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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it ordered the appellant's sentence be served consecutively to a previously imposed sentence in another cause number.
2. The trial court erred in imposing an exceptional sentence under RCW 9.94A.535(2)(c) because the State failed to provide notice of its intent to seek an exceptional sentence.
3. The appellant did not receive effective assistance of counsel at sentencing because his attorney did not object to setting sentencing on another day after the appellant entered a guilty plea to the offense of bail jumping after being sentenced earlier that day before another judge in another case, and did not schedule sentencing in both cases to take place on the same day.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under RCW 9.94A.589(3), which permits a trial court to impose consecutive sentences if expressly makes that order, did the court in Bowen's case improperly impose an exceptional sentence?
2. Did Bowen receive ineffective assistance of counsel when the trial court had no obligation to both accept Bowen's plea and sentence him at the same time he was sentenced on separate charges?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Bowen's recitation of the procedural history and facts and adds the following:

At Bowen's sentencing hearing on November 16, 2009, the deputy prosecutor made the following record:

-[W]hen Mr. Foley brought an issue of not stipulating to an offender score, but instead, wanting to see the certified copies of the prior convictions. And this matter was set over for sentencing multiple times, and we had a heck of a time getting Mr. Bowen back before this Court to accomplish this sentencing. RP 24: 3-8.

The deputy prosecutor also noted that not including the conviction for bail jumping, Bowen had accumulated "twenty-seven prior felonies." RP 17: 22-23. Bowen's explanation for not appearing at his sentencing hearing on September 26, 2008, was as follows:

Well, the reason I didn't show up to court was I was trying to – I was surprised I got convicted on the charge. So, Judge Sawyer gave me two days to go out there and I only had – I had a lot of stuff to take care of. I was trying to take care of everything. I was late for court that morning, so I decided just not to come in and to stay out for a couple of days. You know, I stayed in Kitsap County where my address was. I didn't move. I was just trying to get rid of all my stuff and put it in storage, prepare for a ten-year sentence. RP 32: 15-23.

The trial court ultimately sentenced Bowen to 60 months on the bail jumping charge, to run consecutively to his convictions for unlawful

possession of a firearm 1st degree and unlawful possession of methamphetamine. RP 33: 10-21.

3. Summary of Argument

The trial court did not err and improperly impose an exceptional sentence in Bowen's case because it expressly ordered consecutive sentences under the authority of RCW 9.94A.589(3). Likewise, Bowen did not receive ineffective assistance of counsel because the trial court had no duty to both take his plea and sentence him to bail jumping on the same day that he was sentenced on separate charges.

Bowen's attorney also made a strategic decision and required the State to obtain certified copies of all twenty-seven of his client's convictions prior to sentencing, ostensibly with the hope that it would be unable to do so and/or that the documents would prove that some of Bowen's criminal history washed-out. Neither happened, the tactical decision that Bowen's attorney made was unsuccessful, and error did not occur. The State respectfully requests the Court to affirm the judgment and sentence in Bowen's case.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR AND IMPROPERLY IMPOSE AN EXCEPTIONAL SENTENCE IN BOWEN'S CASE BECAUSE IT EXPRESSLY ORDERED CONSECUTIVE SENTENCES UNDER THE AUTHORITY OF RCW 9.94A.589(3).

Statutory interpretation is a question of law that is reviewed de novo. State v. King, 149 Wash.App. 96, 101, 202 P.3d 351 (2009); see State v. Swecker, 154 Wash.2d 660, 665, 115 P.3d 297 (2005). The primary objective with statutory interpretation is to carry out the legislature's intent. State v. Young, 125 Wash.2d 688, 694, 888 P.2d 142 (1995). The intent of the legislature is determined by looking at the statute's language. Young, 125 Wash.2d at 694. The process of legislative intent begins with examining the language of the statute itself, then moves to reading the statute as a whole, and concludes with an attempt to harmonize each provision. State v. Thorne, 129 Wash.2d 736, 761, 921 P.2d 514 (1996). Statutory provisions are harmonized by giving meaning to every word the legislature included in a statute, which avoids rendering any word superfluous. State v. Cooper, 156 Wash.2d 475, 483, 128 P.3d 1234 (2006).

RCW 9.94A.589(3)¹ gives a sentencing judge the discretion to impose either a concurrent or consecutive sentence for a crime that the defendant committed before he [or she] started to serve a felony sentence for a different crime. King, 149 Wash.App. at 101. Subsection (3) of the statute also declares that the imposition of a consecutive sentence is not an exceptional one that would require a finding of aggravating factors. RCW 9.94A.589(3); see King, 149 Wash.App. at 101; State v. Jones, 137 Wash.App. 119, 126, 151 P.3d 1056 (2007). The judge need only order that the sentences be served consecutively; no reason for the decision is required. State v. Mathers, 77 Wash.App. 487, 494, 891 P.2d 738 (1995).

The facts of Bowen's case are similar to those in King, because there the Court upheld the imposition of consecutive sentences. In King, a sheriff's deputy arrested defendant King in 2003 for possession of drugs and stolen property. King, 149 Wash.App. at 99. King was later charged with one count of unlawful possession of a controlled substance, and two counts possession of stolen property. The deputy who arrested defendant King testified against him at trial, and was also present when the trial court

¹ RCW 9.94A.589(3): Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under the sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or any other state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

judge pronounced King guilty of all three charges. When King was found guilty, he threatened the deputy sheriff while leaving the courtroom that day. Defendant King was sentenced on his three convictions on October 5, 2004².

On November 1, 2004, the State charged King with intimidating a witness, and a jury convicted him as charged. King, 149 Wash.App. at 100. The trial court ordered that defendant King serve a standard range sentence consecutively to his sentence for drug possession. Defendant King appealed, and argued in part that RCW 9.94A.589 required a concurrent sentence.

The Court disagreed with defendant King and affirmed the trial court's decision sentencing him consecutively, reasoning that RCW 9.94A.589(3) gave the sentencing judge the discretion to impose either a concurrent or³ consecutive sentence for the crime the defendant committed before he started to serve a felony sentence for a different crime. King, 149 Wash.App. at 101. Per the Court, the trial court in King did not err because its imposition of consecutive sentences did not constitute an exceptional sentence that would require a finding of aggravating factors. Employing the rationale from Mathers, the Court in King aptly reasoned, "[t]he judge need only order that the sentences be served consecutively; no

² The Court later vacated the two possession of stolen property charges.

reason for the decision is required. King, 149 Wash.App. at 101; see Mathers, 77 Wash.App. at 494.

This rationale is applicable to Bowen's case, because he committed bail jumping when he failed to return for the jury's verdict which found him guilty of unlawful possession of a firearm in the first degree and unlawful possession of methamphetamine in September 2008. When Bowen was sentenced for bail jumping on November 16, 2009, the trial court had the authority under RCW 9.94A.589(3) to expressly order a consecutive sentence to these two prior convictions. The trial court did so in the judgment and sentence for the bail jumping conviction. CP 45, pg. 6 of 14. The trial court's imposition of a consecutive sentence likewise did not constitute an improper exceptional one, because the trial court had the authority to sentence consecutively under RCW 9.94A.589(3). Bowen's consecutive sentence was proper, and error did not occur.

2. BOWEN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE TRIAL COURT HAD NO DUTY TO TAKE HIS PLEA AND SENTENCE HIM ON THE BAIL JUMPING CHARGE THE SAME DAY THAT HE WAS SENTENCED ON SEPARATE CHARGES.

At arraignment, a defendant may plead not guilty, not guilty by reason of insanity, or guilty. CrR 4.2; see State v. Tracer, 155 Wash.App. 171, 187, 229 P.3d 847 (2010).

³ Emphasis added.

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. State v. Walker, 143 Wash.App. 880, 890, 181 P.3d 31 (2008); see Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. State v. Rodriguez, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004). Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wash.2d 322, 334-335, 899 P.2d 1251 (1995). Effective assistance of counsel does not mean successful assistance of counsel. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. State v. Gilmore, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

Bowen was arraigned under this superior court cause number⁴ on March 9, 2009. CP 11. On March 23, 2009, he pled as charged to one count of bail jumping. CP 12. Under CrR 4.2, Bowen could have pled on March 9, 2009, at the time of his arraignment. Superior Court was not required, however, to accept Bowen's plea and sentence him on March 23,

2009, along with a separate cause number. Because his attorney required the State to obtain certified copies of all twenty-seven prior felony convictions and conclusively prove the offender score, Bowen made a strategic sentencing decision and lost: if the State had been unable to establish Bowen's conviction history and offender score, he might have received a lesser sentence. See RP 24: 3-8. Bowen received effective if not successful assistance of counsel, and error did not occur.

F. CONCLUSION

The State respectfully requests the Court to affirm the judgment and sentence.

Dated this 18TH day of JUNE, 2010

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burlison, Prosecuting Attorney
Mason County, Washington

⁴ Mason County No. 08-1-00465-1.

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

STATE OF WASHINGTON,)
)
Respondent,)
)
vs.)
)
KEVIN R. BOWEN,)
)
Appellant,)
_____)

No. 40020-1-II

DECLARATION OF
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STATE OF WASHINGTON
BY _____

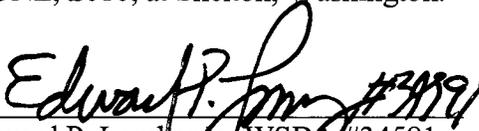
I, EDWARD P. LOMBARDO, declare and state as follows:

On FRIDAY, JUNE 18, 2010, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Peter B. Tiller c/o
The Tiller Law Firm
P.O. Box 58
Centralia, WA 98531

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 18TH day of JUNE, 2010, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591

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