Supreme Court No. _____
COA No. 58191-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BOB NOEL ROTH,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
No. 22-1-00822-1

PETITION FOR SUPREME COURT REVIEW

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A. IDENTITY OF PETITIONER

Mr. Bob Roth was the defendant in Pierce County No. 22-1-00822-1, the appellant in COA No. 58191-4-II.

B. COURT OF APPEALS DECISION

Mr. Roth petitions for review of the Court of Appeals decision in No. 58191-4-II, issued November 21, 2024, which erroneously misapplied Washington statutory sentencing law. Appendix A (decision attached hereto).

C. ISSUES PRESENTED ON REVIEW

1. Facts relating to the general purposes of the Sentencing Reform Act may justify departure from the standard range. Does a sentencing court commit an error of law when it fails to demonstrably recognize that *mitigating* factors, which were proffered by the defense in this case, need not be among the listed, non-exclusive factors listed by statute?

2. Did the trial court commit an error of law when it declined to impose a downward departure sentence below the standard range based on legal error?

E. STATEMENT OF THE CASE

After an argument about a parking space, one Bill Rogers called the Puyallup police and claimed that Mr. Roth had "damaged" his Tesla by kicking it. CP 1-2; RP 149-55. Mr. Rogers pursued Mr. Roth, and later admitted that he drove after him because he wanted "some type of restitution[.]" RP 151. Mr. Rogers followed Mr. Roth home, and then also claimed that Mr. Roth brandished a firearm. RP 169-70.

Subsequently, security video footage did not support Mr. Rogers' claim Mr. Roth had kicked and damaged a tail light on his Tesla. RP 142, RP 160-61, RP 316; see RP 266 (Officer Obermiller's testimony that Mr. Rogers' claim had "no evidence to support [it] whatsoever."). In addition, no firearm was ever located, despite Mr. Rogers' allegation - which had caused the police officers to respond with tactical gear. RP 141, RP 145, RP 158, RP 178, RP 302, RP 185, RP 266, RP 317-18.

When the officers first arrived, they spoke with Mr. Roth, who was standing in front of his house. RP 171, 261. Mr. Rogers had gotten out of his Tesla, which he had left in a position blocking the lane of travel of the suburban road and causing a traffic jam. RP 169-72. The officers quickly took the handcuffs off of Mr. Roth when Mr. Roger's gun claim was determined to be baseless. RP 266-68.

However, the officers, having responded in force and likely feeling obligated to arrest someone, decided to believe *Mr. Rogers*' claims that he had observed Mr. Roth driving during a time when it later appeared he may have been intoxicated. RP 158. Police officers assessed that there was an odor of intoxicants coming from Mr. Roth, and said his eyes were watery and bloodshot. RP 273, 299. It was also determined that Mr. Roth was required to have his vehicle equipped with an ignition interlock device. RP 182, 283-85, see also RP 232, 237-38 (testimony of records custodian).

After being advised of his Miranda warnings, Mr. Roth stated that he had drank two whiskeys, but noted that his girlfriend, Shawna Batty, had been driving. RP 269, RP 275. At Mr. Roth's trial he stipulated to prior DUI convictions. CP 7-8; CP 38-42; RP 3-4, RP 184-85.

The jury found Mr. Roth guilty. RP 331-32; CP 12-14. Despite numerous letters of support for Mr. Roth , and the defense motion for an exceptional sentence based on mitigating facts that mirrored the general policy purposes of the SRA, the court sentenced him to a standard range term of incarceration. RP 346; CP 43-49, CP 67-71. Mr. Roth appealed. CP 72.

D. ARGUMENT

Review should be granted because the court erred by failing to properly consider the defense request for an exceptional sentence below the standard range.

(1). Mr. Roth seeks review by the Supreme Court pursuant to RAP 13.4(b)(1) and (2).

Review should be granted, and an order entered permitting the filing of supplemental briefing for a decision on the merits by the Supreme Court, as authorized by RAP 13.4(d).

Below, the Court of Appeals ruled that the trial court meaningfully considered Roth's request for an exceptional downward sentence but reasonably concluded such a departure was not justified by the evidence presented at sentencing. Appendix A, at p. 1.

The Petitioner believes this was a mischaracterization of the case. The Supreme Court will take review of a Court of Appeals decision where the Petitioner – here, Mr. Roth seeking review - can show that the Court of Appeals decision in his case is contrary to decisions of the Supreme Court, or contrary to other decisions of the Court of Appeals. RAP 13.4(b)(1); RAP 13.4(b)(2); see, e.g., State v. Warden, 133 Wn.2d 559, 562, 947 P.2d 708 (1997).

These errors, requiring that Mr. Roth's incorrect appellate affirmance of his trial court judgment be reversed, are present in the case sub judice.

The sentencing court necessarily abuses its discretion when its decision is based on an erroneous view of the law.

State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); see also State v. Korum, 157 Wn.2d 614, 637, 141 P.3d 13 (2006) (court must meaningfully consider the defense request). See, e.g., State v. Branch, 12 Wn. App. 2d 1018, review denied, 196 Wn.2d 1002 (2020) (unpublished, cited for persuasive purposes only under GR 14.1(a) (court's statements that Branch's failed defense was not "an appropriate basis for the Court to grant an exceptional sentence down" was an error of law allowing appeal and requiring remand).

(2). Request for downward departure.

Mr. Roth asked for an exceptional sentence downward of 25 months, based on several individual mitigating circumstances that were concordant with the purposes of the Sentencing Reform Act. CP 43; CP 342.

Mr. Roth readily agreed that he should be subject to 12 months on community custody, with a court order that he complete a substance use disorder evaluation and complete recommended treatment. RP 342, 345; CP 43. Mr. Roth argues

that the sentencing court, when it denied the motion, abused its discretion when it said it could not go below the standard range. See RP 346-47.

(3). Only an exceptional sentence below the standard range would be proportionate with the lack of harm caused by Mr. Roth, and a standard range sentence was incongruent with the purposes of the SRA.

A sentencing court is legislatively permitted to impose a sentence below the standard range in substantial and compelling circumstances. RCW 9.94A.535. If a particular case presents atypical features, the Sentencing Reform Act (SRA) allows the court to depart from the guidelines and sentence outside the prescribed range. The drafters of the SRA recognized that the judiciary was entitled to exercise discretion in appropriate circumstances. Wash. Sentencing Guidelines Comm'n, Implementation Manual § 9.94A.390, Cmt. (1984).

Recognizing the importance of upholding this policy, the Washington State Supreme Court has stated that "an exceptional sentence is appropriate when circumstances of a

particular crime distinguish it from other crimes within the same statutory definition." State v. Fisher, 108 Wn.2d 419, 424, 739 P.2d 683 (1987). Hence, when the circumstances concerning a particular crime are substantial and compelling, the sentencing judge may depart from the standard guidelines. Consideration of whether an exceptional sentence is justified follows a two-step analysis

> (1) The sentence must be supported by the record, a factual determination; and (2) there must be substantial and compelling reasons justifying imposition of the exceptional sentence as a matter of law.

RCW 9.94A.535(1); State v. Nelson, 108 Wn.2d 491, 496, 740 P.2d 835 (1987).

In determining if substantial and compelling mitigating circumstances exist which warrant the imposition of an exceptional sentence, the court is limited to such facts as are admitted to or acknowledged at the time of sentencing. Id. at 496; RCW 9.94A.370. A trial court's reasons for imposing a sentence outside of the standard range are reviewed under the

clearly erroneous standard. Nelson, at 496. Under this standard, a trial court's conclusions will be upheld if they are supported by substantial evidence.

As Mr. Roth noted, the factors listed in RCW 9.94A.535(1) are by the legislature's own terms "illustrative only and are not intended to be exclusive reasons for exceptional sentences." CP 45. As such, the court may impose an exceptional sentence even when a specific statutory factor is not a perfect fit for the facts and circumstances of a given case. The Court need only find "substantial and compelling reasons justifying an exceptional sentence" viewed considering the purposes of the Sentencing Reform Act. RCW 9.94A.535.

The 25 months sentence requested by Mr. Roth was the only sentence that would be commensurate with the intent of the SRA. The Act's goals are to assure public accountability in the administration of the criminal justice system by structuring discretionary decisions affecting sentences that:

> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
> (2) Promote respect for the law by providing punishment which is just;
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
> (4) Protect the public;
> (5) Offer the offender an opportunity to improve him or herself; and
> (6) Make frugal use of the state's resources.

State v. Nelson, 108 Wn.2d at 501-502 (citing RCW 9.94A.010). Therefore, the legislature intended the punishment to be proportionate to the seriousness of the offense and the offender's criminal history. State v. Allert, 117 Wn.2d 156, 815 P.2d 752 (1991).

The importance of treatment in Mr. Roth's sentencing was paramount. A sentence that would provide treatment was not clearly too lenient considering the paramount purpose of the SRA, which is punishment that be commensurate with the defendant's culpability and commensurate with the punishment other similarly situated offenders receive. State v. Estrella, 115 Wn.2d 350, 357, 798 P.2d 289 (1990).

Mr. Roth did not seek to minimize the conduct for which he was convicted, but counsel faithfully emphasized that no individual was harmed by Mr. Roth's actions. Mr. Roth was not involved in an accident, nor was he contacted by police for driving dangerously or erratically. In fact, the facts presented at trial clearly established that law enforcement at no point observed Mr. Roth driving a vehicle, much less in a dangerous manner - officers only responded to the scene in response to a dispute between Mr. Roth and the reporting party, Mr. Rogers. RP 171, 261. Mr. Rogers did not report speeding or swerving by Mr. Roth. See RP 344. As Officer Thompson testified, the police had no basis to and did not investigate any claim of dangerous driving or an accident. RP 184.

It is true that there are significant potential risks posed to the community by driving under the influence generally. However, the actual harm to the community posed by Mr. Roth's driving under the influence in this case was nonexistent.

Although Mr. Roth had undergone treatment in the past, he was not beyond the possibility of rehabilitation. Substance use disorder is a lifelong disease that often comes with relapses and roadblocks. Beginning on March 22, 2022, Mr. Roth had been out on bail, and since that time over one year prior, Mr. Roth had maintained his sobriety and not otherwise violated his conditions of release. RP 331. An allegation earlier during his conditions of release that he had tampered with an ankle monitor was investigated internally, and it was determined that the alert was due to incorrect installation of the ankle monitor. See CP 49 (attachment A to sentencing memorandum.).

Mr. Roth had shown over the year prior to the present incident that he was capable of following a court's orders and maintaining his sobriety. RP 332. Although the court had an important interest in protecting the public, our State's sentencing laws recognize the important goals of offering offenders an opportunity to improve himself and prioritize making frugal use of the state's resources. Both Mr. Roth and

the community at large would have been best served by a sentence which allowed rehabilitation.

Mr. Roth argues that the court abused its discretion by failing to properly entertain the valid bases for an exceptional sentence downward. Non-statutory aggravating factors may indeed be compelling, and here, Mr. Roth argues that it appears the court erroneously failed to recognize its authority to depart downward. The defendant may and did ask that the trial court consider that the factors listed in RCW 9.94A.535(1) are "illustrative only" and not exclusive reasons for exceptional sentences. See RP 333.

Here, given the importance of a viable assessment of all the mitigating factors proffered, the Court of Appeals should be concerned by the fact that the trial court did not deem them legally substantial and compelling - a mistake of law. The court's ruling should be deemed a categorical statement that the factors could not support a sentence below the standard range.

F. CONCLUSION

Based on the foregoing, this Court should accept review. The Court should order that the parties file supplemental briefing pursuant to RAP 13.4(d), address Mr. Roth's sentencing arguments on their merits, and reverse his judgment and sentence.

This Petition contains 2,201 words in font Times New Roman size 14.

Respectfully submitted this 12th day of December, 2024.

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Washington State
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BOB NOEL LEE ROTH, Appellant.	No. 58191-4-II UNPUBLISHED OPINION

LEE, J. — Bob Noel Lee Roth appeals his standard range sentence, arguing the trial court erred by failing to properly consider his request for an exceptional downward sentence. Roth also challenges the imposition of the crime victim penalty assessment (CVPA) and DNA collection fee on his judgment and sentence. The State does not object to striking the CVPA and DNA collection fee.

Because the trial court meaningfully considered Roth's request for an exceptional downward sentence but reasonably concluded such a departure was not justified by the evidence presented at sentencing, the trial court did not abuse its discretion. Therefore, we hold that Roth cannot appeal the length of his standard range sentence, and we affirm Roth's sentence. However, we remand to the trial court with instructions to strike the CVPA and DNA collection fee from Roth's judgment and sentence.

FACTS

A. BACKGROUND FACTS

On March 16, 2022, Roth and Brent Rogers had an altercation in Puyallup. Rogers was parked outside a restaurant when Roth parked in front of him. Rogers exited his vehicle and entered the restaurant. After Rogers exited the restaurant, he observed Roth sitting in Roth's vehicle; Roth asked Rogers whether a nearby vehicle was Rogers', and Rogers responded affirmatively. Roth responded, "Nice car. That's why I put my steel-toed boot in the headlight," and then drove away. 2 Verbatim Rep. of Proc. (VRP) (Mar. 21, 2023) at 157.

Rogers pursued Roth, calling 911 as he did. Eventually, Roth and Rogers stopped outside Roth's home. Rogers saw Roth "making erratic movements" and told the 911 operator he though Roth had a gun. 2 VRP (Mar. 21, 2023) at 158. When police arrived, they found no evidence of a gun, and based on their subsequent investigation, concluded that Rogers' allegation that Roth kicked his car was "unfounded." 3 VRP (Mar. 22, 2023) at 266.

However, one of the responding officers—Sergeant David Obermiller—spoke with Roth and later testified that Roth smelled of alcohol and had bloodshot, glassy eyes, drooping eyelids, and slurred speech. Sergeant Obermiller then performed some field sobriety tests. Based on Roth's performance on the field sobriety tests and Roth's general state, Sergeant Obermiller concluded that "Roth was impaired and should not have been driving." 3 VRP (Mar. 22, 2023) at 281.

Sergeant Obermiller subsequently took Roth into custody for driving under the influence (DUI). After doing a driver's check, Sergeant Obermiller learned that Roth was driving on a suspended license and was required to have an interlock ignition device on his vehicle. Sergeant

Obermiller confirmed that the vehicle Roth had been driving did not have the required interlock ignition device. After being arrested, Roth's blood alcohol content (BAC) was measured at .159 and .168.

The State charged Roth with one count of felony DUI (count 1) and two gross misdemeanors: driving with a suspended or revoked license in the first degree (count 2) and failure to have a required ignition interlock device (count 3). After a jury trial, Roth was found guilty as charged.

B. SENTENCING

Both parties filed a sentencing memorandum with the trial court. The parties agreed that Roth should be sentenced to 364 days of confinement for the convictions on counts 2 and 3 and that the sentence for those convictions should run concurrently to the conviction on count 1. The parties disagreed on the appropriate sentence for the conviction on count 1: the State recommended a standard range sentence of 57 months (the high end of the standard sentencing range) while Roth sought an exceptional downward sentence of 30 months of confinement.

At sentencing, Roth amended his request and sought an exceptional downward sentence of 25 months of confinement for the conviction on count 1. Roth argued that this exceptional sentence was justified because he did not injure anyone and none of the witnesses at trial testified to seeing Roth drive erratically. Roth argued this lack of harm was indicative of his entire record of DUIs: "This isn't a person who has ever been charged or convicted of any kind of vehicular assault," he "is not a person who gets in impacts and rolls his car or anything like that." 4 VRP (May 5, 2023) at 344. Roth also argued that he was amenable to treatment, had been sober for over a year, and was "obviously capable of following the Court's orders." 4 VRP (May 5, 2023)

at 346. Finally, Roth argued that State resources would be better utilized treating him than imprisoning him.

The State argued that in light of Roth's extensive history of DUIs, Roth should be sentenced to the high end of the standard sentencing range for the conviction on count 1. The State noted that Roth was being sentenced for his eighth DUI conviction, and that Roth's BAC was almost twice the legal limit when he was arrested. Thus, the State argued, the danger Roth posed to the community and his history of treatment without improvement justified a 57 month sentence.

The trial court denied Roth's request for an exceptional downward sentence, explaining:

> I have reviewed both the memorandums prepared by counsel. I have sat through the trial. I have reviewed Mr. Roth's history, and it's true. It's significantly limited to driving and the DUI offenses and the offspring of all those DUIs.
>
> In good conscience, I cannot go below the standard range. In good conscience, I can't do anything except impose the high end of the standard range. It appears to me as though the public has been fortunate eight times in that nobody has been hurt or injured otherwise by Mr. Roth and his driving.
>
> I understand the claim that he can follow court orders. At the time of his arrest, he was breaking at least two court orders. Not just the law, but two court orders in addition to the law in terms of driving without the ignition interlock and while his license was suspended.

4 VRP (May 5, 2023) 347.

The trial court sentenced Roth to 57 months of confinement for the conviction on count 1 and 364 days for the convictions on counts 2 and 3, to run concurrently with the sentence for the conviction on count 1. The trial court also ordered that Roth undergo alcohol or chemical dependency treatment services while incarcerated.

The trial court found Roth indigent because he "was indigent at the time he received his attorney" and "[h]is finances presumably have not improved and won't improve over the next three

years." 4 VRP (May 5, 2023) at 348. The trial court imposed the $500 CVPA and $100 DNA collection fee.

Roth appeals.

ANALYSIS

A. SENTENCING

Roth argues that the trial court erred by not properly considering his request for an exceptional downward sentence. The State responds that the record shows the trial court considered Roth's request and appropriately exercised its discretion in imposing a standard range sentence, and therefore, Roth is precluded from appealing his standard range sentence. We agree with the State.

