

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 66847-1-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
SAMUEL WARNER CORNISH,)	
)	
Appellant.)	FILED: July 23, 2012

Schindler, J. — Samuel Warner Cornish was convicted of felony violation of a domestic violence no-contact order. Cornish challenges the trial court’s refusal to impose an exceptional sentence below the standard range. Because the trial court did not refuse to exercise its discretion and it did not rely on an impermissible basis in refusing the request for an exceptional sentence, we affirm.

FACTS

Samuel and Salle Cornish were married for 15 years. The couple divorced in the late 1990s. Since then, Cornish has been hospitalized a number of times for major depression. The court has issued a number of no-contact orders to prevent Cornish from contacting Salle.¹

¹ We refer to Salle Cornish by her first name for purposes of clarity and mean no disrespect by doing so.

In 1998, Cornish was convicted five times for gross misdemeanor violation of a protection order and violation of a no-contact order. In 1999, Cornish was convicted of domestic violence stalking of Salle. The court sentenced Cornish to six months in jail and entered a no-contact order to protect Salle. In 2000, Cornish was convicted of felony violation of the no-contact order. The court sentenced him to 12 months plus one day and issued a no-contact order with Salle. In 2003, Cornish was convicted of felony violation of the no-contact order. The court issued another no-contact order and sentenced Cornish to 29 months in prison.

In 2006, Cornish was again convicted of felony violation of the no-contact order with Salle. The court imposed an exceptional sentence below the standard range. The court sentenced Cornish to 12 months and one day, and 36 months of community custody with a special Department of Corrections (DOC) manager. Nonetheless, Cornish violated the no-contact order in 2007, and was sentenced to one year in jail.

On December 13, 2010, Cornish went to Salle's house to talk to her. Salle told Cornish to leave and called 911. Cornish admitted to the police that he contacted Salle. Cornish waived his right to a jury trial. The trial court found Cornish guilty of felony violation of a no-contact order, and that it was a crime of domestic violence under RCW 10.99.020.

2. December 13, 2010, a valid No Contact Order (as identified in Findings of Fact 3) was in place which prohibited the defendant from having any contact with Salle Cornish and from going to her residence. The defendant was aware of that Order. The defendant did knowingly go to Salle Cornish's residence and did have contact with her in violation of the valid No Contact Order.
3. Prior to December 13, 2010, the defendant has been convicted of Violation of a No Contact Order [(Domestic Violence)] on 10 prior

occasions.

With an offender score of 5, the standard sentence range was 33-43 months.

Before sentencing, Cornish filed a motion for an exceptional sentence below the standard range. The defense asked the court to sentence Cornish to 4 months in jail with credit for time served and 56 months of community custody.

In the memorandum in support of the exceptional sentence, the defense explained that Cornish had been “in and out of the mental health system since 1997,” and needed “long term, intensive mental health treatment to keep him from reoffending and to keep him stabilized.” The defense argued that when Cornish was under the supervision of DOC, he complied with mental health treatment and “abided by the no contact order.”

The defense also submitted an evaluation prepared for the defense by Dr. Lee Gustafson to determine whether Cornish was competent to stand trial, and to evaluate the defense of diminished capacity or insanity at the time of the offense. The evaluation concludes Cornish was competent, he understood the no-contact order prohibited him from having contact with Salle, but also addressed treatment recommendations. Dr. Gustafson recommended an adult home setting and regular meetings with a counselor and probation officer, and suggested imposition of an order that required Cornish to take medications and follow treatment recommendations.

At the sentencing hearing, the State asked the court to impose a high-end standard range sentence of 43 months in prison, and a no-contact order.² The prosecutor recognized that Cornish had “emotional issues and there are, obviously,

² At the hearing, Cornish’s counsel asked for a sentence of one year and one day with four years of community custody.

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some reasons to want to help Mr. Cornish.” But the prosecutor argued that the previous

attempts to accommodate Cornish had not been successful.

We have tried -- when I say we, the system, have tried to accommodate Mr. Cornish. In one of the sentences, and I outlined this in the Affidavit of Probable Cause I provided the Court. . . . There was this umbrella protection that was around him for a period of time. I think it was on that particular day as well.

In support of the recommendation for a high-end sentence, the prosecutor submitted a letter from Salle and asked the court to impose a sentence that would protect her.

