

66847-1

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NO. 66847-1-1

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

STATE OF WASHINGTON

Respondent

v.

SAMUEL W. CORNISH,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

The sentencing court considered the evidence in mitigation presented by the defendant and did not exclude the possibility of granting an exceptional sentence below the standard range. The court, however, concluded that an exceptional sentence would not adequately protect the victim. Can the defendant now appeal the standard range sentence?

II. STATEMENT OF THE CASE

On February 16, 2011, the defendant was convicted at a bench trial on stipulated facts of felony violation of a no contact order (DV). 2/16 RP 36-37, 1 CP 48, 35. Before that date, the defendant had been convicted of six gross misdemeanor violations of a no contact order, five in 1998, and one in 2007, all with the same victim. In 1999, the defendant was convicted of stalking the same victim. The defendant also had been convicted of four felony violations of a no contact order in 2000, 21001, 2003, and 2006. 3/16 RP 3, 1 CP 15. The 2007 violation was committed while the defendant was on community custody from the 2006 felony conviction. 3/16 RP 5, 1 CP 52.

Before sentencing, the defendant filed a Motion for Exceptional Sentence Down and Memorandum in Support of

Motion. 2 CP _____. The defendant requested a sentence of four months confinement, followed by 56 months of community custody, arguing “ It is this supervision, and ONLY this supervision, which seems to keep Mr. Cornish from violating the order.” 2 CP _____ (emphasis in the original).

At sentencing, the State requested a sentence at the high end of the standard range to protect the victim. It argued that the court tailored a sentence in 2006 that was an exceptional sentence with a short term of prison and a long term of community custody, but that did not prevent the defendant from contacting the victim in 2007. When prosecuting that violation, the State reduced the charge to a gross misdemeanor “to try to again create some kind of program for him in the community and that didn’t work.” 3/16 RP 5.

The defendant requested an exceptional sentence below the standard range of 12 months plus one day in prison followed by community custody “for an exceptional period of time[.]” 3/16 RP 9.

The court then inquired “In terms of the 2007 violation of the no-contact order, did that happen while he was on this intensive community custody?” Initially, the State believed that the defendant was under supervision, but the defendant said that his supervision was from November of 2007 to October of 2009. 3/16 RP 10. The

State concluded that the defendant had been under some type of supervision when he committed the 2007 violation. 3/16 RP11.

The court then asked if the parties agreed that “for the majority of the duration of that supervision, though, it seemed to work to some degree?” 3/16 RP 11. The parties did not agree. 3/16 RP 11-12.

The court then agreed with the defendant that “this is a case that, to a very large degree, is driven by mental health issues that the mental health system and the court system have not been able to adequately address[.]” 3/16 RP 17. The court indicated that if it could suspend part of the sentence to confinement, as it could in a DOSA sentence, it might be inclined to impose an exceptional sentence. The court did not consider being able to impose 60 days for a violation of community custody as a adequate protection for the victim. 3/16 RP 18.

The court observed that another sentencing court had “engaged in the experiment, if you will, of the exceptional sentence down and the intensive supervision, which worked to some degree, obviously didn’t work perfectly[.]” 3/16 RP 18.

The court sentenced the defendant to the top of the standard range. 3/16 RP 19, 1 CP 38.

III. ARGUMENT

A. STANDARD OF REVIEW.

In sum, we now hold that in order for a “procedural” appeal to be allowed under Ammons,¹ it must be shown that the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so. Without such a showing, the clear rule of RCW 9.94A.210(1)² applies and the appeal will be denied.

State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993).

The same principles apply where a defendant has requested an exceptional sentence below the standard range: review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.

State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998).

B. THE DEFENDANT HAS NOT SHOWN THAT THE COURT FAILED TO FOLLOW ANY REQUIRED PROCEDURES IN IMPOSING A STANDARD RANGE SENTENCE.

The court imposed a standard range sentence. This Court must reject this appeal unless the defendant shows some procedural defect or impermissible basis for the court’s decision to impose a standard range sentence. The defendant has not

¹ State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, cert. denied, 479 U.S. 930 (1986).

² Re-codified as RCW 9.94A.585.

identified any particular procedure that the Sentencing Reform Act (SRA) required that the court failed to follow. Accordingly, this appeal must be rejected. Mail, 121 Wn.2d at 712.

C. THE COURT DID NOT REFUSE TO CONSIDER AN EXCEPTIONAL SENTENCE.

If requested, a court must consider imposing an exceptional sentence below the standard range. A categorical refusal to impose an exceptional sentence under any circumstances or refusing to consider an exceptional sentence for a class of offenders “is effectively a failure to exercise discretion and is subject to reversal.” State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Here, the court considered giving the defendant an exceptional sentence below the standard range. The court acknowledged that such a sentence had been tried before, and it worked to some degree, but not perfectly. The court explained why it did not believe an exceptional sentence would adequately protect the victim. The court did not categorically refuse to consider an exceptional sentence.

D. THE COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING A STANDARD RANGE SENTENCE.

The precept that a standard range sentence may not be appealed “arises from the notion that, so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence’s length.” State v. Williams, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003).

The defendant does not argue that the court refused to consider an exceptional sentence or had an improper basis for refusing one here. Rather, he argues that his interpretation of the sanctions available to the court and the Department of Corrections (DOC) is more compelling than the courts, thus the court abused its discretion by not giving him an exceptional sentence. Brief of Appellant 17-22. This is the incorrect standard of review.

The court clearly understood that if it imposed the exceptional sentence, it and DOC would have sanctions available should the defendant reoffend. The court also understood that those sanctions had not been tried before and had not been totally effective in dissuading the defendant from violating the no contact order. “[A] trial court that has considered the facts and has

concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.” Garcia-Martinez, 88 Wn. App. at 330.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on December 12, 2011.

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