1. Legal Principles

A standard range sentence is not appealable. RCW 9.94A.585(1); *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). However, "this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision." *McFarland*, 189 Wn.2d at 56; *see also State v. Mandefero*, 14 Wn. App. 2d 825, 833, 473 P.3d 1239 (2020). In other words, a defendant cannot challenge the length of their standard range sentence, but can seek review where the trial court (1) refuses to exercise its discretion at all or (2) refuses to impose an exceptional sentence for impermissible reasons. *McFarland*, 189 Wn.2d at 56.

We review the trial court's denial of a request for an exceptional sentence for an abuse of discretion. *See id.* A trial court abuses its sentencing discretion when "'it refuses categorically to impose an exceptional sentence below the standard range under any circumstances'" or refuses to

exercise its discretion due to a "'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" *Id.* (alteration in original) (first quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998); then quoting *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007)).

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the trial court may impose an exceptional sentence if it finds "that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The SRA provides a nonexclusive list of mitigating factors the trial court may consider. RCW 9.94A.535(1). The mitigating factors must be established by a preponderance of the evidence, and the trial court may rely on "only such information as is admitted to or acknowledged at the time of sentencing." RCW 9.94A.535(1); *State v. Nelson*, 108 Wn.2d 491, 497, 740 P.2d 835 (1987). So long as the trial court "'has considered the facts and has concluded that there is no basis for an exceptional sentence,'" it has appropriately exercised its discretion, and the defendant cannot appeal the resulting standard range sentence. *Mandefero,* 14 Wn. App. 2d at 833 (quoting *Garcia-Martinez*, 88 Wn. App. at 330).

2. Roth Cannot Appeal His Standard Range Sentence

The record shows that the trial court understood its discretion to depart from the standard sentencing range, considered Roth's mitigation arguments, and concluded that Roth's mitigating evidence was not sufficiently substantial and compelling to justify the exceptional downward sentence that Roth requested.

Roth requested an exceptional downward sentence of 25 months. Roth argued that the downward sentencing departure was justified because his intoxicated driving did not cause actual

harm, he was amenable to treatment for his substance use, he was capable of following the trial court's orders, and State resources would be better utilized treating Roth than imprisoning him. The record shows that the trial court considered Roth's arguments but concluded an exceptional sentence was not justified in the face of Roth's extensive criminal history of intoxicated driving, the danger Roth's behavior posed to the community at large, and Roth's demonstrated inability to follow two of the court's orders at the time of his arrest. Thus, the trial court did not categorically refuse Roth's request, nor did the court refuse Roth's request due to a mistaken belief that it lacked the discretion to depart from the standard range.

Rather, the trial court explicitly considered Roth's extensive criminal history of driving while intoxicated and acknowledged that Roth's intoxicated driving did not result in actual harm to the community, but the court reasonably concluded that it was luck rather than any action on Roth's part that had protected the community. The trial court also considered Roth's amenability to treatment and his ability to follow court orders, reasonably concluding those were not substantial and compelling reasons to depart from the standard range in the face of Roth's disregard for his suspended license status and ignition interlock device requirement. Also, the uncontroverted facts presented at sentencing showed that Roth has an extensive criminal history of DUI and other driving-related crimes despite previous attempts at treatment.

The trial court meaningfully considered Roth's mitigating evidence and reasonably concluded that neither luck nor Roth's purported ability to follow court orders were substantial and compelling enough reasons to depart from the standard sentencing range. Thus, Roth cannot appeal the length of his standard range sentence.

B. LFOs

Roth argues that the CVPA and DNA collection fee should be stricken from his judgment and sentence. The State does not object to striking the CVPA or DNA collection fee.

Pursuant to RCW 7.68.035(4), the CVPA is no longer authorized for indigent defendants. And the State does not object to striking the CVPA from Roth's judgment and sentence. Also, effective July 1, 2023, the DNA collection fee is no longer statutorily authorized. RCW 43.43.7541; LAWS OF 2023, ch. 449, § 4. Because Roth's case is on appeal, the amendments to RCW 7.68.035(4) and RCW 43.43.7541 apply. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 17, 530 P.3d 1048, *pet. for rev. filed*, No. 102378-2 (Sep. 14, 2023). Therefore, imposition of the CVPA and DNA collection fee are no longer authorized and should be stricken from Roth's judgment and sentence.

CONCLUSION

Because the trial court meaningfully considered Roth's arguments in support of an exceptional downward sentence and there is no indication in the record that the trial court thought it had no ability to depart from the standard sentencing range, Roth cannot appeal the length of his standard range sentence. Thus, we affirm Roth's sentence. However, we remand to the trial court with instructions to strike the CVPA and DNA collection fee from Roth's judgment and sentence.

No. 58191-4-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Cruser, C.J.

Veljacic, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 58191-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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