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No. 39676-9-II

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

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MONTE HUNLEY,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Procedural Background.

The defendant was charged by Information on April 20, 2009, with Attempt to Elude a Pursuing Police Vehicle, RCW 46.61.024. The Information contained an allegation that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the defendant while committing the crime. RCW 9.94A.834. (CP 1-3). The matter was tried to a jury on June 30, 2009. The jury returned a verdict of guilty and a special verdict pursuant to RCW 9.94A.834.

Sentencing was conducted on July 13, 2009. At sentencing the State of Washington presented a Statement of Prosecuting Attorney. That statement listed the defendant's criminal history, all of which, except for a reckless driving conviction from Aberdeen Municipal Court, occurred in either Grays Harbor Superior Court or Grays Harbor Juvenile Court. The court found that the defendant had an offender score of 5 yielding a standard range of 4 to 12 months plus a year and a day for the enhancement for a total standard range of 16 months and

a day to 24 months and a day. The court imposed a sentence of 24 months and a day. (CP 7-15).

Factual Background.

On April 18, 2009, Trooper Blankenship of the Washington State Patrol was on duty. He was in uniform and operating a marked Washington State patrol vehicle equipped with emergency lights and sirens. (RP 5-6). Trooper Blankenship was working stationary radar for westbound traffic on Highway 12 west of Montesano near Clemons Road. (RP 6). Trooper Blankenship observed a black Eclipse motor vehicle traveling westbound on Highway 12. He visually estimated Mitsubishi speed in excess of 80 miles per hour in a posted 55 mile per hour zone. He received a radar read out of 87 miles per hour. (RP 7).

As the vehicle passed him, Trooper Blankenship pulled out and gave pursuit. The vehicle approached a deceleration (left turn) lane at Timber Lane Drive. The vehicle turned into Timber Lane Drive and then shot out back onto Highway 12 eastbound. (RP 8). Blankenship eventually caught up with the vehicle and activated both his lights and siren. (RP 9-10). Blankenship gave pursuit.

The vehicle made a right turn onto Alder Grove, a two-lane county road, posted for 25 miles per hour. Trooper Blankenship proceeded at approximately 60 miles an hour down Alder Grove. The Eclipse was

pulling away. Blankenship estimated the Eclipse's speed to be 70 miles per hour. (RP 11). Just prior to the south end of Alder Grove Road the Mitsubishi passed a motor vehicle heading southbound. (RP 12). At this point Blankenship estimated the speed to be about 70 miles per hour. (RP 12).

At the end of Alder Grove Road the Eclipse was still traveling at about 70 miles per hour. The vehicle ran a stop sign, hit the railroad tracks and flew into the air. (RP 13). A high speed pursuit continued down Devonshire Road at about 60 miles per hour in a posted 35 mile per hour zone. (RP 14). Eventually, the vehicle ended up on Arland Road, a two-lane county road, and then onto a dirt farm road that dead ended near a wooded area by the Wynooche River. (RP 14-15).

The defendant and his passenger then bailed out of the vehicle and ran off on foot. They were tracked to a location near the bank of the Wynooche River where they were hiding. (RP 16, 26-28). The defendant acknowledged to the officers that he was the driver and wanted to make sure the officers understood that his girlfriend had done nothing wrong. (RP 30).

RESPONSE TO ASSIGNMENTS OF ERROR

1. The defendant received effective assistance of counsel.

The defendant must show two things in order to prevail on a claim of ineffective assistance for counsel: (1) He must first show that defense

counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) He must show that if there was a deficient performance that it resulted in prejudice which the courts have defined as "a reasonable possibility that but for the deficient conduct, the outcome of the proceeding would have differed." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The defendant alleges that trial counsel was ineffective for failing to request instructions for Reckless Driving. The short answer is that Reckless Driving is not a lesser included offense of Attempt to Elude a Pursuing Police Vehicle. A person is guilty of Reckless Driving when that person drives a vehicle in willful or wanton disregard for the safety of persons or property, RCW 46.61.500. Attempt to Elude by contrast requires only that the defendant drive a motor vehicle in a "reckless manner." The mental element for Reckless Driving requires a "willful or wanton disregard for the safety of persons or property." The mental element for "driving in a reckless manner" requires only "driving in a rash or heedless manner indifferent to the consequences." State v. Roggenkamp, 153 Wn.2d 614, 621-622, 628, 106 P.3d 196 (2005); State v. Bowman, 57 Wn.2d 266, 270, 271, 356 P.2d 999 (1960). The mental element of "wanton or willful" is different and is a higher mental state than the "reckless manner" element required for Attempt to Elude. State v. Ridgley, 141 Wn.App. 771, 782, 174 P.3d 105 (2007).

