NO. 46248-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MARCUS T. ALMANZOR,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR LEWIS COURT
The Honorable James Lawler, Judge
Cause No. 13-1-00476-8

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 626-0148

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Constitutional

Statutes

A. ASSIGNMENTS OF ERROR

01. The trial court erred in imposing an exceptional sentence.

02. The trial court erred in permitting Almanzor to be represented by counsel who provided ineffective assistance by failing to properly object to the imposition of his exceptional sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in imposing an exceptional sentence where the State's failure to provide proper notice regarding the aggravating factor prior to trial violated Almanzor's statutory and due process right to notice? [Assignment of Error No. 1].

02. Whether Almanzor was prejudiced as a result of his counsel's failure to object to the imposition of his exceptional sentence on the ground that the State failed to provide proper notice regarding the aggravating factor prior to trial? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Marcus T. Almanzor was charged by information filed in Lewis County Superior Court July 19, 2013, with burglary in the second degree, count I, residential burglary, count II, trafficking in stolen property in the first degree, count III, and unlawful possession of a firearm in the second degree, count IV, contrary to RCWs 9A.52.030(1), 9A.52.025, 9A.82.050(1), and 9.41.040(2)(a)(i), respectively. [CP 1-3].

No pretrial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 10; RP 20].[1] Trial to a jury commenced February 13, 2014, the Honorable James Lawler presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 153-54]

Almanzor was found guilty as charged, given an exceptional sentence of 144 months, with counts I-III served concurrently to one another but consecutive to count IV [CP 57-60, 74], and the court entered the following the FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF EXCEPTIONAL SENTENCE:

I. FINDINGS OF FACT

1.1 The defendant was found guilty at jury trial to an information charging him with Burglary – 2, Residential Burglary, Trafficking in Stolen Property – 1, and Unlawful Possession of a Firearm – 2.

1.2 The defendant has an offender score of 27 points on the Burglary – 2 and Residential Burglary charges, and 20 points on the trafficking in Stolen Property – 1 and Unlawful Possession of a Firearm – 2.

1.3 The defendant stipulated that his offender score reflected pints of 20 and 27 respectively.

//

//

[1] Unless otherwise indicated, all references to the Report of Proceedings are to the transcripts entitled Jury Trial - Volumes I-II.

II. CONCLUSIONS OF LAW

2.1 The defendant's criminal history results in some offenses going unpunished.

2.2 Because of the defendant's high offender score, the provisions of RCW 9.94A.535(2)(b) apply.

2.3 As a result, the court imposes its sentence as reflected in the judgment and sentence dated May 15, 2014.

[CP 81-82].

Timely notice of this appeal followed. [CP 85].

02. Substantive Facts

On Monday, July 1, 2013, at approximately 10:30 a.m., Deputy Gabriel Frase was dispatched to the scene of a reported burglary located at 234 Hubbard Road in Curtis, Washington. [RP 44-45]. The owner of the residence and separate shop on the property was out of state at the time. [RP 33-34]. Property, including operable firearms, had been taken from the house, in addition to tools and other items from the shop. [RP 35-37, 40-41, 134].

Christopher Lopez, who was arrested on unrelated charges later that month [RP 52], said that in early June he conducted surveillance of the property on Hubbard Road at Almanzor's request, after which he observed Almanzor and a person he knew as Donny break into and

remove property from the shop into a van, which Lopez helped them load. [RP 59-60, 87, 94-95].

Two days later, Lopez and Almanzor returned to the property, and Almanzor broke into the residence and stole more items–including a TV, rifles, handguns, collectible swords and knives–which they hid in a drop-off spot nearby, while Almanzor left to get and return with his car. [RP 65-66]. "The only thing we ended up taking that night specifically was the TV, a pillowcase with jewelry and stuff in it, and then that lockbox." [RP 65]. According to Lopez, he and Almanzor sold the TV to Crystal Aguilar for $40 because they needed gas money. [RP 67].

> We pulled up in her alleyway, he (Almanzor) popped his trunk, I got out, handed the TV to her through the window, and she gave us $40 at the time which is not what the TV was worth.

[RP 67].

For purposes of the unlawful possession of a firearm charge, Almanzor stipulated he had previously been convicted of a felony. [RP 133; CP 23].

//

//

//

//

D. ARGUMENT

01. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE WHERE THE STATE'S FAILURE TO PROVIDE PROPER NOTICE REGARDING THE AGGRAVATING FACTOR PRIOR TO TRIAL VIOLATED ALMANZOR'S STATUTORY AND DUE PROCESS RIGHT TO NOTICE.

"'In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'" State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)).

RCW 9.94A.537(1) provides:

> At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

While the above requires the State to provide notice of its intent to prove aggravating circumstances, it does not specify the manner in which such notice is to be given. State v. Siers, 174 Wn.2d 269, 277, 274 P.3d 358 (2012).

Concomitantly, under article 1, § 22 of the Washington Constitution, "the accused shall have the right ... to demand the nature and cause of the accusation against him." Similarly, the Sixth Amendment of

the United States Constitution demands that "[i]n all criminal prosecutions, the accused shall ... be informed of the nature of the cause of the accusation." These constitutional provisions provide the same protections, State v. Hooper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992), and this court reviews constitutional challenges de novo. In re Detention of Salvala, 147 Wn. App. 798, 803, 199 P.3d 413 (2008).

Here, the record shows that the State did not provide notice of its intent to seek an exceptional sentence until sentencing, when the prosecutor argued:

> Given Mr. Almanzor's exceptionally high offender score, he's looking at a standard range on the burglary two of 58 to 68 months, on the residential burglary 63 to 84, trafficking in stolen property first degree 63 to 84, and unlawful possession of a firearm in the in the second degree 51 to 60. With that range and his offender score, correspondingly of 27, 27, 20 and 20, State feels that a lot of these crimes would not be appropriately punished and pursuant to RCW 9.94A.535(2)(c) the State's asking that the sentence be on the high end of each to run consecutively.
> ....
>
> All four to run consecutive.[2]

[RP 05/15/14 2-3].

Prior to Siers, Division I of this court rejected a similar challenge in State v. Edvalds, 157 Wn. App. 517, 237 P.3d 368 (2010), petition

[2] As previously noted, the court imposed an exceptional sentence of 144 months, with counts I-III served concurrently to one another but consecutive to count IV. [CP 74].

denied, 171 Wn.2d 1021 (2011), holding that notice is not required when the State alleges aggravating factors based on prior criminal history, Id. at 531, and that additional process is not required in this context because the statute (RCW 9.94A.535(2)(c) itself provides sufficient notice. Id. at 534. Though the court's central rational was based on the statutory scheme of RCW 9.94A.535 and .537, it further held, given the convictions justifying the exceptional sentence arose after trial but before sentencing, that it would be unfair to prohibit the State from seeking an exceptional sentence and "contrary to the intent of the legislature, which intended to give judges the discretion to impose an exceptional sentence where certain crimes would otherwise go unpunished." (citations omitted). State v. Edvalds, 157 Wn. App. at 535.

It is difficult to juxtapose Edvalds with Siers, wherein our Supreme Court adopted the lead opinion's decision in Powell (plurality opinion), that "'notice of aggravating circumstances is required as a matter of due process. Due process is satisfied when the defendant receives sufficient notice from the State to prepare a defense against the aggravating circumstances that the State will seek to prove in order to support an exceptional sentence.'" State v. Siers, 174 Wn.2d at 278 (quoting State v. Powell, 167 Wn.2d 672, 682, 223 P.3d 492 (2009), overruled on other grounds by Siers, 174 Wn.2d at 282)). And such is applicable, or should

be, whether the aggravating factor is to be found by the jury or, as in this case, solely on the defendant's criminal history. Division I found no such distinction in Edvalds, holding that since the calculation of the defendant's criminal history is automatic, "[a]voiding conviction on the immediate charges is the only trial strategy to avoid the application of the automatic calculation of the free crimes aggravating factor." State v. Edvalds, 157 Wn. App. at 535.

Division I's reasoning in Edvalds is misplaced, for it limits the discussion, and hence the scope of the right to notice of potential aggravating factors, to the singular purpose of preparing to avoid conviction of the pending charges, and in the process ignores other vital considerations, such as a defendant's right to make an informed decision on whether to go to trial or, when offered, to accept a plea bargain. Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S. Ct. 316, 92 L. Ed. 2d 309 (1948); In re Personal Restraint of McCready, 100 Wn. App. 259, 263-64, 996 P.2d 658 (2000). The record in this case gives no indication that Almanzor was even aware that his sentence could be increased–here by 5 years [CP 74]–due to an aggravating factor first argued at the time of sentencing. Based on this record, that Almanzor was uninformed is not up for question, and his right to notice was violated by the imposition of the

exceptional sentence, with the result that he is entitled to be resentenced within his standard range.

02. ALMANZOR WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT TO THE IMPOSITION OF HIS EXCEPTIONAL SENTENCE ON THE GROUND THAT THE STATE FAILED TO PROVIDE PROPER NOTICE REGARDING THE AGGRAVATING FACTOR PRIOR TO TRIAL.[3]

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

[3] While it has been argued in the preceding section that this issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of any error initiated by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Both elements of ineffective assistance of counsel were established when counsel failed to object to the imposition of the exceptional sentence for lack of proper notice of the aggravating factor, as set forth in the preceding section. First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to object for the reasons argued in the preceding section. And the prejudice is self-evident: but for counsel's failure to object, Almanzor would not have been given an exceptional sentence. Remand for resentencing should follow.

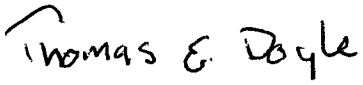
E. CONCLUSION

Based on the above, Almanzor respectfully requests this court to reverse his sentence and remand for sentencing within his standard range.

//

DATED this 15th day of October 2014.

Respectfully submitted,



THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

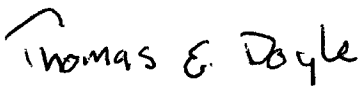
I certify that I served a copy of the above brief on this date as follows:

Sara L. Beigh

appeals@lewiscountywa.gov

Marcus T. Almanzor #811590
WCC
P.O. Box 900
Shelton, WA 98584

DATED this 15th day of October 2014.



THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

October 15, 2014 - 3:31 PM

Transmittal Letter

Document Uploaded: 462486-Appellant's Brief.pdf

Case Name: State v. Almanzor

Court of Appeals Case Number: 46248-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: ted9@me.com

A copy of this document has been emailed to the following addresses:

appeals@Lewiscountywa.gov