No. 97346-6
COA No. 51172-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ALAN WUCO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

PETITION FOR REVIEW

THOMAS M. KUMMEROW
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Kenneth Wuco asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Kenneth Alan Wuco*, No. 51172-0-II (May 21, 2019). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Under *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017), the trial court has discretion to impose an exceptional sentence below the standard range for firearm-related offenses for which the statute requires consecutive sentences. In addition, the request for an exceptional sentence of concurrent sentences can be made for the first time on appeal under *McFarland*. Here, Mr. Wuco was sentenced to consecutive firearm sentences and no request for an exceptional sentence was made. Is the Court of Appeals decision in this case directly contrary to the decision in *McFarland*?

2. A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant who is denied the effective assistance of counsel and is prejudiced by that failure at sentencing is entitled to remand for a new sentencing hearing. Here, counsel failed to seek an exceptional sentence of concurrent sentences under *McFarland*, for the theft of a firearm and unlawful possession of a firearm counts. Is a significant issue under the United States and Washington Constitutions presented where Mr. Wuco was prejudiced by his attorney's deficient representation, thus requiring remand for resentencing for the trial court to consider concurrent sentences?

D. STATEMENT OF THE CASE

Kenneth Wuco was charged and, following a jury trial, convicted of one count of unlawful possession of a firearm in the first degree, one count of theft of a firearm, and one count of vehicle prowling in the second degree, all arising out of the same incident. CP 5-6, 54-56.

At sentencing, Mr. Wuco sought, and the trial court imposed, a prison-based Drug Offender Sentence Alternative. CP 67; RP 523, 530-37, 555-56. Defense counsel did not seek an exceptional sentence of

concurrent sentences; defense counsel agreed the sentences were required to be consecutive. RP 532. The court did not consider an exceptional sentence, presumed the sentences were required to be consecutive, and imposed consecutive sentences on the unlawful possession of a firearm and theft of a firearm counts. CP 67; RP 555-56.

The Court of Appeals ruled that there was nothing in the record suggesting the trial court did not know it possessed discretion to impose concurrent sentences, thus there was no need to remand for resentencing. Decision at 5-6. In addition, in light of the Court's determination that the record failed to show the trial court misunderstood it could impose concurrent sentences, the Court ruled that Mr. Wuco could not demonstrate any prejudice by his attorney's failure to request concurrent sentences. Decision at 6-7.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals decision is contrary to this Court's decision in *McFarland.*

Under RCW 9.94A.589, the presumption here was Mr. Wuco would be sentenced to consecutive sentences for the theft of a firearm and unlawful possession of a firearm counts. This is the sentence Mr. Wuco received. CP 67. Defense counsel did not argue for an

exceptional sentence downward based on *McFarland*. The error in failing to do so is still subject to review. *McFarland* is directly on point on this issue.

In *McFarland*, Mr. McFarland argued for the first time on appeal that the sentencing court erred by failing to recognize its discretion to impose an exceptional mitigated sentence by running multiple firearm-related sentences concurrently. *McFarland*, 189 Wn.2d at 49. Defense counsel had not sought an exceptional sentence and had agreed the sentences were required to be consecutive. *Id*. at 50-51. The Court of Appeals had refused to consider this issue, noting that the sentencing judge "cannot have erred for failing to do something he was never asked to do." *Id*. at 49. The Supreme Court reversed and remanded for resentencing to allow the trial court the opportunity to consider whether to impose a mitigated sentence by running the firearm-related sentences concurrently. *Id*. at 50.

> What the Court of Appeals did not consider is the authority of an appellate court to address arguments belatedly raised when necessary to produce a just resolution. Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values.

Id. at 57. The same applies in Mr. Wuco's case.

The Court of Appeals ruled that the record does not show the trial court misunderstood that it possessed the discretion to impose concurrent as opposed to consecutive sentences. Decision at 5-6. Contrary to the Court's assertion, nothing in the record shows the trial court *understood* it possessed the discretion. The trial court expressed its opinion, supported by the parties, that the sentences were *required* to run consecutive. RP 555-56. The facts here are identical to those in *McFarland*. 189 Wn.2d at 50-51.

"Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law." *State v. McGill*, 112 Wn.App. 95, 100, 47 P.3d 173 (2002). Resentencing is appropriate where "the record suggests at least the possibility" that the sentencing court would have considered a different sentence had it understood its authority to do so. *McFarland*, 189 Wn.2d at 59. As in *McFarland*, there is at least a possibility that the trial court would have imposed concurrent sentences had it properly understood its discretion to do so.

This Court should grant review, follow *McFarland*, and reverse Mr. Wuco's sentence and remand for resentencing.

2. Alternatively, Mr. Wuco's trial attorney rendered constitutionally deficient representation when he failed to move the court to enter concurrent sentences for theft of a firearm and possession of a firearm.

