NO. 46312-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL BLANE HECKER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 13-1-03642-0

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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1. Whether Defendant failed to show he received ineffective assistance of counsel where defense counsel argued for an exceptional sentence downward despite having no obligation to do so and successfully secured a low end standard range sentence despite defendant's lengthy criminal history?

B. STATEMENT OF THE CASE.

1. Procedure

On September 23, 2013, the State charged Daniel Hecker, herein after "Defendant," with one count of felony violation of domestic violence no contact order and one count of making a false statement to a public servant. CP 1-2. Defendant had six prior convictions of violation of a protective order. 2RP 40;[1] CP 22.

Defendant waived his right to a jury trial and the case proceeded to a bench trial before the honorable Garold E. Johnson. 2RP 86; 3RP 104. A 3.5 hearing was held and Defendant's statements made to law enforcement officers were deemed to be admissible at trial. CP 47-52. Neither Defendant nor the victim, Kathy Jo Devine, testified at trial. 3RP

[1] The State will refer to the verbatim report of proceedings by the volume number followed by the page number.

91. The court subsequently found Defendant guilty as charged. CP 21, 45-46; 3RP 168.

During sentencing defense counsel argued for an exceptional sentence downward, stating that Defendant's prior convictions were extremely dated and the sentencing minimums were fundamentally unfair. 5RP 188-89. Counsel further argued that the protected party in this case, Kathy Jo Devine, was not a true "victim" because she consented to being in defendant's presence. 5RP 190.

The court considered defense counsel's argument and imposition of an exceptional sentence, but ultimately found that the facts at hand did not warrant an exceptional sentence downward. 5RP 193. The court subsequently imposed a low end standard range sentence of thirty three months confinement. 5RP 194; CP 25. Defendant's timely notice of appeal follows. CP 56-57.

2. Facts

On September 20, 2013, Pierce County Sherriff's Deputy Aaron Thompson conducted a traffic stop on a vehicle which he later discovered was reported stolen. CP 39; 3RP 122-23. Defendant was in the front passenger seat of the vehicle and a second passenger, Kathy Jo Devine, was seated in the back. CP 39; 3RP 124. Deputy Thompson removed all

three passengers from the vehicle and began conducting routine record checks. CP 39-40; 3RP 125. Defendant provided the deputy with a false name and date of birth.[2] CP 40; 3RP 125. The deputy informed Defendant that a records check of the information Defendant provided did not yield any results and again asked Defendant for his name. CP 40; 3RP 126. Defendant insisted that he had given the deputy his correct name and claimed that never had an identification card. CP 40; 3RP 126.

Deputy Thompson then turned his attention to Ms. Devine. CP 40; 3RP 126. After obtaining her name and birthday, the deputy conducted a records check which revealed that Ms. Devine was listed as a protected party in three separate no contact orders. CP 40; 3RP 127. The no contact orders listed Defendant as the responding party. CP 40; RP 127. The deputy then searched Defendant's name through the database and discovered several booking photos of Defendant. CP 40; RP 128. The deputy identified the man in the booking photographs as Defendant. CP 40; RP 128.

Deputy Thompson informed Defendant he had discovered his true identity and placed Defendant under arrest. CP40-41; 3RP 129-30. Defendant waived his *Miranda* rights and told the deputy he was aware of the protection orders prohibiting him from having contact with Ms.

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[2] Defendant told the deputy his name was Mark P. Jones and provided a date of birth of 9/30/1962.

Devine. CP 41; 3RP 129-30. He then admitted to placing his wallet on the front passenger tire of the deputy's vehicle as he was being detained in order to conceal his identity from the deputy. CP 41; 3RP 130.

C. ARGUMENT.

1. DEFENDANT FAILS TO SHOW HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL ARGUED FOR AN EXCEPTIONAL SENTENCE DOWNWARD DESPITE HAVING NO OBLIGATION TO DO SO AND SUCCESSFULLY SECURED A LOW END STANDARD RANGE SENTENCE DESPITE DEFENDANT'S LENGTHY CRIMINAL HISTORY.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Under ***Strickland***, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

> Unless a defendant makes both showings, it cannot be said that the conviction...resulted from a breakdown in the adversary process that renders the result unreliable.

State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (*quoting* ***Strickland,*** 466 U.S. at 687); *see also* ***State v. Cienfuegos,*** 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) ("Washington has adopted the ***Strickland*** test to determine whether a defendant had constitutionally sufficient representation.").

Under this standard, performance is deficient if it falls "below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. "The threshold for the deficient performance prong is high, given the deference afforded to the decisions of defense counsel in the course of representation." ***State v. Grier,*** 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." ***State v. Kyllo,*** 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

"When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." ***State v. Kyllo,*** 166 Wn.2d at 863; ***State v. Garrett,*** 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Appellate courts will not find ineffective assistance of counsel if "the actions of counsel complained of go to the theory of the case or to trial

tactics." ***State v. Renfro***, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). A defendant can only rebut the strong presumption of reasonable performance if she can demonstrate "there is no conceivable legitimate tactic explaining counsel's performance." ***State v. Reichenbach,*** 153 Wn.2d 126, 130, 101 P.3d 80 (2004); ***State v. Aho,*** 137 Wn.2d 736, 745-76, 975 P.2d 512 (1999).

To satisfy the prejudice prong of the ***Strickland*** test, the defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." ***State v. Kyllo,*** 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694; ***State v. Thomas,*** 109 Wn.2d at 226; ***State v. Garrett***, 124 Wn.2d at 519. In assessing prejudice, "a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiently, that the judge or jury acted according to the law" and must "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." ***Strickland***, 466 U.S. at 694-95.

Ineffective assistance of counsel is a fact-based determination that is "generally not amenable to per se rules." ***State v. Cienfuegos,*** 144 Wn.2d at 229. "Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles

we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." ***Strickland***, 466 U.S. at 696.

Finally, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Strickland***, 466 U.S. at 689.

a. Counsel was not ineffective because Counsel had no duty to raise a mitigating factor for Defendant's sentence where there was no basis or evidence in the record to support such a claim.

"Defense counsel...has no duty to pursue strategies that reasonably appear unlikely to succeed." ***State v. Brown***, 159 Wn. App. 366, 371, 245 P.3d 776 (2011)(*citing* ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 744, 101 P.3d 1 (2004); ***State v. McFarland***, 127 Wn.2d 322, 344 n. 2, 899 P.2d 1251 (1995)). Counsel's failure to raise novel legal theories or arguments is insufficient to support an ineffective assistance of counsel claim. ***State v. Brown***, 159 Wn. App. at 371 (*citing* ***Anderson v. United***

States, 393 F.3d 749, 754 (8th Cir.) *cert. denied*, 546 U.S. 882, 126 S. Ct. 221, 163 L. Ed. 2d 185 (2005)).

Defendant argues that counsel was ineffective for failure to cite to the specific statute that allows a court to deviate from a standard range sentence in such a case if it finds that the victim was the initiator of the incident. App.Br. at 12; *See* RCW 9.94A.535(1)(a). However, there was no evidence adduced at trial that would indicate that such was the case here. Neither Defendant nor Ms. Devine testified at trial. 3RP 132. Nor were there any statements presented during trial that would indicate Ms. Devine was a willing participant in the no contact order violation. 3RP 105- 132; *See* CP 39-41.

The court's findings of fact and conclusions of law following the bench trial additionally show no indication of willingness on the part of the victim. *See* CP 38-46. Unchallenged findings of fact, as is the case here, are verities on appeal. *See* ***State v. Rodgers***, 146 Wn.2d 55, 61, 43 P.3d 1 (2002); ***State v. Hill***, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)**Error! Bookmark not defined.**; ***State v. Neeley***, 113 Wn. App. 100, 105, 52 P.3d 539 (2002); *see also* RAP 10.3(g). Defendant solely relies on his statements made during allocution as evidence that Ms. Devine was a willing participant in the order violation. 5RP 191-92.

As such, there was no basis for the court to even consider this mitigating factor. Counsel had no duty to inform the court of this statute as there was no legal basis in doing so. Counsel's performance was therefore not deficient, and as a result, Defendant cannot show ineffective assistance of counsel.

b. Defendant would have incurred no prejudice because counsel argued for an exceptional sentence downward despite not having an obligation to do so and was able to successfully secure a low end standard range sentence.

Contrary to defendant's claim now, defense counsel in this case moved the court to impose an exceptional sentence downward on the basis that Ms. Devine had voluntarily sought out contact with Defendant and as such she was not necessarily a "victim." 5RP 190. In addition to that argument, counsel further argued that the statutory framework elevating a no contact order violation from a misdemeanor to a felony was unjust considering the requirements of elevating a DUI charge to a felony. 5RP 188. Counsel argued both of these reasons justified a departure from the standard range. 5RP 190.

Although Defendant argues that the trial court declined to depart from the standard range because it did not believe it had the discretion to do so, App.Br. at 13, the record shows otherwise. It shows that the court

took into consideration defendant's argument, acknowledged its discretion to depart from the standard range, and ultimately found that the facts at hand did not warrant a departure from the sentencing guidelines. 5RP 193-94. Specifically, the court noted:

> There [is] the possibility of doing exceptional sentences downward, but the facts have to be exceptional. I don't find these facts are exceptional. This is exactly what this order is intended to cover.

5RP 193-94. The court subsequently imposed a low end standard range sentence. 5RP 194.

Thus, it cannot be said that Defendant received ineffective assistance of cousnel. Counsel made multiple arguments attempting to persuade the court to impose an exceptional sentence downward, and was ultimately successful in securing a low end sentence for Defendant despite his lengthy criminal history and six prior no contact order violations. CP 22.

D. CONCLUSION.

Defendant fails to show he received ineffective assistance of counsel because defense counsel argued for an exceptional sentence downward despite having no obligation to do so and successfully secured a low end standard range sentence despite defendant's lengthy criminal

history. For the foregoing reasons the State respectfully requests this Court affirm Defendant's conviction and sentence.

DATED: FEBRUARY 10, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney

BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

Miryana Gerassimova
Rule 9

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/10/15
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