NO. 93040-6

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER,

v.

DANIEL BLANE HECKER, RESPONDENT

Court of Appeals Cause No. 46312-1
Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 13-1-03642-0

PETITION FOR REVIEW

MARK LINDQUIST
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

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

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

A. IDENTITY OF PETITIONER.

State of Washington, responded in the Court of Appeals.

B. COURT OF APPEALS DECISION.

The petitioner seeks review of ***State v. Hecker***, 2016 WL 562748 (No. 46312-1-II, February 9, 2016). The Court of Appeals issued an unpublished opinion on the matter. (Appendix "A").

C. ISSUE PRESENTED FOR REVIEW.

1. There is a conflict between the decision of Division II in this case and the decision of Division III in ***State v. Hernandez-Hernandez***, 104 Wn. App. 263, 15 P.3d 719 (2001), RAP 13.4(b)(2). This case also represents an issue of substantial public interest and a significant question of law under RAP 13.4(b)(3) and (4). Did the Court of Appeals err in finding that defense counsel was ineffective for failing to inform the court of a legal basis for an exceptional sentence when it could have been a strategic decision and the defendant also did not show prejudice, and did Division II misinterpret Division III's holding in ***Hernandez-Hernandez***?

D. 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 CrR 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 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,

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

Kathy Jo Devine, was not a true "victim" because she consented to being in defendant's presence. 5RP 190.

The trial 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 filed a timely notice of appeal. CP 56-57.

On February 9, 2016, the Court of Appeals, in an unpublished opinion, granted the defendant relief and remanded his case for resentencing, finding that defense counsel was ineffective for failing to properly advise the trial court of its sentencing authority. Opinion, at 1 (Appendix "A"). The State filed a motion for reconsideration, which was denied on March 17, 2016. (Appendix "B").

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE COURT OF APPEALS ERRED IN HOLDING THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ADVISE THE TRIAL COURT OF A SPECIFIC STATUTE REGARDING AN EXCEPTIONAL SENTENCE WHEN HE HAD NO OBLIGATION TO DO SO AND THE DEFENDANT CANNOT SHOW PREJUDICE.

"Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI, and Washington Constitution article I, section 22 (amendment X)." ***State v. Yarbrough***, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009). *See* ***In re Personal Restraint of Elmore***, 162 Wn.2d 236, 251, 172 P.3d 335 (2007); ***State v. Johnston***, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. ***Yarbrough***, 151 Wn. App. at 89.

"Washington has adopted the ***Strickland*** test to determine whether a defendant had constitutionally sufficient representation." ***State v. Cienfuegos***, 144 Wn.2d 222, 25 P.3d 1011 (2001) (*citing* ***State v. Bowerman***, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant prove both parts of a two-prong test. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also* ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "First, the

defendant must show that counsel's performance was deficient" and "[s]econd, the defendant must show that the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687; ***Cienfuegos***, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Hendrickson***, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); ***In re Personal Restraint of Rice***, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "A failure to establish either element of the test defeats an ineffective assistance of counsel claim." ***Riofta v. State***, 134 Wn. App. 669, 693, 142 P.3d 193 (2006).

The first prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Specifically, "[t]o establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness." ***Johnston***, 143 Wn. App. at 16. "The reasonableness of trial counsel's performance is reviewed in light of all the circumstances of the case at the time of counsel's conduct." *Id.*; ***State v. Garrett***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). "Competency of counsel is determined based upon the entire record below." ***State v. Townsend***, 142 Wn.2d 838,

15 P.3d 145 (2001) (*citing* ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); ***State v. Gilmore***, 76 Wn.2d 293, 456 P.2d 344 (1969).

"To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective." ***Yarbrough***, 151 Wn. App. at 90. This presumption includes a strong presumption "that counsel's conduct constituted sound trial strategy." ***Rice***, 118 Wn.2d at 888-89. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." ***Yarbrough***, 151 Wn. App. at 90 (*citing* ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), ***State v. Adams***, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

An ineffective assistance of counsel claim must not be allowed to "function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the ***Strickland*** standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." ***Harrington v. Richter***, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011). "It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Id.* (*quoting* ***Strickland***, 466 U.S. at 689). "The question is whether an attorney's representation amounted to

incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* (*quoting* ***Strickland***, 466 U.S. at 690).

