629263 629263

N0. 62926-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL RYAN,

Appellant.

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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

2009 DEC 14 PM 4:53

TABLE OF CONTENTS

A. ARGUMENT 1

1. DEFENSE COUNSEL'S FAILURE TO UNDERSTAND AND EXPLAIN TO THE COURT ITS AUTHORITY TO IMPOSE A LESSER SENTENCE DENIED RYAN EFFECTIVE ASSISTANCE OF COUNSEL 1

2. BECAUSE OF THE SIGNIFICANT AND PENDING CHANGES IN THE LAW WHILE THIS CASE HAS BEEN ON DIRECT REVIEW, AND THE UNDERLYING MANIFEST ERROR, RYAN'S CONSTITUTIONAL CHALLENGES ARE PROPERLY BEFORE THIS COURT3

B. CONCLUSION 6

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005) 4

State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008) 4

State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006) 4

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 117 (2009) 1

State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005) 4

Washington Court of Appeals Decisions

State v. Aguirre, COA No. 36186-8-II, rev. granted, 165 Wash.2d 1036 (2009) 4

State v. Kelley, 146 Wn.App. 370, 189 P.3d 853 (2008), rev. granted, 165 Wash.2d 1027 (2009) 4

State v. McGill, 112 Wn.App. 95, 47 P.3d 173 (2002).....1, 2

Court Rules

RAP 2.5 5

A. ARGUMENT.

1. DEFENSE COUNSEL'S FAILURE TO UNDERSTAND AND EXPLAIN TO THE COURT ITS AUTHORITY TO IMPOSE A LESSER SENTENCE DENIED RYAN EFFECTIVE ASSISTANCE OF COUNSEL

When there is relevant case law pertinent to an issue in a case, counsel must make reasonable efforts to know of and abide by the requirements of this case law. State v. Kyllo, 166 Wn.2d 856, 868, 215 P.3d 117 (2009). Here, with proper research, counsel should have discovered that Ryan was eligible for a sentence below the standard range. Instead, counsel told the court it had no authority to depart from the standard range.

But contrary to Ryan's counsel's explanation of the law, the court had authority to impose an exceptional sentence if there was an applicable mitigating factor. See State v. McGill, 112 Wn.App. 95, 98, 47 P.3d 173 (2002) (ineffective assistance for attorney to neglect notifying sentencing court of availability of exceptional sentence below standard range); Ryan's Opening Brief, page 28-31 (potential mitigating factors).

Counsel's "strategy" was illegitimate and his representation fell below the standard of competence when he told the court that

it's "hands were tied" and it could not impose a lesser sentence. 1/23/09RP 11.

Furthermore, the error may reasonably have affected the outcome of the sentencing hearing. There is no record that the court considered and rejected an exceptional sentence even though Ryan's attorney argued against such a sentence. The court in McGill ruled that because the trial court cannot make an informed decision without being informed of the parameters of its decision-making authority, it constitutes ineffective assistance when counsel does not explain to the sentencing court that there is a valid legal basis for an exceptional sentence below the standard range. 112 Wn.App. at 102.

The court had previously imposed a far-lower sentence of 128 months based on its understanding that the offenses merged for sentencing, but in January 2009, it ordered Ryan serve 447 months, a middle of the range sentence. CP 31, 87. The prosecution claims that the trial court only gave Ryan a lesser sentence because it believed it had no choice, but the court's understanding of the case law was predicated on its determination of the incidental nature of the offenses, and it demonstrates a

willingness to impose a sentence less than that sought by the prosecution. CP 38.

Because defense counsel pointedly and incorrectly told the court that it had no choice but to impose a standard range sentence, and did not clearly direct the court to available mitigating factors, Ryan's attorney's performance was deficient and there is a reasonable probability of a different sentencing outcome if Ryan is represented by competent counsel.

2. BECAUSE OF THE SIGNIFICANT AND PENDING CHANGES IN THE LAW WHILE THIS CASE HAS BEEN ON DIRECT REVIEW, AND THE UNDERLYING MANIFEST ERROR, RYAN'S CONSTITUTIONAL CHALLENGES ARE PROPERLY BEFORE THIS COURT

Samuel Ryan's convictions were premised on charges that arose in 2002, but his case remains on direct review. He has twice filed appeals from the sentence imposed, and he has twice been granted relief on appeal from this Court, the controlling case law has changed, or is presently unsettled. He is entitled to receive the benefit of cases that are decided while his case remains on direct review.

In its claim that Ryan may not litigate the constitutionality of his sentence, the prosecutor completely neglects to mention cases

presently pending in the Supreme Court, such as State v. Kelley, 146 Wn.App. 370, 189 P.3d 853 (2008), rev. granted, 165 Wash.2d 1027 (2009), and State v. Aguirre, COA No. 36186-8-II, rev. granted, 165 Wash.2d 1036 (2009), that will address the double jeopardy implicates of offenses enhanced by firearm or deadly weapon possession both in the offense of conviction and as a so-called sentencing enhancement. Ryan's Opening Brief, page 21.

Ryan filed his first appeal in 2003, but the prosecution claims his double jeopardy analysis is controlled by an array of cases decided later, such as State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005); and State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006). The prosecution also misleadingly neglects the double jeopardy analysis in State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008), which rejected the prosecution's efforts to reverse the Court's recent analysis in State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005), involving the double jeopardy analysis appropriate for robbery and assault convictions when separate victims are involved. Kier rejected many of the "separate harm" arguments proffered by the prosecution that are similar to those it offers here, surmising that the listing of different victims also constitutes a

separate harm and mandates separate punishments for purposes of double jeopardy. 164 Wn.2d at 813-14.

In any event, the appellate court has discretion to decide any issues not raised in an earlier appeal. RAP 2.5(c)(1). In the case at bar, after remand by this Court following Ryan's most recent appeal, the trial court imposed a sentence based on an offender score calculation and predicated on separately punishing each offense for the first time in the course of this case. The trial court had previously imposed a "three strike" life sentence that did not rest on imposition of punishment for all offenses, and had previously merged Ryan's underlying offenses, thus this appeal is the first opportunity to challenge the trial court's recent imposition of multiple punishments for what Ryan contends violates his right to be free from double jeopardy.

The prosecution claims Ryan's personal restraint petition was dismissed as if that dismissal demonstrated an indication this Court found his claims frivolous. However, this Court's computer database lists Ryan's personal restraint petition, No. 62905-1-I, as dismissed for failure to file a statement of finances.

Ryan is not precluded from litigating issues of constitutional error when the state of the law is unsettled, has changed through

the course of the appeal, and the issues reflect the trial court's determinations that are part and parcel of the most recent appeal based on the recent re-sentencing for offenses for which sentences were not previously imposed.

B. CONCLUSION.

For the foregoing reasons as well as all of the grounds argued in Appellant's Opening Brief, Mr. Ryan respectfully requests this Court reverse his sentence and remand for further proceedings.

DATED this 14th day of December 2009.

Respectfully submitted,

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 62926-3-I
v.	)	
	)	
SAMUEL RYAN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DENNIS MCCURDY, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] SAMUEL RYAN 860930 MCNEIL ISLAND CORRECTIONS CENTER PO BOX 88100 STEILACOOM, WA 98388-1000	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

2009 DEC 14 PM 4:53
STATE OF WASHINGTON

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF DECEMBER, 2009.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710