COA 69697-1-I

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

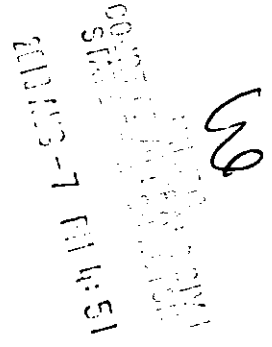
State of Washington,

Plaintiff/Appellee

vs.

Vincent Pettie,

Defendant/Appellant,



On Appeal from:
King County Superior Court
Cause No. 11-1-07885-6 SEA

STATEMENT OF ADDITIONAL GROUNDS

By:

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After recieving and reviewing the opening brief prepared by my attoney I have decided the brief filed on my behalf is inadequate and fails to raise viable issues on appeal that is significant and obvious on the record.

Facts

The State charged Pettie with first degree assault. The prosecution and Mr. Pettie's counsel reached an agreement which included, amonst other things, the information would be amended to second degree burglary (count I) and third degree assault (count II) [1VRP153] although the standard sentence range for both counts was 22 to 29 months, the agreement would allow the trial court to use the statutory maximums as the presumptive standard ranges. [1VRP155] Finally, the parties agreed to jointly recommend that the judge run the sentences consecutively for a total combined sentence of 180 months in prison. [1VRP156]

The trial court, as agreed upon by the parties, sentenced Mr. Pettie to 120 months on count I and 60 month for count II and ordered them served

consecutively as an exceptional sentence for a total sentence of 180 months. [1VRP156] [2]
The sentencing court found Mr. Pettie's plea to be knowingly, intelligently, and voluntarily made. [1VRP159] , The exceptional sentence was imposed pursuant to RCW 9.94A.535 and the only reasons given by the court to support the sentence was the parties stipulation that justice is best served. The court also found the sentence to be consistent with the furtherance of justice and the purposes of the SRA. [Appendix D Findings and Consclusions[[3]

[2]: RCW 9.94A.589(1)(a) (all current sentences shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provision of RCW 9.94A.535)

[3]: The evidence in the record reflects the sentencing court failed to comply with the Supreme Court holding in Breedlove that required it to complete the two stage analysd before approving the plea bargain. 138 Wh.2d 298

Mr. Pettie appeals herein arguing (1) his trial counsel was ineffective because because he in correctly told him that because Mr. Pettie hal to prior conviction of attempt robbery he was facing a life sentence hal he been convicted of first degree assault; (2) the courts reason for imposing

an exceptional sentence is not supported by the record; (3) the standard range was incorrect because the statutory maximum penalty for the offenses was incorrectly used as the presumptive standard ranges

Additional Ground 1

Ineffective Assistance of Counsel

Mr. Pettie contends that he would not have plead guilty and insisted in going to trial if his counsel had correctly informed him about his two attempted robbery convictions were not serious offenses within the meaning of RCW 9.94A.030(32) an a subsequent conviction of either first or second degree assault would not have exposed him to life in prison as a persistent offender pursuant to RCW 9.94A.570. The Sixth amendment right to counsel guarantee the right to the assistance of counsel during critical stages of the criminal process. U.S. v. Chronic (S.Ct.) The plea negotiation process is a critical stage to which the Sixth Aendment right applies. The test for effective assistance of counsel in the plea bargaing context is the same as defined in Strickland, (performance) 466 U.S. at 668; and (prejudice) 466 U.S. at 687;

