

No. 44147-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRIAN BUCKMAN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUE

- A. Was Buckman's attorney ineffective in his representation of Buckman during the SSOSA revocation hearing?

II. STATEMENT OF THE CASE

Brian Buckman was charged by information on November 1, 2011 with Rape of a Child in the Second Degree. CP 1-3. The information alleged the rape took place on or about and between May 1, 2010 and September 30, 2010. CP 1. The State received a report from the Winlock Police Department that on October 25, 2011 Chief Williams and Social Worker Roni Jensen had met with KBS¹ at Winlock High School to discuss KBS's relationship with Buckman. Supp. CP PC Aff.² KBS was fourteen years old, with a date of birth of November 8, 1996. Supp. CP PC Aff. KBS disclosed that she was the current girlfriend of Buckman. Supp. CP PC Aff. Buckman's date of birth is November 19, 1992, making him three years and 11 months older than KBS. CP 3; Supp CP PC Aff. KBS disclosed that she and Buckman had a sexual relationship and the first time KBS and Buckman had intercourse was in June 2010 when she was 13 years old. Supp. CP PC Aff.

¹ The State will refer to the victim by her initials, KBS, to protect her identity.

² State will be filing a supplemental designation of Clerk's papers to include the affidavit regarding probable cause.

On January 26, 2012 Buckman pleaded guilty as charged to one count of Rape of a Child in the Second Degree. CP 4-14. Buckman's attorney submitted a motion for Special Sex Offender Sentencing Alternative (SSOSA) examination. CP 15-16. The judge signed the order for the SSOSA examination on January 31, 2012. CP 19-20.

Buckman was sentenced on March 7, 2012. RP (3/7/12) 1-20; CP 24-37. The State opposed the imposition of a SSOSA sentence and asked the sentencing court to impose a sentence in the middle of the standard range. RP 5, 8. A standard range for Buckman was a minimum of 86 to 114 months in prison with a maximum of life in prison. RP 5, 8. Buckman's attorney asked the sentencing court to allow Buckman to do a SSOSA. RP 9. The judge granted Buckman's request for a SSOSA. RP 15; CP 24-37. As part of the SSOSA sentence the sentencing judge imposed a number of restrictions and conditions on Buckman. RP 15-18; CP 27-37. Buckman was required to serve six months in the Lewis County Jail. CP 27. If Buckman did not successfully complete the SSOSA and it was revoked he was to serve 114 months minimum term in prison. CP 27. Buckman was required to be on community custody and abide by his community custody conditions including, outpatient sexual deviancy treatment, no criminal law violations, no

contact with the victim for life, register as a sex offender and all the additional requirements of community custody listed in Appendix H of his judgment and sentence. CP 27-37.

On March 26, 2012 Buckman signed the Department of Corrections (DOC) Conditions, Requirements, and Instructions form acknowledging his community custody requirements. CP 38. One of Buckman's requirements was to report as directed to DOC. CP 38. Buckman was released from the Lewis County Jail on July 11, 2012. CP 38. Buckman phoned his Community Corrections Officer (CCO) on July 12, 2012 and was instructed to report that day to his CCO. CP 38. Buckman failed to report as directed but did report on July 16, 2012. CP 38. Buckman failed to report on his next scheduled report date of August 2, 2012. CP 39. CCO Colleran attempted to contact Buckman on August 3, 2012 but was unable to reach him. CP 39. Buckman eventually reported on August 6, 2012 but failed to report again on August 11, 2012. CP 39. Buckman's CCO completed a violation report on August 15, 2012 after having no contact with Buckman since August 6, 2012. CP 39. At that time the CCO was requesting 30 days confinement as a sanction for failing to report as directed. CP 39.

On September 11, 2012 the State filed a motion for an order modifying sentence, revoking the SSOSA, and resentencing

Buckman within the standard range. CP 41-45. The State attached CCO Colleran's report from August as the basis for the motion. CP 41-45.

On October 3, 2012 the State filed a supplemental petition to revoke Buckman's SSOSA. CP 46-67. The State alleged that Buckman had contacted KBS in person on September 4, 2012 and attempted to make contact with her by third party on September 7th and 9th, 2012. CP 47, 50-58. These contacts violated the provisions of the judgment and sentence, Buckman's conditions of community custody, and the Sexual Assault Protection Order, which would also make each contact a crime. CP 47. The State alleged Buckman sold heroin to a confidential informant during the week of September 3, 2012. CP 47, 60-63. Next, the State alleged Buckman failed to properly register as a sex offender. CP 47, 65-67. Finally, the State alleged that Buckman had made admissions during phone calls in the jail and to law enforcement that he continued to use heroin. CP 47. The State again requested Buckman's SSOSA be revoked and he be sentenced within the standard range. RP 48.

A SSOSA revocation hearing was held on October 10, 2012. RP (10/10/12) 1-12. Buckman admitted to the violations. RP (10/10/12) 3-5. Buckman and his attorney asked the sentencing

judge to give Buckman a second chance and allow Buckman to continue with his SSOSA. RP (10/10/12) 7-10. The State argued Buckman's SSOSA should be revoked. RP (10/10/12) 5-7. The sentencing judge agreed with the State and revoked Buckman's SSOSA and sentenced Buckman to 114 months minimum term to life in prison. RP (10/10/12) 11; CP 69-83. Buckman timely appeals his revocation and sentence. CP 84-101.

The State will further supplement the facts as needed throughout its argument.

III. ARGUMENT

A. BUCKMAN RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT HIS SSOSA REVOCATION HEARING.

Buckman's attorney provided competent and effective legal counsel throughout the course of his representation. Buckman asserts his attorney was ineffective for failing to challenge the State's allegations during the SSOSA revocation hearing. Brief of Appellant 5, 7-9. Buckman argues his attorney was deficient for having Buckman admit the allegations and/or failing to argue that a 60 day sanction was the appropriate penalty. Brief of Appellant 7-9. Buckman also finds fault with what he argues is his attorney's lack of presenting mitigating factors in support of his request that the sentencing judge not revoke the SSOSA. Brief of Appellant 7-9.

Buckman's assertion that his attorney was ineffective is false. If, this Court were to find Buckman's attorney's performance was deficient, Buckman has not shown that he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Buckman's Attorney Was Not Ineffective During His Representation Of Buckman At The SSOSA Revocation Hearing.

To prevail on an ineffective assistance of counsel claim Buckman must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally

competent assistance.” *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney’s conduct is not deficient “where there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130.

If counsel’s performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

The sentencing court may revoke a SSOSA suspended sentence at any time during the period of community custody if the court is reasonably satisfied that the defendant has violated a condition of his or her suspended sentence or failed to make satisfactory progress in their required treatment program. RCW 9.94A670(11). The sentencing court does retain its discretion to sanction the defendant rather than revoke the SSOSA sentence if it deems the sanction to be the appropriate remedy. *State v. Partee*, 141 Wn. App. 355, 362, 170 P.3d 60 (2007). A defendant facing

revocation of his or her SSOSA has only minimal due process rights. *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). A defendant is entitled to the same due process rights afforded defendant's during the revocation of parole or probation. *Dahl*, 139 Wn.2d at 683. In a SSOSA revocation hearing the State's burden of proof is merely to reasonably satisfy the sentencing judge that a condition of the suspended sentence was violated. *State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992).

In a trial setting, if an attorney's conduct can be characterized as legitimate tactics or trial strategy the attorney's performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If an attorney's actions are trial tactics or the theory of the case the reviewing court will not find ineffective assistance of counsel. *Grier*, 171 Wn.2d at 33. A "defendant can rebut the presumption of reasonableness by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance." *Id.* (internal quotations and citations omitted).

The State had a number of allegations and documentation to support the allegations against Buckman for violating the conditions of his SSOSA suspended sentence. CP 41-67. The State alleged:

1. Buckman failed to report to Department of Corrections as directed on August 16, 2012.

2. Buckman contacted KBS in the case in person on September 4, 2012, attempted to contact KBS through a third party via text message on September 7, 2012, and attempted to contact her through a third party via telephone on September 9, 2012. Each incident constituted a violation of the Sexual Assault Protection Order.

