

App. Harrison

NO. 38500-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIFFANY NICOLE HARRISON,

Appellant.

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

The Honorable Bryan Chushcoff, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Ineffective assistance of counsel denied appellant a fair trial.
2. The trial court imposed an indeterminate sentence in violation of the Sentencing Reform Act.

Issues pertaining to assignments of error

1. Did trial counsel's failure to object to improper opinion evidence as to appellant's guilt and failure to have irrelevant and prejudicial testimony stricken constitute ineffective assistance of counsel?

a. Appellant was convicted of possession of marijuana with intent to deliver. She admitted possession, testifying that the marijuana found in her apartment was for her personal use. A deputy testified, however, that marijuana was being sold from the apartment. Where trial counsel failed to object and there is a reasonable likelihood the jury was swayed by the improper opinion testimony, did ineffective assistance of counsel deny appellant a fair trial?

b. In order to convict appellant of identity theft, the State had to prove she possessed a stolen passport with intent to commit a crime. Although there was no evidence tying appellant's possession of the passport to the drugs found in her apartment, a

deputy testified that co-conspirators of drug dealers often commit crimes such as identity theft to facilitate drug sales. The court found this testimony speculative and improper, but trial counsel did not move to have it stricken. Where it is reasonably likely the jury relied on the deputy's speculation in finding appellant intended to commit a crime, did counsel's ineffective representation deny appellant a fair trial?

2. The statutory maximum sentence for Appellant's offense is 60 months. The court below imposed a sentence of 60 months confinement plus nine to 12 months community custody, noting on the Judgment and Sentence form that the combined term of confinement and community custody actually served shall not exceed the statutory maximum. Where the court failed to make an initial determination of the sentence length and required the DOC to ensure that the statutory maximum was not violated, must the indeterminate sentence be vacated?

B. STATEMENT OF THE CASE

1. Procedural History

On July 26, 2007, the Pierce County Prosecuting Attorney charged appellant Tiffany Harrison with unlawful possession of Ecstasy with intent to deliver and unlawful possession of marijuana with intent to deliver. CP 1-2; RCW 69.50.401(1)(2)(a); RCW 69.50.401(1)(2)(c). The information

was amended to add firearm and school bus stop allegations as well as two counts of second degree possession of stolen property, one count of second degree identity theft, and one count of unlawful possession of payment instruments. CP 12-15; RCW 69.50.435; RCW 9A.56.160(1)(c); RCW 9.35.020(3); RCW 9A.56.320(2)(a)(i).

Harrison and co-defendant Lance Alexander were tried together before the Honorable Bryan Chushcoff. The jury found Harrison guilty of the lesser included offense of possession of Ecstasy and guilty on all other counts as charged. The jury entered special verdicts finding the possession with intent was committed within 1000 feet of a school bus route stop and finding Harrison or an accomplice was armed with a gun while in possession of Ecstasy. CP 161-84. The court imposed a total of 60 months confinement, including 18 months for the firearm enhancement and 24 months for the school zone enhancement. CP 212-14. In addition, the court imposed nine to 12 months community custody on the drug convictions. CP 216. The court noted on the judgment and sentence that “standard sentencing range adjusted to comply with statutory maximum. Defendant is not to serve, including community custody, that exceeds the 5 years.” CP 217.

Harrison filed this timely appeal. CP 225.

2. Substantive Facts

In June 2007, Lance Alexander became the focus of a narcotics investigation by the Pierce County Sheriff's Department. 5RP¹ 591. He was seen entering and leaving the same apartment on more than one occasion, and his car was observed at the apartment complex overnight. 5RP 592-94. Deputies concluded Alexander lived at the apartment and sought a search warrant. 5RP 592. Although Tiffany Harrison was later identified as the apartment tenant, she had not been a part of the investigation leading up to the warrant. 5RP 596.

At 6:50 a.m. on July 25, 2007, sheriff's deputies executed the search warrant at the apartment. 3RP 266, 331. The entry team knocked and announced the search warrant, waited 30 to 40 seconds, and then forced the door open. 3RP 267, 365. The door was blocked with a sofa and coffee table, which had to be moved for the team to enter. 4RP 483.

Deputies saw Harrison running to the bedroom, and two followed her. 3RP 334-35. The bedroom door slammed shut, and the deputies broke the door down to enter the room. 4RP 485. The door landed on top of Harrison. 4RP 485. When they lifted the door, the deputies found her lying on the floor face down, with her head toward the foot of the bed.