This Court "defer[s] to an attorney's strategic decisions to pursue, or to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances." ***State v. Riofta***, 134 Wn. App. 669, 693, 142 P.3d 193 (2006). If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has chosen not to employ." *Id.*

With respect to the second prong, a "defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." ***State v. Crawford***, 159 Wn.2d 147, 99, 147 P.3d 1288 (2006). "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Crawford***, 159 Wn.2d at 99-100 (*quoting* ***Strickland***, 466 U.S. at 694). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (*quoting* ***Strickland***, 466 U.S. at 694); ***Cienfuegos***, 144 Wn.2d at 229.

In the present case, the defendant has not and cannot show either prong of ineffective assistance of counsel and the Court of Appeals'

decision is contrary to ***State v. Hernandez-Hernandez***, 104 Wn. App. 263, 15 P.3d 719 (2001).

With respect to the first prong, the Court of Appeals found that defense "[c]ounsel's failure to base his argument" for an exceptional sentence below the standard range on "statutory grounds and supporting case law that ***could*** have justified" such a sentence "constituted deficient performance under ***State v. Hernandez-Hernandez***, 104 Wn. App. 263, 266, 15 P.3d 719. Appendix C, p. 5 (emphasis added). However, ***Hernandez-Hernandez*** is distinguishable from the present case in at least three important ways.

First, Hernandez-Hernandez "claim[ed] he received ineffective assistance of counsel because his lawyer did not [so much as] seek an exceptional sentence downward," ***Hernandez-Herndandez***, 104 Wn. App. at 264, whereas here, defense counsel clearly requested and argued for such a sentence—both in writing and orally. CP 13-16; RP 187-91.

Second, the Court in ***Hernandez-Hernandez*** never found counsel deficient for failing to cite a decision, but only assumed a deficiency in order to pursue a prejudice analysis. *See* ***Hernandez-Herndandez***, 104 Wn. App. at 266-67.

Third, and perhaps most important, the Court in ***Hernandez-Hernandez*** never held that a "failure to base [an] argument" for an

exceptional sentence on a specific statute and/or decision, Appendix C, p. 5, was ineffective assistance of counsel. Rather, ***Hernandez-Hernandez***, citing ***State v. Ermert***, 94 Wn.2d 839, 850, 621 P.2d 121 (1980), found only that "[f]ailure to cite ***controlling*** case law ***may*** be grounds for finding ineffective assistance." ***Hernandez-Hernandez***, 104 Wn. App. at 266 (emphasis added). Then, in the next paragraph, it specifically held that a decision that only "permit[s] an exceptional sentence downward," is "not controlling since the court in its discretion could, and [in that case,] did, impose a standard range sentence." ***Hernandez-Hernandez***, 104 Wn. App. at 266. Therefore, counsel there could not have been deficient for "failure to base his argument on such legal grounds." Appendix A, p. 5. Because the Court of Appeals' decision erroneously relies on ***Hernandez-Hernandez*** for the opposite result, Appendix C, p. 5, this decision should be reversed.

In fact, under the analysis of ***Hernandez-Hernandez***, defense counsel here could not have been deficient in failing to base his argument for an exceptional sentence downward on the decision cited by the Court of Appeals.

That decision, ***State v. Bunker***, 144 Wn. App. 407, 183 P.3d 1086 (2008), is not controlling here for the same reason that ***State v. Sanchez***, 69 Wn. App. 255, 848 P.2d 208, *review denied,* 122 Wn.2d 1007, 859

P.2d 604 (1993), was not controlling in ***Hernandez-Hernandez***.

Bunker held only that "[t]he trial court erroneously concluded that it did not have the discretion to consider th[e] mitigating factor" that "[t]o a significant degree, the victim was an initiator, willing participant, or provoker of the incident" under RCW 9.94A.535(1)(a). ***Bunker***, 144 Wn. App. at 421. However, it also found that "there is, of course, no requirement that the trial court actually impose a mitigated exceptional sentence" based on that factor or any other. *Id.* at 422. Hence, ***Bunker*** only "permit[s] an exceptional sentence downward," and is "not controlling since the court in its discretion could, and did [in the instant case], impose a standard range sentence." ***Hernandez-Hernandez***, 104 Wn. App. at 266.

