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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

No. 40668-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL D. CRAWFORD
Appellant.

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

The Honorable, Judge Gary R. Tabor
Cause No. 09-1-00568-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court correctly add a point to Mr. Crawford's offender score as he was "under community custody" and based on his stipulation?
2. Did defense counsel effectively assist Mr. Crawford?

B. STATEMENT OF THE CASE.

The State accepts the Appellant's Statement of the Case with the following additions and corrections. Also, pursuant to the petitioner's request, this appeal was consolidated with Mr. Crawford's personal restraint petition in No. 40729-9-II; therefore, for the ease of this Court, all documents referred in this response are contained as appendices in No. 40729-9-II.

Mr. Crawford was charged by Information filed on March 30, 2009, with one count of perjury in the first degree alleging that he committed that crime on February 25, 2009. On July 23, 2009, Mr. Crawford entered a plea of guilty to that charge as contained in the original Information pursuant to an agreed plea agreement where this cause number would run concurrent with the sentence imposed in Thurston County Superior Court Cause No. 08-1-02248-3; his standard sentence range for the instant offense was 62-82 months.

The trial court sentenced Mr. Crawford as having an offender score of "8". The Court engaged in the following discussion

regarding the defendant's offender score with counsel and the defendant at the change of plea hearing on July 23, 2009:

THE COURT: The standard range for that offense would be based upon your criminal history. I'm told that you have a criminal history that consists of seven prior adult felony convictions, and it looks like there are two juvenile convictions, but I don't see them counted in the offender score.

MR. JONES: They are counted, Your Honor, and that is because the parties are agreeing for purposes of this sentencing that crime number one and crime number three constitute same criminal conduct, Your Honor. And so the seven adult felonies would count as six points. The two adult -- two juvenile felonies would count as one point. And then he was on supervision, that counts as one point. For a total of eight.

THE COURT: Okay. I've amended the sheet so I understand that. In any event, the offender score would be 62 -- I'm sorry. The offender score would be eight, and the standard range would be 62-82 months. You understand that?

THE DEFENDANT: Yes.

THE COURT: All right. Paragraph 6(g), the State indicates that they will recommend a bottom-of-the-range sentence of 62 months, concurrent with another cause number, 08-1-2248-3. Usual costs, crime victim assessment, DNA. Is that what you understand the State will be recommending?

THE DEFENDANT: Yes, Your Honor.

[7/23/09, RP 3-5].

He was sentenced on July 23, 2009, and ordered to serve 62 months (the low end of the SRA standard sentencing range) in the department of corrections; the Court adopted the agreed plea recommendation and ordered that this sentence run concurrent to

the sentence imposed in Thurston County Superior Court Cause

No. 08-1-02248-3:

THE COURT: All right. Mr. Crawford, it's to your advantage to tie this up in a package deal, I would indicate. And so this appears to be something that you've thought out. You've talked to your attorney about it. In pleading guilty, you're now accepting the Court's sentence, and I must sentence you within the standard range. So the State's recommendation is the bottom of the range. Your attorney concurs with that. And, under the circumstances, that's appropriate.

I'll sentence you to 62 months in prison concurrent with 08-1-2248-3.....

[7/23/09, RP 8].

In the earlier cause number, Thurston County Superior Court Cause No. 08-1-02248-3, Mr. Crawford was ordered to serve a sentence of 27 months in the department of corrections for the crimes of attempting to elude a police vehicle and 2 counts of felony violation of the Uniform Controlled Substances Act.

C. ARGUMENT.

1. The trial court correctly added a point to Mr. Crawford's offender score as he was "under community custody" and based on his stipulation.

Pursuant to RCW 9.94A.525(19):

If the present conviction is for an offense committed while the offender was under community custody, add on point. For purposes of this subsection, community custody includes community placement or

postrelease supervision, as defined in chapter 9.94B RCW.