¹ The Verbatim Report of Proceedings is contained in 13 volumes, designated as follows: 1RP—9/8/08; 2RP—9/9/08; 3RP—9/10/08; 4RP—9/15/08; 5RP—9/16/08; 6RP—9/17/08; 7RP—9/18/08; 8RP—9/19/08; 9RP—9/22/08; 10RP—9/23/08; 11RP—9/24/08; 12RP—10/24/08 (Harrison Sentencing); 13RP—10/24/08 (Alexander Sentencing).

4RP 520. The deputies took her into custody, handcuffing her while she knelt on the floor. 4RP 486. Harrison was naked at the time, so one of the deputies covered her with a sheet. 3RP 335-36. She was taken to the case officer's patrol car, where she agreed to make a statement. 5RP 598.

Harrison wanted to know who the snitch was who had been to her apartment, explaining she had seen search warrants executed on Court TV. 5RP 637-38. In response to questioning, Harrison told the deputy she had been living in the apartment for seven to eight months, she had been dating Alexander for about a year, she had no knowledge of any drug use or selling from the apartment, and she had no source of income. 5RP 599.

While two deputies were arresting Harrison, others went to the bathroom, where Alexander was located. The first deputy tried to open the door, but Alexander was holding it closed from the inside. Eventually the deputy knocked the door off its hinges and entered the bathroom. 3RP 269-70. He struggled with Alexander, hitting him three to four times with his fist before taking him into custody. 4RP 427. In the toilet, the deputy found a large Ziploc bag containing six smaller Ziploc bags, each containing 100 red and blue Ecstasy pills. 3RP 273, 276, 317-18; 4RP 557. Alexander was also naked, and he was covered with a sheet or blanket when he was brought outside. 4RP 427-28.

Alexander told the case officer that he had been staying at the apartment for several months and that Harrison was his girlfriend. Alexander admitted that he sold both Ecstasy and marijuana, and he said he and Harrison used Ecstasy. 5RP 601. Alexander told the deputy that there was marijuana in the apartment, as well as a blue box next to the bed which contained 500 Ecstasy pills. 5RP 602-03. When asked if there were any firearms in the apartment, Alexander said he had bought a gun two months earlier because someone had broken into the apartment, pistol-whipped Harrison, and stolen some marijuana. 5RP 603.

Once Harrison and Alexander were removed from the apartment, deputies conducted a secondary search to ensure no one else was present. 4RP 488. Photographs were taken to show the condition of the apartment before the search was conducted. 4RP 432. Then, with the aid of a canine officer, the deputies searched the apartment for evidence of narcotics. 4RP 538.

In a kitchen cupboard, deputies found a bag of blue and red Ecstasy pills, similar to those found in the bag in the toilet. 4RP 505. A bag of 37 green Ecstasy pills with smiley face logos was found in Harrison's purse in the living room. 4RP 49; 6RP 793.

Marijuana and marijuana residue was found in numerous locations throughout the apartment. 4RP 516. A total of 55 grams was found, and

the largest quantity in one location was 20 grams. 4RP 542. A bag of marijuana was found under the dining room table. 4RP 493. In the kitchen, deputies found several gallon Ziploc bags with marijuana residue and two bags containing marijuana. 4RP 503, 511. A Crown Royal bag with marijuana residue was found in a kitchen drawer. 4RP 505. In the bedroom, the deputies found a plastic bag with marijuana residue on the floor by the closet, and a bag of marijuana in a shoe organizer in the closet. 4RP 506-08. They also found the blue box Alexander had mentioned, but there were no pills in it. Instead, it contained a bag of marijuana. 4RP 509; 5RP 617.

Deputies also found four scales in the apartment. 3RP 281, 285; 4RP 494. Although an empty vacuum seal bag containing marijuana residue was found in the apartment, no vacuum seal machine was located. 4RP 443; 5RP 706.

Deputies found indications that marijuana was consumed in the apartment, including a marijuana pipe. 4RP 434. In addition they found a grinder with marijuana residue, commonly used for making "blunts," which are cigarillos with the inner tobacco removed and replaced with ground marijuana. 4RP 439; 5RP 730. Several cigarillo boxes were found in the apartment as well. 4RP 439.