Neither, for that matter, was the statute upon which ***Bunker*** relied controlling because this statute—RCW 9.94A.535(1)(a)—like ***Bunker*** itself, only "***permit[s]*** an exceptional sentence downward," ***Hernandez-Hernandez***, 104 Wn. App. at 266 (emphasis added).

Because neither ***Bunker*** nor RCW 9.94A.535(1)(a) were controlling, failure to cite them was not "grounds for finding ineffective assistance." ***Ermert***, 94 Wn.2d at 850.

Nor was there any other basis upon which to rest an ineffective assistance of counsel holding.

Defense counsel below could very well have made a reasonable strategic decision *not* to argue that the victim invited the contact. Because such invitations are, as the trial court below noted, too common to be exceptional, RP 193-94, it was quite reasonable for counsel to base his argument for an exceptional sentence on a different ground: the equity and/or proportionality of basing a significant felony sentence on relatively old predicate convictions. *See* RP 187-89.

Because appellate courts "defer[s] to an attorney's strategic decisions... to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances," ***Riofta***, 134 Wn. App. at 693, and such decisions "cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel," ***Yarbrough***, 151 Wn. App. at 90, there is no basis for such a claim here.

Therefore, the Court of Appeals' holding to the contrary should be reversed and a decision finding no deficient performance rendered.

Even if counsel's failure to cite a specific code section and/or appellate decision could be considered deficient performance, the record in this case shows that it could not have prejudiced the defendant.

Unlike the Court in ***State v. McGill***, 112 Wn. App. 95, 47 P.3d 173 (2002), upon which the Court of Appeals relies for the contrary conclusion, the trial court here never stated that "it had 'no option but to

sentence [the defendant] within the standard range," and never "indicated that it would have considered an exceptional sentence had it known it could." Appendix A, p. 6 (*citing* ***McGill***, 112 Wn. App. at 99, 101-02).

Rather, the record indicates that the trial court explicitly recognized that "there [was] the possibility of doing exceptional sentences downward, but the facts have to be exceptional," and specifically concluded, "I don't find these facts are exceptional." RP 193.

The trial court then explained why that was the case. Specifically, it found the following with respect to the victim's alleged invitation to violation of the no contact order:

> It does appear to me—without the alleged victim being here there's not much way for me to know one way or the other—but the evidence before me is it's something she may have invited. But this happens with regularity when there's no contact orders in the first place. Something the Legislature is fully aware of. These are sometimes invited by the alleged victim. In fact, oftentimes are.

RP 194. In other words, the court below explicitly made two important findings at the sentencing.

First, by concluding that "without the alleged victim being here [and testifying] there's not much for me to know one way or the other," it found that the evidence before it could not establish that "to a significant degree, the victim was an initiator, willing participant aggressor, or provoker or the incident." RCW 9.94A.535(1)(a). Therefore, even had

defense counsel specifically cited this statute to the trial court, the court would have found that it had an insufficient factual basis upon which to use this statute to render an exceptional sentence.

Second, even had there been sufficient evidence that the victim invited the violation of the no contact order, the trial court found that this was not exceptional in that no contact order violations are often invited by the victims. In other words, the trial court has already stated that it would *not* base an exceptional sentence below the standard range on a finding that "to a significant degree, the victim was an initiator, willing participant aggressor, or provoker or the incident." RCW 9.94A.535(1)(a). Thus, again, even had defense counsel specifically cited this statute to the court, there is no probability that the outcome of the sentencing would have been different. Because defendant cannot "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,'" ***Crawford***, 159 Wn.2d at 99-100, he cannot show prejudice, and the Court of Appeals erred in finding that prejudice occurred.

F. CONCLUSION.

The Court of Appeals' opinion remanding this case for resentencing is erroneous. The Court of Appeals erred in relying on

Hernandez-Hernandez and in finding that defense counsel was ineffective in failing to advise the trial court that it could impose an exceptional sentence on the basis of victim participation under RCW 9.94A.535(1)(a).

The Supreme Court should accept review in order not only to reverse an erroneous decision by the Court of Appeals, but also because this issue, common in protection order cases, represents an issue of substantial public interest.

DATED: APRIL 15, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney

MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

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.

4/15/16
Date Signature

APPENDIX "A"

Unpublished Opinion, State v. Hecker

2016 WL 562748
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.
Daniel Blane HECKER, Appellant.

No. 46312-1-II.
|
Feb. 9, 2016.

Appeal from Pierce County Superior Court; Hon. Garold E. Johnson, J.

Attorneys and Law Firms

Dana M. Nelson, Nielsen Broman & Koch PLLC, Seattle, WA, for Appellant.

Brian Neal Wasankari, Pierce County Prosecuting Atty, Tacoma, WA, for Respondent.

UNPUBLISHED OPINION

WORSWICK, J.

***1** Daniel Hecker appeals his sentence following a bench trial. Hecker was convicted of felony domestic violence court order violation [1] and misdemeanor making a false statement to a public servant. [2] At sentencing, defense counsel sought an exceptional sentence downward. The sentencing court declined to impose an exceptional sentence, and instead sentenced Hecker to the low end of the standard sentencing range. Hecker appeals, arguing that his counsel rendered ineffective assistance by failing to properly advise the court of its sentencing authority. We agree and remand for resentencing.

FACTS

Pierce County Sheriff's Deputy, Aaron Thompson, conducted a routine records check on a vehicle driving in Pierce County, and discovered that the vehicle was listed as stolen. Deputy Thompson removed and detained all three occupants of the vehicle. A woman in the back seat was identified as Kathy Jo Devine. Hecker, the front seat passenger, told Deputy Thompson his name was "Mark B. Jones," his date of birth was September 30, 1962, and he had never had a state identification card out of any state. Clerk's Papers (CP) at 39. Deputy Thompson was unable to find any record of a Mark B. Jones born on September 30, 1962.

Deputy Thompson then conducted a records check for Devine, which revealed that Devine was the protected party under three separate protection orders listing Hecker as the party restrained from contacting her. Deputy Thompson looked up a booking photo for Hecker and identified him as the front seat passenger who had given the name "Mark B. Jones." When confronted, Hecker admitted his identity. Hecker also admitted he knew about the protection orders. Deputy Thompson placed Hecker under arrest for violation of a protection order and making a false statement to a public servant.

On September 23, 2013, Hecker was charged by information of one count of domestic violence court order violation and one count of making a false or misleading statement to a public servant. Hecker pleaded guilty to the charge of making a false statement to a public servant. Following a bench trial, Hecker was found guilty of domestic violence court order violation.

At the time of sentencing, Hecker had six prior convictions for violation of a protection order. Five of those convictions were Tacoma Municipal Court convictions from 1992. The most recent conviction for violation of a protection order occurred in 2012 in Pierce County.

At sentencing, defense counsel moved for an exceptional sentence downward "due to the unfair nature of the charge against [Hecker]." CP at 14. Counsel argued that because there was not a ten-year limitation for counting prior convictions under RCW 26.50.110(5), as there was for the felony driving under the influence (DUI) statute, the consequence was unfair. [3] Defense counsel also noted Hecker "was merely in the presence of the protected party, and was there at the request of the protected party," and questioned whether under the circumstances Devine was a victim. CP at 15. Counsel offered no authority suggesting the court

could consider Devine's consent to the contact as a mitigating factor, and focused solely on the unfairness of the sentence in comparison to the DUI statutory scheme.

*2 During allocution, Hecker explained the nature of the contact with Devine and apologized for violating the order:

> Your Honor, I was leaving the grocery store. Ms. Devine approached me. She said she needed help. I agreed to give her help. She had become homeless. I was going to pay for a room.
>
> I wasn't—I didn't set out to break the law. I just did. For that I apologize.

Verbatim Report of Proceedings (VRP) at 191–92.

The sentencing court rejected the DUI comparison argument, stating that comparing the fairness of different statutes was the Legislature's role. The court declined to impose an exceptional sentence downward:

> And [the sentencing guidelines] aren't guidelines like, you know, a dashed yellow down the middle of the street. These are guidelines like the concrete barriers that they give the court. This isn't something that the court just willy-nilly says well, in this particular case I don't like them so I'm going to do what I want to do. That's not the way it works.
>
> There are (sic) 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. Exactly what it's intended to cover.
>
> The court is going to give the low range....
>
> I do appreciate this was a non-violent situation, and that's why it's at the lowest range. It does appear to me—without the alleged victim being here there's not much way for me to know one way or the other—but the evidence before me is it's something she may have invited. But this happens with regularity when there's no contact orders in the first place. Something the Legislature is fully aware of. These are sometimes invited by the alleged victim. In fact, oftentimes are.

