

NO. 64398-3-I

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

STATE OF WASHINGTON,

REC'D

Respondent,

JUL 15 2010

v.

King County Prosecutor SHERWIN CORALES,
Appellate Unit

Appellant.

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

The Honorable Gregory P. Canova, Judge

REPLY BRIEF OF APPELLANT

KARY DADY
DAVID B. KOCH
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS
STATE OF WASHINGTON

2010 JUL 15 PM 3:49

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THERE WAS NOT A LEGITIMATE STRATEGIC REASON JUSTIFYING DEFENSE COUNSEL’S FAILURE TO REQUEST THAT THE TRIAL COURT CONSIDER THE BURGLARY AND THE THEFT AS SAME CRIMINAL CONDUCT.....	1
B. <u>CONCLUSION</u>	3

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987) 2

A. ARGUMENT IN REPLY

THERE WAS NOT A LEGITIMATE STRATEGIC REASON JUSTIFYING DEFENSE COUNSEL'S FAILURE TO REQUEST THAT THE TRIAL COURT CONSIDER THE BURGLARY AND THE THEFT AS SAME CRIMINAL CONDUCT.

The State contends that defense counsel had a strategic reason for not requesting that the court consider scoring the burglary and theft as the same criminal conduct. Br. of Resp't at 7. The State claims that raising the issue would have negatively impacted the court's willingness to consider the defense request for a DOSA:

A trial court is more likely to grant such an option [a DOSA] if it believes the offender sincerely takes responsibility for his crimes and wishes to address the substance abuse issues at their root. Such a posture would be negated should the offender also seek to persuade the court to use its discretion and essentially not punish for one of the crimes committed.

Br. of Resp't at 9.

This argument is unpersuasive for two reasons. First, there was no evidence in the record that drug use was a factor in the crimes. There was no allegation that Corales was under the influence or apprehended with drugs. At most, police found several cans of beer opened behind the home where police apprehended

Corales. But the State did not allege that alcohol abuse was a motivating factor for any of the assailants in committing the crimes. There is no evidence that any drugs were stolen from Sprague's home. Given the lack of objective evidence to support defense counsel's request for a DOSA, the trial court had no choice but to deny the request. RP 353. Therefore, even assuming counsel's failure was intentional, it was objectively unreasonable to present only a request for a DOSA at sentencing.

Further, there is no support for the State's assertion that a request for the court to consider sentencing some of the crimes as the same criminal conduct is inconsistent with Corales taking responsibility for his actions. The State overlooks the fact that Corales immediately and candidly confessed to police about his role in committing the burglary and theft. Corales took responsibility for the poor choices that he made. Arguing for the correct offender score is not inconsistent with taking responsibility for one's actions.

Corales need not show with certainty that the outcome of his sentencing would have been different; he must only demonstrate the reasonable probability of a different outcome. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Both the prosecutor

and the trial court acknowledged that a low-end sentence was appropriate given Corales's youth and evidence that he was not the leader in committing the crimes. RP 351, 355. Given the court's recognition that a more lenient sentence was appropriate, there is a reasonable probability that the court would have exercised its discretion and sentenced the burglary and the theft as the same criminal conduct.

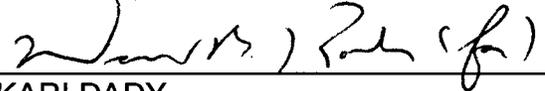
B. CONCLUSION

Defense counsel failed to present the same criminal conduct argument at sentencing, thereby precluding the court from considering the matter and exercising its discretion to impose a more lenient sentence. This Court should remand the case for a new sentencing hearing.

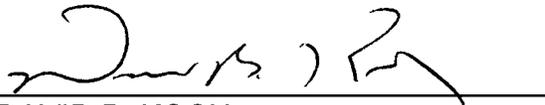
DATED this 15th day of July 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



KARI DADY
WSBA No. 38449



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64398-3-I
)	
SHERWIN CORALES,)	
)	
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 15TH DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SHERWIN CORALES
DOC NO. 325155
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JULY, 2010.

x *Patrick Mayovsky*