Filed
Washington State
Court of Appeals
Division Two

April 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RACHELLE DOVA CABE, Appellant.	No. 50451-1-II UNPUBLISHED OPINION

MELNICK, J. — Rachelle Dova Cabe appeals her sentence for burglary in the second degree. She argues that the trial court failed to recognize it had discretion to run her sentence concurrently with an earlier conviction. We agree. We reverse Cabe's sentence and remand for resentencing.

FACTS

In December 2015, the State charged Cabe with burglary in the second degree in Clallam County. Cabe entered drug court in May 2016.[1] The following June, the court issued an arrest warrant.

In October 2016, Cabe committed another burglary in the second degree, this time in Kitsap County. In January 2017, she received a 51 month sentence for this charge. Cabe then filed a request for speedy trial in her drug court case.

[1] As a part of her drug court contract, Cabe agreed that if she quit or was terminated from the program, she stipulated "that there [were] facts sufficient for the Court to find [her] guilty of the pending charge(s)." Clerk's Papers (CP) at 80.

In March 2017, the court remanded Cabe from drug court and found her guilty of burglary in the second degree. It immediately proceeded to sentencing.

Cabe and the State both requested a sentence of 51 months. The State requested that the sentence be consecutive to the Kitsap County sentence and Cabe's trial counsel stated, "I believe my client is already serving a lengthy sentence out of Kitsap County as well. If that's imposed consecutively that will be longer." Report of Proceedings (RP) at 34.

The court gave Cabe a chance to speak. Cabe stated that she was pregnant and had an opportunity to enter a residential parenting program at the prison, but not if the court ran her sentence consecutive to her Kitsap County sentence. Accordingly, she asked the court to run her sentence concurrent with her Kitsap County sentence. The State brought up RCW 9.94A.589 and Cabe's extensive criminal history. It argued:

> The State's reading of her criminal history, she was under sentence at the time she was convicted and therefore it shall be consecutive and I'm sorry, I'm not heartless, I understand that Ms. Cabe has a child but that is something that should have been considered all the time during these criminal sprees. There's a potential for a child at any time and unfortunately that's where we are and this is a situation that the State nor [defense counsel] or the Court made but Ms. Cabe made. So I'm asking the Court to run that consecutively.

RP at 41.

The court stated:

> I think that it's, it kind of comes out at the same place though to be honest. I'd like to tell you that I had better news but I don't really so I think the way I read the law we're kind of—I don't have a whole lot of options here and I'm going to run them one after the other or consecutive 51 months, I'll waive the attorney fee. I don't feel good about it but it's one of these things when things play out this way that's what occurs.

RP at 42. It then sentenced Cabe to 51 months consecutive to her Kitsap County case. Cabe appeals.

ANALYSIS

Cabe contends that the trial court had discretion to run her sentence concurrent with or consecutive to her Kitsap County sentence. She contends that the trial court's failure to recognize that it had this discretion was an abuse of discretion. We agree.

I. LEGAL PRINCIPLES

RCW 9.94A.589(3) provides:

> Subject to subsections (1) and (2) of this section, whenever 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 any 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.

RCW 9.94A.589(2)(a), however, requires a consecutive sentence "whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement."

State v. King considered a similar situation to this case. 135 Wn. App. 662, 145 P.3d 1224 (2006) (*King* I). The defendant in that case threatened a witness after he was pronounced guilty at his criminal trial. *King* I, 135 Wn. App. at 666-67. He was then convicted of witness intimidation. *King* I, 135 Wn. App. at 675. Because he committed the crime of witness intimidation "*before* he was sentenced for the earlier three felonies," he was not yet "under sentence" and RCW 9.94A.589(3) controlled his sentencing on the witness intimidation charge rather than 9.94A.589(2)(a). *King* I, 135 Wn. App. at 675. Likewise, Cabe committed her Clallam burglary before she was "under sentence" for her Kitsap burglary. Accordingly, RCW 9.94A.589(3) controlled her sentence, and the trial court had the authority to sentence her concurrent with or consecutive to her Kitsap sentence.

