IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TROY MATTHEW MCLEOD, Appellant.	No. 62629-9-I DIVISION ONE UNPUBLISHED OPINION FILED: November 23, 2009

Grosse, J. — A trial court that has considered the facts and concluded there is no basis for an exceptional sentence has properly exercised its discretion. Here, the trial court evaluated Troy McLeod's claimed mitigating factors and disagreed that the facts warranted an exceptional sentence downward. We find no abuse of discretion and accordingly, affirm.

FACTS

The State charged Troy McLeod with one count of second degree murder, alleging that McLeod shot Joaquin Tavares five times with a shotgun. The shooting occurred in a building where McLeod rented a room for a tattoo business and from which he had been recently evicted. Tavares was the friend of another building tenant, Horacio Araguz.

According to Araguz, McLeod came into a back room where Araguz was cleaning up. McLeod was acting in "a bizarre manner," standing very close to Araguz and saying nothing. McLeod then walked out of the room and Tavares walked in and spoke with Araguz. Tavares walked back out and seconds later, Araguz heard

gunshots and found Tavares shot in the next room. McLeod fled the scene but police apprehended him shortly after. Police found him sitting alone in his parked car with a shotgun lying on the floorboard next to him. According to witnesses, no disturbance or argument preceded the shots and McLeod had been acting strangely since he was evicted from the building. An autopsy revealed that Tavares died after being shot twice in the chest, twice in the buttocks and once in the upper back.

According to McLeod, he shot Tavares because he believed Tavares was threatening him. He said that earlier Tavares had asked him to buy a gun because Tavares needed money. He gave Tavares $30 and planned to pay the rest later. According to McLeod, Tavares then returned later on that day for the rest of the money and was "agitated and high on drugs," blew smoke in McLeod's face and had his hand in his pocket as though he was concealing a gun.

McLeod notified the State of his intent to pursue a diminished capacity defense and the court ordered him committed to Western State Hospital for an insanity/diminished capacity evaluation. After several evaluations and competency hearings, the court ultimately found him competent to stand trial.

On October 6, 2008, McLeod entered an Alford plea to the second degree murder charge, but asked for an exceptional sentence downward based on his mental illness. McLeod identified mitigating factors of "failed" self-defense and "failed" diminished capacity, and the significant impact of a mental disorder in affecting his ability to appreciate the wrongfulness of his conduct and understand his actions. Dr. Mark McClung testified on his behalf at the sentencing hearing. Dr. McClung had

evaluated him previously for the competency hearings and concluded that he suffered from psychosis and paranoia. The trial court declined to impose the exceptional sentence, concluding that there were not substantial and compelling reasons to justify a downward departure from the standard range. The court then imposed a standard range sentence of 180 months.

ANALYSIS

McLeod acknowledges that he may not appeal a standard range sentence and instead challenges the trial court's denial of the exceptional sentence as an abuse of discretion. He contends that the court abused its discretion by relying on an impermissible basis for refusing to impose an exceptional sentence. We disagree.

Review of a trial court's denial of an exceptional sentence below the standard range is limited to circumstances where the court has refused to exercise discretion at all or had relied on an impermissible basis for its refusal to impose an exceptional sentence.[1] As we have explained:

> A court refuses to exercise its discretion if it 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. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex or religion. . . . Conversely, a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.[2]

Here, the trial court considered the facts and found that they did not establish

[1] State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).
[2] 88 Wn. App. at 330.

mitigating factors justifying a sentence below the standard range. The court first rejected McLeod's claims of "failed" defenses, finding:

> [T]he fact that Mr. McLeod suffers from mental illness which, among other things, the doctor tells me, results in paranoia and delusions, suggests to me that his perception of Mr. Tavares and his account of this event is not reliable.
>
> If it's not reliable, then the claim of self-defense doesn't go very far, even as a failed claim, because, if in fact Mr. Tavares did not menace Mr. McLeod—even his version of events has Mr. Tavares at most blowing smoke in his face and reaching into his jacket for a weapon that definitely was not there—then I don't really see this as a case of failed self-defense.
>
> To the extent that it's a case allegedly of failed diminished capacity, the difficulty with that assertion is that any expert evidence I've been given is that Mr. McLeod was capable of forming the intent to commit this offense.

