



## State v. Pebley

146 Wash.App. 1020 (2008) | Cited 0 times | Court of Appeals of Washington | August 4, 2008

### UNPUBLISHED OPINION

Edward Pebley appeals the standard range sentence imposed upon him as a result of a jury verdict convicting him of one count of assault in the second degree with a firearm enhancement, one count of drive-by shooting, and one count of unlawful display of a weapon. Pebley contends that the sentencing court erred by ruling that it did not have the discretion to consider Pebley's depression, in isolation from his prescribed consumption of the anti-depressant Paxil and his alcohol consumption, as a mitigating factor under former RCW 9.94A.535(1)(e) (2004) when determining his sentence. Given that the evidence at trial established that Pebley was impaired, at least in part, due to his voluntary consumption of alcohol, and that the plain language of former RCW 9.94A.535(1)(e) prohibited a downward departure from the standard sentence range where a defendant's impairment resulted from the voluntary consumption of alcohol, the sentencing court properly determined that it did not have the discretion to grant an exceptional downward sentence. We affirm.

#### I.

Edward Pebley first sought medical help for depression in 2003. After taking various prescribed anti-depressants for one year, he started taking Paxil in April 2004. In June 2004, Pebley began hearing voices telling him "it's hopeless" and began contemplating suicide. Also in early June 2004, Pebley's prescribed dosage of Paxil was doubled.

On the morning of June 29, 2004, Pebley woke up, took his Paxil medication, dressed in a suit and tie, and drove to Nintendo, Inc., for a job interview. In fact, Pebley did not have an appointment for an interview. He never made it to Nintendo. Instead, while on his way there, Pebley stopped for lunch. He testified that, while at lunch, he consumed alcohol:

[PROSECUTOR]: And then you drank alcohol, right?

[MR. PEBLEY]: I did.

[PROSECUTOR]: And you said two, perhaps three? You said a couple, a very-

[MR. PEBLEY]: Yeah, a few.

Pebley then bought a bottle of vodka and drove home.



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Pebley testified that, with respect to that which occurred after he returned home, he did not "remember much," and that "at this point the memory [became] very sketchy." At some point thereafter, Pebley took his gun and drove toward Redmond to buy cocaine, with which he later attempted to kill himself.

On his way to Redmond, Pebley began tailgating a car, making obscene gestures, and swearing at the vehicle's passengers. Pebley swerved around the car as it drove to the side of the road. He then began tailgating a second car. When the second car pulled into a gas station to escape from Pebley, Pebley followed. As Pebley chased the car around the coffee stand in the gas station, he pulled out his gun and pointed it out of his car's window at the other car. The other car then left the gas station and drove into a parking lot. Pebley fired at least one shot. The second car then left the parking lot. Pebley did not follow it. Pebley was later arrested without incident.

Pebley was charged with drive-by shooting and two counts of assault in the second degree with firearm enhancements. Several expert witnesses evaluated Pebley and testified at trial. Dr. Christian Harris and Dr. Ty Hunter testified for the defense. Dr. Harris testified that Pebley's aggressive, suicidal-type behavior was associated with his agitated depression, and was caused by the interaction of Paxil and alcohol. Dr. Hunter testified that Pebley suffered from a Paxil-induced mood disorder on June 29, 2004, but could not rule out Pebley's consumption of alcohol or cocaine as the cause of Pebley's aggressive behavior. To the contrary, the State's expert witness, Dr. Mark McClung, testified that Pebley was capable of forming intent on the night of June 29, 2004, and that his behavior was inconsistent with a Paxil-induced mood disorder.

The jury found Pebley guilty of drive-by shooting and one count of assault in the second degree with a firearm enhancement. Instead of finding him guilty of the second count of assault in the second degree, the jury found Pebley guilty of the lesser-included offense of unlawful display of a firearm.

