

NO. 67656-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

GARRETT CZERSKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable John M. Meyer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by failing to recognize it had discretion to impose a mitigated exceptional sentence.

Issues Pertaining to Assignment of Error

1. Does a trial court abuse its discretion as a matter of law by declining a request for a mitigated exceptional based on the erroneous assumption it lacked legal authority to impose one?

2. Is remand for resentencing appropriate when it is apparent from the record the trial court would have imposed a mitigated exceptional sentence if it had properly recognized it had the legal authority to do so?

B. STATEMENT OF THE CASE

A Skagit County jury convicted appellant Garrett Czerski of indecent liberties by forcible compulsion, second degree attempted rape, unlawful imprisonment, and first degree burglary. CP 4, 5, 6, 130. The State convinced a jury that on April 8, 2010, Czerski unlawfully entered the tent of a woman camped at a park in Mt. Vernon, held her there against her will, and tried to have sexual intercourse with her before she was able to flee to safety without having incurred physical injury. 1RP¹ 145, 149-

¹ There are four volumes of verbatim report of proceedings referenced as follows: **1RP** - November 3, 2010 & June 28-29, 2011; **2RP** - February 17, 2011; **3RP** - June 30, 2011 & July 1, 2011; and **4RP** - September 1, 2011 (sentencing).

62 (testimony of complaining witness about the incident); 1RP 175 (testimony of emergency room nurse who saw complaining witness after the incident); 3RP 22-27 (testimony of Czerski admitting he entered the tent, but denying he threatened to hurt or tried to rape anyone).

At sentencing, the parties and the court agreed it was appropriate to vacate and dismiss the indecent liberties conviction because it was part and parcel of the attempted rape conviction. CP 8-15; 4RP 7, 35; Supp CP __ (sub no. 129, Felony Judgment and Sentence, 9/1/11, at 2). The State requested imposition of a 210-month minimum sentence,² the high end of the standard sentence range for the attempted rape, the most serious of Czerski's convictions. Supp CP __ (sub no. 129, *supra*, at 3); 4RP 13.

The defense requested a mitigating exceptional sentence of 87 months, noting it would still constitute the longest sentence ever served by Czerski. 4RP 29-30. Defense counsel argued it was appropriate because Czerski committed the offenses in large part because he suffers from a long-term, degenerative and debilitating mental health disorder that "impairs his capacity to appreciate the wrongfulness of his conduct and to

² Czerski's attempted second degree attempted rape conviction is a Class A felony sex offense, and therefore the sentence imposed is expressed in terms of the minimum term (somewhere within the "standard range" unless an exceptional sentence is imposed) and the maximum term ("life" for a Class A felony). RCW 9.94A.507; RCW 9A.44.050; RCW 9A.28.020(3)(a); RCW 9A.20.021(1)(a).

conform his conduct to the requirements of the law." CP 17-18 (citing RCW 9.94A.535(1)(e)³); 4RP 17-31.

The trial court acknowledged Czerski has significant underlying mental health issues, noting that even the experts at trial agreed on this point. 4RP 16.⁴ The court specifically found "Czerski's long time mental health issues contributed to this series of crimes." 4RP 24. It asked for guidance, however, on how to sentence Czerski in a way that would ensure he gets the mental health treatment he needs while still safeguarding the public. 4RP 24-25.

Defense counsel conceded there were currently no readily available programs Czerski could access in the community that would ensure he got the treatment and medication he needs to reduce the likelihood of reoffending as a result of his mental health problems. 4RP 25. Counsel noted, however, that granting Czerski's request for a mitigated exceptional sentence would only result in lowering the minimum term at which the Indeterminate Sentencing Review Board (ISRB) could consider him for

³ This provision provides as a mitigating sentencing factor that "The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded."

⁴ The trial testimony of both the prosecution and defense mental health experts is discussed in more detail in the argument section of this brief.

release. 4RP 26, 30, 35-36.

In its oral ruling at sentencing, the trial court began by bemoaning the lack of public resources to deal with offenders like Czerski, who have severe mental health problems, noting it was "very sympathetic to [defense counsel's] arguments I think they're well taken." 4RP 40. The court noted, however, that under the circumstances the only options was to incarcerate Czerski for a period of time in order to ensure public safety. *Id.* The court then stated:

So I -- I feel I can do nothing less than [sic] a standard range sentence. I don't feel that the facts of the case justify high-end of the range. I'm going to sentence him to 160 months just above the low-end and hope that over the next 13 and a quarter years, 13 and [a] third years something can happen in treatment that will make Mr. Czerski less of a threat or just the passage of time and the aging process will do that. . . .

