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Division II
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No. 49855-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WELLS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. Under due process and equal protection guarantees, Mr. Wells is entitled to an additional 91 days of credit for time served.

a. The issue is not waived.

Although the issue of the proper amount of credit for time served was before the trial court, the State asks this Court to skirt the issue because Mr. Wells makes a different argument on appeal. Br. of Resp't 4-6. Effectively, the State contends Mr. Wells must suffer 91 more days of incarceration because he did not make the right argument below. Br. of Resp't at 4-6.

Neither precedent nor justice requires this result. Mr. Wells did not waive the issue. The issue of the proper amount of credit for time served was before the trial court. This is no new issue.

Moreover, it is well established that "illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). As our Supreme Court recently made plain, appellate courts have authority "to address arguments belatedly raised when necessary to produce a just resolution." State v. McFarland, 189 Wn.2d 47, 57, 399 P.3d 1106 (2017). "Proportionality and consistency in sentencing are central values of the [Sentencing Reform Act], and courts should afford relief when it serves these values." Id. &

n.4 (noting that “[u]nder RAP 2.5(a) appellate courts may entertain issues raised for the first time on appeal in the interest of justice.”).

And even if the foregoing were not enough dispose of the State’s contentions, RAP 2.5(a)(3) applies here. Under RAP 2.5(a)(3), manifest error affecting a constitutional right may be raised for the first time on appeal as a matter of right. State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015) (“The text of RAP 2.5(a) clearly delineates three exceptions that allow an appeal as a matter of right.”). To make this determination, the appellate court asks: (1) is the error of constitutional magnitude, and (2) is the error manifest? State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Here, the claimed error is plainly constitutional. Mr. Wells is arguing that due process and equal protection principles entitle him to additional credit for time served. See State v. Lewis, 184 Wn.2d 201, 205, 355 P.3d 1148 (2015) (recognizing similar arguments as being based in due process and equal protection).

The error is also “manifest.” To be “manifest,” there must be a showing of “actual prejudice,” meaning “that the claimed error had practical and identifiable consequences . . .” State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The appellate court may examine whether the trial court could have corrected the error. Kalebaugh, 183 Wn.2d at

583. The analysis previews the claim and should not be confused with establishing an actual violation. Lamar, 180 Wn.2d at 583.

Here, the error had practical and identifiable consequences.

Assuming Mr. Wells is correct, he is being required to serve 91 more days of incarceration than he should. And because the trial court was considering how credit for time served Mr. Wells should receive, the court could have corrected the error. Indeed, although the trial court accepted the State's framework, the court disagreed with the State's calculations. RP 28; CP 75; Br. of Resp't at 12 n.2.

This Court should reject the State's arguments and address Mr. Wells' argument on the merits.

b. By denying Mr. Wells credit for the 91 days he was incarcerated during the appeal, he is being treated differently based on his lack of wealth and the exercise of his constitutional rights.

After his successful suppression motion, