrine is separate from the felony murder rule in California which does not ascribe liability to a defendant for the death of his co-defendant when the death occurs in the course of or flight from the commission of another felony. Gilbert, 63 Cal.3d at 703.

The defendant argues that the California murder statute is broader than the Washington murder statute because Washington does not employ the same “provocative acts doctrine.” Under very limited circumstances that doctrine would constitute a murder in California but would not constitute a murder in Washington.

A defendant who shoots at an officer intending to assault the officer, and who thereby provokes the officer into shooting at the defendant and his accomplice and thereby kills that accomplice would be guilty of the murder of that accomplice in California, but not guilty in Washington. The defendant would not be guilty of intentional murder because the intent was to assault not murder. The defendant would not be guilty under an extreme indifference

theory because the intent was focused on a single person, not people in general. State v. Berge, 25 Wn. App. 433, 437, 607 P.2d 1247, review denied, 94 Wn.2d 1016 (1980). The defendant would not be guilty under a felony murder theory because a participant in the crime did not cause the death of another, and a participant in the crime was killed. RCW 9A.32.030, RCW 9A.32.050.

A defendant is guilty of murder in both states when the defendant shoots at an officer intending to kill that officer, and then the officer responds by shooting at the defendant and killing the defendant's accomplice. Under that scenario the defendant's actions were a proximate cause of the accomplice's death. "Proximate cause' means a cause, which in direct sequence, unbroken by any new independent cause, produces death, and without which the death would not have happened. There may be more than one proximate cause of a death." WPIC 25.02. Proximate cause includes "cause in fact." State v. Dennison, 115 Wn.2d 609, 624, 801 P.2d 193 (1990). That refers to "the 'but for' consequences of an act – the physical connection between an act and an injury." Id. quoting Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). "But for" the defendant shooting at the officer the officer would not have shot at the defendant and his

accomplice. The defendant's act of shooting at the officer would therefore be the proximate cause of the accomplice's death.

The defendant also argues California's attempt statute is also broader than Washington's comparable attempt statute. His argument that attempted murder in California is broader than attempted murder in Washington is based on the differences in the murder statutes, not the attempt statutes. Attempt in Washington and California are comparable.

Attempt is defined as "a specific intent to commit the crime, and a direct but ineffectual act done toward its commission. California Penal Code §21a. California requires the act to go beyond mere preparation, but it need not be the last proximate or ultimate step toward commission of the substantive offense. People v. Kipp, 18 Cal. 4th 349, 376, 75 Cal. Rptr.2d 716 (1998), cert. denied, 525 U.S. 1152, 119 S.Ct. 1055, 143 L.Ed.2d 61 (1999). Washington defines attempt as "with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.08.020(1). Like California mere preparation is insufficient to establish an attempt to commit a crime. State v. Goddard, 74 Wn.2d 848, 851, 447 P.2d 180 (1969). Any difference between attempted murder in California

and Washington therefore results from the difference in the murder statutes, and not the statutes defining attempt.

Because the California murder statute is broader than Washington's murder statute in very limited circumstances the court was required to look to the facts of the California conviction to determine if it was comparable to murder and attempted murder in Washington. The records provided to the court included (1) the Amended Information, (2) Waiver on Plea of Guilty form, (3) Transcript of the Change of Plea on April 8, 1992, (4) Alameda County Probation Officer's Report and Recommendation, (5) Transcripts of the Commitment (sentencing) hearing on June 3, 1992, (6) Court's sentencing report, (7) Abstract of Judgment, June 8, 1992 (equivalent to the judgment and sentence), and (8) Commitment to Youth Authority. 1 CP 34, 70-131.

In the plea colloquy the defendant's attorney told the court the factual basis to support the plea was in the p.x. report. 1 CP 87. The report provided with the transcript was the probation officer's report and recommendation. 1 CP 91-115. That report recounted the defendant's version of events as told to the police and the probation officer. The defendant's version of events established that he acted as an accomplice to Tony Davis who

acquired a gun and shot at Kevin Reed, London Willard, and Natasha Buckner, as the defendant and Davis drove by those three who were standing on a street corner. As a result of the gunshots Kevin Reed was killed, and Willard and Buckner were struck by gunfire. 1 CP 93-96. Under Washington Law the defendant conduct constituted either intentional second degree murder or second degree felony murder. RCW 9A.32.050(1)(a),(b) 9A.08.020(2)(c), 9A.08.020(3). Because the crimes for which the defendant was convicted in California were factually comparable to murder and attempted murder in Washington the trial court did not err when it included those offenses in his offender score.