VRP at 193–94.

The sentencing court imposed a low end standard range sentence of 33 months for felony domestic violence court order violation. The court also imposed a concurrent 90–day sentence for giving false information to a public servant.

ANALYSIS

Hecker argues that he received ineffective assistance of counsel when his trial counsel failed to inform the sentencing court of its authority to impose an exceptional sentence downward based on Devine's willing participation in the violation. We agree.

I. STANDARD OF REVIEW

To show ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient, and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *see also Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show deficient performance, Hecker must show that defense counsel's performance fell below an objective standard of reasonableness. *Reichenbach,* 153 Wn.2d at 130. To show prejudice, Hecker must show a reasonable possibility that, but for counsel's purportedly deficient conduct, the outcome of the proceeding would have differed. 153 Wn.2d at 130. Because ineffective assistance of counsel claims present mixed questions of law and fact, we review them de novo. *State v. Sutherby,* 165 Wn .2d 870, 883, 204 P.3d 916 (2009).

II. DEFICIENT PERFORMANCE

*3 Hecker argues that his counsel's performance was deficient because he failed to properly advise the court of its sentencing authority. We agree.

As we stated above, Hecker must show that defense counsel's performance fell below an objective standard of reasonableness. RCW 9.94A.535 allows a trial court to deviate downward from a standard sentence if it finds that certain mitigating factors warrant such a departure. One such mitigating circumstance is when "to a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a). Additionally, Washington courts have held that while consent is not a defense to violating a no contact order, a victim's willing presence is a mitigating factor the court may

consider at sentencing. *State v. Bunker,* 144 Wn.App. 407, 421, 183 P.3d 1086 (2008).

Here, counsel requested an exceptional sentence. However, his advocacy centered on a failed fairness argument and an appeal to "mercy and leniency" rather than the victim's willing presence. There were clear statutory grounds and supporting case law that could have justified the trial court's imposition of an exceptional sentence downward. Counsel's failure to base his argument on such legal grounds constituted deficient performance. *State v. Hernandez-Hernandez,* 104 Wn.App. 263, 266, 15 P.3d 719 (2001).

III. PREJUDICE

Hecker further argues that his counsel's deficient performance prejudiced him. Again, we agree.

To satisfy the prejudice prong of the *Strickland* test for ineffective assistance of counsel, Hecker must show that there was a reasonable likelihood the trial court would have granted an exceptional sentence downward had defense counsel presented the proper argument. *Reichenbach,* 153 Wn.2d at 130.

This case is similar to *State v. McGill,* 112 Wn.App. 95, 47 P.3d 173 (2002). In *McGill,* a defendant was convicted of two counts of delivery of cocaine and one count of possession with intent to deliver cocaine. 112 Wn.App. at 98. Following a jury trial, the trial court stated that it had "no option but to sentence [McGill] within the range," and imposed a low end sentence. 112 Wn.App. at 99. McGill's counsel failed to inform the trial court that there were permissible bases to impose an exceptional sentence downward. 112 Wn.App. at 97. On appeal, Division One of this court held that McGill received ineffective assistance where the trial court's comments indicated that it would have considered an exceptional sentence had it known it could. 112 Wn.App. at 101-02.

Here, like in *McGill,* the record suggests that the trial court was unaware of its decision-making authority. The court understood that it could impose an exceptional sentence, but explained "the facts have to be exceptional." VRP at 193. The trial court emphasized the Legislature's consideration when setting sentencing guidelines, explaining that the sentencing guidelines were more like concrete barriers than a painted line on a road, and that in setting the standard sentence for Hecker's crime, the legislature had already considered that the contact may have been invited.