4RP 40-41.

Then, following a brief discussion about appropriate community custody conditions, the following colloquy occurred between the court and Czerski:

THE COURT: [Court advises Czerski of his right to appeal.] Do you have any questions about those rights, Mr. Czerski?

MR. CZERSKI: I guess I think that's too much time and -- but and programs on top of it. I -- I -- but you've already done it.

THE COURT: I think it's too much time too, but you know something I -- the law doesn't -- I don't feel that

the law allows me to do much different from that. I gave you as little time as I could [sic] within the standard range.

4RP 42-43.

C. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO RECOGNIZE IT HAD LEGAL AUTHORITY TO IMPOSE A LESSER SENTENCE.

The trial court failed to recognize it had legal authority to impose a lesser sentence via a mitigated exceptional sentence, as requested by Czerski. Moreover, the record reveals the trial court would have done so had it recognized this authority. The trial court's failure to properly understand the breadth of its legal authority in sentencing Czerski constitutes an abuse of discretion as a matter of law. Remand for resentencing is required.

When judicial discretion is called for, the judge must exercise some sort of meaningful discretion. State v. Grayson, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005). A sentencing court has discretion to determine whether the circumstances of an offense warrant an exceptional sentence below the standard range. State v. Korum, 157 Wn.2d 614, 637, 141 P.3d 13 (2006).

A trial court abuses its discretion when its decision is "manifestly unreasonable, or is exercised on untenable grounds, or for untenable

reasons." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). All defendants have the right to the trial court's examination of available sentence alternatives. In re Restraint of Mulholland, 161 Wn.2d 322, 334, 166 P.3d 677 (2007). A trial court's failure to exercise its discretion or to properly understand the breadth of its discretion is an abuse of discretion. See State v. Elliott, 121 Wn. App. 404, 408, 88 P.3d 435 (2004) (refusal to hear expert testimony was a failure to exercise discretion); State v. Fleiger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (failure to determine whether defendant was a security risk before ordering "shock box" was abuse of discretion), review denied, 137 Wn.2d 1003 (1999); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (refusal to exercise discretion in imposing an exceptional sentence below the range is reviewable error), review denied, 136 Wn.2d 1002 (1998).

In Mulholland, the trial court failed to recognize it had discretion to impose concurrent sentences for several first degree assault convictions as a mitigated exceptional sentence, despite a statutory presumption of consecutive sentences. In affirming the Court of Appeals remand for resentencing, the Supreme Court noted that although the record did not indicate the trial court would necessarily have imposed a mitigated exceptional sentence if it had known it had the authority, there was some

indication it might, and remand was appropriate so the court could at least consider the available options. 162 Wn.2d at 333-34.

Here, the trial court concluded the law did not allow it to impose a sentence below the standard range. 4RP 43. This was error because there is a statutory mitigating factor directly on point:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. . . .

...

(1) Mitigating Circumstances--Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

...

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

RCW 9.94A.535.

This is precisely the legal authority relied on by defense counsel in his sentencing memorandum. CP 17. Moreover, there was ample evidence before the court to support finding Czerski's capacity to appreciate the wrongfulness of his conduct towards the woman in the tent, or to conform his conduct to the requirements of the law, was significantly impaired at the time he committed the offenses, and that this impairment

was the result of something other than the voluntary use of drugs or alcohol. For example, it was uncontested that at the time of the offenses Czerski suffered from paranoid schizophrenia, the effects of which can be attenuated through proper medication, but not completely eliminated. 1RP 132, 139; 3RP 56-58.⁵ Symptoms of this disorder including "hearing voices, disorganized speech[,] "being out of touch with reality" and impairment to "reality testing, judgment, thinking, reasoning, can result in hallucinations, delusions, confusion, all the things you see in an acutely psychotic individual." 1RP 132; 3RP 57 . It can also "impair their ability to appreciate the consequences and nature of their actions." 1RP 136-37.

Czerski's mother testified at trial that her son began having mental health problems when he was about 16, and began taking medication for the illness sometime in his late 20's. 3RP 6-8. She recalled in March/April 2010, however, Czerski was homeless, out of medications, and his mental stability was deteriorating. 3RP 9.

The complaining witness testified she thought Czerski "was mental." She recalled that he was talking to himself a lot, and would say

⁵ See also Forensic Psychological Report dated June 9, 2010, submitted under separate cover in light of the trial court order sealing the report to maintain confidentiality. Supp CP ___ (sealed sub no. 24, Sealed Confidential Report, 6/14/10).

things that did not comport with reality, like claiming she had a knife and was threatening to stab him. 1RP 165-66.

Czerski's testimony at trial was equally supportive of a finding he lacked a full appreciation for the nature of his actions on April 8, 2010. When asked to explain what happened on that date, Czerski recalled that he woke up in the emergency room lobby of a hospital where he had been allowed to sleep after getting a "full x-ray" for knee pain he had complained of the night before. 3RP 16-17. He eventually made his way to the park where the woman's tent was pitched. 3RP 17-21. Czerski recalled approaching the tent sometime during the day and asking the woman inside if she had any blankets to spare. 3RP 21. When he returned to the tent later that night, Czerski testified:

I had a bunch of that x-ray taken of me, and it seemed like the tent was cleaner than the tent poles. The poles said something defending the cleanness. It was a very clean tent, brand new. I had all of that x-ray in me, radiation, and I didn't feel comfortable getting into the tent with my clothes. So I took my clothes off, put them on the ground with my shoes, put my shoes on the ground, pants on top of my shoes, put my shirt on top of my pants, folded. And I put my coat, folded on top of my shirt. Okay. I entered the tent.

Q. Were you wearing any clothes at that time?

A. Wearing my underwear. I thought leaving the items outside could possibly give somebody the idea that I was there if they came back to that spot. I didn't think of any other reason why. That's the first thing that occurred to my mind was that the tent was too clean to go in with radiation

that I feel. By that time it was starting to wear off, but it was still coming down on me pretty bad.

3RP 22-23.

Czerski recalled after getting inside the tent he discovered there was a woman inside repeatedly asking him what he was doing, to which Czerski testified he replied, "Oh, you are a prostitute. This is a bad idea. I believe you are a prostitute. I brought groceries." 3RP 23. Czerski then explained he had purchased groceries to bring to the tent to eat or, in the event someone there, to offer as "a house warming gift." 3RP 23.

With regard to the complaining witness's claim Czerski told her he had a knife, Czerski testified, "I didn't say I had a knife. I said: 'Do you have a knife or anything to ward off these people chasing me, to stop these people from hurting me?' I want to be around another person. She didn't understand because I was carrying on quite quickly." 3RP 25. Czerski's testimony is littered with similar disjointed recollections.

Similar to Mulholland, the trial court here failed to recognize it had authority under RCW 9.94A.535(1)(e) to impose a mitigated exceptional sentence. The record here, even more than in Mulholland, shows the court would have exercised this authority but for its erroneous conclusion "the law" did not allow it. 4RP 43. It had already made a supportable finding that Czerski's mental health disorder contributed to commission of the

offenses. 4RP 24. This is tantamount to finding Czerski's ability to conform his conduct to the requirement of the law were significantly impaired. There is similarly ample evidence to support a finding Czerski's capacity to appreciate the wrongfulness of his criminal conduct was significantly impaired. Either finding provides the legal authority necessary to impose a mitigated exceptional sentence. RCW 9.94A.535(1)(e).

To the extent the trial court was concerned for public safety if Czerski were released without first receiving treatment for his condition, it never articulated this as its basis to reject a mitigated exceptional sentence. To the contrary, its only clear expression of rejecting a lesser sentence was that "the law doesn't" allow for it. 4RP 43. Moreover, as defense counsel correctly noted, imposing a mitigated exceptional sentence would only result in lowering the minimum term at which the ISRB could consider him for release. 4RP 26, 30, 35-36. It did not mean he would be released after the minimum term.

But for the trial court's misconception that it lacked the legal authority to do so, it almost certainly would have imposed a mitigated exceptional sentence. The failure to exercise discretion at sentencing based on a lack of understanding that such discretion exists constitutes an abuse of discretion. Grayson, 154 Wn.2d at 335. This Court should

reverse and remand for resentencing so the court may properly exercise its sentencing discretion. Mulholland, 162 Wn.2d at 333-34.

D. CONCLUSION

For the reasons presented, remand for resentencing is required.

DATED this 8th day of May 2012.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67656-3-1
)	
GARRETT CZERSKI,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF MAY 2012.

x *Patrick Mayovsky*