A pair of pants found in the living room contained a cell phone, a wallet with Alexander's identification and \$15 cash, as well as a roll of \$1000 cash. 4RP 498-502. Another cell phone was found on top of the microwave in the kitchen. 5RP 617. Three firearm magazines were found in a shoebox in the dining room along with one of the baggies containing marijuana residue. 5RP 733-34.

Deputies were searching for crib notes documenting narcotics transactions, but none were found. 4RP 431. Instead, they seized notebooks containing writing, possibly song lyrics, referring to marijuana sales. 6RP 807, 811.

A loaded Glock 9 mm handgun was found under the head of the bed. 4RP 512. Although the deputies did not see the gun when they arrested Harrison in the bedroom, when they conducted the secondary search, when the canine handler conducted his safety sweep, or during the canine search, the gun was found during the more intensive hands on search. 4RP 536-38. The deputies found a digital camera with photographs of Harrison, Alexander, and others in the apartment, including photographs of Alexander holding the gun found during the search. 3RP 286, 300, 308.

Deputies found a purse in the bedroom closet which contained numerous documents in Harrison's name. 5RP 612. In addition, there

was a credit card in the name Ashley Johnson, a debit card in the name Shallen Green, a debit card in the name Brad Goodwin, an expired Korean passport in the name In Suk Goodwin Chong, and a checkbook in the names Billy and Selena Spiva. 5RP 614.

Harrison was charged with possession of Ecstasy and marijuana with intent to deliver. She was also charged with identity theft based on the passport, possession of stolen property relating to the debit cards, and unlawful possession of payment instruments relating to the checkbook. CP 12-15.

The parties stipulated that two school bus stops were located within 1000 feet of the apartment, that the firearm found in the apartment was operable and confirmed as stolen, that the debit cards belonging to Shallen Green and Brad Goodwin were stolen, that the passport belonging to In Suk Goodwin was stolen, that the checkbook belonging to the Spivas was stolen, and that neither Alexander nor Harrison had permission to have any of the stolen items. 6RP 857-58.

At trial, Harrison testified that when she was living in the apartment she smoked marijuana all day every day. 6RP 868. She would smoke it either in a pipe or in blunts, which she made using her grinder. 6RP 867-68. She smoked with Alexander and other people, going through seven to 20 grams or more a day. 6RP 869. She used the scales to weigh

the marijuana she bought and when she was making blunts. 5RP 871. Harrison testified that she did not know if Alexander was selling marijuana, but she was not. 5RP 871-82.

Harrison also denied selling Ecstasy, although she admitted that the green Ecstasy pills found in her purse were hers, and she used two to three pills every other day. 6RP 870, 872. She was not aware that Alexander was selling Ecstasy, and she did not know about the blue and red pills found in the toilet and the kitchen cupboard. 6RP 872-73.

As for the items found in the purse in her closet, Harrison explained that she found them in a backpack Alexander's cousin had left in her apartment. When she went to move it, she saw several important-looking documents inside, and she moved them to her old purse, which she used for storage. 6RP 874-75.

Harrison testified that the gun found under the bed was not hers and she did not know it was there. 6RP 877-78. She was not going for the gun when she was arrested. 6RP 878. Harrison explained that she was awakened by a noise at the door, and she walked to the living room to see what was happening. 6RP 878. She was in the habit of barricading her door with the sofa because she had been the victim of a home invasion robbery. 6RP 882. Even so, she saw her front door come down and people with guns entering the apartment. 6RP 878. Harrison ran back to

her bedroom and closed the door. At that point she heard the deputies shouting, “Police, get down,” and she got on the floor. 6RP 879. Her bedroom door was then broken down on top of her. 6RP 880.

C. ARGUMENT

1. INEFFECTIVE ASSISTANCE OF COUNSEL DENIED HARRISON A FAIR TRIAL.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney’s conduct “(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney’s conduct.” State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances.” State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). While an attorney’s decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State

v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). Moreover, “tactical” or “strategic” decisions by defense counsel must still be reasonable decisions. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (“The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.”).

The second prong of Strickland requires the defendant to show only a “reasonable probability” that counsel’s deficient performance prejudiced the outcome of the case. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. The defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.” Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine the confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

In this case, trial counsel’s failure to object to improper opinion evidence as to Harrison’s guilt and credibility, and his failure to have irrelevant and prejudicial testimony stricken, constituted deficient performance which prejudiced the defense. Harrison did not receive the constitutionally mandated effective assistance of counsel, and her convictions must be reversed.

a. Trial counsel's inexcusable failure to object to improper opinion testimony prejudiced the defense.

During the search, deputies found a large amount of packaging containing marijuana residue in apartment, as well as some bags with small amounts of marijuana. These items were not found in any central location but instead were spread all over the apartment. 4RP 516. The State's theory was that Harrison was bringing large quantities of marijuana into her apartment and repackaging it for sale. Harrison explained, however, that she brought large quantities of marijuana into her apartment for her personal use, testifying that she smoked upwards of 20 grams a day. 6RP 869. She said she kept marijuana in smaller bags all over the apartment so that it was there whenever she wanted to smoke. 6RP 895.

A large unsealed vacuum seal bag containing marijuana residue was found in the apartment, and the case officer testified that such bags were used to hide the smell of marijuana. 5RP 685. Several Ziploc bags containing marijuana residue were also found, and the deputy testified that those types of bags were also used to package narcotics. 5RP 685. On cross examination, the defense attempted to show that the presence of used, empty packaging was consistent with Harrison buying the marijuana, rather than selling it, and the deputy admitted that the seller

was the party who sealed the vacuum seal bags and that generally the buyer would take the marijuana in the seller's packaging. 5RP 709.

On redirect, the deputy testified that the various baggies with marijuana residue found in the apartment were consistent with repackaging for distribution and sale. 5RP 712-13. The prosecutor then asked whether the presence of the baggies in the apartment undermined the concept that marijuana was being sold. Not content to state merely whether the physical evidence was consistent with marijuana sales, the deputy gave his opinion about what Harrison was doing with the marijuana in her apartment: "The presence of baggies shows that there is narcotics coming in, being repackaged, and being sold." 5RP 714.

Although defense counsel had objected to repetitive and leading questions by the prosecutor, he did not object to the deputy's unsolicited opinion. This failure constitutes deficient performance.

A witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Hudson, ___ Wn. App. ___, 208 P.3d 1236, 1239 (2009). Improper opinion testimony violates the defendant's constitutional right to a jury trial by invading the fact-finding province of the jury. Montgomery, 163 Wn.2d at 590; State v. Dolan, 118 Wn. App.

323, 329, 73 P.3d 1011 (2003). In determining whether testimony constitutes improper opinion as to the defendant's guilt, the reviewing court considers the circumstances of the case, including (1) the type of witness, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591; Hudson, 208 P.3d at 1239.

In Montgomery, the defendant was charged with possession of pseudoephedrine with intent to manufacture methamphetamine, after detectives followed him and a companion from store to store as they individually purchased several items which could be used in the production of methamphetamine. Montgomery, 163 Wn.2d at 584-86. After describing these events at trial, one of the detectives testified, "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes. I'd seen those actions several times before." Montgomery, 163 Wn.2d at 587-88. Another detective also testified that "those items were purchased for manufacturing." Montgomery, 163 Wn.2d at 588. And, after testifying about the ingredients necessary for making methamphetamine, a forensic chemist testified that he concluded

the pseudoephedrine was possessed with intent. Montgomery, 163 Wn.2d at 588.

In concluding that this testimony constituted improper opinion evidence, the Supreme Court noted that opinions regarding the intent of the accused are clearly inappropriate. Montgomery, 163 Wn.2d at 591, 593. As the testimony went to the core issue and the only disputed element, the defendant's intent, it amounted to improper opinion on the defendant's guilt. Montgomery, 163 Wn.2d at 593.

Similarly, in Hudson, the defendant was convicted of third degree rape. He did not dispute the sexual encounter, or that the alleged victim was injured. At issue was whether the encounter was consensual. The nurse who examined the alleged victim and the coordinator who had reviewed her report testified at trial. Hudson, 208 P.3d at 1237. Both witnesses were permitted to testify over defense objection that the alleged victim's injuries were related to nonconsensual sex. Hudson, 208 P.3d at 1238.

On appeal, this Court held that the experts' explicit testimony that the injuries were caused by nonconsensual sex amounted to statements that the defendant was guilty of rape. Because the opinions went to the essence of the rape charge and the only disputed issue, they were improper. Hudson, 208 P.3d at 1239-40. Since the case turned on

whether the jury believed the defendant or the alleged victim, the error was not harmless. Hudson, 208 P.3d at 1241.

