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The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court’s opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: <https://www.lexisnexis.com/clients/wareports>.

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FILED
JANUARY 8, 2026
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	No. 40341-6-III
)	
Respondent,)	
)	
v.)	OPINION PUBLISHED
)	IN PART
STEVEN LEE SMITH,)	
)	
Appellant.)	

LAWRENCE-BERREY, C.J. — Steven Smith appeals his resentencing for convictions of seven counts of first degree unlawful possession of a firearm and one count of possession of a stolen firearm. Because of RCW 9.94A.589(1)(c), the resentencing court imposed consecutive sentences on all counts. He has been imprisoned on those convictions for over 12 years.

On appeal, Smith argues the trial court erred by (1) concluding it could not consider an exceptional mitigated sentence, (2) imposing consecutive sentences on all

No. 40341-6-III
State v. Smith

counts, (3) miscalculating his offender score, and (4) not allowing a jury to determine the effect of prior convictions on his sentence. We agree with Smith’s first two arguments and remand for a second resentencing. We retain jurisdiction, should resentencing not achieve the purposes of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW.

FACTS

In 2013, the State charged Steven Smith with seven counts of first degree unlawful possession of a firearm and one count of possession of a stolen firearm. The firearms were found in his residence and car. A jury convicted him of all charges. Because of RCW 9.94A.589(1)(c),¹ the trial court imposed consecutive sentences on each of his eight convictions. Based on an offender score of “2,” the court sentenced Smith to 255 months of incarceration.

In November 2023, this court issued its decision in *In the Matter of the Personal Restraint of: Steven L. Smith, Petitioner*, No. 38641-4-III. We remanded for resentencing for the trial court to conduct a factual comparability analysis of Smith’s 1995 Oregon conviction for second degree burglary with Washington’s offenses of residential burglary or second degree burglary.

¹ We later set forth the relevant portions of this statute. In general, it requires a sentencing court to impose consecutive sentences for each firearm-related conviction if one conviction includes either theft of a firearm or possession of a stolen firearm.

No. 40341-6-III
State v. Smith

At the April 2024 resentencing, the trial court found that Smith’s 1995 Oregon conviction for second degree burglary was factually comparable to Washington’s second degree burglary statute. After this finding, Smith’s attorney did not request an exceptional mitigated sentence. The request came from Smith during his allocution:

Your Honor, in *State v. Blakeley* [sic]^[2] [the court] determined that . . . the jury [must] find an exceptional sentence . . . even at resentencing An exceptional sentence is [one that] run[s] consecutive. . . .

So I would ask that [the sentences] run concurrent, because under [the] Sixth Amendment [to the United States Constitution]—due process.

Your Honor, I’ve been in custody for—eleven years. And I [know] how precious time [i]s. My dad died in January My mom, my family are here to support me. I have a job, a house.

Your Honor, I’m convinced, if you give me one shot at this I will be a productive mem[ber] of society.

Eleven years is a long time. A lot of things have happened in eleven years. In that 11-year period, your Honor, I never got one infraction, not even a minor infraction. I—didn’t know anything about computers, went there, learned all about computers, worked for—for seven years My conduct in the last eleven years has been exemplary, your Honor.

And, you know, . . . you have the right to give a lower mitigated sentence, . . . when the sentence . . . exceeds the severity of the crime. And in this case, your Honor, I really feel that the sentence exceeds the severity of the crime.

So I’d ask for lenience, your Honor.

Amended Report of Proceedings (ARP) at 35-36.

² Smith’s intended reference was to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

No. 40341-6-III
State v. Smith

The resentencing court explained to Smith that his consecutive sentences were not an exceptional sentence because, by statute, the presence of one possession of a stolen firearm conviction required the sentences for each of his eight convictions to run consecutively. With respect to Smith's request for a mitigated sentence, the court believed its hands were tied, and it was "mandated to . . . impose those times to run consecutive in this case." ARP at 37. Later, the court commented that even though a 255-month sentence exceeded many murder and rape sentences, it was appropriate because it met "the purposes of the statute." ARP at 38. Because of RCW 9.94A.589(1)(c), the court imposed consecutive sentences on each conviction. Based on an increased offender score of "3," the court reimposed the same 255-month sentence.

Smith appealed to this court.

ANALYSIS

Smith argues the trial court erred by concluding it lacked discretion to impose a mitigated sentence, and resentencing is necessary because there is a possibility the trial court would have imposed a lesser sentence had it recognized its discretion.

Before addressing Smith's arguments, we must consider two arguments raised by the State. First, the State argues that Smith received a standard range sentence, and he may not appeal from it. We disagree. Although "no defendant is entitled to challenge a

No. 40341-6-III
State v. Smith

sentence within the standard range, this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision; every defendant is entitled to have an exceptional sentence actually considered.” *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

Second, the State argues that Smith had asked for an exceptional mitigated sentence but his counsel did not, and thus the issue was not properly raised. We disagree with this argument also. Although a sentencing court can decline to consider a pro se motion when the party is represented by competent counsel at the hearing, *State v. Bergstrom*, 162 Wn.2d 87, 97, 169 P.3d 816 (2007), it is clear in this case the trial court did consider and rule on Smith’s request for an exceptional mitigated sentence. The court explained its legal reasoning and concluded that the statute required consecutive sentences and that its hands were tied. Because the trial court considered Smith’s request for a mitigated sentence, we conclude this claim of error is preserved.

We now turn to the merits of Smith’s arguments. A defendant is entitled to have an exceptional sentence actually considered. *McFarland*, 189 Wn.2d at 56. Thus, where the court refuses to exercise its discretion at all, such as by mistakenly believing it lacks discretion to impose an exceptional mitigated sentence, it abuses its discretion. *Id.* Here, the resentencing court said it lacked discretion to impose an exceptional mitigated sentence. The court therefore erred.