The defendant argues that the court could not rely on the probation report because he did not stipulate to it or admit the fact contained in that report. He seeks to have the Court presume despite the evidence before the trial court that the defendant was convicted under a narrow set of circumstances that would not be a crime in Washington. The Court should not ignore the facts before the trial court and presume the defendant was not convicted of crimes that under the facts would have been comparable crimes in Washington.

The probation report recounted the defendant's own version of the facts. His counsel assented to the California court using that information to support a factual basis for the pleas to murder and attempted murder. The Washington court should be able to rely on the defendant's own statements which he agreed supported his convictions in California, to assess whether those crimes were factually comparable to Washington offenses.

B. THE TRIAL COURT'S REASONS FOR IMPOSING AN EXCEPTIONAL SENTENCE WERE SUFFICIENT. REMAND FOR RESENTENCING IS NOT NECESSARY EVEN IF THE TRIAL COURT MISCALCULATED THE DEFENDANT'S OFFENDER SCORE.

1. The Trial Court's Reasons For Imposing An Exceptional Sentence Were Supported By The Record.

The Court may impose an exceptional sentence if the jury finds that one of the exclusive factors listed in RCW 9.94A.535(3) has been proved beyond a reasonable doubt. RCW 9.94A.535(3), 9.94A.537(3). One listed factor justifying an exceptional sentence is that the offense was a domestic violence offense and it occurred within sight or sound of the victim's or the offender's minor children under the age of 18 years. RCW 9.94A.535(2)(i)(ii). The jury found this aggravating factor had been proved. 3 CP ___ (sub. 65.2, special verdict form C). The trial court included the jury

determination in its findings of fact and conclusions of law supporting the exceptional sentence. 1 CP 27.

The defendant argues that the trial court's exceptional sentence was unlawfully imposed because the trial court's findings of fact included non-statutory factors which could not be used to impose the exceptional sentence. Specifically the defendant relies on the court's reasoning in its oral decision that the defendant had bragged about his criminal history to the victim. He also points to the trial court's written finding that the defendant had a history of domestic violence. He argues that the court's reliance on those factors violates his Sixth Amendment right to a jury verdict on every fact which increased his punishment beyond the prescribed statutory maximum because neither factor was found by a jury beyond a reasonable doubt. BOA at 16-17.

Because the trial court incorporated a written finding that the defendant had boasted about his criminal history to the victim, it became part of the courts' decision. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). Neither that finding, nor the finding that the defendant had a history of domestic violence, was a factor found by the jury. Had the court relied on those facts to support imposition of an exceptional sentence it would have been error.

However, the court did not do so. Rather those additional facts were used to justify the length of the sentence.

If the jury unanimously finds beyond a reasonable doubt that one or more of the facts alleged by the state in support of an aggravated sentence has been proved, the court may impose an term of confinement up to the maximum sentence if it finds, considering the purposes of the SRA, that the facts found are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.537(6). The reviewing court may look to the trial court's oral ruling to interpret the findings and conclusion. State v. Hescock, 98 Wn. App. 600, 606, 989 P.2d 1251(1999). The trial court stated the aggravating factors operated to permit the imposition of an exceptional sentence. RP 14. By inference then the court held at the factor found by the jury was a substantial and compelling reason justifying an exceptional sentence.

The rest of the court's comments were directed at explaining why the statutory maximum sentence was appropriate in this case. The court prefaced its oral opinion by stating that its decision to impose an exceptional sentence "and particularly an exceptional sentence at the maximum of 120 months" was based on evidence that the defendant had a prior history which he disclosed to the

victim. RP 12. A court may not impose an exceptional sentence based on impermissible factors, but it may justify the length of the sentence on those factors. State v. Ross, 71 Wn. App. 556, 568, 861 P.2d 473, 883 P.2d 329 (1993), review denied, 123 Wn.2d 1019 (1994).

A trial court is not required to articulate the reasons for the length of the exceptional sentence once the court decides there are substantial and compelling reasons to impose such sentence. State v. Ritchie, 126 Wn.2d 388, 395-396, 894 P.2d 1308 (1995). However, the court is not prohibited from articulating its reasoning, and articulating those reasons can be beneficial.

The Court reviews for an abuse of discretion the length of an exceptional sentence to determine if it is clearly excessive. RCW 9.94A.585(4)(b), State v. Souther, 100 Wn. App. 701, 721, 998 P.2d 350, review denied, 142 Wn.2d 1006, 34 P.3d 1232 (2000). A trial court's reasons may assist the reviewing court in assessing whether the trial court abused its discretion. This is particularly so where, as here, the court imposed the maximum allowed under the law, and at sentencing the defendant pressed a claim that the court's sentence was based on invalid reasons.

Under the facts of this case the court relied on a valid factor to determine there were substantial and compelling reasons for imposing an exceptional sentence. The court's oral ruling makes clear that other facts found in the written findings of fact and conclusion of law were meant to justify the length of the sentence.

2. The Trial Court Would Impose The Same Sentence Even If This Court Holds The Trial Court Erred In Calculating The Offender Score Or Imposing An Exceptional Sentence On Some Invalid Factors.

Remand for re-sentencing is not required where it is clear from the record that the court would have imposed the same sentence absent error in calculating the offender score, or relying on invalid factors to justify an exceptional sentence. State v. Hooper, 100 Wn. App. 179, 188, 997 P.2d 936 (2000). State v. Jennings, 106 Wn. App. 532, 543-44, 24 P.3d 430, review denied, 144 Wn.2d 1020, 32 P.3d 284 (2001), State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). In Jennings the Court reversed an exceptional sentence imposed after the trial court miscalculated the offender score because the trial court specifically referenced the incorrect standard range in imposing its sentence. Jennings, 106 Wn. App. at 544. Similarly in Parker the Court remanded for resentencing after finding the offender score had been calculated

incorrectly because it appeared that the exceptional sentence was based directly on the incorrect standard ranges. Parker, 132 Wn.2d at 192.

Even if the court's comments could be construed to mean that it relied on invalid reasons to impose an exceptional sentence, rather than justify the length of the sentence, the court did rely on one valid factor to impose that sentence. It is clear from the two sentencing hearing the court believed the jury finding did constitute substantial and compelling reasons for an exceptional sentence.

In addition, it is clear that the court would impose the same sentence if his score was actually 1 instead of 7. This Court reversed the trial court's exceptional sentence after the first sentencing hearing because it was not clear from the record that the trial court would have imposed the same exceptional sentence had it correctly calculated the offender score. 1 CP 186. At the second sentencing hearing the trial judge clearly stated that the decision to impose an exceptional sentence was based on the authority vested in the court by virtue of the jury finding that the aggravating factor was present. RP 14. The trial court made it eminently clear that it based the length of the sentence on the underlying facts of the case.

My decision to impose an exceptional sentence and particularly an exceptional sentence at the maximum of 120 months was not based on Mr. Jones' offender score. It was based on the fact of his history as disclosed to the victim. That is to say, I think the evidence was that she was aware of his murder conviction because it seemed that at least at times he took some pride in that. ...

My recollection is that the victim here was aware of that prior conviction, at least the murder conviction, because Mr. Jones had told her about that. And in the context it seemed that he almost – almost boasted about that. It wasn't something that he was ashamed of or was trying to keep secret. That was a fact that I found significant, but I thought the circumstances of this assault, particularly the threat to burn her with a heated knife and his preparation to do so, although that is not a specific finding by the jury, it still was part of the part of the trial record. It's a part of the record that I placed some credence on along with the aggravating factor.

... And my focus was almost exclusively on the brutality of the nature of this assault and the bullying conduct by Mr. Jones as evident by not only this assault but their entire relationship that culminated in this assault.

RP 12-14. (emphasis added)

After the court explained its reasoning the defendant was given a second opportunity to speak to the court. The defendant accused the court of racism. The defendant stated that because he was African American and the victim was white that he did not receive a fair trial or sentence. RP 17-19. The trial judge responded to those accusations by stating race was not a factor in

his decision. Rather it was the facts as outlined by the Court of Appeals in its decision that was the basis for his decision. "It's the conduct that was at issue, and that was what I found to be most egregious." RP 20-21.

Here, unlike in Parker and Jennings the trial court specifically stated that the exceptional sentence was not based on its calculation of the offender score. Rather it was based on the defendant's extraordinary behavior. The defendant used his prior murder conviction to intimidate and bully the victim. He did not just strike her in the face, breaking her nose. Instead he threatened and humiliated her by ordering her to strip naked and by telling her he was going to burn her with a hot knife like he had done to a former girlfriend. The defendant nearly succeeded in burning Ms. Phillips in the anus as he intended, and only succeeded in burning Ms. Phillips' arm as she fought to keep him from injuring her. 1 CP 182-183.

The trial court's comments could not be clearer. Even if the court were not allowed to include the defendant's violent criminal history as part of his offender score, in the court's eyes the defendant has earned the 120 month sentence. This Court can be assured that the trial court would have imposed the same sentence

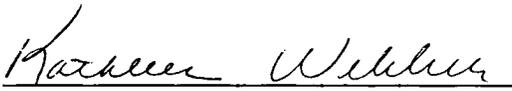
whether or not the murder and attempted murder convictions could be included in his offender score.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's exceptional sentence.

Respectfully submitted on June 22, 2011.

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Appellant.

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AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 20th day of June, 2011, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 22nd day of June, 2011.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit