

NO. 49006-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

CORY LEWIS,

Appellant.

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

The Honorable Jack Nevin, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. LEWIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING SENTENCING.

In his opening brief, appellant Corey Lewis asserts he was denied effective assistance of counsel when defense counsel failed to provide appropriate notice for Lewis' request for a sentence below the standard range, failed to brief the issue, and failed to inform the trial court of compelling case law supporting his motion. Brief of Appellant (BOA) at 8-15. In response, the State correctly recognizes that a presumption of counsel's competence can be overcome by showing counsel failed to adequately investigate the law and facts; however, it goes on to argue that counsel's performance here was not deficient because he cited to the relevant statute and brought up some case law in support of Lewis' sentencing request. Brief of Respondent (BOR) at 12-14. As shown below, the State's is incorrect because counsel's performance here fell below objectively reasonably professional standards.

The duty to provide effective assistance of counsel includes the duty to research and apply relevant statutes and case law. In re Personal Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351

P.3d 138 (2015). Prevailing norms of practice as reflected in American Bar Association standards ... are guides to determining what is reasonable.” Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The A.B.A. Defense Function Standard 4- 4.1(a) provides the following:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction....

This standard implies that defense counsel must be apprised of the relevant case law pertaining to the sentencing issues before he may competently pursue defense strategies. In fact, the A.B.A. standard addressing consultation between attorney and client nearly states as much, requiring:

After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

A.B.A. Defense Function Standard 4-5.1(a) (emphasis added).

These professional standards establish that counsel’s familiarity with relevant law is a threshold requirement for making informed decisions regarding a legitimate trial or sentencing strategy and for rendering effective representation. See, e.g., Tsai, 183

Wn.2d at 102-03; State v. Kylo, 166 Wn.2d 856, 865-69, 215 P.3d 177 (2009) (holding that counsel was ineffective where he failed to conduct proper legal research when formulating and executing the defense); Hinton v. Alabama, ___ U.S. ___, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014) (“An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance”); Williams v. Taylor, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding counsel’s failure to investigate an avenue of defense because he was ignorant of relevant law could not be excused as strategic or tactical); State v. Felton, 110 Wis.2d 485, 500-07, 329 N.W.2d 161(1983) (holding that defense counsel was ineffective where he argued one defense but failed to argue another line of defense because he was unfamiliar with the law).

Given the record in this case, it cannot be said that defense counsel was reasonably competent in his representation of Lewis at the sentencing hearing. Defense counsel failed to give adequate notice of his motion for a sentence below the standard range, failed to file briefing supporting the request, and most importantly failed to bring forth to the trial court relevant case law supporting the motion.

Specifically, as argued in detail in appellant's opening brief – given the factual findings entered at the end of the bench trial – it was objectively unreasonable for defense counsel not to have specifically placed before the trial court the holding in State v. Whitfield, 99 Wn. App. 331, 333-34, 994 P.2d 222 (1999) while making a timely motion supported by briefing. See, BOA at 9-13 (providing detailed argument).

The State next argues that prejudice cannot be shown because Lewis cannot show a “nexus between the argument and the eventual sentence.” BOR at 12. However, in the context of cases in which defense counsel fails to inform himself of relevant facts and case law, the focus under Strickland's prejudice prong is on whether counsel's failure has resulted in relevant evidence or a viable line of argument not being presented. See, Hinton, 134 S. Ct. at, 1089 (holding prejudice could be established if defense counsel's ignorance of the law resulted in the defense's failure to put forth a credible expert supporting a viable line of defense); Felton, 110 Wis.2d at 507 (finding prejudice where defense counsel's ignorance of the law resulted in the failure to raise a viable line of defense).

Lewis has shown on appeal that defense counsel's unreasonable failure to give adequate notice, fully brief Lewis' sentencing request, or inform the court as to the Whitfield case foreclosed a viable line of argument supporting an exception sentence downward. BOA at 9-13. It was crucial that the trial court was informed of this holding and had adequate time to consider it in the context of the bench's findings. By not informing himself of this relevant case law or bringing it to the trial court's attention, defense counsel failed to present a viable line of argument supporting Lewis' motion for a downward departure based on the victim's own involvement. This shows sufficient prejudice.

