

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

STONE PHILLIPS, III,

Appellant.

No. 39241-1-II

UNPUBLISHED OPINION

Hunt, J. — Stone Phillips, III, appeals his exceptional sentence for the following jury convictions: five counts of securities fraud and seven counts of first degree theft, each found to be a major economic offense. He argues that substantial evidence does not support the trial court’s finding that the crimes constituted major economic offenses.¹ He also raises four issues in his Statement of Additional Grounds. We affirm.²

¹ In his opening brief, Phillips argues that the trial court erred by failing to enter appropriate findings of fact and conclusions of law supporting the exceptional sentence. Following the submission of his brief, the trial court entered written findings of fact and conclusions of law, rendering Phillips’ argument moot. *In re Detention of Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (“A case is moot if a court can no longer provide effective relief.”). In his reply brief, Phillips argues that the trial court’s findings are not supported by substantial evidence. In general, this court will not consider issues raised for the first time in a reply brief. RAP 10.3(c); *West v. Thurston County*, 144 Wn. App. 573, 580, 183 P.3d 346 (2008). But in light of the procedural development of this case, we accept this newly raised issue and address it.

² A commissioner of this court initially considered Phillips’ appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

FACTS

Stone Phillips, III began targeting Tacoma area churchgoers as potential “investors” in 1999. After attending the church for a time, he presented investment seminars, some even sanctioned by clergy, to persuade congregation members to invest in his company, Northwest Financial Solutions (NFS). Many churchgoers did invest with Phillips. They trusted him to sell and to refinance homes, to manage others’ property, and to invest in real estate with retirement funds and savings. Many of his “clients” became concerned about their money when they did not see returns or they received letters that mortgage payments had not been made; and they asked for refunds. Phillips’ contact with these citizens continued as late as 2004.

On March 29, 2007, the State charged Phillips with 21 counts of theft and securities fraud. The statute of limitations for first degree theft is three years, RCW 9A.04.080(h). The statute of limitations for securities fraud is five years, RCW 21.20.400.

A jury found Phillips guilty of five counts of securities fraud and seven counts of first degree theft. The jury also found that each crime constituted a major economic offense. Based on the jury’s findings, the trial court imposed an exceptional sentence of 215 months of confinement. Phillips appeals his sentence.

analysis

I. Exceptional Sentence

A trial court may impose a sentence outside the standard sentencing range if it finds that substantial and compelling reasons justify an exceptional sentence. Former RCW 9.94A.535 (2008). We review the trial court’s findings of fact made in support of an exceptional sentence

under the clearly erroneous standard. *State v. Nordy*, 106 Wn.2d 514, 517-18, 723 P.2d 117 (1986). Under that standard, reversal is required only if the findings are not supported by substantial evidence. *Branch*, 129 Wn.2d at 646. Such is not the case here.

A. Substantial Evidence

Phillips argues that substantial evidence does not support the trial court's finding that the jury found aggravating factors for each of his convictions because the special verdicts failed to indicate which factors of a major economic offense it found beyond a reasonable doubt. But the trial court based its finding on the jury's special verdicts that each of Phillips' convictions constituted a major economic offense; substantial evidence in the record supports these special verdicts.³ Thus, Phillips' first argument fails.

B. Major Economic Offense

A crime may constitute a "major economic offense" based on consideration of any of the following factors:

- (i) The current offense involved multiple victims or multiple incidents per victim;
- (ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;
- (iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or
- (iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

Former RCW 9.94A.535(3)(d) (2008).

The State presented the following evidence supporting its allegation that Phillips' offenses constituted major economic offenses:

³ See later discussion of evidence in this analysis.

Counts I and II: Emanuel McAuley testified that in 2000, he met Phillips when Phillips presented a seminar at McAuley's church. After the seminar, McAuley decided to invest in Phillips' company, Northwest Financial Solution (NFS). McAuley turned over his retirement savings, approximately \$96,200, to NFS. When McAuley later asked for the return of those funds, he received only two checks for \$16,930 and \$2,500 each. He never received the remainder of the funds.

Count III: McAuley testified that he moved to North Carolina the same year he met Phillips, and Phillips offered to assist him with the sale of his home in Tacoma in exchange for splitting the proceeds. At that time, McAuley owed \$108,000 on his home mortgage. McAuley authorized Phillips to refinance the home with a \$133,000 mortgage, and he signed documents releasing his interest in the home to Phillips. But McAuley never received the proceeds from the refinancing or the sale of the home.

Counts VII and VIII: Claudette Nash testified that in 2000, she met Phillips when he presented a seminar at the church she attends along with McAuley. Phillips persuaded Nash to invest with NFS; Nash invested her personal and retirement savings as well as money previously held in trust for her grandson, to which her daughter had contributed. Nash's investment with NSF totaled approximately \$41,000. Thereafter, Nash placed numerous phone calls to Phillips seeking to get back her money. Nash received back only \$18,500.

Counts XII and XIV: Steven Shriver testified that in 1999 or 2000, he met Phillips at the church where he and Phillips served as ushers. Shriver considered Phillips a friend. Shriver began to place increasing trust in Phillips, eventually agreeing to use Phillips as his broker to refinance

No. 39241-1-II

his home in SeaTac so that he could purchase another home in Tacoma. In December 2001, Shriver moved to a home in Tacoma and agreed to make Phillips the property manager for the SeaTac home. Shriver let the renters make payments to Phillips so that Phillips could make payments on the mortgage. In 2003, Shriver engaged Phillips to help refinance the Tacoma home as well.

Shriver later discovered that payments were not made on the SeaTac mortgage, and he eventually lost the home in foreclosure. Shriver never received the proceeds from the SeaTac home refinance. He had to pay a \$26,000 loan deficit, and additional costs for excise tax paid on the transaction.

In addition, Shriver later discovered a quitclaim deed that purported to grant his interest in the SeaTac home to Phillips “for and in consideration of gift/love and affection.” IV Report of Proceedings (RP) at 272-73. Shriver testified that he never intended to give the Sea Tac home to Phillips. Shriver later discovered that Phillips had also transferred the Tacoma home into his (Phillips’) name.

Count XV: Shriver testified that in September 2003, he and Phillips agreed that he (Shriver) would roll his \$14,000 retirement account into an account with NFS and, for a \$1,000 fee to Phillips, withdraw his retirement savings without penalty. After completing the transfer, however, Shriver received only two checks for less than \$1,000.

Counts XVIII⁴ and XIX: Kojo Aako testified that, in 2002, he met Phillips when Phillips

⁴ There appears to be a clerical error on the judgment and sentence worksheet. Count “XVII” is followed by an ink blot. In looking at the verdict form, we conclude that the ink blot is intended to be an “I,” thus, making the correct count “XVIII.”

presented a seminar at Aako's church. Aako testified, "I attended [the seminar] with the intention that this is a man of God and will do what he says he's going to do." IV RP at 316. Aako agreed to let Phillips help him secure a home mortgage with a low interest rate; at Phillips' suggestion, Aako transferred \$15,000 from his mutual fund to NFS to cover closing costs, appliances, and furniture. When Aako asked for the funds back to cover those costs, Phillips returned \$10,000 but kept the remaining \$5,000, telling Aako that he had been forced to cover \$10,000 of Aako's closing costs. The loan documents did not record Phillips' providing any money for Aako's loan.

Counts XX and XXI: James Balthis testified that, in 2002, he met Phillips after receiving a program at church that contained an advertisement for NFS. Balthis talked to Phillips about refinancing his home; Phillips introduced him to another person who ultimately completed the refinancing. Balthis used \$40,000 from the refinancing proceeds to invest with NFS. Balthis testified that he had no experience with investing and trusted Phillips as an investor. In 2004, Balthis requested information on liquidating his account, but he never received information or the money back.

The above testimony supports the finding that each of Phillips' offenses involved multiple incidents per victim, ranging from theft of the victim's retirement savings to theft of multiple victims' homes. The subsequent monetary losses were substantially greater than typical for these offenses, ranging from thousands to tens of thousands of dollars. The offenses involved a high degree of sophistication or planning or occurred over a lengthy period of time, including utilizing complicated marketing schemes directed towards church congregations and transpiring over months or years. In each instance, Phillips used his position of trust, confidence, or fiduciary

responsibility, both as the victims' friend or acquaintance through church and as a purported financial professional, to facilitate the commission of the crimes. In sum, substantial evidence supports the trial court's finding that the jury heard evidence establishing the existence of each factor of a major economic offense.

II. Statement of Additional Grounds

In a Statement of Additional Grounds, Phillips raises four arguments. All four fail.

First, he argues that his counsel provided ineffective assistance by failing to advise him of the possibility of an exceptional sentence. Because addressing this argument would require evidence outside the record, he cannot raise it in this direct appeal.

Second, Phillips asserts that because five years elapsed between the commission and charge of the crimes, the statute of limitations has expired. RCW 9A.04.080(1)(d)(iv) provides a six-year statute of limitations when first degree theft is accomplished by color or aid of deception. Phillips' first degree theft charge with the earliest end date is Count VIII, occurring between August 13, 2000, and December 16, 2002. The charges were filed March 29, 2007, within the six-year limit. The other four first degree theft charges ended after December 16, 2002, and are, therefore, also within the statute of limitations.

RCW 21.20.400(3) provides a statute of limitations for securities fraud, either (a) five years after the violation, or (b) three years after the actual discovery of the violation, whichever date of limitation is later. The earliest end date of Phillips' securities fraud charge is December 10, 2002. The State charged him on March 29, 2007. Thus, all of the securities fraud charges are within the statute of limitations.

Third, Phillips argues that insufficient evidence supports his convictions for securities fraud. The evidence we set forth above supports those convictions. Fourth and finally, he argues that the trial court erred in running some of his sentences consecutively because his convictions were neither multiple, serious, violent felony convictions, RCW 9.94A.589(1)(b), nor multiple, firearm offense convictions, RCW 9.94A.589(1)(c). Because, however, the jury and trial court found that an exceptional sentence was appropriate, the trial court had authority under RCW 9.94A.535 to make the sentences run consecutively.

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, PJ.

Quinn-Brintnall, J.