

No 71216-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEFF HEURTELOU,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated the real facts doctrine of RCW 9.94A.530(2) in sentencing Jeff Heurtelou.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

RCW 9.94A.530(2) bars a court from considering at sentencing facts which have not been proved, agreed to or acknowledged by the defendant. Where the sentencing court considered facts regarding the victims and other codefendants and those facts were not proved by the State, or agreed to or acknowledged by Mr. Heurtelou, did the Court violate the limits of RCW 9.94A.530 and exceed its sentencing authority?

C. STATEMENT OF THE CASE

Mr. Heurtelou pleaded guilty to seven counts of first degree robbery and two counts of first degree burglary. CP 27. The charges arose from a series of incidents in which Mr. Heurtelou and others entered several apartments used by massage therapists and robbed those present of money and property. CP 4-11. As part of his plea agreement, Mr. Heurtelou agreed to recommend a sentence of not less than 273 months. CP 31.

At sentencing, the State discussed in detail the sentences imposed by different sentencing judges in the case of the other codefendants. 11/1/13 RP 4-6. The victims did not appear at nor speak at sentencing. However, at the court's invitation, the prosecutor discussed details of the victims' lives. *Id.* at 7-9.

Based upon the prosecutors' presentation, the court imposed a sentence of 297 months. CP 48

D. ARGUMENT

The trial court violated the provisions of RCW 9.94A.530 at sentencing.

1. The "real facts" doctrine of RCW 9.94A.530 prohibits a court from considering facts at sentencing which have not been agreed to or proved.

"A [] court only possesses the power to impose sentences provided by law." *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). When a sentencing court does not follow the proper procedure, a party may appeal even a standard range term. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (State may appeal where the sentencing court had a duty to follow a specific procedure under the SRA and failed to carry out that duty); *State v. Kinneman*, 155 Wn.2d 272, 283, 119 P.3d 350 (2005) ("well established" that party may appeal to correct "legal errors or abuses of

discretion in the determination of what sentence applies.”). Here, the trial court violated the plain provisions of RCW 9.94A.530(2).

RCW 9.94A.530(2) provides in relevant part:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. . . .

The purpose of this doctrine is to protect the defendant from the trial court's “consideration of unreliable or inaccurate information.”

State v. Morreira, 107 Wn. App. 450, 456-57, 27 P.3d 639 (2001)

(quoting *State v. Handley*, 115 Wn.2d 275, 282, 796 P.2d 1266 (1990)).

That purpose is consistent with the requirement that the State bears the burden of presenting evidence to support the sentence imposed

regardless of whether the defendant objects. *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). The State cannot meet that burden

by bare assertions unsupported by evidence. *State v. Hunley*, 175

Wn.2d 901, 910, 287 P.3d 584 (2012). Thus, RCW 9.94A.530(2) limits

those facts a court may consider when imposing any sentence other than an exceptional sentence above the range.

2. The trial court violated the provisions of RCW 9.94A.530(2) when it considered facts which had not been agreed to or proved.

In this case, the sentencing court invited the prosecutor to provide details of the victims' lives. The court asked the prosecutor to give her a "picture" of "what they are like." 11/1/13 RP 7. Thus, the prosecutor was allowed to detail that many of the victims were recent immigrants and may have potentially been victims of a human trafficking ring, of which Mr. Heurtelou was not a part and of which there is no reason to believe he had knowledge. *Id.* at 7. The court also permitted the deputy prosecutor to detail the sentences imposed by another judge on Mr. Heurtelou accomplices. *Id.* at 7-8.

Mr. Heurtelou did not agree to the facts regarding his accomplices' sentences or of the victim's background. The State did not prove those facts at a trial or any hearing. Those facts are not contained in the State's presentence report, and thus Mr. Heurtelou did not acknowledge them by failing to object. In his plea agreement Mr. Heurtelou agreed the sentencing court could consider the facts set forth in the certification for determining probable cause. CP 43. But the facts

considered by the sentencing court were not contained in that document. RCW 9.94A.530(2) did not permit the court to consider any of those facts in setting Mr. Heurtelou's sentence. But it is plain the court did just that.

In announcing her sentence, the judge said "surely you knew after the first few times that you were dealing with young women from another country." RP 12. "I don't know how you could not have known that these women weren't human trafficking victims." *Id* at 13. Finally, the court said "I can't find a basis to distinguish you from [your codefendants]. *Id*."

Mr. Heurtelou did not agree to or acknowledge the facts regarding his accomplices' sentences imposed by a different judge. He did not agree to or acknowledge the facts of the victim's past and current immigration circumstances. The State did not prove those facts. Although the sentencing judge may have wished to have a clearer "picture" of the victims and their lives, RCW 9.94A.530(2) restricts the type of information the sentencing court considers, even when imposing a standard range sentence. The trial court went beyond those restrictions and exceeded its sentencing authority.

3. This Court should reverse Mr. Heurtelou's sentence and remand for resentencing before a new judge.

It is clear the sentencing judge violated the provisions of RCW 9.94A.530. As such Mr. Heurtelou is entitled to be resented free of any consideration of those facts. The only way that can occur is if resentencing occurs before a new judge. *See State v. Aguilar-Rivera*, 83 Wn. App, 199, 203, 920 P.2d 623 (1996) (when trial court inadvertently omits allocution until after intended sentence announced "the remedy is to send the defendant before a different judge for a new sentencing hearing.").

E. CONCLUSION

This Court should reverse Mr. Heurtelou's sentence and remand for resentencing.

Respectfully submitted this 23rd day of May, 2014.



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DIVISION ONE**

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.) NO. 71216-1-I
)
 JEFF HEURTELOU,)
)
 Appellant.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF MAY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF MAY, 2014.

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