In sum, contrary to the State's assertion, the record shows Lewis received ineffective assistance of counsel during sentencing. Therefore, the case should be remanded for a new sentencing hearing so he may receive effective assistance of counsel.

II. THE SENTENCING RECORD IS INSUFFICIENT TO PERMIT APPELLATE REVIEW.

In his opening brief, Lewis alternatively asserts the trial court's failure to state on the record its reasons for denying an exceptional sentence below the standard range forecloses meaningful appellate review as to whether the trial court relied on

an impermissible basis. BOA at 15-16. In response, the State first claims that because the trial court is not statutorily required to enter formal written findings and conclusions, there is no merit to this argument. BOR at 7-9. This incorrect.

While the State correctly recognizes that the sentencing statutes and case law do not require formal written findings, it wrongly concludes that the trial court need not state the basis of its decision on the record. In the end, the State fails to explain how this Court may meaningfully consider whether the trial court relied on an impermissible basis for refusing Lewis' proposed sentence departure without any clue as to what actually was the basis of the trial court's decision.

The State recognizes (as it must), where the defendant has requested an exceptional sentence below the standard range, an appellate court will review this decision to determine whether the trial court relied on an impermissible basis. BOR at 8 (citing State v. Khanteechit, 101 Wn. App. 137, 138, 5P.2d 727 (2000)). This is so even though no written findings and conclusions are required. As such, the implication is that the trial court must at some point on the record establish the substantive basis for its decision.

Indeed, it is well recognized that requiring the trial court to identify on the record its reasons for imposing or denying an exceptional sentence is essential to meaningful appellate review of a trial court's decision to impose a certain type of sentence. See, ABA Standards for Criminal Justice: Sentencing std. 18-5.19, 18-8.2 (3d ed.1994). The commentary to ABA Standards for Criminal Justice: Sentencing std. 18-5.19 (at 213) specifically note that a trial court's statement of the reasons for a particular sentencing decision is "essential to meaningful appellate review of sentences" and particularly important when the trial court is asked to depart from the presumptive range. As these ABA standards indicate, the simple fact is that the trial court must identify – on the record – the basis for its decision not to impose an exceptional sentence below the standard range before an appellate court may effectively review whether the trial court has relied on an impermissible basis for such a denial.

Next, the State claims that the record does in fact state a sufficient basis thus permitting meaningful review. However, the State confuses a record that shows the trial court actually exercised its discretion with a record that establishes the substantive basis for the court's decision. BOR at 9-10. It is true the record shows the

trial court recognized and intended to exercise its discretion. RP (4-28-16) 28. As explained in appellant's opening brief, however, the record unfortunately also reveals the trial court failed to provide substantive reasoning as to why it rejected Lewis' requested downward departure. See, BOA at 15-16.

Importantly, given the necessary interplay between the bench findings and the sentencing provision Lewis relied upon, there is a significant possibility that the trial court in fact rested its decision on an impermissible basis. As explained in appellant's opening brief (BOA at 16, n. 1), the trial court might have taken the position that a downward departure is only available where the defendant's use of force is proportional to the victim's provocation. Given the trial Court's findings that the victim was provoking only a fist-fight, it might have then concluded that Lewis' response was disproportional and there was no basis for a downward departure. However, this analysis would be wrong under Whitfield and would therefore be an impermissible basis for denying the downward departure. This demonstrates exactly why there needs to be an adequate record of the trial court's reasoning to permit meaningful appellate review.

For the reasons stated above and in Lewis' opening brief, this Court should – at the very least – remand with an order for the trial court to provide on the record the basis for its decision not to grant the requested sentencing departure.

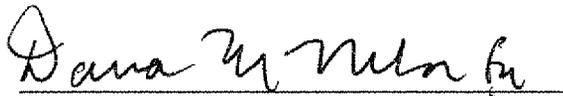
B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this Court should vacate the sentence and order a new sentencing hearing.

DATED this 28th day of March, 2017.

Respectfully submitted,

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Case Name: Cory Lewis

Court of Appeals Case Number: 49006-4

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Comments:

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