

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MAYSO PICKINS,

Appellant.

No. 39837-1-II

UNPUBLISHED OPINION

Hunt, J. — Mayso Pickins appeals his enhanced sentence for attempting to elude a police officer. He argues that the sentencing court erred in finding him ineligible for a first time offender waiver. He also filed a Statement of Additional Grounds challenging his conviction. We affirm his conviction, vacate his sentence, and remand for resentencing with instruction to the trial court to consider Pickins eligible for a first time offender waiver.

Facts

On July 25, 2008 and while intoxicated, Mayso Pickins drove his motorcycle at high speeds, weaving within and between lanes, with police cars in pursuit. A jury found him guilty of attempting to elude a pursuing police vehicle and returned a special verdict that he had endangered more than one other person.¹ Under RCW 9.94A.533(11), the jury's special verdict increased

¹ The jury also found Pickins guilty of driving while under the influence of intoxicants and refusing

Pickins' presumptive standard sentence by 12 months and one day. At sentencing, Pickins, a first time offender, asked the trial court to waive the standard sentence range under RCW 9.94A.650. The State countered that the "endangering others" sentence enhancement, Verbatim Report of Proceedings (VRP) at 222, which it characterized as "mandatory," Clerk's Papers (CP) at 46, rendered Pickins ineligible for this statutory first time offender waiver; the State recommended a high-end standard-range sentence.

The trial court responded:

I think the intent of the legislature was that if the jury returned a special verdict finding that more than one person was endangered by a defendant's actions, then they wanted an enhanced sentence. I don't think their intent was to simply have that finding made, go through the extra work of submitting that question to the jury, and then ignoring it, basically.

I think attempting to elude without that finding certainly would qualify someone as a first time offender. I think here, under these circumstances, while no one else was injured, the testimony was pretty egregious as to the driving. Quite honestly, Mr. Pickins was probably the one most likely to be killed in this driving as he was on a motorcycle, but there were—there was substantial testimony as to what other drivers were doing to kind of get out of his way while he was doing it, and he certainly did put other people at risk, including law enforcement officers that were pursuing him.

So I am not inclined to grant or deviate from what I think is the statutory scheme, and that's to require the 12 months and a day. I don't think this is a case—even if I were to believe that he could simply be treated as a first time offender, I don't think I would do that under these circumstances in any event.

As to the—and, you know, I am mindful that Mr. Pickins doesn't have any other history that I am aware of. I think he generally is a law-abiding individual. I hope that this is an aberration; I hope the alcohol issue is not a significant problem.

But I think the low end is I think reasonable here.

VRP at 227-28. The trial court sentenced Pickins to 12 months plus one day of confinement for

a breath or blood test in violation of RCW 46.61.502(1)(b)(c), count II; and second degree driving while his license was suspended in violation of RCW 46.20.342(1)(b), count III. Pickins does not appeal these two sentences.

attempting to elude conviction, count I. The trial court imposed and ran concurrently suspended sentences on the remaining two counts.

Pickins appeals.²

ANALYSIS

I. Sentencing: Eligibility for First Time Offender Waiver

Pickins first argues that that the trial court erred in (1) ruling that he was ineligible for, and thereby failing to consider, waiver of his enhanced standard range sentence under the “first offender” provision of RCW 9.94A.650, Reply Br. of Appellant at 5; and (2) in mistakenly believing that imposition of RCW 9.94A.533(11)’s enhanced one year and a day sentence was mandatory because the jury had returned a special verdict finding that, in attempting to elude the police, Pickins had endangered others. We agree.

A. Standard of Review

Generally, a defendant cannot appeal a standard range sentence. RCW 9.94A.585(1).³

But as the State acknowledges:

² Originally, our court commissioner affirmed Pickins’ sentence for eluding, (1) noting the State’s implicit concession on the first offender eligibility issue, (2) concluding that the trial court’s ruling was erroneous and that Pickins was eligible for the first time offender waiver, and (3) ruling that the error was harmless and that remand for resentencing was unnecessary because the trial court had been unequivocal “about its belief that it would not grant Pickins a first time offender waiver.” *Spindle*, Ruling Affirming Sentence at 5-6. We granted Pickins’ motion to modify the commissioner’s ruling.

³RCW 9.94A.585(1) provides:

A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed. For purposes of this section, a sentence imposed on a first-time offender under RCW 9.94A.650 shall also be deemed to be within the standard sentence range for the offense and shall not be appealed.

[A] defendant ‘can challenge the procedure by which a sentence within the standard range was imposed.’

Br. of Resp’t at 7 (quoting *State v Watkins*, 86 Wn. App 852, 854, 939 P.2d 1243 (1997) (citing *State v Ammons*, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986))). More specifically, as we held in *State v. Stately*, even though a first-time offender’s sentence is generally not appealable, this limitation does not preclude appellate review of whether the sentencing court had legal authority to impose a first-time offender waiver under RCW 9.94A.650. *State v. Stately*, 152 Wn. App. 604, 607, 216 P.3d 1102 (2009), *review denied*, 168 Wn.2d 1015 (2010). On the contrary, where a trial court refused to exercise discretion at sentencing because it erroneously believed it lacked authority, RCW 9.94A.585(1) does not bar a defendant’s appeal of a standard range sentence. *State v. McGill*, 112 Wn. App. 95, 99-100, 47 P.3d 173 (2002). And a trial court’s failure to consider an available alternative sentence is reversible error. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (citing *State v. Garcia-Martinez*, 88 Wn. App 322, 330, 944 P.2d 1104 (1997) (failure to consider exceptional sentence downward)).

Under the RCW 9.94A.585(1) first-time offender option, the trial court has broad discretion to waive a standard range sentence, including refusing to grant the option. *State v. Johnson*, 97 Wn. App. 679, 682, 988 P.2d 460 (1999) (citations omitted). Where the record is clear that the trial court would impose the same sentence on remand, even taking into consideration alternatives or law it erroneously ignored originally, remand is not required. *See, e.g., McGill*, 112 Wn. App. at 100 (citing *State v. Pryor*, 115 Wn.2d 445, 456, 799 P.2d 244 (1990)). In contrast, where the record is uncertain and it is possible that the superior court might

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have imposed a different sentence under a correct reading of the law, remand is proper. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007) (citations omitted). Such is the case here.

B. Failure To Consider First Offender Waiver

RCW 9.94A.650(2) provides:

In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses.

And RCW 9.94A.533(11) provides:

An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

The record shows that the trial court did not believe it had discretion to waive Pickins' enhanced standard range sentence under RCW 9.94A.650(2) because, although he was a first time offender, the jury had found that, in attempting to elude pursuing police, he had endangered others, thus bringing him under RCW 9.94A.533(11), which requires an increase in his standard range sentence by a year and a day.⁴

⁴ In concluding that the first offender waiver process was inapplicable to Pickins, the trial court also relied on *State v. Archambault*, in which Division One of our court held that the mandatory language of the firearm enhancement statute conflicted with the first time offender option, thereby depriving the court of discretion to grant this statutory option. *State v. Archambault*, 86 Wn. App. 711, 715, 937 P.2d 1323 (1997). *Archambault* does not apply here because the firearm enhancement statute, RCW 9.94A.533(3)(e), contains mandatory language not present in RCW 9.94A.533(11)'s sentence enhancement for endangering others while eluding police. RCW 9.94A.533(3)(e) requires the sentencing court to impose a firearm sentencing enhancement, typically to run consecutively with the sentence for the underlying crime. RCW 9.94A.533(11), in

But RCW 9.94A.650 unambiguously grants the trial court authority to consider waiving a standard range sentence for a first time offender. And there are no other statutes or case law that limit the trial court's authority to waive a standard range sentence under this statute. We hold, therefore, that the trial court erred in ruling that the jury's special verdict finding that Pickins' eluding had endangered others, which enhanced his standard sentencing range, rendered him ineligible for first time offender status for waiver purposes under RCW 9.94A.650.

C. Error Not Harmless

The trial court's failure to consider waiving Pickins' enhanced standard range sentence under RCW 9.94A.650 was not harmless error because we cannot say that the trial court would have imposed the same sentence had it known that waiver was an option. *See, e.g., Mulholland*, 161 Wn.2d at 334, (quoting *McGill*, 112 Wn. App. at 100-01).

The trial court was equivocal in declining to apply the statute. For example, the trial court stated, "I don't think this is a case—even if I were to believe that [Pickins] could simply be treated as a first time offender, I don't think I would do that under these circumstances in any event." VRP at 228. The trial court's use of the equivocal term "I think" creates uncertainty. Instead of clearly stating that it would not consider waiver under the circumstances of this case, for example, because of the danger Pickins had posed to himself and to others, the trial court focused on what it considered was the legislature's intent in enhancing sentences for such endangerment. In so doing, the trial court read into RCW 9.94A.533(11) a non-existent

contrast, merely requires the sentencing court to augment the standard range; it does not, however, restrict the sentencing court's ability to waive a first offender's standard range sentence, enhanced or not, under RCW 9.94A.650(2).

mandatory requirement that Pickins' sentence must include at least a year and a day of confinement.

Additional factors support our inability to conclude, on this record, that the trial court would not have waived Pickins' enhanced standard range sentence and would have imposed the same sentence had it actually considered the first offender waiver statute: The trial court expressed that leniency for Pickins was appropriate. The trial court imposed the most lenient sentence it believed possible for the eluding conviction, namely one year and one day, the term of confinement it mistakenly believed to be mandatory under RCW 9.94A.533(11). The trial court also suspended the sentences for Pickins' other two convictions and ran all three sentences concurrently. We hold, therefore, that the sentencing error was not harmless and that remand for resentencing is appropriate.

II. SAG

In his SAG, Pickins next contends that we should reverse his conviction because: (1) the trial court improperly refused to admit evidence that the throttle on his motorcycle had jammed; (2) during his arrest he sustained injuries that hindered his ability to cooperate with a blood test; and (3) the State improperly charged him with driving without a license because he never had a motorcycle endorsement for his driver's license. These contentions fail.

Pickins' first two grounds rely on facts outside the record, which we cannot consider in a direct appeal;⁵ therefore, we do not address these additional grounds. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Pickins' third argument reflects a misunderstanding of the law. It is undisputed that Pickins' license was revoked. The fact that his license lacked the proper motorcycle endorsement prior to revocation is irrelevant.

⁵ A personal restraint petition is the proper method for seeking review of issues that depend on facts outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); RAP 16.3

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Accordingly, we affirm Pickins' conviction and vacate his sentence and remand for resentencing, at which the trial court shall consider whether to exercise its discretion to waive his enhanced standard range sentence under RCW 9.94A.650.⁶

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 pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, P.J.

Van Deren, J.

⁶ Because reconsideration of Pickins' enhanced sentence for the attempting to elude count may affect the concurrent suspended sentences for the other two counts, we leave to the trial court's discretion whether to reconsider the sentences for those two counts as well.