In *Roggenkamp*, the Washington Supreme Court consolidated two cases involving the “reckless manner” standard. 153 Wn.2d at 618. In affirming Division One’s decision in *State v. Roggenkamp*, 115 Wn.App. 927, 64 P.3d 92 (2003), the court explained that

through a series of decisions by this court, a definition of the term “in a reckless manner” for purposes of the vehicular homicide and vehicular assault statutes has evolved and is now well settled. This evolution culminated in our decision in *State v. Bowman*, 57 Wn.2d 266, 270, 271, 356 P.2d 999 (1960), in which we indicated that driving “in a reckless manner” means “driving in a rash or heedless manner, indifferent to the consequences.” (Emphasis omitted.)

Roggenkamp, 153 Wn.2d at 621-22. The court also indicated that the term “reckless manner” contemplated a *lesser* mental state than that of the “willful or wanton” standard. *Roggenkamp*, 153 Wn.2d at 626-29.

When the legislature amended RCW 46.61.024 in 2003 to adopt the “reckless manner” standard for attempting to elude, it is presumably acted knowing the appellate court’s interpretation of the prior statute.

These two crimes require different mental elements. The mental element for Reckless Driving is not an element of the charged crime herein. The State was not required to prove that the defendant drove in a wanton or willful manner to prove the charge of Attempt to Elude.

The statute defining the crime of Attempt to Elude was amended in 2003. The Legislature at that time struck the phrase “indicating a wanton or willful disregard for the lives or property of others.” Since that time,

the mental element has been only that the defendant operated his vehicle “in a reckless manner while attempting elude a pursuing police vehicle.”

Prior to 2003, Reckless Driving was a lesser included offense since the mental elements for Reckless Driving and Attempt to Elude were the same. The effect of the amendment was to change the mental element required. Reckless driving is no longer a lesser included offense of attempt to elude and cannot be because the mental element for Reckless Driving is higher than the mental element for Attempt to Elude. See State v. O’Connell, 137 Wn.App. 81, 96, 152 P.3d 349 (2007). Counsel’s performance cannot be deficient for failing to ask for a lesser included offense instruction to which the defendant is not entitled.

In any event, the trial court would have been correct in refusing instructions on reckless driving based on the evidence presented at trial. As soon as the vehicle passed Trooper Blankenship it immediately made a u-turn and headed at a high rate of speed in the opposite direction. The vehicle continued at a high rate of speed down a county road as the trooper pursued him and eventually ended up on a private dirt road which dead ended near the Wynooche River. At that point the defendant and his girlfriend ran away on foot and hid. This evidence was not rebutted. He fled because he knew the officer was after him. The evidence at trial did not support a factual determination that the defendant was unaware of the

officer's presence or that he was not attempting to elude the trooper. In short, there was no reasonable inference that only the crime of Reckless Driving was committed. State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006).

2. The sentencing court properly computed the defendant's offender score.

RCW 9.94A.500 provides, in part, as follows:

A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be *prima facie* evidence of the existence and validity of the convictions listed therein. If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it is found to exist.

In the case at hand, no one disputed the defendant's criminal history. Counsel was provided with the Statement of Prosecuting Attorney. Counsel certainly had the opportunity to dispute the defendant's prior criminal history. The court, in its judgment and sentence, listed the criminal history that it found.

Contrary to the assertion of the defendant, the burden of proof as to the defendant's prior criminal history is not placed on the defendant. All the defendant had to say was that he disputed the criminal history. At that point the court could require the State to produce certified copies of the

prior convictions. The defendant did not dispute his criminal history. Accordingly, he is deemed to have acknowledged the existence of the criminal history. RCW 9.94A.530(2). The current was statute enacted to legislatively overturn the result in State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009).

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

Respectfully Submitted,

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