A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 47, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective lawyer. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

> First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed 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.

Strickland, 466 U.S. at 687.

Here, despite the decision in *McFarland*, defense counsel did not seek an exceptional sentence of concurrent sentences. *McFarland* gave the court the discretion to impose concurrent sentences had counsel requested it. Counsel's omission cannot be deemed a reasonable tactical decision in light of the discretion granted the trial court had counsel requested an exceptional sentence.

Where counsel fails to apprise the court of the relevant case law and use it to argue for an exceptional sentence down, the trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. *McGill*, 112 Wn.App. at 101-02.

Contrary to the Court of Appeals' conclusion, counsel's deficient performance in failing to apprise the trial court of the decision in *McFarland*, and seek an exceptional sentence resulted in prejudice to Mr. Wuco. This Court should reverse Mr. Wuco's sentence and remand for resentencing.

F. CONCLUSION

For the reasons stated, Mr. Wuco asks this Court to grant review and remand for resentencing.

DATED this 19th day of June 2019.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Petitioner

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

May 21, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH ALAN WUCO, Appellant.	No. 51172-0-II UNPUBLISHED OPINION

CRUSER, J. — Kenneth Wuco appeals from the sentence imposed following his convictions of first degree unlawful possession of a firearm and theft of a firearm asserting that (1) the sentencing court erred by failing to recognize its discretion to consider an exceptional sentence downward and (2) his defense counsel was ineffective for failing to request an exceptional sentence downward.[1] We affirm.

FACTS

On September 22, 2016, Charles Benzinger parked his vehicle in an alley behind his place of employment in Tacoma. Benzinger left his firearm underneath some items on the front passenger seat of his vehicle. Surveillance video shows Wuco breaking into Benzinger's vehicle

[1] Wuco was also convicted of second degree vehicle prowling. He raises no issues related to this conviction.

before driving away in a pickup truck. After Wuco drove away, Benzinger saw that his firearm had been taken from his vehicle.

The State charged Wuco with theft of a firearm, first degree unlawful possession of a firearm, and second degree vehicle prowling. The matter proceeded to a jury trial. The jury returned verdicts finding Wuco guilty of all charges.

The State requested the sentencing court to impose a 218-month sentence, the top of Wuco's standard sentence range based on his offender score of 9+. The State noted that RCW 9.94A.589(1)(c) required Wuco to serve consecutive sentences for his convictions of first degree unlawful possession of a firearm and theft of a firearm.

Wuco requested the sentencing court to impose a prison-based "Drug Offender Sentencing Alternative" (DOSA), RCW 9.94A.660. The following exchange took place between defense counsel and the sentencing court during Wuco's request for a prison-based DOSA sentence:

> [Defense counsel]: [A] DOSA sentence holds a very heavy hammer over [Wuco's] head for a long period of time. The actual incarceration time that he would serve under [a] DOSA sentence is serious. I mean, it is a lot of time. I think that I heard [the State's] calculation add up to 95 and a half or 96 months in custody and a similar amount of out-of-custody.
>
> . . . .
>
> [Sentencing court]: You agree that because these have to be served consecutively, that the DOSA periods stack.
>
> [Defense counsel]: Yes.
>
> [Sentencing court]: So that he is looking at eight years in prison, maybe minus a couple of years for good time, but he is looking at six years net of good time, if you will, in prison, even if we grant what you want.
>
> [Defense counsel]: Right.
>
> [Sentencing court]: Then he is looking at another eight years on community custody or supervision.
>
> [Defense counsel]: Right.

6 Verbatim Report of Proceedings (VRP) at 532-33.

Following a lengthy colloquy with Wuco about his crimes, criminal history, drug addiction, and previous attempts at recovery, the sentencing court granted his request for a prison-based DOSA sentence. The sentencing court noted its reluctance to impose a DOSA sentence, telling Wuco, "I came this close to not doing this." 6 VRP at 559.

Wuco's judgment and sentence contains handwritten notations stating, "Pursuant to RCW 9.94A.589(1)(c), Counts I & II must run consecutively." Clerk's Papers at 67-68. Wuco appeals from his sentence.

ANALYSIS

I. EXCEPTIONAL DOWNWARD SENTENCE

Wuco first contends that the sentencing court erred by failing to recognize its discretion to impose an exceptional downward sentence and that remand for resentencing is required under *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017). We disagree.

Generally, a trial court's decision whether to impose a DOSA sentence is not reviewable. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). Likewise, a trial court's discretionary decision not to impose an exceptional sentence outside the standard range is generally not reviewable. *McFarland*, 189 Wn.2d at 56. But "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." *McFarland*, 189 Wn.2d at 56. And "[a] trial court errs when . . . it operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" *McFarland*, 189 Wn.2d at 56 (last alteration in original) (quoting *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007)).