No. 40341-6-III
State v. Smith

In *McFarland*, the court emphasized that an appellate court should order resentencing if “the record suggests at least the possibility that the sentencing court would have considered imposing concurrent firearm-related sentences had it properly understood its discretion to do so.” *Id.* at 59. The State argues that resentencing should not be ordered here because the trial court’s comments showed it would not be open to granting a mitigated sentence. The State points to the court’s comments that a 255-month sentence was “appropriate” and “would meet the purposes of the statute.” ARP at 38.

We disagree with the State. Resentencing not only is appropriate, but it is necessary to correct a legal error.

The trial court framed the question as whether the 255-month sentence met the purposes of the statute, referring to RCW 9.94A.589(1)(c), the statute that mandates consecutive sentences. Framed in that manner, consecutive sentences always will meet the purposes of a statute that requires consecutive sentences. The trial court made the wrong inquiry. The correct inquiry is whether the 255-month sentence meets the purpose of the SRA.

In *McFarland*, the court held, “in a case in which standard range consecutive sentencing for multiple firearm-related convictions ‘results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA],’ a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-

No. 40341-6-III
State v. Smith

related sentences.” *Id.* at 55 (quoting RCW 9.94A.535(1)(g)). The *McFarland* court further held, “Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values.” *Id.* at 57.

Here, all seven firearms were found either in Smith’s residence or his car; one happened to be a stolen firearm. Had none of the seven firearms been stolen, Smith’s mid-point standard range sentence would have been 36 months. But because one of them was stolen, Smith received a sentence of 255 months.

To determine the proportionality and consistency of this sentence, we compare what other felony offenses would result in such a severe sentence, given Smith’s offender score of “3.” Referring to the sentencing grid found in RCW 9.94A.510 and the seriousness levels found in RCW 9.94A.515, only four felonies with an offender score of “3” would warrant a sentence of 255 months or higher: aggravated murder, homicide by abuse, first degree malicious explosion,³ and murder in the first degree. Whereas all other felonies would receive a lesser sentence. These other less serious felonies include: second degree murder, first degree assault, first degree assault of a child, promoting commercial sexual abuse of a minor, first degree rape, first degree rape of a child, first degree manslaughter, second degree rape, second degree rape of a child, vehicular

³ This offense requires proof of intent to commit a terrorist act. RCW 70.74.280(1).

No. 40341-6-III
State v. Smith

homicide, first degree child molestation, indecent liberties with forcible compulsion, first degree kidnapping, and leading organized crime.

Had the trial court expressly determined that the current convictions were proportional to the above offenses, we would have reversed for an abuse of discretion. But it has not yet expressly determined this question. On remand, we direct the trial court to examine which group of offenses are proportional to the offenses committed by Smith and impose sentences that further the central values of the SRA.

A majority of the panel having determined that only the foregoing portion of this opinion *and the Conclusion* will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Smith also argues that the resentencing court misconstrued RCW 9.94A.589(1). Because the resentencing court will need to correctly construe this statute at resentencing, we address two additional arguments. We set forth the relevant portions of RCW 9.94A.589(1) and italicize those portions impacting our analyses of Smith's arguments:

No. 40341-6-III
State v. Smith

(1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: *PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.* Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. . . .

....
(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. *The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.*

Smith first argues that a consecutive sentence pertains only to the firearm that was both unlawfully possessed and stolen. In this case, it would be only one of the seven firearms possessed by Smith. Under Smith’s construction of the statute, all of his sentences would run concurrent, except one. We reject Smith’s first argument. This argument contradicts the plain language of the last sentence of subsection (c). That subsection expressly requires consecutive sentences “for each conviction of the felony

No. 40341-6-III
State v. Smith

crimes listed in this subsection (1)(c), *and* for each firearm unlawfully possessed.”
(Emphasis added.)

Smith’s second argument appears to focus on the italicized proviso above. He argues that the firearm offenses that arise from the same criminal conduct must all be sentenced concurrently. In support of his argument, he cites *State v. Haddock*, 141 Wn.2d 103, 3 P.3d 733 (2000). Smith’s argument conflates how to calculate an offender score with whether a separate conviction runs concurrent or consecutive. *Haddock*, similar to the proviso above, involved the question of “same criminal conduct” for calculating an offender score, not whether separate convictions run concurrent or consecutive. *Id.* at 106. We reject Smith’s second argument.

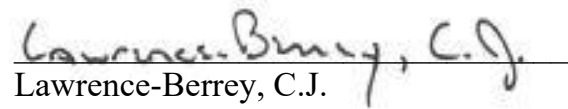
CONCLUSION

“Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values.” *McFarland*, 189 Wn.2d at 57. Sentencing courts must mitigate the harshness of a prosecutor’s decision to stack multiple firearm consecutive sentences onto one another, and, when courts fail to do this, they fail to further the central values of the SRA.

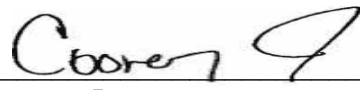
We remand for the trial court to consider Smith’s request for an exceptional mitigated sentence and to impose a proportional sentence by comparing Smith’s firearm offenses with the seriousness of other felony offenses. We remand for a second

No. 40341-6-III
State v. Smith

resentencing, but retain jurisdiction should it be necessary to correctly resolve the remanded issue or any other issue raised and briefed by the parties.


Lawrence-Berrey, C.J.

WE CONCUR:


Cooney, J.


Murphy, J.