Although the accused has the ultimate authority to decide whether to plead guilty, waive a jury, or take an appeal, Jones v. Barnes, 463 U.S. 745, 77 L,Ed.2d 987 (1983), however, when the accused own counsel provides him erroneous advice about an ultimately knowable sentence may contribute to that plea being made not knowingly, intelligently, or involuntarily and constitute ineffective assistance of counsel. U.S. v. ex rel Hill v. Ternullo, 510 F.2d 844 (2d Cir.1975) see also U.S. v. Rumery, 698 F.2d 764 (5th Cir.) ("patently erroneous advice that defendant was facing 30 years instead of 5 years was ineffective assistance") U.S. v. Booze, 293 F.3d 516, (D.C. Cir. 2002) ("remanding for a hearing on claim that attorney advised client to accept plea based on plainly incorrect estimate of the likely sentence due to ignorance of applicable law attorney should have beenn aware"). U.S. v. Cooks, 461 F.2d 530 (5th Cir.) ("vacating plea based on patently erroneous advice that if defendant did not plea he was subject to sentence six times more severe than the actually allowed by law").

Here, the record eviences [redacted] the terms of the plea agreement were not accepted by Mr. Pettie until after he was told by counsel he was facing a life sentence because he had two prior convictions which were strikes and if he were to be convicted of the underlying crime it would expose him to the provision of RCW 9.94A.570 and in turm the court could sentence him to a life sentence.

The sentencing juge also cautioned Mr. Pettie about the potential dangers of going to trial and being subsequently convicted of the underlying crime would expose him to a life sentence because of the two prior convictions for attempted robbery.

"The reason I want to bring that up to you is particularly as to you, thats very important because I unerstand you face your third strike." [1VRP147]

"So the jury could say its okay, its an assault two case, and if they decide it was, and you were an accomplice, its still your third strike." [1VRP148]

However, attempt robbery is not defined as a "most serious offense" within the meaning of RCW 9.94A.030(32). A persistent offender is defined as an offender who has been convicted in this state of any felony considered a most serious offense and has, before the commission of the offense been

convicted as an offender on at least two separate occassion of felonies considered most serious offenses. see former RCW 9.94A.570(a)(i)(ii).

From refview of Mr. Pettie's criminal history he has no felony convictions, adult or juvenile, that are defined most serious offenses. and for his counsel to to provide Mr. Pettie erroneous advice about a life sentence when he knew or should have known the provisions of RCW 9.94A.570 were not applicable in Mr. Pettie's circumstances rendered the plea of guilty unconstitutional and in violation of ¶ Mr. Pettie's Sixth and Fourteenth Amendment rights.

Additional Ground 2

The Sentencing Judges reasons for the exceptional sentence is not valid an the sentence is clearly excessive

Mr. Pettie contends next the court imposed exceptional sentence should be reversed because the reasons therefor is not valid and clearly excessive. State v. Parker, (1996) 82 Wash.App. 130, 916 P.2 467, review d granted, 130 Wash.2d 1007, 928 P.2d 416, reversed, 132 Wash.2d 182;
When the sentencing court acts outside the structure set by the SRA, the appellate court may review

any such departure. State v. Mail, 121 Wash.2d 707, 711-12, 854 P.2d 1042 (1993) (defendant may appeal a sentence by showing "the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so"); Boerner, supra at 6-34 ("appellate review exists to correct legal error in the imposition of sentences just as it does to review claimed error in all other areas of the law")

The record eviences the sentencing court reasons for imposing consecutive sentences of two non violent offenses was because the parties agrreed to the exceptional sentence and because Mr. Pettie was facing a life sentence. As noted above Mr. Pettie was not facing a life sentence and he only agreed to the sentence because his attorney provided him erroneous legal advice moreover, dispite his agreement, the supreme court has held an individual cannot, by notiated plea agreement, agree to a sentence in eccess of that allowed by law. Goodwin, 146 Wash.2d at 870("actual sentence imposed pursuant to a plea bargain must be statutorily authorized") Thompson, 141 Wn.2d at 723; Quoting More, 116 Wn.2d at 489;

Although a consecutive sentence is authorized by RCW 9.94A..535 where there is substantial and compelling reasons to justify it however, the circumstances of the instant crime does not distinguish it from other crimes of the same category. State v. Pennington, 112 Wn.2d at 610. The sequence of events makes it clear the sentencing court did not base its decision to sentence Mr. Pettie outside the standard range because of any circumstances related to the underlying crime. Instead, the catalyst of the court decision is the agreement and the fraudulent misrepresentation he was facing a life sentence.

