

NO. 46523-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN FESSEL,

Appellant.

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

The Honorable Susan L. Clark, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in imposing an exceptional sentence.
2. The trial court erred in failing to enter written findings of fact and conclusions of law justifying an exceptional sentence, in violation of RCW 9.94A.535.

Issues Pertaining to Supplemental Assignments of Error

1. The trial judge identified the basis for the exceptional sentence as appellant's "history." 7RP¹ 784. Must the sentence be vacated because the court failed to identify a statutory aggravating factor capable of lawfully supporting an exceptional sentence?

2. RCW 9.94A.535 requires entry of written findings of fact and conclusions of law justifying an exceptional sentence. Is remand required for entry of written findings and conclusions in support of the exceptional sentence?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Appellant Justin Fessel was sentenced jointly on the same day on the vehicular assault and hit and run under this cause number and for two convictions of bail jumping under cause number 13-1-00551-4. 7RP 755-57. Fessel was sentenced to 72 months on the vehicular assault conviction

¹ The index to the citations to the record is found in the brief of appellant at 2, n.1.

and 60 months on the hit and run conviction, to be served consecutively to the bail jumping convictions, for a total of 144 months imprisonment. 7RP 784; CP 86-102.

At sentencing, the prosecutor asked the court to impose consecutive rather than concurrent sentences. 7RP 759, 771-73. The prosecutor explained she was making the request based on Fessel's "criminal history," and because concurrent sentences "doesn't send the right message." 7RP 757-58, 771. The prosecutor renewed her request after sentencing was continued. Id.

Defense counsel objected to the prosecutor's consecutive sentence request, explaining it would constitute an exceptional sentence since Fessel was being sentenced on two different cause numbers at the same time. 7RP 775, 781. Counsel noted that consecutive sentences were discretionary, "only if the sentencing's [*sic*] occur at different times." 7RP 776. Defense counsel directed the trial court to RCW 9.94A.589(1)(a), RCW 9.94A.535, and RCW 9.94A.589(3). 7RP 777.

In response, the trial court explained, "well, I think it says unless the Court pronouncing the current sentence expressly orders that they be served consecutively, so I interpret that as it's the Court's discretion." 7RP 778. The prosecutor noted the trial court's interpretation was consistent with the State's "understanding." 7RP 778.

When imposing the consecutive sentences, the trial court explained:

The concern I have is we've got this history and the jury gave you the benefit of the doubt – as far as whether it was intentional and reckless. But I don't see any way we can't say it's reckless, looking at the damage – on those vehicles. That said, the court has a little bit of discretion here.

7RP 784.

The judgment and sentence does not indicate the trial court imposed an exceptional sentence. CP 86-102. No written findings of fact and conclusions of law in support of the consecutive sentences were entered.

C. SUPPLEMENTAL ARGUMENT

1. THE TRIAL COURT DID NOT IDENTIFY A VALID AGGRAVATING FACTOR TO JUSTIFY IMPOSITION OF AN EXCEPTIONAL SENTENCE.

The trial court did not articulate a proper basis for imposing an exceptional sentence on Fessel. The exceptional sentence must therefore be vacated and the case remanded for resentencing to a non-exceptional sentence.

Fessel was sentenced jointly on the same day on the vehicular assault and hit and run under this cause number and for two convictions of bail jumping under cause number 13-1-00551-4. 7RP 755-57. Fessel was

sentenced to 72 months on the vehicular assault conviction and 60 months on the hit and run conviction, to be served consecutively to the bail jumping convictions, for a total of 144 months² imprisonment. 7RP 784; CP 86-102. This is an exceptional sentence. Consecutive sentences for two or more current, non-violent offenses are exceptional sentences and “may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.” RCW 9.94A.535; RCW 9.94A.589(1)(a).

The prosecutor explained she was requesting consecutive sentences based on Fessel’s “criminal history,” and because concurrent sentences “doesn’t send the right message.” 7RP 757-58, 771. The State cited no statutory provision that would justify exceptional consecutive sentences. Indeed, the prosecutor seemed to be under the misapprehension that the trial court had discretion to run the bail jumping conviction consecutive to the vehicular assault and hit and run convictions as a matter of law, without regard to whether aggravating factors support an exceptional sentence. 7RP 758, 775, 778.

² This sentence included a third consecutive sentence of 12 months for a prior conviction for possession of a controlled substance. Fessel does not challenge the consecutive possession of a controlled substance conviction. 7RP 769; CP 86-102.

The Legislature has identified four aggravating factors that may be considered by the trial court and used to impose an exceptional sentence without a jury finding that the factor exists:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

RCW 9.94A.535(2).

The trial judge did not identify any of these aggravating factors to impose an exceptional sentence in this case. The judgment and sentence does not indicate any reason why an exceptional sentence was imposed. In fact, the judgment and sentence, in running the sentences of both counts consecutive to one another, did not show any recognition that such a sentence was exceptional.