Here, as in Montgomery and Hudson, the deputy gave his personal opinion as to the core issue and only disputed element, Harrison's intent to deliver the marijuana found in her apartment. He explicitly stated that marijuana was being sold from the apartment. While the deputy may have been qualified to testify whether the physical evidence was or was not consistent with narcotics distribution, he was not an expert on what was actually going on within Harrison's apartment, or her intent. See State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) (officer not qualified to testify as to defendant's state of mind while driving). The deputy's opinion amounted to testimony that Harrison was guilty of possessing marijuana with intent to deliver. Under Montgomery and Hudson, this opinion testimony was clearly improper.

Because defense counsel failed to object or move to strike the improper testimony, the jury was permitted to consider the officer's opinion as to Harrison's intent. There is a reasonable likelihood counsel's error prejudiced the defense. There was a significant amount of evidence that the marijuana in the apartment was for Harrison's personal use. The deputies found a pipe and a grinder, which they testified indicated personal use. 4RP 434; 5RP 732. The amount of marijuana found was

also consistent with personal use, and Harrison testified that she intended to smoke the marijuana, not sell it. 4RP 543; 6RP 872. It is well recognized, however, that testimony from police officers carries an “aura of reliability” likely to influence the jury. See Montgomery, 163 Wn.2d at 595 (citing State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). In this case, not only did the deputy give his opinion that Harrison was selling marijuana, but he phrased that opinion as an established fact, stating “there is narcotics coming in, being repackaged, and being sold.” 5RP 714. Under the circumstances, it is likely that the improper opinion testimony affected the jury’s verdict, and counsel’s failure to object to that testimony constituted ineffective assistance of counsel.

b. Counsel’s failure to move that the deputy’s speculative testimony be stricken prejudiced the defense.

On cross examination of the case officer, defense counsel established that there was no evidence Harrison had used or attempted to use any of the stolen documents found in her closet. 5RP 641-43. The deputy also testified that Alexander, not Harrison, had been the focus of the investigation leading to the search warrant. 5RP 654-55.

On redirect the deputy testified that just because an investigation initially focused on one person did not mean no one else was involved. The subject’s boyfriend or girlfriend commonly acts as a co-conspirator

conducting crimes to facilitate the sales of narcotics and generate money. The deputy testified that these facilitating crimes can include fraud, forgery, computer theft, and identity theft, and that sometimes a boyfriend or girlfriend will trade possessions, stolen merchandise or credit cards for drugs. 5RP 656-57.

When the prosecutor asked the deputy if a co-conspirator might lend the use of his or her home to facilitate drug transactions, defense counsel objected that the question was leading. 5RP 657. The court excused the jury. It asked whether there was any evidence connecting Harrison's possession of the stolen documents to drugs sales, noting that without such evidence the deputy's testimony was just speculation. 5RP 658-59. Defense counsel argued that there was no evidence connecting the documents to drug transactions, and the court agreed. 5RP 660-61. It sustained defense counsel's objection to further testimony along those lines. 5RP 662, 680. Defense counsel did not move to strike the testimony already before the jury, however.

Counsel's failure amounts to deficient performance. The testimony was clearly improper. In order to convict Harrison of identity theft, the State had to prove she possessed the stolen passport with the intent to commit a crime. See RCW 9.35.020(1). The existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133

Wn. App. 789, 796, 137 P.3d 892 (2006). As the trial court pointed out, there was no evidence linking Harrison's possession of the passport to drug transactions, and the deputy's testimony that co-conspirators often commit crimes such as identity theft to facilitate drug sales invited the jury to speculate as to Harrison's intent. See State v. Maule, 35 Wn. App. 287, 293-94, 667 P.2d 96 (1983) (where defendant was charged with rape of daughter and step daughter, testimony that majority of cases at sexual assault center involved male parent figure was improper as it invited jury to conclude defendant was guilty based on speculation and conjecture disguised as expert testimony).

Moreover, counsel's deficient performance prejudiced the defense. The trial court had already indicated that the deputy's testimony was improper and it clearly would have granted a motion to strike. 5RP 659, 661-62, 670. Although there was evidence Harrison possessed the stolen passport, there was no evidence she had done or attempted to do anything with the passport or any of the other stolen documents. In fact, the passport bore the photograph of the owner, it had expired in 1994, and there was no indication that Harrison had attempted to alter it for her use. 5RP 641-42. Because defense counsel did not move to strike the deputy's improper testimony, however, the jury was invited to speculate that Harrison intended to use the passport to facilitate drug transactions, thus

making her guilty of identity theft. As discussed above, an officer's testimony carries an aura of reliability likely to sway the jury. See Montgomery, 163 Wn.2d at 595. In this case, it is reasonably likely the jury was swayed by the deputy's speculative testimony, and counsel's failure to have it stricken amounted to ineffective assistance of counsel.