***4** However, the trial court failed to consider, because of counsel's deficient performance, that the Legislature provided mitigating factors enumerated in RCW 9.94A.535. The sentencing guidelines may indeed be "like the concrete barriers" in a road, but RCW 9.94A.535 gives the trial court off-ramps should it choose to utilize them. The trial court's statements show that it was unaware that a victim's willing participation may be statutory grounds for an exceptional downward sentence under RCW 9.94A.535.

"A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." *McGill,* 112 Wn.App. at 102. Because there is a reasonable probability the sentencing court would have imposed an exceptional downward sentence had it known Devine's willing participation constituted a mitigating factor explicitly contemplated by the Legislature in RCW 9.94A.535, resentencing is required. 112 Wn.App. at 100-01.

STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Hecker challenges his sentence by arguing that the sentencing court improperly calculated his offender score and that his counsel rendered ineffective assistance by failing to raise the issue. We do not address this claim.

Hecker argues that his 1989 conviction for attempted unlawful possession of a controlled substance with intent to deliver should have washed out within five years. The required number of years spent in the community without being convicted of any additional felonies before a prior conviction is not included in one's offender score varies depending on what class felony the prior conviction was. Former RCW 9.94A.360(2) (1989). It is not clear from the record what class felony Hecker's 1989 conviction was. Without knowing whether his 1989 conviction was a Class A, Class B, or Class C felony, we cannot address whether his offender score was improperly calculated. We assume the trial court will properly recalculate Hecker's offender score at resentencing.

We remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur: JOHANSON, CJ., and MAXA, J.

All Citations

Not Reported in P.3d, 2016 WL 562748

Footnotes

1 RCW 26.50.110(5).

2 RCW 9A.76.175.

3 Counsel compared the statute elevating Hecker's charge to a felony based on prior convictions, RCW 26.50.110(5), to RCW 26.61.502(6) which similarly elevates a misdemeanor DUI to a felony based on prior convictions. Counsel pointed out that the DUI statutory scheme elevates the violation from a misdemeanor to a felony only after four offenses within ten years, whereas the VNCO offense elevates to a felony after only two prior offenses with no time period cap.

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APPENDIX "B"

Order Denying motion for Reconsideration

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DANIEL BLAINE HECKER,

Appellant.

No. 46312-1-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **February 9, 2016** opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Maxa, Johanson

DATED this 16th day of March, 2016.

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

Dana M Nelson
Nielsen Broman & Koch PLLC
1908 E Madison St
Seattle, WA 98122-2842
nelsond@nwattorney.net

Brian Neal Wasankari
Pierce County Prosecuting Atty
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2171
bwasank@co.pierce.wa.us

APPENDIX "C"

State v. Hernandez-Hernandez

104 Wash.App. 263
Court of Appeals of Washington,
Division 3,
Panel One.

STATE of Washington, Respondent,
v.
Mario HERNANDEZ-HERNANDEZ, Appellant.

No. 18308-4-III.
|
Jan. 18, 2001.

Defendant was convicted in the Superior Court, Chelan County, John Bridges, J., on two counts of unlawful delivery of a controlled substance. Defendant appealed, claiming ineffective assistance of counsel on grounds that his attorney failed to seek an exceptional sentence downward. The Court of Appeals, Kato, J., held that even if defense counsel was deficient by failing to cite controlling case to support his argument for an exceptional sentence below the standard range, defendant was not prejudiced by such deficiency.

Affirmed.

West Headnotes (5)

[1] **Criminal Law**
Other Particular Issues

Even if defense counsel was deficient by failing to cite controlling case to support his argument for an exceptional sentence below the standard range for defendant who was convicted on two counts of unlawful delivery of a controlled substance, defendant was not prejudiced by such deficiency, where counsel argued the mitigating factors in seeking a low-end standard range sentence, and court in its discretion could have, and did, impose a standard range sentence. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[2] **Criminal Law**
Deficient Representation and Prejudice in General

To establish ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced by the deficiency. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[3] **Criminal Law**
Deficient Representation in General

The first prong of the ineffective assistance of counsel test which requires a showing that the attorney's performance was deficient is met by showing that defense counsel's performance was not reasonably effective under prevailing professional norms. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[4] **Criminal Law**
Prejudice in General

The second prong of the ineffective assistance of counsel standard that requires that a defendant show that he was prejudiced by counsel's deficiency is met by showing that, but for counsel's errors, the result would have been different. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[5] **Criminal Law**
Particular Cases and Issues

Failure to cite controlling case law may be grounds for finding ineffective assistance. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

Attorneys and Law Firms

****720** ***264** John W. Beuhler, Jr., Paul J. Cassel, Cassel, Beuhler, Ditommaso & Murdock, Wenatchee for Appellant.

James A. Hershey Deputy Prosecuting Atty., Wenatchee, for Respondent.

