Supreme Court No. 94610-8
COA No. 34371-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE OTTO RUNGE,

Petitioner.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Dwayne Runge, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Runge seeks review of the Court's Unpublished Opinion in *State v. Runge*, No. 34371-5-III, filed May 2, 2017. No Motion for Reconsideration has been filed in the Court of Appeals. A copy of the Court's Opinion is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

1. Whether the petitioner/appellant was denied effective assistance of counsel when his attorney did not move for a sentence under the Drug Offender Sentencing Act (DOSA)? RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

On October 13, 2016, Runge filed a brief alleging that the trial court had erred in regards to the above-indicated issue. The brief set out facts and law relevant to this petition and are hereby incorporated herein by reference.

E. ARGUMENT

It is submitted that the issue raised by this Petition should be

addressed by this Court because the decision of the Court of Appeals raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, and involved and issue of substantial public interest, as set forth in RAP 13.4(b).

1. THE COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT MR. RUNGE WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Runge argues on appeal that he received ineffective assistance of counsel due—*inter alia*—to trial counsel's failure to request DOSA at sentencing.

The Court of Appeals rejected Runge's argument, finding that "counsel's failure to request a DOSA was reasonably strategic." Slip op. at 3. In its unpublished opinion, Division 3 found:

> [d]efense counsel likely made the accurate assumption that the sentencing court would not be inclined to impose a DOSA. Accordingly, it was more effective to seek a low end sentence.
>
> Slip op. at 3.

The Court of Appeals also found that Runge could not show prejudice. Both of these conclusions by Division 3 deviate from the standard for ineffective assistance contained in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

i. Ineffective assistance of counsel

To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. ***State v. Stenson***, 132 Wn.2d 668, 705–06, 740 P.2d 1239 (1997). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. ***Stenson***, 132 Wn.2d at 705. Prejudice occurs when, but for counsel's deficient performance, the outcome would have differed. ***In re Personal Restraint of Pirtle***, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). In ***Strickland***, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under ***Strickland***, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

State v. Thomas, 109 Wash.2d 222, 225–26, 743 P.2d 816 (1987) (quoting ***Strickland***, 466 U.S. at 687, 104 S.Ct. 2052); see also ***State v.***

Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001).

Under this standard, performance is deficient if it falls "below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688, 104 S.Ct. 2052. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation.

To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." ***State v. Kyllo***, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." ***Kyllo***, 166 Wn.2d at 863. Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." ***State v. Reichenbach***, 153 Wash.2d 126, 130, 101 P.3d 80 (2004); ***State v. Aho***, 137 Wash.2d 736, 745–46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." ***Roe v. Flores–Ortega***, 528 U.S. 470, 481,

120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Nothing in the record affirmatively indicates that Mr. Runge was not eligible for a DOSA. RCW 9.94A.660. He has no violent offense convictions or sex offense convictions and the record does not indicate that Runge was subject to deportation. Further, his standard sentencing range for the charges was greater than one year. The court inquired about DOSA, and Runge stated that he completed DOSA in 2001. RP at 304.

ii. Reasonableness of defense counsel's failure to request DOSA

Runge's attorney acted unreasonably when he failed to recommend a DOSA. ***Stenson***, 132 Wn.2d at 705. Here, Division 3 found that it was a reasonable, strategic choice not to seek DOSA and instead found it was "more effective" to seek a low end sentence. Slip op. at 3. Runge faced a standard range of sentence of 43 to 57 months based on an offender score of 9+ points. His counsel argued for 43 months and the State argued for 48 months. RP at 303. The sentencing court imposed a sentence of 45 months.

A DOSA sentence is an alternate form of standard range sentence because it "is split evenly between incarceration and community custody based upon the midpoint of the total standard range." ***State v. Williams***, 112 Wash.App. 171, 176, 48 P.3d 354 (2002); RCW 9.94A.662. Therefore, a DOSA sentence consisting of 25 months in DOC and 25

months in community custody is significantly more appealing than the requested 43 months in the DOC. Nothing prevented defense counsel from initially pursuing DOSA, and then if denied, requesting a low end sentence, and in fact it would be a more strategic to demonstrate to the court that he was eligible for DOSA in order to further strengthen the argument for a low end sentence. In other words, contrary to the Court of Appeals' assessment, it was not an "either/or" proposition. Not only could counsel request both forms of sentencing, but it would have behooved Runge for the court to consider both DOSA and a standard range sentence.

Counsel's failure to argue for DOSA appears to be based not on a legal prohibition under RCW 9.94A.662, but instead on a change in policy in the prosecutor's office. When asked why he did not pursue DOSA, defense counsel stated: "Originally we did, your Honor, and then things changed when the prosecutor's policy . . . . ." RP at 303. After discussion, the deputy prosecutor told the court:

> Your Honor, the policy as of the 14th of January of this year indicates that if a defendant, due to any number of issues such as---well, mainly evidentiary issues or they only have one particular file, my office has authorized me to offer—either we could recommend a high end sentence or we would jointly recommend a prison DOSA. The policy also indicates that if a defendant has more than one file, then now I am not able to offer a prison-based DOSA.
>
> RP at 312.

iii. Runge was prejudiced by counsel's failure to argue for DOSA

Runge's counsel, of course, was not bound by a "policy" of the prosecutor's office to not recommend DOSA, and in fact the court seemed troubled by the fact that Runge's co-defendant, with "a worse record than Mr. Runge," received prison-based DOSA. RP at 312. The court seemed inclined to grant DOSA. Runge's counsel was not bound by agreement or policy and was free to argue for DOSA, but inexplicably did not. Runge's co-defendant, with a worse record—received DOSA.

Runge was *a priori* prejudiced by counsel's failure to argue for DOSA. The Court of Appeals stated that there is no indication in the record the court would have opted for DOSA if counsel had "prompted the inquiry." Slip op. at 4. To the contrary, the record shows that the sentencing court was not only inclined to grant prison-based DOSA, but would have done so if requested, as was the case with Runge's co-defendant. RP at 313-14.

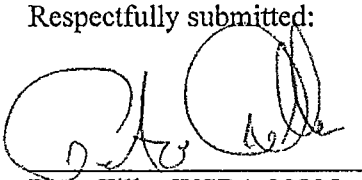
The Court of Appeals' affirmance of Runge's convictions was based on an unsupportable assessment of *Strickland* and merits review by this Court.

F. CONCLUSION

This Court should accept review for the reasons indicated in Part E and reverse and remand consistent with the arguments presented herein.

DATED this 31st day of May, 2017.

Respectfully submitted:



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CERTIFICATE OF SERVICE

The undersigned certifies that on May 31, 2017, that this Petition for Review was sent by the JIS link to Ms. Renee Townsley, Clerk of the Court, Court of Appeals, Division III, 500 N Cedar St, Spokane, WA 99260, and copies were emailed to Spokane Prosecutor, Brian O'Brien nd a copy was mailed by U.S. mail, postage prepaid, to the Appellant at the following:

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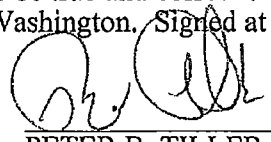
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 31, 2017.



PETER B. TILLER

FILED
MAY 2, 2017
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. DWAYNE OTTO RUNGE also known as DWAYNE O. RUNGE, Appellant.	)	No. 34371-5-III UNPUBLISHED OPINION

PENNELL, J. — Dwayne Runge appeals his conviction and sentence for one count of second degree possession of stolen property and two counts of second degree identity theft. We affirm.

FACTS

The facts of this case are known to the parties and need not be restated here. Mr. Runge was convicted of one count of second degree possession of stolen property and

two counts of second degree identity theft. At sentencing, after defense counsel requested a low end standard range sentence, the court inquired into the applicability and desirability of a drug offender sentencing alternative (DOSA). The court ultimately imposed a 45-month sentence followed by 12 months of community custody for the two counts of identity theft. Mr. Runge appeals.

ANALYSIS

Ineffective assistance of counsel

Mr. Runge contends he received ineffective assistance of counsel when defense counsel (1) failed to request a DOSA, and (2) failed to argue his offenses constituted the same criminal conduct. To demonstrate ineffective assistance of counsel, Mr. Runge must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either prong, this court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To show prejudice, Mr. Runge must demonstrate there is a probability that, but for counsel's deficient performance, "the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. There is a strong

presumption of effective assistance, and Mr. Runge bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

DOSA

Mr. Runge first argues defense counsel was ineffective for failing to request a DOSA at sentencing. A DOSA is intended to provide treatment to offenders judged likely to benefit from treatment. *State v. Grayson*, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005). A trial court has discretion to grant a DOSA if the offender meets all of the statutory criteria. RCW 9.94A.660. Generally, the court's decision whether to grant a DOSA is not reviewable. *Grayson*, 154 Wn.2d at 338. But an offender may challenge the procedure under which his sentence was imposed. *Id.* Here, Mr. Runge is not challenging the court's failure to impose a DOSA but is instead arguing his counsel was ineffective for not requesting that the court consider a DOSA.

Mr. Runge's ineffective assistance claim fails because defense counsel's failure to request a DOSA was reasonably strategic. Defense counsel likely made the accurate assumption that the sentencing court would not be inclined to impose a DOSA. Accordingly, it was more effective to seek a low end sentence. But in any event, Mr. Runge cannot show prejudice. A trial court has the ability to move for a DOSA

sua sponte. In apparent recognition of this ability, the trial court questioned defense counsel and Mr. Runge about the applicability of and a desire for a DOSA. RCW 9.94A.660(2). After considering whether a DOSA was appropriate for Mr. Runge, the court opted for a standard range sentence. There is no indication in the record that the court would have decided differently had defense counsel prompted the inquiry.

Offender score and same criminal conduct

Mr. Runge next claims the second degree possession of stolen property and identity theft offenses (counts I and II and counts I and III) encompassed the same criminal conduct: using Alexandra Rich's stolen debit card. Mr. Runge argues in the alternative that defense counsel was ineffective for failing to raise the same criminal conduct issue.

As it relates to Mr. Runge's principal argument, he argues for the first time on appeal that his offender score was miscalculated because the two offenses encompassed the same criminal conduct. He has waived this argument by failing to raise it in the trial court. *State v. Nitsch*, 100 Wn. App. 512, 520-23, 997 P.2d 1000 (2000) (holding the defendant's "failure to identify a factual dispute for the court's resolution and . . . failure to request an exercise of the court's discretion" waived the challenge to his offender score); *State v. Jackson*, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (defendant waived

the same criminal conduct issue on appeal by failing to raise it in the trial court); *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002) (waiver can be found where the alleged error involves a matter of trial court discretion).

Recognizing the possibility of waiver, Mr. Runge alternatively argues his defense counsel was ineffective for failing to argue the two offenses encompassed the same criminal conduct. Regardless of whether defense counsel's conduct was deficient, Mr. Runge does not establish prejudice. Even if counts I and II and counts I and III are considered the same criminal conduct, the standard sentencing range is still 43-57 months.[1] The trial court imposed a sentence near the low end of this range. There is no indication the sentence would have been lower had the trial court utilized a different offender score. The salient facts about Mr. Runge's current offense and criminal history were not subject to change. The sentencing judge indicated she imposed sentences near the low end of the standard range because she wanted Mr. Runge to receive a full 12 months of community custody. Any error in Mr. Runge's offender score was not prejudicial.

[1] Without scoring his current offenses, Mr. Runge's offender score was an 8. The current offenses, even if considered the same criminal conduct, would have increased Mr. Runge's offender score to a 9. The trial court classified Mr. Runge's offender score as 9+. However, the standard range sentence is the same at a 9 as a 9+.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Perjured testimony

Mr. Runge first alleges Detective Justin Hobbs committed perjury by falsely testifying he had previously met Mr. Runge or had firsthand knowledge of Mr. Runge. Mr. Runge misrepresents Detective Hobbs's testimony. Detective Hobbs testified he had no personal experience with Mr. Runge before this investigation and learned the man on the videos was Mr. Runge during the course of the investigation. We reject this concern as unpersuasive.

Ineffective assistance of counsel

Mr. Runge next claims he received ineffective assistance of counsel when defense counsel (1) failed to object to Detective Hobbs's perjured testimony, (2) failed to move to suppress evidence, and (3) failed to review discovery documents. As discussed above, there was no issue with Detective Hobbs's testimony. As to Mr. Runge's remaining two allegations, he does not identify which evidence counsel should have moved to suppress and the discovery documents he discusses are not in the record on appeal. If the evidence or facts are not in the record, this court does not consider the matter on a direct appeal. *McFarland*, 127 Wn.2d at 335. The appropriate means of raising such matters is through the filing of a personal restraint petition. *Id.*

CONCLUSION

We affirm the judgment and sentence of the trial court.

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.

Pennell, J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

THE TILLER LAW FIRM

May 31, 2017 - 4:37 PM

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