The only stated basis for the sentence was Fessel's "history," and the court's "discretion," but there is no such aggravating factor. 7RP 784. "History" is not the same as the unpunished "current offenses" identified as an aggravator in RCW 9.94A.535(2)(c). To the extent the judge's remark about "history" is an oblique reference to the unscored "criminal history" in RCW 9.94A.535(2)(b) or criminal history omitted from the offender score in 9.94A.535(2)(d), those factors are inapplicable because there is nothing in the record to show Fessel has any criminal history left unscored or omitted from the offender score.

Fessel anticipates the State may assert that the consecutive sentences imposed are not exceptional sentences under RCW 9.94A.589(3).³ This argument is not supported by the record here and should be rejected.

RCW 9.94A.589(3) provides sentencing courts with discretion "to impose either a concurrent or a consecutive sentence for a crime that the defendant committed before he started to serve a felony sentence for a

³ RCW 9.94A.589(3) provides:

[W]henver a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by a court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

different crime.” State v. King, 149 Wn. App. 96, 101, 202 P.3d 351, rev. denied, 166 Wn.2d 1026 (2009). Consecutive sentences under RCW 9.94A.589(3) are not exceptional sentences that require aggravating factor findings. King, 149 Wn. App. at 101.

A sentencing court does not, however, have discretion to impose consecutive sentences under RCW 9.94A.589(3) when sentencing a defendant for multiple “current offenses.” By its express terms, RCW 9.94A.589(3) is subject to the provisions of RCW 9.94A.589(1), which states in relevant part:

[W]henever a person is to be sentenced for two or more *current offenses*, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score.... *Sentences imposed under this subsection shall be served concurrently.*

(Emphasis added).

Convictions “sentenced on the same date” are “deemed ‘other current offenses’ within the meaning of RCW 9.94A.589.” RCW 9.94A.525(1). Here, the trial court sentenced Fessel for his bail jumping convictions in cause number 13-1-00551-4 and vehicular assault and hit and run in cause number 13-1-01542-1 on the same date. Accordingly, the trial court lacked authority to impose consecutive sentences for these “current offenses” under RCW 9.94A .589(3).

Fessel's exceptional sentence cannot stand. The remedy is remand for resentencing within the standard range because the aggravating factor identified by trial court is insufficient to justify an exceptional sentence. State v. Ha'mim, 132 Wn.2d 834, 847, 940 P.2d 633 (1997).

2. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS AND CONCLUSIONS JUSTIFYING AN EXCEPTIONAL SENTENCE.

Remand is required even if the trial court accurately identified an appropriate aggravating factor. The trial court must enter written findings of fact and conclusions of law supporting an exceptional sentence. Its failure to do so here necessitates remand for entry of written findings and conclusions.

RCW 9.94A.535 requires that “[w]henver a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” “[T]he SRA’s written provision requires exactly that – *written findings*.” State v. Friedlund, 182 Wn.2d 388, 394, 341 P.3d 280 (2015) (emphasis in original).

An exceptional sentence may be imposed only where the trial court finds substantial and compelling reasons, set forth in written findings and conclusions, which support an exceptional sentence. Friedlund, 182 Wn.2d at 394. A trial court imposing an exceptional sentence has an

independent statutory duty to make findings that show the sentence imposed is consistent with the goals of the Sentencing Reform Act. In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 300, 979 P.2d 417 (1999).

Entry of written findings is essential when a court imposes an exceptional sentence. Friedlund, 182 Wn.2d at 393. “Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range.” Breedlove, 138 Wn.2d at 311. Furthermore, “[t]he purpose of the requirement of findings and conclusions is to insure the trial judge has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made.” In re Det. of LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). Sufficiently detailed findings give the reviewing court some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts and their application to the law. Nelbro Packing Co. v. Baypack Fisheries, L.L.C., 101 Wn. App. 517, 532-33, 6 P.3d 22 (2000) (addressing findings required for certification of final judgment under CR 54(b)).

The remedy for a trial court's failure to issue findings of fact and conclusions of law is remand for entry of findings and conclusions supporting the exceptional sentence. Friedlund, 182 Wn.2d at 394-95.

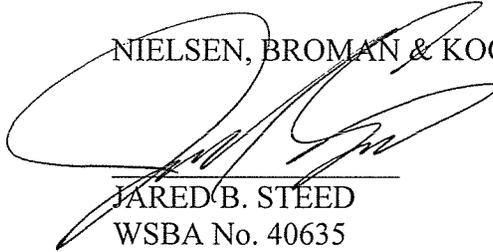
D. CONCLUSION

For the reasons stated, this Court should reverse the exceptional sentence and remand for entry of a sentence within the standard range. In the event this Court declines to do so, then the case should be remanded for entry of written findings and conclusions justifying the exceptional sentence and conviction.

DATED this 27th day of July, 2015.

Respectfully submitted,

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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 27TH DAY OF JULY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATE MAIL.

[X] JUSTIN FESSEL
DOC NO. 769462
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 9852

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF JULY 2015.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

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