RCW 9.94A.589(1)(c) and RCW 9.41.040(6) provide that offenders shall serve consecutive sentences for certain firearm-related offenses, including first degree unlawful possession of a firearm and theft of a firearm.[2] In *McFarland*, our Supreme Court held that notwithstanding the language of RCW 9.94A.589(1)(c) and RCW 9.41.040(6), a sentencing court has discretion to run firearm-related sentences concurrently as an exceptional downward sentence under RCW 9.94A.535(1)(g).[3] 189 Wn.2d at 53-55. Although the defendant in *McFarland* had not requested the sentencing court to impose an exceptional downward sentence, our Supreme Court addressed the issue for the first time on appeal and held that remand for resentencing was appropriate because the "record suggest[ed] 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." 189 Wn.2d at 59.

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[2] RCW 9.94A.589(1)(c) states in relevant part,

> 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, . . . [t]he offender shall serve consecutive sentences for each conviction of the felony crimes . . . and for each firearm unlawfully possessed.

RCW 9.41.040(6) states in relevant part,

> Notwithstanding any other law, if the offender is convicted under this section 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, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

[3] RCW 9.94A.535(1)(g) provides that a sentencing court may impose an exceptional sentence below the standard range if it finds that "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010."

Unlike in *McFarland*, here the record does not suggest that the sentencing court misunderstood its discretion to impose an exceptional downward sentence. Although the sentencing court questioned defense counsel about the requirement that Wuco's firearms-related convictions be served consecutively as part of his requested prison-based DOSA sentence, the sentencing court's question did not suggest that it mistakenly believed it lacked discretion to impose an exceptional downward sentence under RCW 9.94A.535(1)(g). Likewise, the sentencing court's legally correct notation on Wuco's judgment and sentence that RCW 9.94A.589(1)(c) required his firearm-related convictions to be served consecutively does not suggest that the sentencing court mistakenly believed it lacked discretion to impose an exceptional downward sentence.

These facts stand in contrast with *McFarland* where both the State and defense counsel agreed that the defendant's multiple firearm-related convictions had to be served consecutively, and the trial court stated, "'I don't have—apparently [I] don't have much discretion, here. Given the fact that these charges are going to be stacked one on top of another, I don't think—I don't think [the] high end is called for, here.'" 189 Wn.2d at 51 (alterations in original). Because the record does not show that the sentencing court misunderstood its discretion to impose an exceptional downward sentence, remand for resentencing is not appropriate.

Even assuming the sentencing court misunderstood its discretion to impose a downward departure, the record does not suggest that it would have imposed such a sentence in any event.[4]

[4] Wuco's opening and reply brief address only the requirement that the record show the sentencing court misunderstood its discretion to impose an exceptional downward sentence. Wuco does not address the second requirement under *McFarland*, that the record show the possibility that the sentencing court would have considered imposing an exceptional downward sentence had it properly understood its discretion to do so.

To the contrary, the sentencing court expressed its reluctance to impose a DOSA sentence in light of Wuco's criminal history and the facts underlying the multiple crimes for which he was being sentenced. This stands in contrast with the facts in *McFarland* where the sentencing court equated the defendant's presumed sentence with that imposed for second degree murder and expressed some discomfort with its perceived lack of discretion to impose concurrent sentences. 189 Wn.2d at 51, 58-59. For this reason, remand for resentencing is not warranted.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, Wuco contends that his defense counsel was ineffective for failing to request an exceptional downward sentence. Again, we disagree.

We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To demonstrate that he received ineffective assistance of counsel, Wuco must show both (1) that defense counsel's performance was deficient and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Performance is deficient if it falls below an objective standard of reasonableness. *Reichenbach*, 153 Wn.2d at 130. Prejudice ensues if there is a reasonable possibility that the outcome of the proceeding would have differed but for counsel's deficient performance. *Reichenbach*, 153 Wn.2d at 130. If Wuco fails to make either showing, we need not inquire further. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Here, as discussed above, there is nothing in the record showing that the sentencing court would have imposed an exceptional downward sentence had defense counsel requested such a sentence. Accordingly, Wuco cannot demonstrate that he was prejudiced by defense counsel's

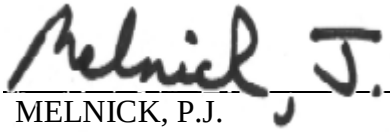
decision not to request an exceptional downward sentence, and his claim of ineffective assistance of counsel fails.

We affirm.

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.

CRUSER, J.

We concur:



MELNICK, P.J.

SUTTON, J.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 51172-0-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: June 19, 2019

WASHINGTON APPELLATE PROJECT

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