The court also rejected McLeod's claim that he lacked the capacity to appreciate the wrongfulness of his conduct, although noting that it was "a closer question," finding:

> I do agree that he had a loss of appreciation of the wrongfulness of his conduct because of mental illness, because I believe that, due to his mental illness, he wrongfully thought that Mr. Tavares posed some sort of threat. But even if I enter into a delusional state where I visualize Mr. Tavares blowing smoke in Mr. McLeod's face and reaching into his jacket, that does not explain firing two shots apparently into Mr. Tavares' chest and then continuing to fire into his body, into his buttocks and his back. That's well beyond something that is explained by mental illness and the inability to appreciate the wrongfulness of conduct. Not to slice it too fine, but this isn't a single shot from a shotgun.

McLeod contends that the trial court refused to consider his request for an exceptional sentence based on the failed defenses of self-defense and diminished capacity for the improper reason that these defenses would not have prevailed at trial. But the court did not refuse to consider these "failed defenses" nor did the court conclude that to establish a "failed defense" as a mitigating factor, the defense must

have prevailed at trial. Rather, the court considered the "failed defense" claims and found that they did not warrant a sentence below the standard range because given the facts, these defenses were very weak or not established at all.[3] In other words, the court just disagreed with McLeod that the facts warranted entry of the findings he sought and concluded that there was no factual or legal basis to justify an exceptional sentence. As we observed in State v. Garcia-Martinez, "[t]his is an appropriate exercise of sentencing discretion."[4]

McLeod also contends that the court misapplied the self-defense standard because the court failed to evaluate the defense from McLeod's perspective. McLeod correctly states that "evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees."[5] But this approach to reasonableness incorporates both subjective and objective characteristics.[6] While the jury is to stand "'as nearly as practicable'" in the defendant's shoes, it must also use this information to determine what "'a reasonably prudent [person] similarly situated would have done.'"[7] As the court has explained:

The objective portion of the inquiry serves the crucial function of providing

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[3] As the prosecutor pointed out to the court, Dr. McClung's report supported the court's finding that diminished capacity would not have been available as a defense. That report concluded that "[d]espite the mental illness symptoms, Mr. McLeod was still capable of goal-directed behavior— . . . working, driving, engaging in conversation, et cetera—at the time of the crime and appears to have been cognizant that his act of the crime was the shooting of another person. Therefore his capacity to form the specific intent for the crime was not significantly impaired by his mental illness."

[4] 88 Wn. App. 322, 330-31, 944 P.2d 1104 (1997).

[5] State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993).

[6] Garcia-Martinez, 121 Wn.2d at 238.

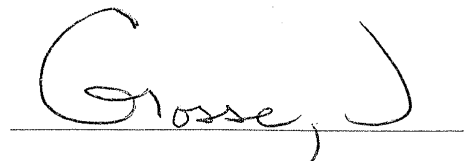
[7] Garcia-Martinez, 121 Wn.2d at 238 (quoting State v. Wanrow, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977)).

> an external standard. Without it, a jury would be forced to evaluate the defendant's actions in the vacuum of the defendant's own subjective perceptions. In essence, self-defense would always justify homicide so long as the defendant was true to his or her own internal beliefs.[8]

Thus, the defendant must also provide some evidence that his or her belief in imminent danger was reasonable at the time of the homicide.[9] Here, the trial court found that there was no such evidence because the facts showed only that Tavares blew smoke in McLeod's face and reached in his pocket. The court therefore properly applied the self-defense standard.

McLeod further contends that the court erred by acknowledging that he had a loss of appreciation of the wrongfulness of his conduct and then "incongruously" ruling that by firing five shots he could not avail himself of a mental defense. But what the court found was that even though McLeod may have had a "loss of appreciation" of the wrongfulness of his conduct based on his mistaken belief that Tavares was a threat, the facts suggested otherwise. The court noted that he shot Tavares multiple times in different parts of his body even though the threat never materialized. Again, the court simply disagreed with McLeod that the facts sufficiently established a mitigating factor that warranted an exceptional sentence, and in doing so, appropriately exercised its discretion.

We affirm.



[8] Garcia-Martinez, 121 Wn.2d at 239.
[9] 121 Wn.2d at 241.

WE CONCUR:

Leach, J.

Appelwick, J.