IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 67807-8-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
LENNY RAY PRUITT,	)	
	)	
Appellant.	)	FILED: January 28, 2013

Grosse, J. — A sentencing court necessarily abuses its discretion if it refuses to consider a mitigating factor based on the erroneous belief that it lacks authority to do so. Here, however, the sentencing court properly considered the impaired mental capacity mitigating factor proposed by Lenny Pruitt and based on the facts presented, correctly determined that it did not apply. We find no abuse of discretion and accordingly, affirm.

FACTS

Lenny Pruitt has a long history of both mental illness and substance abuse. In 2011, the State charged Pruitt with robbery in the second degree, alleging that he robbed a Seattle pharmacy of alprazolam and methadone. Pruitt entered an Alford[1] plea. Based on Pruitt's offender score of 13, his standard range sentence was between 63 and 84 months. The State recommended a sentence of 63 months.

Pruitt requested an exceptional sentence of 40 months on the basis of RCW

[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

9.94A.535(1)(e), which allows the sentencing court to depart downward from the standard range where 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." This provision expressly excludes impairment caused by "[v]oluntary use of drugs or alcohol."

The trial court concluded that Pruitt could not meet his burden to establish that the mitigating factor applied. Although there was evidence that Pruitt's capacity was impaired by a combination of factors, including significant mental health issues and drug and alcohol addiction, there was no evidence from which the court could determine the effect of his impairment due to mental illness in isolation from his voluntary intoxication. The trial court denied Pruitt's request and imposed a standard range sentence of 63 months. Pruitt appeals.

ANALYSIS

A standard range sentence is generally not appealable.[2] However, where, as here, a defendant has requested an exceptional sentence below the standard range, the denial can be reviewed if the court "either refused to exercise its discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence."[3]

Pruitt argues that the sentencing court erred in its interpretation of the statutory

[2] See RCW 9.94A.585; State v. Khanteechit, 101 Wn. App. 137, 138-39, 5 P.3d 727 (2000).
[3] Khanteechit, 101 Wn. App. at 138.

mitigating factor as applied to defendants whose capacity is impaired by a combination of factors, including mental illness and voluntary intoxication. Pruitt contends that coexisting mental illness and addiction does not prevent application of the mitigating factor, unless the mental impairment is actually caused by intoxication.

Our Supreme Court's decisions in State v. Allert[4] and State v. Fowler[5] are instructive. In Allert, the defendant was convicted of two counts of armed robbery and received an exceptional sentence below the standard sentence range. The trial court found that the defendant suffered from depression, severe compulsive personality disorder, and alcoholism, and that the combined effect of these conditions impaired the defendant's ability to appreciate the wrongfulness of his conduct.[6] Nonetheless, these findings were inadequate to support use of the impaired mental capacity statutory mitigating factor. The Supreme Court explained that because the record failed to show that absent alcoholism, the defendant's psychiatric conditions would have caused the same cognitive impairment, the finding that the combined effect of all three conditions had caused the impairment was insufficient to justify the exceptional sentence.[7]

In Fowler, the defendant was convicted of first degree robbery. The trial court granted Fowler's request for an exceptional sentence below the standard range on the basis that he "'had not slept in more than 48 hours and was experiencing symptoms of

[4] 117 Wn.2d 156, 815 P.2d 752 (1991).
[5] 145 Wn.2d 400, 38 P.3d 335 (2002).
[6] Allert, 117 Wn.2d at 166.
[7] Allert, 117 Wn.2d at 166-67.

extreme sleep deprivation.'"[8] This court reversed because there was no evidence that Fowler's sleep deprivation was unrelated to his consumption of alcohol and drugs.[9] The Supreme Court affirmed, and concluded that because "Fowler's sleep deprivation was associated with his voluntary consumption of alcohol and drugs, it could not serve as a basis for an exceptional sentence."[10]

The sentencing court thus properly determined that where a capacity is impaired by mental illness in combination with drug and/or alcohol abuse, RCW 9.94A.535(1)(e) can only apply as a statutory mitigating factor if the evidence establishes that capacity was impaired absent voluntary intoxication. Here, the psychiatrist who evaluated Pruitt concluded that he has a "complicated and severe chemical dependency and psychiatric history," including a diagnosis of "schizoaffective disorder that is worsened by his substance dependence." In the days before the robbery, Pruitt reported being "quite depressed" and consuming alcohol, alprazolam, heroin, and perhaps cocaine. Just prior to the incident, he consumed alprazolam and alcohol and blacked out. The psychiatrist concluded: "My opinion is that Mr. Pruitt's judgment was severely impacted on January 29, 2011 related to his depression, psychotic disorder, intoxication and blackout from voluntary use of alprazolam and alcohol as well as withdrawal from methadone and heroin." The expert testimony did not establish that the effect of Pruitt's psychiatric issues could be separated from the effects caused by his voluntary

[8] Fowler, 145 Wn.2d at 410 (quoting sentencing court).
[9] Fowler, 145 Wn.2d at 411.
[10] Fowler, 145 Wn.2d at 411.

use of drugs and alcohol and drug withdrawal. Therefore, RCW 9.94A.535(1)(e) could not serve as a basis to impose an exceptional sentence.

The sentencing court considered the impaired capacity mitigating factor, but found it inapplicable based on the evidence presented. The trial court properly exercised its discretion and its decision declining to impose an exceptional sentence is not reviewable.

In his statement of additional grounds, Pruitt contends that the State breached the plea agreement by opposing his request for an exceptional sentence. The plea agreement belies this claim. In the plea agreement, the State agreed only that it would recommend a sentence of 63 months. Pruitt did not agree to this recommendation and retained the right to request a sentence below the standard range. Clearly, in agreeing to recommend a standard range sentence, the State did not indicate support or acquiescence to Pruitt's request for a sentence below the range. Pruitt also claims he was denied effective representation of counsel because counsel failed to present the testimony of the expert who evaluated him at the sentencing hearing. But in imposing Pruitt's sentence, the trial court considered the expert's extensive report. Nothing in the record indicates that the trial court would have permitted the expert to testify at sentencing. Nor is there anything to indicate that the expert's testimony would have differed in any respect from his written report.

We affirm the judgment and sentence.

Grosse, J

WE CONCUR: