IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RASHOD JONES Appellant.	)))))))))))	No. 67270-3-I DIVISION ONE UNPUBLISHED FILED: July 30, 2012

Cox, J. — Under RCW 9.94A.535, a sentencing court has discretion to order a departure from the sentencing standards outlined in RCW 9.94A.589. Where a court fails to recognize that it has discretion to impose an exceptional sentence, its failure to do so is reversible error. Here, the sentencing court concluded that it did not have legal authority under RCW 9.94A.589 to run the sentence of Rashod Jones for cocaine possession concurrently with a revoked DOSA sentence. Because the court did not consider whether it had discretion to order the sentence for cocaine possession to be served as a mitigated exceptional sentence under RCW 9.94A.535, we remand for further proceedings consistent with this opinion.

Jones pleaded guilty to cocaine possession, and the court imposed a sentence of 20 months confinement. Jones was serving a term of community custody for a Drug Offender Sentencing Alternative (DOSA) sentence when he

committed the current offense. At sentencing, Jones asked the court to order that his sentence for cocaine possession be served concurrently with the 27 months he had left on the revoked DOSA sentence. Jones did not call the court's attention to the provisions of RCW 9.94A.589 at the time of sentencing. The court concluded that it did not have authority to run Jones's sentences concurrently and ordered that the 20 months of confinement for cocaine possession be served consecutively to his revoked DOSA sentence.

Jones appeals.

DISCRETION WITH RESPECT TO RCW 9.94A.589(2)(a)

Jones argues that the court abused its discretion when it failed to consider whether it had discretion to order the sentence for cocaine possession to be served as a mitigated exceptional sentence. We agree.

Generally, we do not review the standard range sentencing decisions of a lower court.[1] But, "[w]e can . . . review a court's decision to impose a standard range sentence in '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.'"[2] A "trial court's failure to exercise its discretion [is] an abuse of discretion."[3]

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[1] State v. Garcia-Martinez, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997) (citing State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719 (1986)).

[2] State v. McGill, 112 Wn. App. 95, 99-100, 47 P.3d 173 (2002) (quoting Garcia-Martinez, 88 Wn. App. at 330).

[3] State v. Flieger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998).

RCW 9.94A.589(2)(a) provides that "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***."[4] But RCW 9.94A.535 provides that the court may depart from the standard sentencing guidelines in RCW 9.94A.589. Such a departure "from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence . . . ."[5]

Both In re Personal Restraint of Mulholland[6] and State v. McGill[7] illustrate how a court can fail to exercise its discretion. In Mulholland, the trial court sentenced the defendant under RCW 9.94A.589(1).[8] The trial court concluded that it did not have discretion to run the defendant's sentences concurrently because the law required it to run them consecutively.[9] The supreme court remanded, holding that the plain language of RCW 9.94A.589(1) and RCW 9.94A.535 gave discretion to the trial court to impose an exceptional sentence.[1]

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[4] (Emphasis added.)

[5] In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 328, 166 P.3d 677 (2007).

[6] 161 Wn.2d 322, 166 P.3d 677 (2007).

[7] 112 Wn. App. 95, 47 P.3d 173 (2002).

[8] Mulholland, 161 Wn.2d at 325-26.

[9] Id. at 326.

[1] Id. at 330.

In McGill, this court held that "[t]he court's belief that it lacked authority to impose an exceptional sentence was incorrect[,]" and that remand for resentencing was proper.[11]

Here, at the time of his conviction for cocaine possession, Jones still had 27 months left on his revoked DOSA sentence. Thus, the sentence outlined in 9.94A.589(2)(a) applied, as Jones was under sentence for another crime at the time of his conviction. But the plain language of RCW 9.94A.535 makes clear that exceptional sentences may be imposed when sentencing takes place under RCW 9.94A.589 subsections (1) or (2).[12] Thus, the trial court did have discretion to impose a mitigated exceptional sentence.

Jones asked the trial court to run his sentences concurrently, but the court concluded it did not have such authority:

> I do not believe that I have the legal authority to run this, these two sentences . . . concurrent with the revoked DOSA sentence. Under RCW 9.94A.589(2)(a) . . . the statute appears very clear that I must run these consecutive. . . .[13]

Counsel did not call to the sentencing court's attention the discretion to impose a mitigated exceptional sentence. Therefore, the court failed to exercise its discretion in ordering the sentences to run consecutively.

The State argues that because Jones did not cite RCW 9.95A.535 below,

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[11] McGill, 112 Wn. App. at 99-100.

[12] RCW 9.94A.535.

[13] Report of Proceedings (June 2, 2011) at 37.

and because he did not specifically ask for an exceptional sentence, he did not provide the court with any legal basis by which it could grant an exceptional sentence. This is essentially a waiver argument that has no place with respect to the sentencing issue before us.

In McGill, this court held that "[e]ven though McGill's counsel had not asked for an exceptional sentence below the standard range[,]" the fact that the trial court found it lacked authority to impose an exceptional sentence was error.[14] Thus, counsel's failure to ask specifically for an exceptional sentence, and failure to reference RCW 9.94A.535, does not obviate the need for the trial court to exercise its discretion on remand.

The State next argues that, even if the trial court erred in failing to recognize that it had discretion in sentencing, remand is not appropriate here as it is clear that the trial court would impose the same sentence again. We disagree.

In State v. Grayson,[15] the supreme court held that the trial court erred when it failed to consider a DOSA sentence when the defendant requested it.[16] There, the court noted that "there were ample other grounds to find that Grayson was not a good candidate for DOSA."[17] Despite these facts, it left it to the "able

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[14] McGill, 112 Wn. App. at 98-99.

[15] 154 Wn.2d 333, 111 P.3d 1183 (2005).

[16] Id. at 343.

[17] Id. at 342.

hands of the trial judge on remand to consider whether Grayson" was a suitable candidate for a DOSA sentence.[18] Additionally, in McGill, this court held that because it could not "say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option[,]" remand was necessary.[19]

Here, we are not confident that the trial court would impose the same sentence on Jones, particularly as it was not previously informed of RCW 9.94A.535. "Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law."[2] Here, the trial court did not consider the discretion in sentencing provided to it under RCW 9.94A.535. Thus, like the court in Grayson, we conclude that it is appropriate to remand to the trial judge.

The State argues that we should interpret the failure of the trial judge to indicate "a desire to impose concurrent sentences" as an indication that it would not consider the same sentence, even in light of RCW 9.94A.535. It notes that in both McGill and Mulholland, the court highlighted the trial court's potential consideration of an exceptional sentence. While both courts did note the trial

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[18] Id. at 343.

[19] McGill, 112 Wn. App. at 100-101.

[2] Id. at 100.

court's sympathy toward the defendant,[21] the failure of the trial court here to enunciate such sympathy does not preclude a potential change in sentencing, if it considered its own discretion. Thus, the State's argument is not persuasive.

In directing the trial court to exercise its discretion on remand, we express no opinion whether the trial court should either impose the same sentence or grant a mitigated sentence. We merely direct that the trial court exercise its discretion under the authority granted to it.

We vacate the judgment and sentence and remand for further proceedings consistent with this opinion.

Cox, J.

WE CONCUR:

Schindler, J.

Becker, J.

[21] McGill, 112 Wn. App. at 100-101 ("here the trial court's comments indicate it would have considered an exceptional sentence had it known it could"); Mulholland, 161 Wn.2d at 333 ("the trial court made statements on the record which indicated some openness toward an exceptional sentence, expressing sympathy toward Mulholland because of his former military service.").