Supreme Court No. 99535-4
(Court of Appeals No. 36381-3-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY BERGSTROM,

Petitioner.

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

PETITION FOR REVIEW

DEVON KNOWLES
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
devon@washapp.org

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND DECISION BELOW 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 3

1. Mr. Bergstrom was a passenger in Ms. Thibodeau's car. 3

2. The trial court resentenced Mr. Bergstrom. 5

3. The Court of Appeals denied appellate counsel's motion to withdraw. 6

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED 6

1. Mr. Bergstrom's right to due process was violated when the State failed to prove the elements of each count beyond a reasonable doubt, warranting review under RAP 13.4. 6

a. The State failed to prove beyond a reasonable doubt that Mr. Bergstrom possessed a firearm. *7*

b. The State failed to present evidence that the alleged firearm was a "gun in fact." *12*

c. The State failed to establish Mr. Bergstrom was "armed" with a firearm at the time of the offense. *13*

2. The admission of Detective Knight's testimony violated Mr. Bergstrom's constitutional right to due process. .. 14

3. Mr. Bergstrom received ineffective assistance of counsel when his attorney failed to request an exceptional downward sentence. 15

4. The denial of appellate counsel's motion to withdraw preludes Mr. Bergstrom from exhausting his constitutional claim. 17

E. CONCLUSION 20

TABLE OF AUTHORITIES

United States Supreme Court

Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821 (1985) 18

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) 7

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, L. Ed. 2d 674 (1984) 15

Washington Supreme Court

In re Netherton, 177 Wn.2d 798, 306 P.3d 918, 920 (2013)..... 18

In re Pers. Restraint of McWilliams, 182 Wn.2d 213, 340 P.3d 223 (2014) 16

Shumway v. Payne, 136 Wn.2d 383, 964 P.2d 349 (1998) 20

State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007)..... 14

State v. Davis, 141 Wn.2d 798, 10 P.3d 977 (2000)..... 18

State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005)..... 14

State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009) 18

State v. O'Neal, 159 Wn.2d 500, 150 P.3d 1121 (2007)..... 14

State v. Rich, 184 Wn.2d 897, 365 P.3d 746 (2016)..... 7

State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985) 18

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013)..... 7

Washington Court of Appeals

State v. Bowen, 157 Wn. App. 821, 239 P.3d 1114 (2010)..... 8

State v. Bowman, 36 Wn. App. 798, 678 P.2d 1273 (1984)..... 13

State v. Chouinard, 169 Wn. App. 895, 282 P.3d 117 (2012) 8, 9, 10

State v. Cote, 123 Wn. App. 546, 96 P.3d 410 (2004) 8

State v. Echeverria, 85 Wn. App. 777, 934 P.2d 1214 (1997) 8

State v. France, 176 Wn. App. 463, 308 P.3d 812 (2013) 16

State v. Garcia, 162 Wn. App. 678, 256 P.3d 379 (2011) 17

State v. George 146 Wn. App. 906, 193 P.3d 693 (2008) 7, 8, 9

State v. Ibarra-Raya, 145 Wn. App. 516, 187 P.3d 301 (2008) 8

State v. Listoe, 15 Wn. App. 2d 308, 475 P.3d 534 (2020) 8, 11

State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002) 15, 17

State v. McKee, 141 Wn. App. 22, 167 P.3d 575 (2007) 13

State v. Murray, 128 Wn. App. 718, 116 P.3d 1072 (2005) 17

State v. Reid, 40 Wn. App. 319, 698 P.2d 588 (1985) 8

State v. Raleigh, 157 Wn. App. 728, 238 P.3d 1211 (2010) 13

State v. Turner, 103 Wn. App. 515, 13 P.3d 234 (2000) 7, 8

Constitutional Provisions

U.S. Const. amend. VI 15

Const. art. I, § 22 15

Const. art. I, § 3 ..... 6, 15

Statutes

28 U.S.C. § 2254 20

RCW 9.41.010 ..... 1, 12

RCW 9.94A.533 16

RCW 9.94A.701 16

Rules

RAP 10.10 19

RAP 13.4 .... passim

A. IDENTITY OF PETITIONER AND DECISION BELOW

Zachary Bergstrom, Appellant, asks this Court to review the opinion of the Court of Appeals in *State v. Bergstrom*, No. 36381-3-III, (filed February 4, 2021). A copy of the opinion is attached as an Appendix.[1]

B. ISSUES PRESENTED FOR REVIEW

1. Due process requires that the prosecution prove every element of a crime beyond a reasonable doubt. In a departure from existing caselaw, the Court of Appeals affirmed Mr. Bergstrom's conviction for unlawful possession of a firearm based solely on his proximity to the weapon, even though he did not own the car where the firearm was found, was not driving the car, his fingerprints were not on the weapon, and he did not appear to be aware of the weapon. Does the violation of Mr. Bergstrom's right to due process warrant review under RAP 13.4(b)(3)?

2. To establish the offense of unlawful possession of a firearm, the State must prove the defendant possessed a "firearm" as defined in RCW 9.41.010. Here, the State elicited testimony from an officer who tested a firearm, but failed to present evidence that the tested firearm was the same

[1] The original opinion was filed on November 10, 2020. Counsel moved for reconsideration, and the order on reconsideration was filed on February 4, 2021. The Appendix includes both the opinion and order on reconsideration.

as the alleged gun found in the vehicle, and the firearm was not admitted into evidence. Does the violation of Mr. Bergstrom's right to due process warrant review under RAP 13.4(b)(3)?

3. To establish an individual was "armed" for the purpose of a sentencing enhancement, the State must prove a nexus exists between the defendant, the weapon, and the offense. Mr. Bergstrom was charged with unlawful possession of a controlled substance with intent to deliver, but was in the car as part of social encounter and never possessed the firearm. Does the violation of Mr. Bergstrom's right to due process warrant review under RAP 13.4(b)(3)?

4. Did the jury's consideration of testimony related to an exhibit not admitted at trial violate Mr. Bergstrom's constitutional right to due process under the Fourteenth Amendment?

5. A defendant has a Sixth Amendment right to effective assistance of counsel at sentencing. Should this Court accept review under RAP 13.4(b)(3) where Mr. Bergstrom's attorney ignored the trial court's requests to file a sentencing brief and erroneously informed the court it did not have the authority to impose an exceptional downward sentence?

