

NO. 72313-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY R. STANDLEY,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

Defense requested an exceptional sentence downward and supported her request with briefing and oral argument informing the supporting facts and its legal authority to depart from the standard range. Is an attorney ineffective simply because the court exercised its discretion and imposed a standard range sentence?

II. STATEMENT OF THE CASE

Following a bench trial on agreed documentary evidence, the Honorable Anita Farris found the defendant guilty of one count of Failing to Register between February 18 and February 27, 2014, in violation of RCW 9A.44.130. 2RP7. Sentencing was set for August 11. 2RP8.

The defendant's registration obligation arose when he was convicted as a juvenile of Rape of a Child First Degree, an offense for which he was given a manifest injustice sentence upward. CP 55-65. The defendant had a weekly obligation after he registered homeless "in the Marysville area" on December 31, 2013. CP 41. Between Dec. 31 and Feb. 27, 2014, the defendant registered homeless three more times at various intersections on State Street in Marysville: Jan. 7 at 9710 State Street in the bushes; on Jan 29 at 104th and State; and on Feb. 11 at 115th and State Street. CP

53, 50 and 51, and 52 respectively. He failed to register five times: Jan. 14, Jan. 21, Feb. 4, Feb. 18, and Feb. 25. CP 28-29. He was arrested on Feb. 27. Id.

At the sentencing hearing, the State recommended a sentence at the low end of the standard range of 12+-14 months. 2RP 9. This was the defendant's third failure to register conviction (one prior felony for failing to register and one misdemeanor for attempted failing to register). 2RP 10; CP 30.

Defense filed a sentencing memorandum arguing for an exceptional sentence downward. CP 18-20. In it, defense argued that a standard range sentence was excessive under the facts of the case. CP 18. The defendant had only one prior felony failure to register conviction; his failure was based on his lack of funds for bus fare for the bus ride between Marysville and the Sheriff's Office in Everett; he had no way of contacting the Sheriff's Office to explain himself or his predicament. CP 19. Counsel argued that the defendant failure was not willful as shown by his registration on other occasions and his remaining in the same area "in the bushes" in Marysville. Id.

Defense argued that a standard range sentence was not a just punishment, would not protect the public, would not induce the

defendant to improve himself, and would not reduce his risk of re-offense, all factors listed in RCW 9.94A.010. CP 19-20. Moreover, an exceptional sentence would be a prudent use of the State's resources under RCW 9.94A.010.

At the sentencing hearing, defense reiterated that the defendant was trying to comply, had no resources, always registered on the same street, and was honest with officers when arrested. 2RP 10-12. She said the defendant's prior failures to register were also based on his financial inability to get to the Sheriff's Office. Id.

The defendant addressed the court and said he had made a mistake. Id. When asked, he admitted he could have walked from Marysville to the Sheriff's Office in Everett to register and said he was sorry he hadn't. 2RP 13.

The court considered its alternatives, noting that it did not have complete discretion to deviate from the standard range. 2RP 14. For example, the court lacked authority to give an exceptional sentence in every case doing if the sole reason to do so were to preserve resources. 2RP 16.

The court noted that the defendant's juvenile conviction had resulted in a manifest injustice upward sentence. 2RP 14. The

court noted the defendant's prior failures to appear and his record of going in and out of compliance with his registration obligation. 2RP 15-16. It noted that defendant could have been charged with more offenses in the same charging period based on his failures to register both before and after February 11. Id. The court said, "I am not finding grounds for an exceptional sentence down." 2RP 16. "So even if I look at the facts, it appears to me to be an appropriate actual – actually an appropriate sentence under all the circumstances." 2RP 16-17. The court imposed a low-end sentence. 2RP 17.

This appeal follows.

III. ARGUMENT

A. COUNSEL PROVIDED EFFECTIVE ASSISTANCE WHEN SHE PRESENTED THE COURT WITH ALL HELPFUL AND APPLICABLE LAW AND ARGUED FOR AN EXCEPTIONAL SENTENCE DOWNWARD, AND WHEN THE COURT EXERCISED ITS DISCRETION AND IMPOSED A STANDARD RANGE SENTENCE.

