

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 66603-7-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
NICHOLAS S. PEPPERELL,)	UNPUBLISHED OPINION
)	
<u>Appellant.</u>)	FILED: <u>April 16, 2012</u>

Spearman, A.C.J. — Nicholas Pepperell appeals his standard range sentence for bail jumping, arguing that the court erroneously concluded it did not have the authority to depart from the standard range. Because the trial court did, in fact, consider and reject Pepperell’s request for a departure from the standard range sentence, we reject his argument and affirm the sentence.

FACTS

On Thursday, September 9, 2010, Nicholas Pepperell was sentenced in Snohomish County Superior Court to twelve months and one day of incarceration for his conviction for bail jumping. At the sentencing hearing, counsel for Pepperell requested permission for Pepperell to complete the final five days of a nineteen-day work crew sentence he was serving for a King County conviction before he began serving the bail jumping sentence. Counsel told the court, “[h]e has a final five days on

that work crew sentence which are scheduled to be completed between Monday and Friday of next week.” The court agreed to permit Pepperell to first complete his work crew sentence, and asked defense counsel for a time when Pepperell would be able to complete that sentence to report for the bail jumping sentence:

[Court:] . . . Mr. Wackerman, do you have a date for him to report?

Mr. Wackerman: When do you finish your time?

[Pepperell:] Friday.

Mr. Wackerman: What time?

[Pepperell:] Usually 3:30.

Mr. Wackerman: If the Court gives him until 7 o'clock here, he can get up from King County and turn himself in on Friday.

The Court: Okay. That will be so ordered.

The court ordered Pepperell to report to the Snohomish County Jail on “September 17th, [sic] 2010 at 7:00 p.m.”

Pepperell failed to report to the jail on September 17. He was arrested on September 23 and charged with another count of bail jumping. At trial, Pepperell argued he believed he did not need to report until September 24. A jury convicted him as charged. Under RCW 9.94A.589(2)(a),¹ Pepperell’s sentence for the current bail jumping conviction was to run consecutive to the sentence for his previous bail jumping conviction. At the sentencing hearing for the second bail jumping conviction, defense

¹ RCW 9.94A.589(2)(a) provides:

Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

counsel requested an exceptional sentence downward: that Pepperell be sentenced to 18 months confinement to run concurrently with the sentence for his prior bail jumping conviction. The court declined to impose an exceptional sentence. The court imposed a standard range sentence and ran it consecutively to Pepperell's other sentence for bail jumping. Pepperell appeals his sentence.

DISCUSSION

A court may impose a sentence outside of the standard range if it finds, considering the purpose of the Sentencing Reform Act (SRA), there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. The legislature specified a nonexclusive list of circumstances on which a court may rely to impose an exceptional sentence below the standard range. RCW 9.94A.535(1). One such circumstance is that "The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g). Pepperell contends that running his bail jumping sentence consecutive to the previous bail jumping sentence was clearly excessive, and that the trial court erroneously believed it had no discretion to apply RCW 9.94A.535(1)(g) in this situation.

The parties argue over whether RCW 9.94A.535(1)(g) applies in a circumstance where a defendant is not being sentenced for multiple current offenses, but we need not address that issue because even if RCW 9.94A.535(1)(g) does apply, the sentencing court did exercise its discretion here. Although the court showed some

concern about the length of the standard range, it ultimately concluded there was no factual basis to depart from the statutorily required consecutive term:

Well, certainly a strong case can be made for the fact that the sentence called for here by the standard range is harsher than it should be, but the Court, under the SRA, is restricted to the legislative determination on that unless there are particular facts that are of individual concern to this particular case rather than some general disagreement with the policy decision that in all such cases the sentences should run consecutively. So I don't believe that any of the cases that were cited are directly helpful here.

I really can't think of anything particular to the facts of this case or this defendant that would justify an exceptional sentence. I think the only way you get there is by general disagreement with the legislative determination, and I'm not authorized to give a lesser sentence as a result of that. So I'm going to give a low end sentence of 17 months in the State Department of Corrections, to run consecutively with the other prison sentence.

The court thus did not fail to consider Pepperell's request for an exceptional sentence. Rather, the court considered the request but found no factual basis to support it. As such, the court did not abuse its discretion by imposing a standard range sentence.

In his RAP 10.10 statement of additional grounds for review, Pepperell argues he was denied due process in that he was not given notice as to when he was suppose to report to begin serving the sentence for his prior bail jumping provision. Because he was not given such notice, Pepperell argues, the State could not prove beyond a reasonable doubt that he knew he was required to report. But the jury heard and rejected this argument. Credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). To the extent Pepperell argues that, based on post trial jury interviews, the jury improperly convicted him on the basis that he "should have known" about the report date, this

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appears to rely upon matters outside the record, and as such we cannot consider it on direct appeal. State v. McFarland, 127 Wn.2d 322, 338 n. 5, 899 P.2d 1251 (1995).

Affirmed.

WE CONCUR:

Speer, A.C.J.

Dwyer, J.

Edenberry, J.