6. The right to assistance of counsel on appeal includes the right to effective and conflict free counsel. After Mr. Bergstrom raised ineffective assistance of appellate counsel in his Statement of Additional Grounds

(SAG), the Court of Appeals denied present counsel's motion to withdraw. Should this Court accept review under RAP 13.4(b)(3) where present counsel cannot raise Mr. Bergstrom's constitutional claim in this Petition, forcing him to forgo his ability to raise the issue in federal court?

C. STATEMENT OF THE CASE

1. Mr. Bergstrom was a passenger in Ms. Thibodeau's car.

When Deputy Tyler approached a vehicle in the parking lot of Minnehaha Park, she observed Jada Thibodeau in the driver's seat,[2] a front-seat passenger, and Zachary Bergstrom sitting in the back, driver's-side passenger seat. RP 177-79, 205. Mr. Bergstrom appeared lethargic and under the influence. RP 182. The vehicle was messy, with purses and blankets throughout. RP 145-46. Using his flashlight, a second officer, Deputy Pfeifer, observed what appeared to be a handgun sitting near Mr. Bergstrom's feet. RP 127, 129. 131. A holster was later found underneath a blanket in the backseat. RP 189, 196.

Officers searched the car and discovered a container in the front driver's side of the vehicle, which held several smaller containers of heroin, and arrested Ms. Thibodeau for possession of a controlled substance. RP 207. Officers also found a black zippered pouch wedged

[2] The vehicle was registered to Ms. Thibodeau's husband. RP 205.

between the rear passenger door and the floorboard near where Mr. Bergstrom was sitting. RP 207. The pouch contained approximately 48 grams of methamphetamine, .3 grams of heroin, and a scale and baggies. RP 195, 225. A backpack containing a green notebook and a Goodwill voucher for Mr. Bergstrom was also found in the back seat. RP 188-190. Mr. Bergstrom did not make any statements to law enforcement and no drugs were found on his person. RP 134, 209.

The State charged Mr. Bergstrom with second-degree unlawful possession of a firearm, possession of a stolen firearm, possession of methamphetamine with intent to deliver, including a firearm enhancement, and possession of heroin. CP 8-9.

Neither Ms. Thibodeau nor the front seat passenger testified. *See* RP 115-228. Although there was no evidence Mr. Bergstrom handled the pouch, Deputy Tyler believed handwritten notes in the green notebook referred to quantities of heroin. RP 190-91. The connection between Mr. Bergstrom and the alleged firearm was tenuous. Deputy Tyler never observed Mr. Bergstrom touch the firearm and Mr. Bergstrom's fingerprints were not on the weapon. RP 166, 207. Mr. Bergstrom did not hide the alleged weapon and did not claim ownership. RP 131-32, 134.

The State presented testimony by Detective Knight to establish the alleged firearm was an operable gun. RP 116. Specifically, Detective

Knight – who was not involved in the search – identified proposed Exhibit No. 29 as a pistol. RP 117, 121. However, he did not identify the firearm as the one taken from the car and the exhibit was not admitted. CP 60; *See* RP 116-24.

The only remaining evidence relating to Exhibit No. 29 was testimony by Daniel Hepting, who identified the exhibit as a firearm he owned and reported stolen. RP 155-57. The court later granted Mr. Bergstrom's motion to dismiss the possession of a stolen firearm charge, finding there was no evidence presented "that suggest[ed] even circumstantially that Mr. Bergstrom had knowledge that the weapon was stolen." RP 234-35. The court therefore instructed the jury to disregard Mr. Hepting's testimony. RP 261, 269.

The jury found Mr. Bergstrom guilty on the remaining counts and that he was armed with a firearm during the commission of count three – possession of methamphetamine with intent to deliver. CP 174-77.

2. The trial court resentenced Mr. Bergstrom.

After Mr. Bergstrom filed his Notice of Appeal, the State realized his sentence for possession with intent to deliver exceeded the statutory maximum of 120 months, requiring resentencing. The trial court repeatedly asked defense counsel to brief whether it had the power to impose an exceptional downward sentence. 7/18/19 RP 17-20. Despite the

court's requests, counsel did not submit a brief. Worse yet, counsel erroneously informed the court it lacked the authority to impose an exceptional sentence. 7/25/19 RP 3-5, 17-18. The court reluctantly sentenced Mr. Bergstrom to the statutory maximum of 10 years in prison. 7/25/19 RP 15-17.

3. The Court of Appeals denied appellate counsel's motion to withdraw.

Mr. Bergstrom filed a Statement of Additional Grounds, arguing he received ineffective assistance of appellate counsel. Appellate counsel therefore moved to withdraw. In a single opinion, the Court of Appeals affirmed the convictions and denied the motion to withdraw, finding counsel effective. Mr. Bergstrom moved for reconsideration challenging the Court's conclusion that Mr. Bergstrom possessed a "gun in fact" because the Court misstated the evidence and relied on evidence outside the record. The Court denied the motion, but amended the opinion to remove references to Mr. Hepting's testimony.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Mr. Bergstrom's right to due process was violated when the State failed to prove the elements of each count beyond a reasonable doubt, warranting review under RAP 13.4.

Due process demands the State prove all elements of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3;

State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Although the evidence is viewed in the light most favorable to the prosecution on review, "[i]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). "A 'modicum' of evidence does not meet this standard. *Rich*, 194 Wn.2d at 903 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

a. The State failed to prove beyond a reasonable doubt that Mr. Bergstrom possessed a firearm.