II. EXERCISE OF DISCRETION

RCW 9.94A.589(3) "gives a sentencing judge the 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 different crime." *State v. King*, 149 Wn. App. 96, 101, 202 P.3d 351 (2009) (*King* II). Exercise of this discretion to impose a consecutive sentence is not an exceptional sentence. *King* II, 149 Wn. App. at 101.

"[W]hile trial judges have considerable discretion under the [Sentencing Reform Act of 1981], they are still required to act within its strictures and principles of due process of law." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Further, "where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal." *Grayson*, 154 Wn.2d at 342.

In *Grayson*, the trial court categorically refused to consider whether the defendant should receive a drug offender sentencing alternative (DOSA). 154 Wn.2d at 342. Although "the trial judge's decision whether to grant a DOSA is not reviewable," the court reversed because a trial court "abuses discretion when 'it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.'" *Grayson*, 154 Wn.2d at 338, 342 (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)).

In *King* I, the trial court ordered a consecutive sentence "[p]ursuant to RCW 9.94A.589(2)(a)," despite that RCW 9.94A.589(3) applied to the situation. 135 Wn. App. at 675. The court observed that "[t]he problem here is that the sentencing judge has absolute discretion to impose consecutive sentences. But the presumption is that the sentences will be served concurrently." *King* I, 135 Wn. App. at 675-76 (internal citation omitted). It ruled that, although

the court "may well have imposed the witness intimidation sentence to run consecutively anyway," the defendant "was entitled to have the court at least consider imposing concurrent sentences." *King* I, 135 Wn. App. at 676. Accordingly, it remanded for the trial court to exercise its discretion. *King* I, 135 Wn. App. at 676.

In this case, the State argued that Cabe was "under sentence" and "therefore it shall be consecutive," indicating it believed that RCW 9.94A.589(2)(a) controlled Cabe's sentence. RP at 41. The trial court ruled, "[T]he way I read the law we're kind of—I don't have a whole lot of options here and I'm going to run them one after the other or consecutive 51 months . . . . I don't feel good about it but it's one of these things when things play out this way that's what occurs." RP at 42. The court's ruling is not as clear as *King* I, where it expressly imposed a consecutive sentence "[p]ursuant to RCW 9.94A.589(2)(a)." 135 Wn. App. at 675. However, the court's ruling indicates that it erroneously believed it did not have discretion to impose a concurrent sentence. Because the court did not recognize it had discretion, it abused that discretion by failing to consider a concurrent sentence.

The State contends that the court's references to "when things play out this way that's what occurs," may refer to Cabe's extensive criminal history. Br. of Resp't at 8. It also contends that the trial court's understanding, or lack thereof, of the correct sentencing statute is outside the record, and therefore may not be considered on appeal. However, neither of these arguments address the court's statement on the record that "the way I read the law . . . I don't have a whole lot of options here" in its decision to impose a consecutive sentence. RP at 42. Taken as a whole,

the trial court's statements at Cabe's sentencing demonstrate that it erroneously believed it was required to impose a consecutive sentence.[2]

We reverse Cabe's sentence and remand for the trial court to resentence Cabe.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for the public record in accordance with RCW 2.06.40, it is so ordered.

Melnick, J.

We concur:

Worswick, P.J.

Sutton, J.

[2] The State contends that "it is equally plausible that the court had its own correct understanding of the law and sentenced Cabe accordingly" and that, therefore, the trial court did not abuse its discretion. Br. of Resp't at 10. It neither suggests what this understanding is nor does it argue why that understanding is correct.

RAP 10.3(6) directs each party to supply in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." "We do not consider conclusory arguments unsupported by citation to authority." *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012). "'[P]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *Mason*, 170 Wn. App. at 384 (quoting *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012)). We do not consider this argument.