Threfore, lookinhg to the purposes of the SRA, Mr. Pettie contends a 15 year sentence for a class B felony cannot be justified as proportionate for a defendant with an offender score of 6, does not promote respect for the law because using deception and mistatements of law violates the law, , and nor is the sentence commensurated with punishments imposed on others committing similar sentence offenses.[4]

4: when imposing an exceptional sentence the court must consider the purpose of this chapter RCW 9.94A.120(2) A stated purpose of the SRA is to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender criminal history, promote respect for the law, and is commensurate with the punishment of others. RCW 9.94A.010

Additional Ground 3

The Standard range was incorrect

The Standard Range was incorrect because the sentencing court used the statutory maximum penalty for the offenses as the presumptive standard sentencing range

RCW 9.94A.370 refers to the standard range as the presumptive sentence. The presumptive standard range sentence is a legislative determination of the applicable punishment range for the crime as ordinarily committed. The sentencing court may impose a sentence outside sentence range if it finds substantial and complelling reasons to justify an exception. RCW 9.94A.120(2). However, when imposing an exceptional sentence the court must first consider the presumptive punishment as legilatively determined for an ordinary commission of a crime before it may adjust it up or dopwn to account for the compelling nature of the aggravating or mitagating circumstances of the particular case. RCW 9.94A.390[3] See Statew v. Brown, 60 Wash.App. 60, 802 P.2d 803 (1990) ("it is obvious from the wording of the statute that the sentencing court must first determine the standard range before deciding to impose an exceptional sentence.") review denied, 116 Wash.2d 390, 832 P.2d 103 (1991) overrule on other grounds in part by State v. Chadderton, 119

Wash.2d 390, 832 P.2d 481 (1992).

Here, although the sentencing court calculated the correct offender score, but she incorrectly, basded on that odffender score, designated the # standard range sentence as the statutory maximum. And by setting the statutory maximum as the presumptive standard sentecing range she has not only imposed two exceptional sentences, but has also redesignated the punishment for the crime without reference to the legilsative standard to which the court must defer absent exceptional circumstances. see State v. Freitag, 127 Wash.2d 141, 896 P.2d 1254, 905 P.2d 355 (1995) ("it is the function of the judiciary to impose sentences consistent with legilative enactments.") An exceptional sentence is exceptional because it differs from the underlying presumptive sentence. State v. Richie, 126 Wash.2d 2 388, 894 P.2d 1308 (1995) ("use of the word exceptional by definition implies a deviation from the norm.")

Because the sentencing court must first correctly calculate the standard range before imposing an exceptional sentence failer to do so is a legal error and the remedy is remand unless the record clearly indicates the sentencing court would have imposed

the same sentence anyway. See e.g., Brown, 60 Wash.App. at 70, 802 P.2d 803 ("This court cannot say that the much lower standard range would not have impacte on the amount of time given for the exceptional sentence" and therefore remand for resentencing required): Sttae v. Green, 46 Wash.App. 92, 101, 730 P.2d 1350 (1986) ("Inasmuch as we find the trial court erred in determining the offenders score as legilatively defined and being unable to determine the court imposed its excessive sentence of approxitmately twice the standard range depending upon its determination of the offender score. We remand for resentencing") This is the standard used by our appellate courts in paraplel contenxt. See State v. Smith, Gaines, 122 Wash.2d 502; State v. Smith, 123 Wash.2d 51; State v. Dunaway, 109 Wash.2d 207;

It is clear from the record that the court would not have imposed the same sentence without any aggravating factos.

Dated this 8 day of [redacted], 2013

Vincent Pettie

VINCENT PETTIE/APPELLANT