The State failed to prove Mr. Bergstrom unlawfully possessed a firearm, instead establishing only his proximity to the weapon. Possession may be actual or constructive. *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000). To establish constructive possession, the State must prove the defendant had dominion and control over either the premises where the firearm was found or the firearm itself. *Id.* at 521. Where an individual does not have dominion and control of the premises, close proximity to the firearm and even momentary handling is insufficient to establish constructive possession. *See State v. George* 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

Washington appellate decisions have provided a "checklist" for determining sufficiency of the evidence where contraband is found near a

defendant in a vehicle. *See State v. Listoe*, 15 Wn. App. 2d 308, 475 P.3d 534 (2020); *State v. Chouinard*, 169 Wn. App. 895, 900, 282 P.3d 117 (2012); *George*, 146 Wn. App. at 919-22. First, and most critically, did the defendant own the vehicle? If he did not, courts start with the presumption that the evidence was insufficient. "[C]ourts hesitate to find sufficient evidence of dominion and control where the State charges passengers with constructive possession." *Chouinard*, 169 Wn. App. at 900. Second, was the defendant driving the vehicle?[3] Third, did the defendant handle or touch the contraband?[4] Fourth, did the defendant act as if he possessed the contraband?[5] Fifth, did the evidence rule out the possibility that other occupants owned the contraband?[6]

Every factor favors Mr. Bergstrom. He neither owned nor drove the vehicle, but was a passenger in the backseat. Testing revealed his fingerprints were not on the weapon. There was no evidence about how long Mr. Bergstrom had been in the vehicle. No bullets or other items related to the gun were discovered on his person or in his possessions. No evidence was presented that the gun was in Mr. Bergstrom's possession

---

[3] *State v. Bowen*, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010); *Turner*, 103 Wn. App. at 521; *State v. Echeverria*, 85 Wn. App. 777, 934 P.2d 1214 (1997).

[4] *State v. Reid*, 40 Wn. App. 319, 326, 698 P.2d 588 (1985); *State v. Cote*, 123 Wn. App. 546, 550, 96 P.3d 410 (2004).

[5] *Listoe*, 15, Wn. App. 2d at 326; *George*, 146 Wn. App. at 922; *State v. Ibarra-Raya*, 145 Wn. App. 516, 525, 187 P.3d 301 (2008).

[6] *George*, 146 Wn. App. at 922.

before the stop. There was no evidence ruling out other individuals as the gun's owner. Indeed, there was no evidence he even knew the gun was in the car inasmuch he did not try to hide the weapon, the car was messy, it was dark, and he appeared to be under the influence.

State v. George and *State v. Chouinard* are compelling, if not controlling. Like Mr. Bergstrom, the defendant in *George* did not own the car and was a passenger in the back seat; when ordered to exit the car, police discovered a pipe on the floorboard where George was sitting, resulting in charges for possession of marijuana and drug paraphernalia. 146 Wn. App. at 912-13. The Court of Appeals rightly rejected the argument that the defendant's knowledge the pipe was at his feet was sufficient to prove dominion and control. *Id*. at 923. Specifically, George did not own the car, the State failed to present fingerprint or other evidence linking George to the pipe; he made no admissions of guilt; there was no testimony ruling out other occupants of the vehicle as owners of the pipe; and there was no evidence establishing when George got into the vehicle. *Id*. at 922. As such, the "State's evidence boil[ed] down to mere proximity." *Id*.

In *Chouinard* – as here – the defendant was convicted for unlawful possession of a firearm. 169 Wn. App. at 897. He did not own the car and was a passenger in the back seat. *Id.* When officers stopped the car, they

noticed that the backrest on the backseat was detached, with a rifle protruding through the gap. *Id.* Upon questioning, Chouinard admitted knowing about the rifle. *Id*. The Court of Appeals reversed, finding his proximity was insufficient evidence of dominion and control. *Id*. Again, most significant was the defendant's status as a backseat passenger rather than the owner or driver of the vehicle. *Id.* at 899-901. The court also emphasized that, despite evidence of close proximity and knowledge of the weapon, there was no evidence he ever handled the weapon or transported it to the vehicle. *Id.* at 901.

Here, the Court of Appeals' opinion confirms the evidence amounted to mere proximity. The Court affirmed the conviction because (1) Mr. Bergstrom was the sole occupant of the backseat, (2) he owned other nearby items, and (3) he could have asserted control over, *i.e.* reached for, the gun. App. at 9. Concluding "[l]ittle needs to be said about the possession argument," the Court failed even mention *George* or *Chouinard*, citing only *State v. Echeverria*. App. at 9. The Court's reliance is misplaced – as noted in *Chouinard*, the critical factor in *Escheverria* was that the defendant was driving the car whereas Chouinard was a passenger. *Chouinard*, at 901. Thus, *Escheverria* is not legally comparable to Mr. Bergstrom's case.

State v. Listoe, a published decision by Division Two issued on the same day as Mr. Bergstrom's case, exemplifies the correct approach. 15 Wn. App. 2d at 327-29. Although the *Listoe* Court concluded the evidence supported constructive possession of methamphetamine, the court properly applied the caselaw and the maxim that mere proximity is not enough. *Id.* at 327. Like the court in *Chouinard*, the *Listoe* Court listed the relevant factors and grouped past cases accordingly – those in which the defendant either owned or drove the vehicle versus those where the defendant was merely a passenger. *Id.* The court relied on *Escheverria* to find the evidence sufficient to show possession primarily because Listoe, like Escheverria, was driving the vehicle. *Id.* at 328. The facts also suggested that Listoe was the most recent driver, Listoe had methamphetamine on his person in besides that found in the vehicle, and he made furtive movements and drove a long distance before pulling over. *Id.* The court questioned whether the facts in isolation would have been sufficient, but concluded that "taken together," a rational trier of fact could have found constructive possession. *Id.*

There is simply no caselaw supporting the Court of Appeals' decision in this case. Rightly so. Where the owner or driver has a superior possessory interest, it is both illogical and profoundly unfair to find someone else possessed the weapon by simply being nearby. This would

allow the State to prosecute any occupant for possession if there is doubt as to the actual owner. The Court of Appeals' departure from established caselaw violated Mr. Bergstrom's constitutional right to due process, warranting review.

b. The State failed to present evidence that the alleged firearm was a "gun in fact."

While presenting evidence of ***an*** operable firearm, the State did not present any testimony that it was ***the*** firearm at issue. Neither Detective Knight nor any other witness testified that Exhibit No. 29 (an operational firearm) was the same firearm seized from the vehicle Mr. Bergstrom was riding in or provided other identifiers that suggested it was connected with the incident. RP 165-66. The exhibit was not admitted. CP 60.

The only remaining evidence relating to the seized firearm were photos of the object lying on the floor of the car and Deputy Pfeifer's testimony he ran the serial number on the seized firearm and that items from the scene were catalogued into evidence. RP 136; Exs. 1-4. Absent some connection to the proposed exhibit or other corroborating evidence, pictures of what appears to be a gun are insufficient to show an object is actually a device that "may be fired." RCW 9.41.010(11).

