

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	
)	No. 66848-0-I
v.)	
)	UNPUBLISHED OPINION
VICTORIA HARRIET SMITH,)	
)	
Appellant.)	FILED: May 29, 2012
_____)	

Dwyer, J. — Victoria Smith was serving a jail sentence for a felony drug conviction when, following an authorized leave, she failed to return to the work release program to which she had been assigned. Smith was thereafter convicted of one count of escape in the first degree. Based upon her offender score, Smith faced a standard range sentence for that crime of 63 to 84 months of incarceration. At sentencing, Smith requested an exceptional sentence below the standard range, in part because she had escaped only four days prior to the end of her sentence.

The trial court denied Smith’s request and imposed a sentence of 63 months. On appeal, Smith contends that the trial court erred by failing to recognize that it had the discretion to impose an exceptional sentence below the standard range. However, the record amply demonstrates that the trial court

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both understood that it had such discretion and exercised its discretion in denying Smith's request. Accordingly, we affirm.

I

On August 19, 2010, Smith pleaded guilty to conspiracy to deliver cocaine in violation of the Uniform Controlled Substances Act, chapter 69.50 RCW, and was sentenced to four months in the King County jail and King County work release. On October 5, 2010, Smith was authorized to briefly leave the work release facility in order to obtain medications from Harborview Medical Center. Smith failed to return to the facility. She was arrested on a bench warrant six days later.

Smith was thereafter charged by information with escape in the first degree based upon her failure to return to the work release facility following the authorized leave. Having waived her right to a jury trial, Smith was convicted as charged following a bench trial.

Based upon Smith's offender score, she faced a standard range sentence of 63 to 84 months of incarceration. Smith requested an exceptional sentence below the standard range of eight months of incarceration. She contended that such an exceptional sentence was warranted because she had escaped work release by simply not returning, thus escaping in a "non-violent, non-threatening way," and because she had done so "with only four days remaining on her sentence." Moreover, Smith requested that the trial court impose an exceptional

sentence below the standard range because her criminal history consisted almost entirely of drug convictions.

A sentencing hearing was held on March 4, 2011. The trial court denied Smith's request for an exceptional sentence, instead imposing a sentence at the low end of the standard range. Although the court expressed reservations about imposing the sentence, the court determined that it could not "find within statutory provisions the ability to find that there are mitigating circumstances that would allow this Court to depart from the standard sentencing range." The trial court acknowledged that "obviously there is discretion here." However, the court rejected defense counsel's argument that this case is similar to cases in which an exceptional sentence below the standard range is imposed because only a small amount of drugs was involved. The court concluded that

[t]he end result may not be what I like or what you like[,] but I just cannot intellectually be honest about this and do anything else other than impose a sentence within the standard range[.] [A]nd I will do so at the very bottom of that range but I cannot go outside the standard range in this case. So I will be imposing a sentence of 63 months.

Smith appeals.

II

Smith contends that the trial court abused its discretion by failing to recognize that it had the discretion to impose an exceptional sentence below the standard range. Because the record demonstrates that the trial court both recognized its discretion and exercised that discretion, we disagree.

Where 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). “While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Thus, “[t]he failure to consider an exceptional sentence is reversible error.” Grayson, 154 Wn.2d at 342. Similarly, “[a] trial court’s erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand.” State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008), aff’d, 169 Wn.2d 571, 283 P.3d 487 (2010).

Here, Smith asserts that the trial court erroneously believed that it could not impose an exceptional sentence below the standard range absent an applicable mitigating factor listed in RCW 9.94A.535.¹ However, the record clearly indicates that the trial court recognized that it had the discretion to impose such a sentence—indeed, the trial judge explicitly stated, “I have to

¹ RCW 9.94A.535 provides that “[t]he court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.” The statute then lists several potential mitigating factors, indicating that those factors are “illustrative only and are not intended to be exclusive reasons for exceptional sentences.” See also RCW 9.94A.535(a)-(j).

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apply the law, and I don't do it in a way that's like a machine. I mean obviously there is discretion here." The trial judge then indicated that she disagreed with defense counsel's assertion that this case is analogous to cases in which an exceptional sentence below the standard range is imposed based upon the small amount of drugs involved. The trial judge further acknowledged her discretion in imposing such a sentence when she stated: "Ms. Smith, you walked away, you had signed conditions, you knew that you couldn't and, because it's a small amount of time doesn't necessarily in my mind go to why it is I should excuse you or me from following what the law requires."

In other words, contrary to Smith's contention, the trial court recognized that it had the discretion to impose an exceptional sentence below the standard range notwithstanding the fact that no statutorily-listed mitigating factor applied; the court simply disagreed with Smith's assertion that the relevant facts warranted the imposition of such a sentence. "Without an adequate factual or legal basis to permit it to step outside the standard range, the court decided it could not impose a sentence other than one within the standard range. This is an appropriate exercise of sentencing discretion." Garcia-Martinez, 88 Wn. App. at 331.

Affirmed.

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Denz, J.

We concur:

Jau, J.

Appelwick, J.