She has written that letter that says, all I wish is to be left alone and not worry that he's out there obsessing with me. She has told me on multiple occasions what happens -- my question is, what happens when the phone rings? And her response is, "Every time the phone rings, I cringe, because I just assume it's Sam."

So there is sympathy for Mr. Cornish for his behavior and compulsion and the things he can't control. On the other hand, Salle Cornish has been promised and clearly deserves the right to be left alone, and the only thing we can do at the moment is say, all right, for 43 months we're going to place him somewhere he can't call you and for 43 months you're going to get a little bit of peace. That much, we can promise.

. . . .

Will this thing fail? It probably will no matter what we do, but what we can do by following my recommendation is at least assure the victim of 12 crimes by Mr. Cornish that for 43 months, she gets a little bit of peace. And maybe it's going to turn out to be 30 months, 24 months, but at least for that period of time she gets a little peace, and that, I think, is worth the most in this case. We've done everything we could for Mr. Cornish. Given the resources and given his history and given the failures and given the inevitability, I'm asking that the Court put the victim's needs ahead of Mr. Cornish's.

The court rejected the defense request for an exceptional sentence. The court recognized the concerns about Cornish but concluded protecting the victim of the crime outweighed those concerns.

My problem with it is just that the Court doesn't have the ability to do much of anything if it goes wrong. In other words, if we had a system where I could give some sort of suspended sentence or something like

that so that if, like in a DOSA [(Drug Offender Sentencing Alternative)] or some of the other situations that we have, so that if things didn't go as was hoped, that then there would be another fall-back position, which would be the incarceration. At this point if Mr. Cornish doesn't comply, there can be 60 days for each violation to be served in the county jail and I think that's an imperfect remedy if things don't go well.

I also have to say that having, I guess, basically engaged in the experiment, if you will, of the exceptional sentence down and the intensive supervision, which worked to some degree, obviously didn't work perfectly, it has an end point as well, which everything does: Incarceration does, community supervision does. I mean, there just aren't any good answers here. That is abundantly clear to the Court.

So I think, unfortunately, I'm going to have to go on the side of incapacitation even though I know that is not a good place for Mr. Cornish to be, but I think when I'm faced with the situation of protection of the community and specifically the victim in this case, who certainly has not been well protected by the system, and what, under either scenario, is a short-term solution to the problem, I'm afraid I'm going to have to go with the surer bet, which is incapacitation, because even under the scenario of intensive supervision, that will come to an end. Once that ends, apparently, then, we're back in the same situation that we started with.

So, unfortunately, I think all I can do is go for the maximum term of incapacitation. So I'm going to impose the sentence, the high end sentence of 43 months.

ANALYSIS

Cornish claims the trial court abused its discretion in denying his motion for an exceptional sentence based on the mistaken belief that neither the court nor DOC had the authority to impose sanctions while he was on community custody.

As a general rule, a defendant may not appeal the imposition of a standard range sentence unless the court refuses to exercise its discretion at all or relied on an impermissible basis in refusing to impose an exceptional sentence. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005).

[W]here a defendant has requested an exceptional sentence below the standard range[,] review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard

range.

State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A court

refuses


to exercise its discretion in rejecting a request for an exceptional sentence if:

[I]t refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range.

Garcia-Martinez, 88 Wn. App. at 330. A court relies on an impermissible basis if it does not consider the request because of the defendant's race, sex, religion, or other characterization, such as drug dealer. Garcia-Martinez, 88 Wn. App. at 330.

If the court properly considers whether there is a basis to impose a sentence outside the sentence range, and concludes that an exceptional sentence downward is factually or legally unsupportable, the defendant may not appeal. Garcia-Martinez, 88 Wn. App. at 330.

Here, the trial declined to impose a sentence below the standard range despite expressed concerns about the limitations of the justice system to address Cornish's mental health issues. Because of the previous failed attempts to accommodate Cornish and the need to protect the victim, the court rejected the request for an exceptional sentence and imposed a high-end standard range sentence. In other words, the court disagreed that an exceptional sentence was warranted. We conclude the court did not abuse its discretion in rejecting the request for an exceptional sentence, and affirm.

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WE CONCUR:

Leach, C. J.

Grosse, J