This case differs from cases in which courts have found the evidence sufficient to establish a gun in fact. First, the State failed to show

the object in the car was a particular firearm, *i.e.* Mr. Hepting's pistol. *See Jussila*, 197 Wn. App. at 933-34. Second, the State failed to present any testimony about the alleged gun's physical attributes. While Deputy Pfiefer's testimony assumed the object was a gun in fact, the State presented no testimony it held a magazine or bullets. *See, e.g.*, *State v. Raleigh*, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010); *State v. McKee*, 141 Wn. App. 22, 31, 167 P.3d 575 (2007). Finally, the State presented no evidence that Mr. Bergstrom acted in a manner suggesting the gun was an actual firearm. *See McKee*, 141 Wn. App. at 31. *State v. Tasker*, 193 Wn. App.575, 595, 373 P.3d 310 (2016); *State v. Bowman*, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984). Mr. Bergstrom did not threaten anyone with the alleged firearm, did not wield it, and did not try to hide it from law enforcement. This Court should accept review under RAP 13.4.

c. <u>The State failed to establish Mr. Bergstrom was "armed" with a firearm at the time of the offense.</u>

The evidence was insufficient to support the firearm enhancement as the State failed to prove a nexus between Mr. Bergstrom, the weapon, and the offense. To establish a defendant is "armed" for the purpose of a firearm enhancement, the State must prove both that (1) the weapon is easily accessible and readily available to use for offensive or defensive purposes and (2) a nexus exists between the defendant, the weapon, and

the underlying offense. *State v. O'Neal*, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007). The presence of a deadly weapon at the scene of a crime, close proximity to the defendant, or constructive possession alone are insufficient to show that the defendant is armed with a firearm. *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007).

Again, the Court of Appeals' opinion confirms the lack of evidence, concluding simply that a nexus existed because the weapon, pouch, and accessories were in the same location. App. at 12. And, again, the caselaw is clear that proximity – particularly with a continuing crime such as possession with intent to distribute – is insufficient. *State v. Gurske*, 155 Wn.2d 134, 140, 118 P.3d 333 (2005).

2. The admission of Detective Knight's testimony violated Mr. Bergstrom's constitutional right to due process.

In Mr. Bergstrom's Statement of Additional Grounds, he argued the trial court erred when it did not instruct the jury to disregard Detective Knight's testimony relating to Exhibit No. 29. The State failed to admit the exhibit and the court instructed the jury not to consider the exhibit as evidence. Detective Knight's testimony was therefore irrelevant and highly prejudicial. The admission of the testimony violated Mr. Bergstrom's constitutional right to a fair trial guaranteed by the Due

Process Clause. U.S. Const. amend. XIV; Const. art. I, § 3.This Court should accept review.

3. Mr. Bergstrom received ineffective assistance of counsel when his attorney failed to request an exceptional downward sentence.

Defendants in criminal proceedings have a constitutional right to effective assistance of counsel. *See* U.S. Const. amend. VI; Const. art. I, § 22. That right is denied where counsel's performance is deficient and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, L. Ed. 2d 674 (1984). Failure to cite or argue relevant caselaw supporting an exceptional downward sentence constitutes ineffective assistance of counsel. *State v. McGill*, 112 Wn. App. 95, 102, 47 P.3d 173 (2002).

Despite the seriousness of the charges and repeated requests by the trial court, defense counsel did not submit a sentencing brief. 7/18/19 RP 17-18; 7/25/19 RP 3. Counsel then incorrectly told the court it could not impose an exceptional downward sentence because (1) "[w]ith the felony enhancement on the firearm, I do not believe at all that the court can give a downward departure based on that," and (2) the Sentencing Reform Act (SRA) precludes a downward exceptional sentence solely to impose community custody. 7/25/19 RP 5, 17-18. Counsel was wrong on both counts.

First, although the court does not have discretion to reduce the 36-month enhancement, the existence of the enhancement does not preclude a court from imposing an exceptional downward sentence for the underlying conviction. *See* RCW 9.94A.533. Second, the requirement under RCW 9.94A.701(9) that courts first reduce community custody where a standard-range sentence exceeds the statutory maximum does not apply to exceptional sentences.[7] *In re Pers. Restraint of McWilliams*, 182 Wn.2d 213, 217, 340 P.3d 223 (2014). Once a court has imposed an exceptional sentence, it has "all but unbridled discretion" in fashioning the structure and length of an exceptional sentence. *State v. France*, 176 Wn. App. 463, 470, 308 P.3d 812 (2013).

Here, imposing 84 months for the underlying offense of possession with intent to distribute ***was itself an exceptional downward sentence*** as it was below Mr. Bergstrom's standard range of 100-120 months. Once imposed, the trial court retained discretion to fashion the sentence, including imposing a sentence further below the standard range or community custody as a portion of that sentence.

An exceptional sentence is also appropriate when the underlying facts of the crime distinguish it from other crimes in the same statutory

[7] Defense counsel did not cite a specific statutory section in arguing a court could not reduce a sentence in order to impose community custody, but was presumably referring to RCW 9.94A.701(9).

category. *State v. Murray*, 128 Wn. App. 718, 722, 116 P.3d 1072 (2005). Here, Mr. Bergstrom was sitting in the backseat of a car, using drugs during a social encounter. He was not using a weapon to protect contraband or a drug operation; he was merely proximate to two distinct items. The context and paucity of evidence distinguish this case from the legislatively envisioned offense of possession with intent to distribute while armed with a firearm and resulted in an excessive sentence.

Where counsel is ineffective for failing to argue for an exceptional downward sentence, remand is proper if the "trial court's comments indicate it would have considered an exceptional sentence had it known it could." *McGill*, 112 Wn. App. at 100. The court requested defense counsel brief "whether there is some creative way for an exceptional way [sic]." 7/18/19 RP 19. Counsel had multiple viable arguments. It is likely that the court would have adopted one. The violation of Mr. Bergstrom's right to effective counsel warrants review under RAP 13.4(b).

4. The denial of appellate counsel's motion to withdraw preludes Mr. Bergstrom from exhausting his constitutional claim.

This Court should grant review under RAP 13.4(b)(3) because the Court of Appeals' denial of present counsel's motion to withdraw prevents counsel from raising Mr. Bergstrom's argument that he received ineffective assistance of appellate counsel in this Petition, thereby

precluding him from later raising the error in a writ of habeas corpus in federal court.

A defendant has both the right to appeal a criminal conviction and the right to appointed counsel on appeal. *See In re Netherton*, 177 Wn.2d 798, 801, 306 P.3d 918, 920 (2013). The right to counsel includes the right to effective and conflict free counsel. *State v. Davis*, 141 Wn.2d 798, 860, 10 P.3d 977 (2000); *State v. Rolax*, 104 Wn.2d 129, 135, 702 P.2d 1185 (1985) (citing *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821 (1985)). The right exists until the appeal is final. *See Netherton*, 177 Wn.2d at 801-02. Finality occurs when the appellate court issues its mandate, when [the Supreme Court] accepts review, or when the Court of Appeals issues a certificate of finality. *State v. Kilgore*, 167 Wn.2d 28, 38, 216 P.3d 393 (2009).

In his Statement of Additional Grounds, Mr. Bergstrom argued the Court of Appeals should reverse his conviction due to ineffective assistance of appellate counsel. Mr. Bergstrom asserted that counsel's arguments on appeal improperly shifted the focus of review from admissibility of evidence to sufficiency, that counsel "misconceived their role," and that he was prejudiced by counsel's ongoing representation. Because this argument went beyond discussing errors not addressed in

counsel's brief or a general dissatisfaction with his representation, counsel moved to withdraw. *See* RAP 10.10(a).

The Court of Appeals denied the motion, concluding that, because the substantive claim of ineffective assistance of counsel was without merit, the motion to withdraw "also is without merit." App. at 7. The Court faulted Mr. Bergstrom for not filing a *pro se* request to discharge appellate counsel. App. at 5. The Court also reasoned that SAG issues in every case implicitly criticize appellate counsel's decisions, and criticism of counsel's briefing does not create a conflict of interest. App. at 6.

This decision was shortsighted. The Court of Appeals should have anticipated that after issuing a decision on the merits, the losing party would file a petition for review. Indeed, to be effective, present counsel must file a petition if any of Mr. Berstrom's claims on appeal warrant review. Even if the Court of Appeals properly found no conflict existed during the motion to withdraw, one exists now.[8]

Critically, Mr. Bergstrom must raise this issue in this Petition in order to preserve his right to later seek relief in federal court. A defendant who raises a claim under the United States Constitution may file a writ of

[8] This Court should reject the Court of Appeals' reasoning that a defendant's SAG necessarily criticizes appellate counsel's representation. There are myriad reasons why counsel may choose to advance only certain arguments a brief. The Court's reasoning also suggests that a denial of arguments in a SAG is an implicit finding that appellate counsel was effective.

habeas corpus in federal court. 28 U.S.C. § 2254(a). However, a court will consider the writ only where "the applicant has exhausted the remedies available in the courts of the State[.]" 28 U.S.C. § 2254(b)(1)(A). "The exhaustion requirement is not satisfied until the petition demonstrates that each of the claims presented in the habeas petition has previously been presented to the state's highest court[.]" *Shumway v. Payne*, 136 Wn.2d 383, 390, 964 P.2d 349 (1998). In this case, Mr. Bergstrom has raised an error under the Sixth Amendment, but cannot exhaust the claim.

Counsel is now in the exact position the motion to withdraw was designed to avoid. The denial of the motion raises significant questions of law, warranting review under RAP 13.4(b)(3).

E. CONCLUSION

Zachary Bergstrom respectfully requests this Court grant review.

DATED this 26th day of February, 2021.

s/Devon Knowles
WSBA No. 39153
Washington Appellate Project (91052)
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711
Email: devon@washapp.org

APPENDIX

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

February 4, 2021

E-mail:
Gregory Charles Link
Devon Carroll Knowles
Washington Appellate Project
1511 3rd Ave Ste 610
Seattle, WA 98101-1683

E-mail:
Brett Ballock Pearce
Larry D. Steinmetz
Gretchen Eileen Verhoef
Spokane County Prosecutor's Office
1100 W Mallon Ave
Spokane, WA 99260-2043

CASE # 363813
State of Washington v. Zachary P. Bergstrom
SPOKANE COUNTY SUPERIOR COURT No. 181023981

Dear Counsel:

Enclosed is a copy of the order deciding a motion for reconsideration of this court's November 10, 2020 opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a petition for review in this Court within 30 days after the attached order on reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the Court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this court on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. Raymond F. Clary
c: Zachary P Bergstrom
#398577
Coyote Ridge Correction Center
P.O. Box 769
Connell, WA 99326

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v ZACHARY P. BERGSTROM, Appellant.	)))))))))	No. 36381-3-III ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

THE COURT has considered appellant's motion for reconsideration and the answer thereto, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of November 10, 2020 is hereby denied.

IT IS FURTHER ORDERED the opinion filed November 10, 2020 is amended as follows:

On page 10, the second paragraph, third and fourth sentences that read:

> The officer then used the serial number on the weapon to contact the owner. The owner testified at trial that the gun in the courtroom was his missing weapon.

shall be amended to read:

> The officer then traced the serial number on the gun at the scene. An officer testified that all items recovered from the scene were catalogued and securely stored.

On page 11, the first paragraph, third and fourth sentences that read:

> The arresting officer used the seized weapon to find the owner. The owner identified the gun as his; the arresting officer, owner, detective, and technician all confirmed that it was a genuine gun.

shall be amended to read:

> The arresting officer ran the serial number of the seized weapon. The arresting officer, owner, detective, and technician all confirmed that it was a genuine gun.

The rest of the opinion shall remain as written.

PANEL: Judges Korsmo, Fearing, Pennell

FOR THE COURT:

REBECCA PENNELL
Chief Judge

FILED
NOVEMBER 10, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ZACHARY P. BERGSTROM, Appellant.	)))))))))	No. 36381-3-III UNPUBLISHED OPINION

KORSMO, J. — Zachary Bergstrom appeals from multiple convictions, primarily challenging the sufficiency of the evidence and some conditions of community custody. His attorney seeks to withdraw from representation due to criticism in Mr. Bergstrom's statement of additional grounds (SAG). We affirm the convictions, deny the motion to withdraw, and remand to strike one condition of community custody.

FACTS

A Spokane County sheriff's deputy walked up to a car parked in the closed parking lot of a county park. It was 12:30 a.m. Mr. Bergstrom was the sole occupant of the backseat of the car; two others sat in the front seat.

The deputy observed a semiautomatic handgun on the floor between Bergstrom's feet. When Bergstrom declined to keep his hands in view, the deputy removed him from the car and detained him in handcuffs. The deputy then obtained consent from the driver to search the vehicle and retrieve the gun.

After running the gun's serial number, law enforcement obtained a warrant to search the vehicle. The ensuing search revealed a holster for the firearm located under a blanket directly next to where Mr. Bergstrom had sat. Deputies also located a green ledger with Mr. Bergstrom's name in it with language related to drug dealing. A pouch by Mr. Bergstrom's feet contained a white crystalline substance; another container held a black tar-like substance. Deputies also found a scale, Baggies, and cash near Mr. Bergstrom. Testing positively identified methamphetamine and heroin.

The prosecutor ultimately charged Bergstrom with second degree unlawful possession of a firearm, possession of a stolen firearm, possession of methamphetamine with intent to deliver while armed with a firearm, and possession of heroin. The case proceeded to jury trial. The stolen firearm count was dismissed at the conclusion of the State's case. The jury convicted on the remaining three counts and found that Mr. Bergstrom was armed with a firearm while possessing the methamphetamine.

At the initial sentencing hearing, the trial court identified a base range of 60 to 120 months on the possession with intent count, plus an additional 36 months for the weapons enhancement. The court imposed a midrange term of 126 months on that count and lesser concurrent terms on the unlawful firearm possession and heroin counts. After it was called to the court's attention that the maximum sentence for a class B felony was 120 months, the court resentenced the defendant. Interested in imposing supervision on the defendant, the court inquired of a basis for an exceptional sentence in order to do so. Defense counsel could not think of a basis for an exceptional sentence, so asked to brief the issue; the hearing was continued.

Counsel did not file a brief and indicated at the hearing that he found no basis for an exceptional sentence. The court then imposed a sentence of 120 months, consisting of 84 months and the 36-month enhancement; the court deemed this an "exceptional sentence."

Mr. Bergstrom timely appealed to this court. His appointed counsel filed a brief of appellant and, on April 2, 2020, a reply brief. Mr. Bergstrom filed his SAG on January 14, 2020. The issue raised in that document was a contention that appellate counsel provided ineffective assistance by failing to challenge the foundation for each piece of evidence admitted against him, a purported defect that Mr. Bergstrom allegedly remedied by use of his SAG. On June 22, this court notified the parties that the case would be heard at oral argument on September 10. However, during subsequent review, the panel

decided not to hear argument. The decision was communicated to the parties on August 25. Meanwhile, on August 24, counsel for appellant read the SAG and discovered that it challenged the effectiveness of appellate counsel.

Appellate counsel filed a request to withdraw. The clerk of court denied the request on September 1. Counsel then filed a motion to modify and, if necessary, to stay proceedings pending a motion for discretionary review to the Washington Supreme Court. The motions were passed to the panel considering the appeal.

ANALYSIS

Before addressing the merits of the arguments presented by the briefing, we first consider counsel's motion to withdraw in conjunction with the SAG. We deny the motion to withdraw and, briefly, reject the SAG argument.

Motion to Withdraw and SAG

Washington permits an appellant in a criminal case to file a SAG addressing issues that "the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel." RAP 10.10(a). In the event that issues of possible merit have been identified, the court may require both counsel to address the SAG issues. RAP 10.10(f). Only documents in the record may be considered when assessing a SAG argument. RAP 10.10(c). Thus, if the record does not contain the necessary support for an argument, the

reviewing court will decline to consider it due to lack of an evidentiary basis. *Id*.; *State v. Bluehorse*, 159 Wn. App. 410, 435, 248 P.3d 537 (2011).[1]

Here, Mr. Bergstrom argues in the SAG that his appellate counsel wrongly focused argument on the sufficiency of the evidence instead of its admissibility. He argues that appellate counsel should have challenged the *foundation* for the physical evidence. He also believes that by raising this contention in his SAG, he has refocused the issue to its proper position on appeal. Appointed counsel believes the SAG goes beyond mere disagreement with counsel's approach to the case and is the equivalent[2] to a motion to discharge existing counsel and appoint new counsel. These arguments fail.

Mr. Bergstrom did not file a motion asking for a new attorney, nor did he seek to discharge counsel and represent himself. *State v. Rafay*, 167 Wn.2d 644, 222 P.3d 86 (2009). He also had plenty of time between the filing of the SAG and counsel's review of the document to bring his own request for a new attorney if he had desired to do so.[3]

---

[1] The remedy, if an appellant believes he has a factual basis for an argument not supported by the existing record, is to file a personal restraint petition with which he could file an affidavit describing the evidence available to prove the claim. *E.g.*, *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995); *State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159 (1991).

[2] As a non-dispositive motion, a motion to withdraw would not have been appropriately filed in a brief or a SAG. RAP 10.4(d).

[3] Since the SAG is irrelevant to counsel's handling of the case, unless directed to brief a SAG issue by this court, we are not criticizing the seven month delay between the filing of the SAG and counsel's review. We simply note the lengthy time period allowed Mr. Bergstrom ample opportunity to bring his own motion.

All properly filed SAG issues implicitly criticize counsel's choice of arguments, but that fact does not create a conflict of interest. Similarly, an appellate court's decision to request briefing on a SAG issue could itself be interpreted as a criticism of counsel's choice of arguments; yet, appellate courts do not routinely appoint new attorneys just because a SAG raises an issue of potential merit.

In this instance the SAG did not rise to that level. If the issue had presented a question justifying briefing, this court then would necessarily have had to consider whether current counsel was the appropriate party to brief the issue.[4] But, criticism by an appellant of counsel's briefing does not itself create a conflict of interest requiring the appointment of new counsel.

This case demonstrates that nicely. The SAG issues are without merit. A party seeking to challenge an evidentiary ruling on appeal must necessarily have first raised the same issue to the trial court. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Evidence allegedly admitted in violation of the Rules of Evidence does not present a manifest constitutional error that this court can consider for the first time on appeal. RAP 2.5(a); *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). Appellant did not object to the evidence in the trial court on these same grounds and cannot bring the SAG challenges now. *Id*.

[4] A motion to withdraw would likewise have been appropriately timed.

Thus, the SAG arguments fail in multiple manners. First, because he did not present the foundation challenges in the trial court, the arguments are waived.[5] *Guloy*, 104 Wn.2d at 421. Second, because the arguments were waived at the trial level, appellate counsel could not do anything to revive them on appeal. RAP 2.5(a). Likewise, the effort of the SAG to present the issue is equally ineffectual. Appellate counsel was not ineffective for failing to raise an unpreserved and meritless argument. The motion to withdraw also is without merit.

Accordingly, we decline to modify the clerk's ruling and decline to stay consideration of this case. The SAG claims are without merit.

Issues Presented by the Brief

The appeal raises four challenges to the sufficiency of the evidence, alleges ineffective assistance of counsel and error by the trial judge at sentencing, and challenges several components of the judgment. We jointly consider the sufficiency challenges before turning to the challenges to the sentencing proceeding. Finally, we address the challenges to the sentencing components.

[5] The arguments also demonstrate lack of understanding of basic evidence principles. Evidence is admissible if it is properly identified and shown to be in the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Defects in the chain of custody only go to the weight to be given the evidence; they do not bar admission. *Id*. Chain of custody is but one method of authenticating evidence. *E.g.*, *State v. Russell*, 70 Wn.2d 552, 553, 424 P.2d 639 (1967).

Sufficiency of the Evidence

The brief challenges the sufficiency of the proof that the firearm was genuine, whether Bergstrom "possessed" the weapon or the drugs, and whether he was "armed" with the weapon. We treat those four claims as three, and first consider the possession argument common to all three convictions.

Appellate review of these arguments is in accord with well-understood standards. Evidence is sufficient to support a verdict if the jury has a factual basis for finding each element of the offense proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The evidence is viewed in the light most favorable to the prosecution. *Green*, 94 Wn.2d at 221. Appellate courts defer to the trier-of-fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Possession. Counsel argues that Mr. Bergstrom did not possess the controlled substances and did not knowingly possess the firearm at his feet. Possession may be actual or constructive. "Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with

possession has dominion and control over the goods." *State v. Callahan*, 77 Wn.2d 27, 28, 459 P.2d 400 (1969). Dominion and control are determined by the totality of the circumstances; no single factor is dispositive. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). One aspect of dominion and control is "the ability to reduce an object to actual possession." *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). Additionally, constructive possession of contraband exists if the defendant had dominion and control over the contraband or over the premises where it was found. *Id*.

Little needs to be said about the possession argument. The firearm and the controlled substances were at Mr. Bergstrom's feet, and he was the sole occupant of the back seat of the car. Other items identified as belonging to Bergstrom were beside him on the seat. He could easily have asserted control over the drugs and the gun. The evidence permitted the jury to conclude that he possessed those items and knowingly possessed the weapon. *See State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (sufficient evidence of knowing possession existed where gun was in plain sight at the defendant's feet and within his reach).

Genuine Firearm. Pointing out that the weapon was not admitted into evidence, counsel argues that there was insufficient evidence that the gun seen in the vehicle was genuine because it was not shown to be the one tested by law enforcement. The evidence circumstantially connected the weapon found in the car to that handled and tested by law enforcement.

This court has concluded that in order to constitute a "firearm" as defined by RCW 9.41.010

> a device must be capable of being fired, either instantly or with reasonable effort and within a reasonable time. Evidence that a device appears to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that it is a firearm.

State v. Tasker, 193 Wn. App. 575, 594, 373 P.3d 310 (2016). In *Tasker*, a robbery victim who had never seen a gun before, identified the object used by a robber as a gun, she heard a "click" of the weapon when it was behind her head, and testified that the defendant pointed it at her while demanding her purse. *Id*. at 595. This court concluded that the evidence was sufficient to prove the existence of a firearm.

Significantly more evidence existed here. The arresting officer testified that a gun was discovered between Mr. Bergstrom's feet; a photograph of that item was admitted as exhibit P-1. The officer then used the serial number on the weapon to contact the owner. The owner testified at trial that the gun in the courtroom was his missing weapon.[6] The detective on the case testified to retrieving the weapon from evidence on three occasions: (1) to show defense counsel, (2) to test, and (3) to bring to trial. He also told the jury about firing the weapon six times to confirm its operability and obtain bullet samples for

[6] The weapon was used for illustrative purposes and was never offered into evidence.

further testing. During cross-examination, defense counsel repeatedly asked the laboratory technician about the gun and bullets "related to this case."[7]

Inexplicably, the prosecutor failed to have the arresting officer identify the weapon in the courtroom as the weapon seized from between Bergstrom's feet. Nonetheless, the circumstantial evidence permitted the jury to reach that conclusion. The arresting officer used the seized weapon to find the owner. The owner identified the gun as his; the arresting officer, owner, detective, and technician all confirmed that it was a genuine gun. The jury could see the gun on display during testimony and had a picture of the weapon seized from Bergstrom. Although the connection between the gun at the defendant's feet and the one in the courtroom could have been made clearer, it was sufficient.

The noted evidence allowed the jury to conclude that a genuine firearm was recovered from between Mr. Bergstrom's feet.

Armed. Lastly, Mr. Bergstrom challenges the sufficiency of the evidence to support the jury's finding that he was "armed" with the firearm while possessing the methamphetamine for delivery. The evidence did allow the jury to properly draw that conclusion.

A person is "armed" with a firearm in the commission of a crime when the firearm is (1) "easily accessible and readily available for use, either for offensive or defensive

[7] The defense to the charge centered on whether Mr. Bergstrom possessed the weapon, rather than whether a genuine gun was present.

purposes," and there is (2) "some nexus between the defendant, the weapon, and the crime." *State v. Eckenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) (internal quotations and citations omitted). Stated simply, the weapon must be accessible and connected to the crime.

Those elements are easily satisfied here. The gun was between Mr. Bergstrom's feet. It was accessible. It also was connected to the drug operation. The gun was on the floor next to the container with the drugs. On the seat beside Mr. Bergstrom was both his drug ledger and a holster for the gun, with scales nearby. The weapon and the controlled substances were together in one location and the accompanying accessories—the holster and the ledger—were together in another nearby location. The evidence permitted the jury to conclude that the weapon and the methamphetamine were connected. The nexus existed.

The evidence supported each of the challenged elements. It was sufficient to authorize each verdict.

Sentencing Hearing

Appellant next contends that counsel was ineffective at sentencing and the judge erred by not realizing his authority to impose an exceptional sentence. The first claim is without merit and the second is belied by the record.