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); see U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. That guarantee applies to all critical stages of the proceedings, including sentencing hearings. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

Reviewing courts presume strongly that that counsel's representation was effective. State v. McFarland, 128 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To prevail in an ineffective assistance of counsel claim, the defendant must show both that his counsel's representation was deficient and that the deficiency prejudiced him. McFarland, 127 Wn.2d at 335; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). An attorney's performance is deficient performance if it falls below an objective standard of reasonableness; prejudice occurs when, but for the deficient performance, the outcome would have been different. Id. at 334-35. There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. Strickland, 466 US at 689.

1. The Defendant Cannot Show Deficient Performance When Counsel Provided The Court With A Legal And Factual Basis On For An Exceptional Sentence.

The defendant argues his counsel was ineffective because she did not inform the court that it had the discretion to impose an

exceptional sentence. The record shows, though, that defense counsel did exactly that.

Counsel reminded the court in writing and orally of its authority under RCW 9.94A.535 to impose a sentence below the standard range for substantial and compelling reasons. CP 16-21 and 2RP 10-13. She argued that the defendant's failure to register was based on his transportation difficulties. Id. She argued that he had registered on the same Marysville street previously, thus keeping law enforcement aware of his presence in the jurisdiction. Id. She argued that defendant showed his willingness to comply not only by registering when he could but also by being forthcoming with officers when arrested. Id. Those actions, she argued, justified a downward departure. Id.

The court considered and rejected those arguments: "I am not finding grounds for an exceptional sentence down." 2RP 16.

On appeal, the defendant relies on State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002). That reliance is misplaced. In McGill, the court imposed a standard range sentence and even said that it had, "no option but to sentence you within the range...". Id. at 99. However, the court did have discretion to consider an exceptional sentence under the Sentencing Reform Act's multiple

offense policy. Id. at 99. The Court of Appeals said counsel was ineffective because he should have argued for and presented the court with cases that supported an exceptional sentence down. Id. at 100-01. “A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise.” Id.

Our case is different. Here, counsel did bring to the court’s attention, both in briefing and in oral argument, the applicable statute and facts that could have supported a downward departure. Our court knew it could and did, in fact exercise its discretion, reject the defense request, and impose a standard-range sentence. More was not required.

The defendant now claims his attorney should have cited State v. Garcia, 62 Wn. App. 678, 256 P.3d 379 (2011), review denied, 173 Wn.2d 1008 (2008), to support his request for an exceptional sentence downward. That case, however, is very different from ours.

Garcia was a transient sex offender with a weekly registration requirement. He was required to travel 40 miles to

Yakima in order to register. He had no car so he relied on a friend to drive him to Yakima each week.

On the date of his offense, Garcia's ride was supposed to pick him up at 4 o'clock but arrived late at 4:50. Garcia called the Sheriff's Office and explained that he might be late. The Sheriff's Office told him that his failure to register would be excused if he arrived too late to register but instead turned himself into the Yakima Jail. The Sheriff's Office even went to the Jail to give them what it thought was the required paperwork.

Garcia arrived at 5:30 and reported to the Jail. The Jail turned him away. Garcia went home and was later charged with failure to register.

The Garcia court affirmed the trial court's exceptional sentence downward. Id. Garcia's transportation problems and attempts to comply distinguished his crime from others in the same category. Id. at 685. He tried to comply by contacting the Sheriff's office and attempting to gain admittance to the jail, factors that justified an exceptional sentence. Id. at 686. Garcia's failure to register was based on his inability to register in person, a personal factor and not one that had to do with the purposes of the registration requirement. Id. 686-87. Thus, Garcia's crime

distinguishable from other failures to register and an exceptional sentence was appropriate. Id.

The only way in which Garcia is similar to our case is that both involved sex offender registration. However, this defendant's situation was nothing like Garcia's. It behooved counsel in this case to bring Garcia to the court's attention.

Garcia had to travel 40 miles to register; this defendant could have walked. Garcia arranged for a ride to the Sheriff's Office on the day he failed to register; this defendant arranged for nothing. Garcia called the Sheriff's Office to say he would be late; this defendant called no one. Garcia followed the Sheriff's Office directions and tried to turn himself in to jail. This defendant sought no guidance and followed no directions. Considering the stark differences, counsel's reluctance to cite Garcia was strategic and reasonable.

This defendant's failure to register had everything to do with the elements of the crime and the legislative intent. He could have registered; he did not cooperate with law enforcement to do so.

Failure to cite to Garcia appears to be a tactical decision. When evaluating an ineffective assistance claim, the reviewing court must give deference to decisions of defense counsel in the

course of representation. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2010). Counsel's performance is not deficient when it was a legitimate trial strategy. Id. A defendant can rebut the presumption that defense was employing a legitimate strategy by showing that there was no conceivable tactical reason for the performance. Id. To be legitimate, the decision must be both strategic and reasonable. Id. at 33-34.

The record supports the presumption that counsel failed to cite Garcia for strategic reasons. Any comparison between this defendant and Garcia would have undercut counsel's only arguments for an exceptional sentence downward. The record shows that defense counsel adopted the mitigating factors of Garcia, transportation difficulties and a willingness to comply, and offered those to the sentencing judge in briefing and argument. Counsel's decision not to cite to the actual case was a reasonable one in light of the stark difference in facts.

2. The Defendant Cannot Show Ineffective Assistance Because Case Law Did Not Support An Exceptional Sentence.

To prevail on his ineffective assistance argument, the defendant must also demonstrate that there is a reasonable probability that, but for the ineffective assistance, the result would

have been different. McFarland, 127 Wn.2d at 335. That is another burden the defendant cannot meet.

Legally, the court knew that it had the authority to impose an exceptional sentence and did not. It considered the reasoning of Garcia and rejected the reasoning in light of the circumstances of this case.

There is no probability the court would have imposed an exceptional sentence had it been made aware of the facts of Garcia. Garcia made every effort to comply with his registration obligation. This defendant made none. Garcia cooperated with law enforcement. This defendant avoided law enforcement until he was arrested on an unrelated event. As discussed above, the exceptional sentence in Garcia was appropriate because it was based not on Garcia's personal condition but rather on his ability and willingness to perform his reporting duties. 163 Wn. App. at 686. His transportation difficulties and attempts to comply, specifically calling the YSCO and attempting to check into the Yakima County Jail, were not personal. They related to the elements of the crime and Garcia's ability to report. Id. at 686.

The mitigating factors in our defendant's case were personal. By his own admission, he was able to register and did

not. He admitted he could have and should have walked to the Sheriff's Office to register.

The defendant's argument for an exceptional sentence downward was stronger without a comparison to Garcia. There is no reasonable likelihood that the court would have imposed a different sentence had counsel cited to Garcia.

The defendant cannot show prejudice from any claimed mistakes by his trial attorney. Thus, there are no grounds for reversal for resentencing.

IV. CONCLUSION

The defendant did not receive ineffective assistance of counsel. His counsel's performance at the sentencing hearing was not deficient. Any failure to cite Garcia was a reasonable tactical decision. Nor has the defendant shown that his sentence would

have been different but for the claimed error. His sentence should be affirmed.

Respectfully submitted on January 27, 2015.

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January 21, 2015

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**Re: STATE v. ZACHARY STANDLEY
COURT OF APPEALS NO. 72313-8-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,


JANICE C. ALBERT, #19865
Deputy Prosecuting Attorney

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cc: Nielsen, Broman & Koch
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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THE STATE OF WASHINGTON,

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Appellant.

No. 72313-8-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 22nd day of January, 2015, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 22nd day of January, 2015.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", with a long horizontal flourish extending to the right.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit