IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALBERT E. MCGREGOR, Appellant.	No. 42581-5-II UNPUBLISHED OPINION

Penoyar, J. — Albert W. McGregor appeals his sentence imposed after a plea of guilty. He argues that the trial court erred by imposing an exceptional sentence where the jury did not find an aggravating factor and one was not included in the information. Because the jury did not find an aggravating factor, we vacate the sentence and remand for resentencing within the standard range.

FACTS

The State charged McGregor with second degree burglary on August 10, 2011. The information did not list any aggravating factors. The State and McGregor entered into a plea agreement. In the agreement, the State and McGregor agreed to an offender score of 2, resulting in a standard sentencing range of four-to-twelve months. They agreed to a standard-range sentence recommendation of nine months. The plea agreement did not list any aggravating factors.

With respect to exceptional sentences, the statement of defendant on plea of guilty provided that the trial court can impose such a sentence if McGregor and the State "stipulate that justice is best served" by an exceptional sentence or if the State gives McGregor notice that it is

seeking an exceptional sentence, the notice lists aggravating factors, and facts to support the sentence are proven to a jury beyond a reasonable doubt. Clerk's Papers (CP) at 9.

At sentencing, the State recommended a nine-month sentence. The court, however, reviewed McGregor's unscored prior misdemeanor history and concluded that the sentencing range was "too lenient." Report of Proceedings (RP) (Sept. 6, 2011) at 8-9. The court sentenced McGregor to 22 months in custody.

ANALYSIS

RCW 9.94A.535(2)(b) allows a sentencing court to impose an exceptional sentence based on an aggravating factor that a defendant's prior unscored "criminal history results in a presumptive sentence that is clearly too lenient." We review whether a sentencing court was authorized to impose an exceptional sentence is a question of law, reviewed de novo. *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

McGregor argues, and the State agrees, that whether a standard sentence is "clearly too lenient" is a factual determination for the jury. Both parties rely on *State v. Saltz*, 137 Wn. App. 576, 154 P.3d 282 (2007). In *Saltz*, the State notified the defendant that it would seek an exceptional sentence based in part on unscored prior convictions. 137 Wn. App. at 579. Saltz stipulated to his criminal history. *Saltz*, 137 Wn. App. at 579-80. The State recommended, and the trial court imposed, a sentence above the standard range. *Saltz*, 137 Wn. App. at 580. On appeal, this court ruled that under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), a jury was required to make factual findings to support a conclusion that the standard sentence was "too lenient." *Saltz*, 137 Wn. App. at 583-84. Thus, the trial court erred

by using criminal history to impose an exceptional sentence in the absence of jury findings. *Saltz*, 137 Wn. App. at 583-84; *see also State v. Alvarado*, 164 Wn.2d 556, 564-69, 192 P.3d 345 (2008) (discussing the role of jury in exceptional sentencing under the "too lenient" statute).

Here, as in *Saltz*, the trial court imposed an exceptional sentence without the required jury findings to support the sentence. Accordingly, McGregor's exceptional sentence must be remanded for resentencing.

McGregor next argues that on remand, he is required to be resentenced within the standard range before a different judge. (Citing *State v. Womac*, 160 Wn.2d 643, 663, 160 P.3d 40 (2007), for the proposition that on remand the trial court lacks the authority to empanel a sentencing jury). The State agrees that "if this matter is remanded for re-sentencing, the judge at the re-sentencing hearing would not have the authority to grant an exceptional sentence." Resp't's Br. at 4.

The State, however, takes issue with McGregor's request for a new judge. McGregor posits that "[w]hen a judge imposes an exceptional sentence based on an improper factor, the defendant may choose to be resentenced before another judge." Appellant's Br. at 11. The State distinguishes the sole case relied on by McGregor, *State v. Sledge*, 133 Wn.2d 828, 947 P.2d 1199 (1997), due to the fact that on remand for resentencing in that matter, unlike here, the trial court would have retained the ability to apply an exceptional sentence. The State is correct that *Sledge* does not mandate reassignment to a new judge.

Absent personal bias, it is rare to remand sentencing proceedings to a new judge. *United States v. Rapal*, 146 F.3d 661, 666 (9th Cir. 1998) (citing *United States v. Hicks*, 53 F.3d 276, 280 (9th Cir. 1995)). Generally, in deciding whether to reassign a case to a different judge, we

first determine whether the trial court has some personal bias. Next, we look for unusual circumstances that might support reassignment. For instance, reassignment may be based on our conclusion that the trial court would have substantial difficulty overlooking its previously-stated views and findings. Also, reassignment may be required for the purpose of preserving the appearance of justice. *In re Ellis*, 356 F.3d 1198, 1211 (9th Cir. 2004). Because the record does not reflect either a personal bias or unusual circumstances, we reject McGregor's request for a new judge.

We vacate McGregor's sentence and remand for further proceedings consistent with this opinion.

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 in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Van Deren, J.

Johanson, A.C.J.