The latter point needs little discussion. The court initially inquired about the possibility of an exceptional sentence, was advised by both parties it was possible, and

granted counsel's request for a continuance to explore the potential bases for an exceptional sentence. When imposing sentence, the court even indicated that it was imposing an exceptional sentence of 84 months plus a 36-month weapons enhancement.[8] The court's ability to impose an exceptional sentence was never in doubt. The court simply found no basis for doing so.

Here, Mr. Bergstrom faults the sentencing attorney for not arguing for an exceptional sentence, alleging that this constituted ineffective assistance. *See Strickland v. Washington*, 466 U.S. 668, 688-692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (when an attorney error prejudices the client, counsel has violated the Sixth Amendment right to effective assistance of an attorney). This claim fails because there was no valid basis for imposing an exceptional sentence.

Appellant cites to his drug dependency as a potential basis for an exceptional sentence. However, that argument long has been rejected by the Sentencing Reform Act

[8] This notation did constitute error, but neither party raises it. The standard range for an offense consists of the base range identified by the legislature, plus any enhancement. *See In re Gutierrez*, 146 Wn. App. 151, 188 P.3d 546 (2008) (adding enhancements to both ends of base range to determine standard range). Whenever the standard range exceeds the statutory maximum sentence permitted for the offense, the statutory maximum becomes the standard range. RCW 9.94A.599. In the event that the maximum sentence is exceeded due to an enhancement, the court is not permitted to reduce the enhancement. *Id*. Thus, the standard range sentence here should simply have said "120 months" and carried a notation that the sentence included a 36-month enhancement. There was no need to declare an exceptional sentence and no need to parcel the standard sentence into two pieces.

of 1981 (SRA), ch. 9.94A RCW and our courts. Basing a sentence on the characteristics of the offender violates the anti-discrimination provision of the SRA. RCW 9.94A.340 (SRA applies equally to all offenders "without discrimination as to any element that does not relate to the crime or the previous record of the defendant.") Accordingly, a defendant's need for rehabilitative services does not justify an exceptional sentence. *E.g.*, *State v. Gaines*, 122 Wn.2d 502, 511-512, 859 P.2d 36 (1993) (drug addiction); *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993) (intoxication and cocaine addiction); *State v. Allert*, 117 Wn.2d 156, 815 P.2d 752 (1991) (alcoholism and mental illness).

Counsel did not err when he recognized the extensive authorities and declined to argue for an unsupported exceptional sentence. Mr. Bergstrom has not demonstrated that his counsel performed deficiently.

Sentencing Components

Mr. Bergstrom challenges three community custody conditions, the felony firearms registration requirement, and PADT[9] zone exclusion order. We accept the State's concession that the PADT order is unsupported by the evidence and direct the trial court to strike that provision. We first address the community custody conditions and conclude with the registration requirement.

Community Custody Conditions. Mr. Bergstrom challenges on varying constitutional grounds, community custody conditions (1) prohibiting him from

contacting DOC-identified drug offenders, (2) limiting his travel within geographic boundaries, and (3) requiring he obey all conditions imposed by the Department of Corrections. All contentions are without merit.

We typically review community custody conditions for abuse of discretion. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Mr. Bergstrom does not challenge these standards, but, instead, briefly contends each challenged condition is unconstitutional. Our case law indicates otherwise.

This court has previously rejected a challenge to the identified drug offender condition. *State v. Hearn*, 131 Wn. App. 601, 607-609, 128 P.3d 139 (2006). Freedom of association may be restricted in order to facilitate rehabilitation. *Id*.

The Washington Supreme Court very recently confirmed that offenders on supervision have no right to travel and may be subjected to restriction on movement during the period of supervision. *In re Pers. Restraint of Winton*, No. 97452-7 (Wash. September 17, 2020) https://www.courts.wa.gov/opinions/pdf/974527.pdf. The second challenged condition was properly imposed.

[9] Protected against drug trafficking area. RCW 10.66.010(5).

Finally, Mr. Bergstrom argues that the requirement he comply with all DOC-imposed conditions is vague. The condition is authorized by statute. RCW 9.94A.704. Bergstrom does not explain how some unidentified condition is vague before it is even imposed. This claim simply is not ripe for review. *State v. Peters*, 10 Wn. App. 2d 574, 583, 455 P.3d 141 (2019).

The challenges to the three community custody conditions are without merit.

Felony Firearm Registration. Lastly, we turn to the contention that the trial court wrongly required him to register as a felony firearm offender. RCW 9.41.330. Mr. Bergstrom objected to the registration requirement, but did not explain why it was improper. On appeal, he contends that the court wrongly focused solely on one statutory factor and did not include the others. Since the registration order is supported by the record, we affirm.

A firearm offender registration requirement may, in the discretion of the trial judge, be imposed when an offender has committed a felony firearm offense. RCW 9.41.330(1). In exercising its discretion, the court shall consider "all relevant factors," including the offender's criminal history, any prior insanity-based verdicts, and the offender's propensity for violence that would endanger others. RCW 9.41.330(2).

Although the court's oral remarks did not mention prior insanity-based verdicts, the other factors were stated on the record. Critically, the written notification expressly states that the court considered the statutory factors in reaching its decision. Clerk's

Papers at 121. Given Mr. Bergstrom's previous firearm convictions and his unremitting criminal behavior, the trial court understandably required that he register as a felony firearm offender upon release from custody. There was no abuse of discretion.

Affirmed and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Pennell, C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 36381-3-III
	)	
ZACHARY BERGSTROM,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF FEBRUARY, 2021, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	GRETCHEN VERHOEF [gverhoef@spokanecounty.org] [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X]	ZACHARY BERGSTROM 398577 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF FEBRUARY, 2021.

X_____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

February 26, 2021 - 4:56 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36381-3
Appellate Court Case Title:	State of Washington v. Zachary P. Bergstrom
Superior Court Case Number:	18-1-02398-1

The following documents have been uploaded:

- 363813_Petition_for_Review_20210226165545D3821485_4040.pdf
  This File Contains:
  Petition for Review
  The Original File Name was BERGSTROM-PFR.pdf

A copy of the uploaded files will be sent to:

- bpearce@spokanecounty.org
- greg@washapp.org
- gverhoef@spokanecounty.org
- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org
- wapofficemai@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Devon Carroll Knowles - Email: devon@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20210226165545D3821485