3. Buckman sold 40 dollars' worth of heroin to a confidential informant.

4. Buckman failed to properly register as a sex offender with the Lewis County Sheriff's Office.

5. Buckman made admissions in jail calls and to law enforcement to using heroin.

CP 43, 47. The State filed supporting documentation, including the CCO Colleran's report and police reports detailing the factual allegations. CP 43-44, 50-67. The State filed a witness list for the SSOSA revocation hearing which included the necessary people to establish the violations. Supp. CP Witness List.³ The State was recommending Buckman's SSOSA be revoked and he be sentenced within the standard range. CP 48.

Buckman's attorney understood how strong the State's evidence was in regards to proving the alleged violations. It is clear from the record that Buckman's trial attorney used a tactical and strategic decision to have Buckman admit to the violations. RP (10/10/12) 2-3, 7-8. It was highly likely the trial court, after a

³ The State will be filing a Supplement Designation of Clerk's papers to include the State's Witness List for the SSOSA revocation hearing.

contested hearing, would have found all of the violations committed. See CP 41-67; Supp. CP Witness List. It is also highly unlikely after a contested hearing the sentencing court would have entertained not revoking the SSOSA. See RP (10/10/12) 10-11. Buckman's counsel recognized this and tactically decided the only possible hope of staying on the SSOSA was by accepting responsibility and admitting the violations. RP (10/10/12) 2-5, 7-10. It was a tactical decision to attempt to explain to the sentencing court that Buckman's youth and poor decisions, "young and stupid," were what led to the violations and given an appropriate chance to correct his behavior Buckman could be successful in his SSOSA sentence. RP (10/10/12) 7-10. In essence Buckman was throwing himself on the mercy of the court, hoping for a second shot. Buckman's attorney stated,

If the Court is willing to give him a second chance, the day he gets out, his mother will take him up there [Pacific Psychological] to get him signed up for the classes, get him back in touch with the Department of Corrections. So he is begging the Court for one more chance.

RP (10/10/12) 8. While Buckman's attorney may have not directly asked for Buckman to be sanctioned with time in jail that is the implied request being made by counsel. RP (10/10/12) 8.

Buckman's attorney attempted to keep the trial court from revoking Buckman's SSOSA sentence with the only option available due to the overwhelming evidence the State had available for the revocation hearing, take responsibility and beg for a second chance. Buckman received effective assistance from his attorney and his conviction should be affirmed.

3. If Buckman's Attorney Is Found To Be Deficient Buckman Has Not Met His Burden To Show That He Was Prejudiced By The Deficient Performance Of His Attorney.

The State maintains that Buckman's attorney's performance was not deficient, *arguendo*, if this Court were to find Buckman's attorney's performance deficient; Buckman has not met his burden to show he was prejudiced. Buckman must show that, but for his attorney's error in having him admit to the violations, the court would not have revoked the SSOSA. *See Horton*, 116 Wn. App. at 921-22.

Buckman has not met his burden of showing that absent his attorney's errors it is highly likely that the court would have allowed Buckman a second chance and not revoked the SSOSA. The superior court has the discretion to either impose confinement or revoke a SSOSA sentence if there is a violation of the sentence.

Partee, 141 Wn. App. at 362. When making his ruling the judge stated,

[T]he young and stupid argument does not work with me on this one, so I am revoking the SSOSA. And I'm doing it because I can't imagine any other wake-up call than facing 114 months to life imprisonment. And if that wasn't enough to get you to comply, nothing will. And if I were to turn around and say, oh, after you have done not only nothing, but positively violated a whole series of prohibitions, several of which would be new crimes if they were prosecuted, anyone would be put back on this program...

RP (1/10/12) 10-11. The sentencing court would have revoked Buckman's SOSSA regardless of what Buckman's attorney argued. Buckman has not met his burden to show prejudice and this Court should affirm his conviction.

V. CONCLUSION

This Court should find Buckman's attorney was not ineffective and affirm the revocation of his SSOSA and the standard range sentence ordered by the sentencing court.

RESPECTFULLY submitted this 25th day of June, 2013.

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LEWIS COUNTY PROSECUTOR

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