At sentencing, Pebley requested a mitigated exceptional sentence, arguing that the effects of his prescribed use of Paxil constituted a statutory mitigating factor, pursuant to former RCW 9.94A.535(1)(e), which allowed the sentencing court to depart downward from the standard sentence range where [t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

The trial court ruled that it was without authority to impose a mitigated exceptional sentence, stating that the effect of Paxil alone was not the issue before it:

But that is . . . not the factual scenario that I'm presented with here. It's not simply the use of Paxil in a manner that ended in an amount that was prescribed that was presented in the testimony at trial. Rather the issue that was presented was the combination of Paxil and alcohol and the effect that it placed upon Mr. Pebley. Relying on *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993), the trial



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court ruled that former RCW 9.94A.535(1)(e) was inapplicable because the evidence and testimony at trial demonstrated that Pebley's voluntary consumption of both Paxil and alcohol affected his behavior. Pebley received a standard range sentence of 62 months imprisonment. He now appeals that sentence.

### II.

Pebley contends that the trial court erroneously ruled that it did not have the discretion to grant a mitigated exceptional sentence below the standard range based on consideration of Pebley's depression, in isolation from his consumption of Paxil and alcohol.<sup>1</sup> We disagree. The trial court correctly ruled that it could not depart from the standard sentence range because Pebley's impaired ability to conform his conduct to the requirements of the law resulted, at least in part, from Pebley's voluntary consumption of alcohol.

Former RCW 9.94A.535 provided that the sentencing "court may impose a sentence outside the standard sentence range for an offense if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence." One of the statutorily enumerated mitigating factors that the trial court was authorized to consider in making such a determination was whether:

[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

Former RCW 9.94A.535(1)(e) (emphasis added).

Our Supreme Court addressed this provision in *Hutsell*, holding that the statute's use of the term "voluntary" "excludes consideration of the unforced, and not fraudulently induced, use of drugs or alcohol as a mitigating factor." *Hutsell*, 120 Wn.2d at 921.

In this court, Pebley's argument is slightly different than it was in the trial court. He now contends that the sentencing court erred by ruling that it could not consider Pebley's depression, separate from his lawful use of Paxil and concurrent use of alcohol, as a mitigating factor. This is not, however, the argument addressed to the sentencing court.<sup>2</sup> We will not review an argument that was not made to the trial court. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); *State v. Lucero*, 140 Wn. App. 782, 790, 167 P.3d 1188 (2007).

In any event, whether Pebley contends that the trial court erred by refusing to consider his depression in isolation or by refusing to consider his use of Paxil in isolation is not significant for purposes of determining the applicability of former RCW 9.94A.535(1)(e). The sentencing court properly determined that it had no discretion to grant an exceptional downward sentence based on the mitigating factor set forth in former RCW 9.94A.535(1)(e) because Pebley voluntarily consumed



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both alcohol and Paxil before committing the crimes for which he was to be sentenced.

A sentencing court necessarily abuses its discretion if it refuses to consider a mitigating factor based on the erroneous belief that it has no authority to do so. *Bunker*, 183 P.3d at 1093. Here, however, the sentencing court's belief that it was precluded from considering the mitigating factor proposed by Pebley was correct. The plain language of former RCW 9.94A.535(1)(e) excluded impairment caused by "[v]oluntary use of drugs or alcohol" as a proper mitigating factor.

The evidence at trial established that Pebley had consumed alcohol prior to engaging in the criminal activities of which he was convicted. Additionally, expert testimony established that the effects on Pebley resulting from his use of Paxil and alcohol could not be separated from one another, or from the effects of his depression. As a result, the trial court properly refused to consider the effect of Paxil on Pebley, in isolation from the other causes, stating: "I don't think the . . . testimony . . . allows me to make a finding with regard to Paxil in and of itself without considering the alcohol consumption, as well."

The trial court properly determined that it had no authority to consider Pebley's impairment resulting from depression, or Paxil use, in isolation from his voluntary use of alcohol as a mitigating sentencing factor. There was no error.

Affirmed.

1. A trial court's decision to deny a defendant's request for an exceptional sentence below the standard range is reviewable where the trial court either refused to exercise its discretion or relied on an impermissible basis for refusing to impose an exceptional sentence. *State v. Khantechit*, 101 Wn. App. 137, 138-39, 5 P.3d 727 (2000). A trial court's erroneous belief that it lacks the authority to exercise its discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand. *State v. Bunker*, \_\_\_ Wn. App. \_\_\_, 183 P.3d 1086, 1093 (2008).

2. The dialogue between Pebley's attorney and the trial court demonstrates that Pebley requested that the trial court consider the effect of Paxil, not depression, independently from his alcohol consumption, as a reason for his inability to conform his conduct to the law.