When Mr. Crawford committed the above offense he was “under community custody” on Thurston County Superior Court Cause No. 99-1-1205-8. The period of community placement ordered was 24 months on Thurston County Superior Court Cause No. 99-1-1205-8. The defendant was not released from the custody of the Department of Corrections on the Assault in the first degree conviction in Thurston County Superior Court Cause No. 99-1-01205-8 until September, 2008. Therefore, on February 25, 2009, the date of the commission of the crime of perjury in the first degree, the defendant “was under community placement”.

The appellant argues for a novel approach to community custody arguing that if he commits other crimes and ends up in jail while on community custody that he should not be punished as stated clearly in RCW 9.94A.525(19). He based this argument on no case law. Instead, he cites to RCW 9.94A.625, the community custody tolling statute which states in its totality the following:

- (1) A term of confinement ordered in a sentence pursuant to this chapter shall be tolled by any period of time during which the offender has absented himself or herself from confinement without the prior approval of the entity in whose custody the offender has been placed. A term of

partial confinement shall be tolled during any period of time spent in total confinement pursuant to a new conviction or pursuant to sanctions for violations of sentence conditions on a separate felony conviction.

- (2) Any term of community custody, community placement, or community supervision shall be tolled by any period of time during which the offender has absented himself or herself from supervision without prior approval of the entity under whose supervision the offender has been placed.
- (3) Any period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement for any reason. However, if an offender is detained pursuant to RCW 9.94A.740 or 9.94A.631 and is later found not to have violated a condition or requirement of community custody, community placement, or community supervision, time spent in confinement due to such detention shall not toll the period of community custody, community placement, or community supervision.
- (4) For terms of confinement or community custody, community placement, or community supervision, the date for the tolling of the sentence shall be established by the entity responsible for the confinement or supervision.

[RCW 9.94A.625].

Clearly, the above statute only deals with “tolling”. It does not shed any light on the statutory term of “under community custody” pursuant to RCW 9.94A.525(19). Pursuant to RCW 9.94A.525(19), Mr. Crawford’s SRA criminal history as described above, and the agreement of the appellant, Mr. Crawford was

clearly “under community custody” when he committed the crime of perjury in the first degree. Also, Mr. Crawford agreed with his offender score calculation at sentencing and agreed to a plea agreement which ran the sentence for perjury in the first degree concurrent with a prior felony prison sentence (without this plea agreement, this sentence would have run consecutively by operation of law).

2. Trial counsel provided effective assistance to Mr. Crawford.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when “but for the deficient performance, the outcome would have been different.” *In the Matter of the Personal*

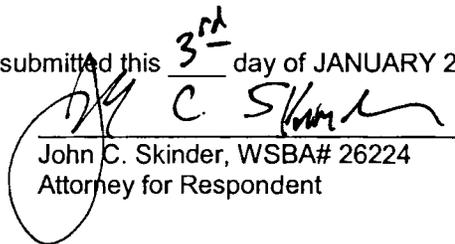
Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. See *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

Clearly, based on the lack of any case law to support his claim, trial counsel was not deficient in his representation of Mr. Crawford. In fact, trial counsel secured a very beneficial agreed plea agreement wherein Mr. Crawford's sentence for the instant case ran concurrent to an earlier felony prison sentence. Under these facts, trial counsel clearly provided effective representation to Mr. Crawford.

D. CONCLUSION.

Based on the above facts and argument and the lack of any supporting case law authority, the State respectfully requests that this Court deny Mr. Crawford's appeal and affirm his sentence as ordered by the trial court.

Respectfully submitted this 3rd day of JANUARY 2011.


John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
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- Hand delivered by to Supreme Court

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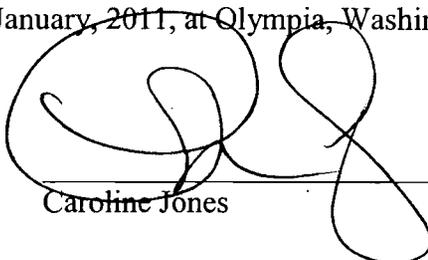
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 4 day of January, 2011, at Olympia, Washington.



Caroline Jones