2. HARRISON'S SENTENCE IS INDETERMINATE BECAUSE IT PLACES THE BURDEN ON DOC TO ENSURE THAT THE STATUTORY MAXIMUM IS NOT VIOLATED.

The Sentencing Reform Act (SRA) requires a sentencing court to impose a determinate sentence in which the combined terms of confinement and community supervision do not exceed the statutory maximum sentence. RCW 9.94A.505(5). That statute provides:

Except as provided under RCW 9.94A.750(4) and 9.94A.753(4), a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

In addition, the SRA requires a trial judge to impose a determinate sentence, defined as follows:

"Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

RCW 9.94A.030(21).

Harrison's sentence is not determinate and violates RCW 9.94A.505. The court below imposed a sentence of 60 months confinement plus nine to 12 months community custody. CP 214, 216. Because the statutory maximum sentence for her offenses is 60 months, the court included the following notation: "standard sentencing range adjusted to comply with the statutory maximum. Defendant is not to serve, including community custody, that exceeds the 5 years." CP 217.

The trial court's approach has been approved by the Court of Appeals in the past. State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004); see also State v. Vant, 145 Wn. App. 592, 605, 86 P.3d 1149 (2008) (adopting Sloan approach). However, Division One of this Court recently rejected the Sloan approach in State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008).

In Linerud, as here, the sentencing court imposed terms of confinement and community custody which combined to exceed the statutory maximum sentence, but included a notation stating "combined maximum of prison time + community custody may not exceed the stat max of 60 months." Linerud, 147 Wn. App. at 947. While recognizing that previous cases had approved this approach, the Court of Appeals

noted that none of the prior cases had addressed whether this approach resulted in an indeterminate sentence in violation of the SRA. Linerud, 147 Wn. App. at 948-49. The Court held that “a sentence is indeterminate when it puts the burden on the DOC rather than the sentencing court to ensure that the inmate does not serve more than the statutory maximum.” Linerud, 147 Wn. App. at 948.

The SRA does not authorize the DOC to determine how long a sentence will be. Rather, the SRA mandates that the court impose a determinate sentence. “Because a court may not impose a sentence that exceeds the statutory maximum and must impose a determinate sentence, it may not sentence a defendant to a term that, on its face, exceeds the statutory maximum and leave to the DOC responsibility for assuring that the sentence is lawful.” Linerud, 147 Wn. App. at 950.

Courts have a duty under RCW 9.94A.505(5) and RCW 9.94A.030(21) to impose a determinate sentence within the standard range. Linerud, 147 Wn. App. at 950. Regardless of the court’s notation, the court below imposed a sentence which exceeds the statutory maximum. Nowhere in RCW 9.94A.505 did the legislature permit the imposition of an unlawful sentence so long as the trial court believes it will not actually be served. Courts must limit the total sentence imposed to the statutory maximum, exercising discretion as to how much of the

sentence is served in confinement and how much in community custody. Linerud, 147 Wn. App. at 951.

“[W]hen a court does not make an initial determination of the sentence length, and requires the DOC to calculate the inmate’s time served and ensure it does not exceed the statutory maximum, the sentence is indeterminate in violation of the Sentencing Reform Act.” Linerud, 147 Wn. App. at 946. Such is the case here, and Harrison’s indeterminate sentence must be vacated.

D. CONCLUSION

Trial counsel’s failure to object to and move to strike the deputy’s improper opinion and speculation amounts to ineffective assistance of counsel which denied Harrison a fair trial. This Court should reverse and remand for a new trial. In addition, the trial court imposed an indeterminate sentence in violation of the SRA, and the sentence must be vacated.

DATED this 8th day of July, 2009.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Tiffany N. Harrison*, Cause No. 38500-7, directed to:

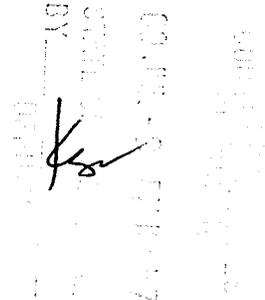
Kathleen Proctor
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
July 8, 2009



A vertical stamp containing the text "U.S. MAIL" and "CERTIFIED MAIL" is visible. A handwritten signature is written over the stamp.