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KING County Prosecutor
Appellate Unit

NO. 64218-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY LANDON HOOD,

Appellant.

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

The Honorable Michael Hayden, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
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COURT OF APPEALS
STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to recognize it had discretion to impose a mitigated exceptional sentence.

2. Appellant was denied his right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

Appellant was convicted of a Class C felony and therefore the statutory maximum sentence was 60 months. Appellant's standard range was 43 to 57 months of incarceration and 36 to 48 months of community custody. At sentencing, appellant's trial counsel stated he would ask for a mitigated exceptional sentence if there were any basis for one, but there was not, so he instead requested a 43-month term of incarceration. Similarly, the sentencing court stated it understood the law to provide no discretion to impose anything but a standard range sentence, even though it believed a low-end standard range was excessive under the circumstances.

Recent case law, however, holds that whenever the combined standard range terms of incarceration and community custody exceed the statutory maximum for the offense, there is, as a matter of law, a basis to impose a mitigated exceptional sentence. As such:

1. did the sentencing court abuse its discretion by failing to recognize and exercise its discretion to consider imposing a mitigated

exceptional sentence?

2. did appellant's trial counsel provide ineffective assistance by failing to properly advise the sentencing court it had discretion to impose a mitigated exceptional sentence?

3. is remand for resentencing required because the record shows the sentencing court would have imposed a mitigated exceptional sentence if it knew it had the authority to do so?

B. STATEMENT OF THE CASE

The King County Prosecutor charged appellant Jeffrey Landon Hood with failure to register as a sex offender. CP 14-15; RCW 9A.44.130. Hood waived his right to a jury trial and agreed to a bench trial on stipulated facts. CP 12-13 1RP-4RP.¹ The court found Hood guilty. CP 47-50; 4RP 12-14.

The court initially sentenced Hood to 43 months of incarceration and 36-48 months of community custody. CP 23-33; 4RP 24. The judgment and sentence was later amended. The court reduced the term of community custody to 17 months and interlineated the following language; "The combined total of prison time actually served and community

¹ There are five volumes of verbatim report of proceedings referenced as follows: 1RP - 8/10/09; 2RP - 8/11/09; 3RP - 8/24/09; 4RP - 8/25/09 (a.m.); and 5RP - 8/25/09 (p.m.). It should be noted that 1RP, 2RP and 4RP are bound together, but separately paginated.

custody may not exceed the statutory maximum of 60 months." CP 36-46.

C. ARGUMENTS

1. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO RECOGNIZE IT HAD DISCRETION TO IMPOSE A MITIGATED EXCEPTIONAL SENTENCE.

The trial court failed to recognize it had discretion to impose a mitigated exceptional sentence. The record reveals the trial court would have done so had it realized it had such authority. Because the facts would have supported a mitigated exceptional sentence, the court abused its sentencing discretion as a matter of law. Remand for resentencing is therefore required.

A trial court abuses its discretion when its decision is "manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). All defendants have the right to the trial court's examination of available sentence alternatives. In re Restraint of Mulholland, 161 Wn.2d 322, 334, 166 P.3d 677 (2007). A trial court's failure to exercise its discretion or to understand the breadth of its discretion is an abuse of discretion. See State v. Elliott, 121 Wn. App. 404, 408, 88 P.3d 435 (2004) (refusal to hear expert testimony was a failure to exercise discretion); State v. Fleiger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (failure to determine whether defendant was a security risk before ordering "shock box" was abuse of

discretion), review denied, 137 Wn.2d 1003 (1999); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (refusal to exercise discretion in imposing an exceptional sentence below the range is reviewable error), review denied, 136 Wn.2d 1002 (1998).

In Mulholland, the trial court failed to recognize it had discretion to impose concurrent sentences for several first degree assault convictions as a mitigated exceptional sentence, despite a statutory presumption of consecutive sentences. In affirming the Court of Appeals remand for resentencing, the Supreme Court noted that although the record did not indicate the trial court would necessarily have imposed a mitigated exceptional sentence if it had known it had the authority, there was some indication it might, and remand was appropriate so the court could at least consider the available options. 162 Wn.2d at 333-34.

Here, because the combined standard range terms of incarceration and community custody exceeded the statutory maximum allowable term of 60 months, the trial court had both factual and legal authority to impose a mitigated exceptional sentence. State v. Davis, 146 Wn. App. 714, 720-22, 192 P.3d 29 (2008) (relevant facts identical to those here, i.e., standard range of 43-57 months of incarceration and 36-48 months of community custody, and statutory maximum term of 60 months), review denied, 166 Wn.2d 1033, 217 P.3d 782 (2009). As in Mulholland, Hood's sentencing

court failed to recognize it had the authority recognized in *Davis*, because it commented erroneously at sentencing that the lowest term of incarceration it could impose was 43 months. 4RP 21. And even more so than in *Mulholland*, the record indicates the sentencing court would have exercised this authority and imposed a sentence below the standard range, just as the court did in *Davis*. 146 Wn. App. at 718-19 (36 months of confinement and 24 months of community custody); *see* 4RP 15-16 (court states its erroneous understanding that the State would seek a sentence of 60 days, and expresses surprise when it learns the penalties have significantly increased); 4RP 22 (court states "in a lot of instances forty-three months for failure to register could be appropriate. In your case, it's probably not."). Under *Mulholland* and *Davis*, remand for resentencing is appropriate.

2. HOOD WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

To the extent Hood's trial counsel invited the trial court's error by stating there was no basis for a mitigated exceptional sentence, then Hood was denied his constitutional right to effective assistance of counsel. As such, reversal and remand for resentencing is appropriate.

The state and federal constitutions guarantee the accused reasonably effective representation by counsel. U.S. Const. amend. 6;

Const. Art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Deficient performance by counsel that prejudices the accused fails to secure this constitutional right and thus denies the accused a fair proceeding. See Strickland, 466 U.S. at 687.

The first prong of the Strickland test requires a showing that counsel's performance "fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 226. The defendant must overcome the presumption that there might be a sound strategy for counsel's actions. Strickland, 466 U.S. at 689. Only legitimate strategy or tactics, however, constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Hood's counsel failed to properly advise the sentencing court that it had discretion under Davis to impose a mitigated exceptional sentence. To the contrary, counsel affirmatively misadvised the court by stating "there's no basis for one." 4RP 17.

There is no legitimate strategic basis for not advising the court of its authority under Davis to order a mitigated exceptional sentence. Moreover, the record reveals that but for the erroneous understanding of the law by defense counsel and the court, a lesser sentence would have been imposed. See 4RP 22 (court indicates it thinks 43 months is too long

under the circumstances). Therefore, Hood was prejudiced by his counsel's deficient performance.

This Court should reverse and remand for resentencing.

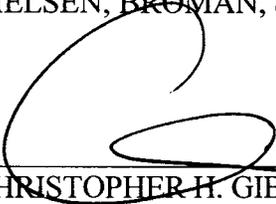
D. CONCLUSION

For the reasons presented, remand for resentencing is required.

DATED this 17th day of February, 2010.

Respectfully submitted,

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Respondent,)	
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JEFFREY HOOD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF FEBRUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JEFFREY HOOD
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WASHINGTON CORRECTIONS CENTER
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SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF FEBRUARY, 2010.

x *Patrick Mayovsky*

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