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COURT OF APPEALS OF THE STATE OF WASHINGTON
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NO. 64218-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY HOOD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES

1. A trial court must impose a sentence within the standard range unless it finds substantial and compelling reasons to depart from that range. A trial court's decision to impose a standard range sentence is reviewable where the court has refused to exercise any discretion. A court's erroneous belief that it lacks the statutory authority to consider an exceptional sentence is a refusal to exercise discretion. A statute may act retroactively if the legislature so intended and where no constitutional prohibition prevents it. After Hood committed his crime, but before he was sentenced, the legislature enacted a retroactive amendment to RCW 9.94A.701 that mandated the reduction of the period of community custody rather than the term of actual confinement when a reduction of one was required to avoid exceeding the statutory maximum. Has Hood failed to show that the court abused its discretion by not imposing an exceptional sentence downward where there was no basis in law to do so?

2. To prevail on a claim of ineffective assistance based on counsel misinforming the court regarding whether there was a legal basis under the case law for an exceptional sentence downward, a defendant must establish that counsel's representation to the court

was incorrect and that had counsel accurately informed the court and requested the exceptional sentence, the request would have been granted. Here, the retroactive amendments to the applicable sentencing statutes superseded the case law that had previously held that avoiding the imposition of sentence that exceeded the statutory maximum was a substantial and compelling reason for a downward departure from the standard range. Counsel cannot be found ineffective for not asking the court to impose an invalid sentence. Has Hood failed to establish that his counsel's performance was deficient and that it prejudiced him?

B. STATEMENT OF THE CASE

The State charged Jeffrey Hood by Amended Information with Failure to Register as a Sex Offender during the time between January 9 and April 12, 2009—a class C felony punishable by up to 60 months in prison and a \$10,000 fine. RCW 9A.44.130(11); CP 14-15; 1RP 12.¹ On August 25, 2009, Hood chose to waive his right to a jury trial and proceeded with a bench trial on stipulated

¹ The Verbatim Report of Proceedings contains five volumes, with volumes one, two and four consolidated into one large bound volume. The State has adopted the following reference system: 1RP (08/10/09), 2RP (08/11/09), 3RP (08/24/09), 4RP (08/25/09) (a.m.), and 5RP (08/25/09) (p.m.).

facts. CP 23-33, 47-50; 2RP 9, 53; 4RP 1-2.² The court found Hood guilty as charged and immediately moved forward with sentencing. CP 22-33, 47-50; 4RP 14.

Hood's counsel told the court that he wished that there was a basis for him to request an exceptional sentence downward, but he did not know of one. 4RP 17. Instead, counsel requested that the sentence on the instant case be served concurrently with the jail time Hood was serving for probation violations under a separate cause number. 4RP 17. The court remarked that it did not have much discretion given Hood's standard range of 43 to 57 months of confinement and that 43 months in prison was "probably not" appropriate in Hood's case. 4RP 21-22. The court then imposed the 43 months of confinement followed by 36 months of community custody, to be served concurrently with the jail time imposed on the other cause number. CP 26; 4RP 24.

On September 15, 2009, the court amended the judgment and sentence to clarify that the combination of incarceration time and the community custody term could not exceed the statutory maximum of 60 months. CP 34-35.

² Hood signed the waiver of jury form on August 11, 2009, but the trial was continued to August 25th for argument and the court's verdict. CP 13; 2RP 56-58.

C. **ARGUMENT**

1. **THE TRIAL COURT DID NOT HAVE THE DISCRETION TO IMPOSE AN EXCEPTIONAL SENTENCE DOWNWARD SOLELY BECAUSE THE IMPOSITION OF THE MINIMUM TERM OF CONFINEMENT AND THE MINIMUM TERM OF COMMUNITY CUSTODY WOULD HAVE EXCEEDED THE STATUTORY MAXIMUM.**

Hood asserts that the trial court abused its discretion by “failing to recognize” that it had the authority to impose an exceptional sentence downward to ensure that the combination of the term of confinement and the term of community custody did not exceed the statutory maximum. App. Br. at 3. This argument should be rejected because the version of RCW 9.94A.701 in effect at the time of Hood’s sentencing mandated that any reduction to accommodate the statutory maximum was to the term of community custody rather than the term of confinement.

Generally, a trial court must impose a sentence within the standard range set out by the legislature. RCW 9.94A.505(2)(a)(i). A court’s decision to impose a standard range sentence is reviewable only in circumstances where the court has refused to exercise any discretion or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard

range. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A trial court is deemed to have refused to exercise its discretion to consider an exceptional sentence when it erroneously believes that it lacks the authority to do so. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

Hood relies on State v. Davis, 146 Wn. App. 714, 192 P.3d 29 (2008), and In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007), to support his argument that the trial court abused its discretion by failing to recognize that it was within the court's discretion to impose an exceptional sentence downward. The Davis and Mulholland courts held that where, as here, a defendant's combined term of confinement and community custody exceeded the statutory maximum, a court could find that substantial and compelling reason to support a downward departure from the standard range. However, this holding was superseded by legislative amendments that took effect August 1, 2009.

At the time Hood committed his offense, former RCW 9.94A.715(1) stated that "the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under

RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer.”

Subsection four authorized the Department of Correction (“DOC”) to determine when an offender would be discharged from community custody. RCW 9.94A.715(4). When the term of community custody was imposed as a statutory range, DOC was directed to release the offender on a date that it established was within the statutory range or at the end of the period of earned early release. Id. When the imposition of community custody extended the sentence beyond the statutory maximum, DOC was required to release the offender on or before the date that the offender would have served the statutory maximum. In re Pers. Restraint of Brooks, 166 Wn.2d 664, 672, 211 P.3d 1023 (2009); RCW 9.94A.505(5).

After Hood committed his crime, but before he was sentenced, the Legislature enacted amendments to several sentencing statutes and repealed others. These changes took effect August 1, 2009. Laws of 2009, ch. 28, § 43; Laws of 2009, ch. 375, § 20. RCW 9.94A.715 was repealed in its entirety, and RCW 9.94A.701, which governs the imposition and duration of

community custody, was amended to add a new subsection. Laws of 2009, ch. 28, § 41; Laws of 2009, ch. 375, § 5.

RCW 9.94A.701(8) currently provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Section 20 of the Laws of 2009, ch. 375 also explicitly states the legislature's intent that the amendments be retroactive:

This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after the effective date of this section.

Although generally a defendant must be sentenced in accordance with the law in effect at the time that the crime occurred, a defendant may be sentenced in accordance with an amended version of the applicable statute if the statute is retroactive. See RCW 9.94A.345; In re Pers. Restraint of Stewart, 115 Wn. App. 319, 332, 75 P.3d 521 (2003).

A statutory amendment is presumed to be prospective in application. Stewart, 115 Wn. App. 319 at 332. An amendment may apply retroactively if the legislature so intended and where no

constitutional prohibition applies. Hale v. Wellpinit School Dist. No. 49, 165 Wn.2d 494, 508, 198 P.3d 1021 (2009); Stewart, 115 Wn. App. at 332-33. Legislative intent for retroactivity must be clearly found within the statute's language. Landgraf v. USI Film Prods., 511 U.S. 244, 268-69, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); State v. Douty, 92 Wn.2d 930, 935, 603 P.2d 373 (1979).