Opinion

KATO, J.

Mario Hernandez-Hernandez claims he received ineffective assistance of counsel because his lawyer did not seek an exceptional sentence downward on his two convictions for unlawful delivery of a controlled substance. We affirm.

Mr. Hernandez-Hernandez was convicted of two counts of delivering cocaine. On one of the convictions, the jury *265 returned a special verdict that the delivery occurred in a park. His standard range for each delivery count was 36-48 months. The court was also required to impose an additional 24 months on the park delivery because of the enhancement. At sentencing, the State recommended a standard range sentence at the high end. Defense counsel argued that a standard range sentence at the low end was warranted because only small amounts of cocaine were involved; this was his first offense; and he was a loyal and trustworthy employee and the father of three children.

The court imposed concurrent sentences of 60 months on the delivery conviction with the park enhancement and 48 months on the other conviction. In imposing this sentence, the court noted "a pretty hefty standard range." This appeal follows.

[1] [2] [3] [4] Mr. Hernandez-Hernandez claims it was ineffective assistance of counsel for defense counsel not to request an exceptional sentence downward. To establish ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas,* 109 Wash.2d 222, 226, 743 P.2d 816 (1987). The first prong is met by showing that defense counsel's performance was not reasonably effective under prevailing professional norms. The second prong is met by showing that, but for counsel's errors, the result would have been different. *State v. McFarland,* 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995).

Mr. Hernandez-Hernandez claims it was deficient for defense counsel not to argue for an exceptional sentence below the standard range based on *State v. Sanchez,* 69 Wash.App. 255, 261, 848 P.2d 208, review denied, 122 Wash.2d 1007, 859 P.2d 604 (1993) because the multiple offense policy resulted in a clearly excessive presumptive sentence. In *Sanchez,* the defendant was convicted of three counts of delivering cocaine. All were controlled buys of small amounts of cocaine and were initiated by police to the same informant over a *266 brief period of time. Finding the difference between the first buy and all three buys was trivial or trifling, the court held that the operation of the multiple offense policy resulted in a sentence that was clearly excessive and the sentencing court had the power to impose an exceptional sentence downward. *Sanchez,* 69 Wash.App. at 261-62, 848 P.2d 208.

[5] Defense counsel failed to cite *Sanchez* to the sentencing court. Failure to cite controlling case law may be grounds for finding ineffective assistance. See *State v. Ermert,* 94 Wash.2d 839, 850, 621 P.2d 121 (1980).

Defense counsel did, however, argue for a low-end standard range sentence based upon the small amounts of cocaine involved; his client's lack of prior criminal history; his history of being a good, loyal, trustworthy, and long-standing employee; and his having three children for whom he was responsible. Counsel also explained to the court that Mr. Hernandez-Hernandez faced deportation proceedings as a result of the convictions. These arguments encompassed some of the mitigating factors in *Sanchez.* Although the *Sanchez* principle permitted an exceptional sentence downward, it was not controlling since the court in its discretion could, and did, impose a standard range sentence. Assuming counsel was deficient, Mr. Hernandez-Hernandez cannot show the requisite prejudice. His counsel argued the mitigating factors in seeking a low-end standard range sentence. The court had the discretion to impose an exceptional sentence downward **721 with or without counsel's request; it did not. The prejudice, if any, was slight. Under the circumstances, we are not convinced the outcome would have been different had defense counsel argued *Sanchez* to support an exceptional sentence. Mr. Hernandez-Hernandez did not receive ineffective assistance.

Pro se, he claims the court abused its discretion by failing to recognize it had the authority to impose an exceptional sentence downward. Other than his mere assertion, however, he makes no showing that the court abused its *267 discretion by imposing a standard range sentence.

Affirmed.

BROWN, A.C.J., and SWEENEY, J., concur.

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All Citations

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