Here, the legislature expressly stated its intent that the 2009 amendments apply retroactively.³ As such, the new subsection added to RCW 9.94A.701, which requires the trial court to reduce the period of community custody, rather than the term of confinement, to avoid exceeding the statutory maximum governed the terms of Hood's sentence. The parties and the court acknowledged this fact when the court, citing In re Pers. Restraint of Brooks, 166 Wn.2d 664 and State v. Sloan, 121 Wn. App. 220, 87 P.3d 1214 (2004), later amended the Judgment and Sentence to clarify that the combination of incarceration time and the community

³ The retroactivity of the amendments was also implicitly recognized by the Washington State Supreme Court in In re Pers. Restraint of Brooks, where the defendant claimed that his sentence exceeded the statutory maximum because he was sentenced to actual confinement for the statutory maximum plus to 18 to 36 months of community custody or the period of earned early release awarded. 166 Wn.2d at 666-67, 672 n.4 ("Having reviewed the upcoming amendments, it appears the legislature has addressed the very questions we are asked to answer in this case... Despite the upcoming changes, we address the issues raised here in order to resolve the conflict between the Courts of Appeal and to give guidance to trial courts as they await the amendment to take effect.").

custody time could not exceed the statutory maximum of 60 months. CP 34-35. Hood's period of community custody was thereby reduced from 36 months to 17 months to conform to the statutory maximum (60-month statutory maximum minus 43 months of actual confinement). CP 26, 34-35.

Because the 2009 statutory amendments that took effect subsequent to Hood's commission of his crime were retroactive, the court at the time of sentencing in this case no longer had the discretion under Davis⁴ and Mulholland⁵ to impose an exceptional sentence downward and did not abuse its discretion when it imposed a standard range sentence. Therefore, Hood's sentence should be affirmed.

2. HOOD CANNOT ESTABLISH THAT HIS COUNSEL WAS INEFFECTIVE FOR CORRECTLY INFORMING THE COURT THAT THERE WAS NO BASIS FOR AN EXCEPTIONAL SENTENCE.

Hood asserts that his counsel was ineffective because counsel misinformed the court that there was no legal basis to impose an exceptional sentence downward and that, but for

⁴ 146 Wn. App. 714.

⁵ 161 Wn.2d 322.

counsel's failure to correctly state the law, he would have otherwise received an exceptional sentence, thereby decreasing his time in prison. This argument is without merit because counsel cannot be ineffective for representing the law accurately to the court.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: 1) that trial counsel's representation was deficient; and 2) that counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong of the test defeats the claim. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

Competency of counsel is evaluated from the trial counsel's perspective at the time of the alleged error and in light of the entire record below. McFarland, 127 Wn.2d at 335. Counsel's performance is deficient only when it falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88. A reviewing court engages in a strong presumption that counsel's performance was effective and within the wide range of reasonable professional assistance. McFarland, 127 Wn.2d at 335.

The second prong of the Strickland test requires the defendant to prove that he was so prejudiced by defense counsel's deficient performance that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's actions. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). "Even deficient performance by counsel 'does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 691-93). "A defendant must *affirmatively prove prejudice*, not simply show that 'the errors had some conceivable effect on the outcome.'" Strickland, 466 U.S. at 693 (emphasis in original).

Here, to prevail on his claim, Hood must establish that, but for counsel's failure to request an exceptional sentence downward based on Hood's standard range sentence exceeding the statutory maximum, the court would have granted his motion.

As discussed above, there was no substantial and compelling reason to support a downward departure from the standard range in light of the retroactive statutory amendment to RCW 9.94A.701, which specifically states that when the standard range term of confinement in combination with the term of

community custody exceeds the statutory maximum for the crime, the term of community custody shall be reduced. See Laws of 2009, ch. 375, § 5.

Because Hood fails to show that counsel's performance was objectively unreasonable, Hood cannot affirmatively show prejudice. See Garcia, 57 Wn. App. at 932. Hood's sentence should be affirmed.

D. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Hood's sentence.

DATED this 5th day of May, 2010.

Respectfully submitted,

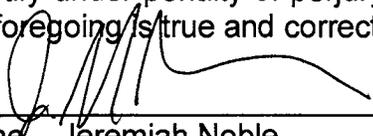
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JEFFREY HOOD, Cause No. 64218-9-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Jeremiah Noble
Done in Seattle, Washington

5.5.17

Date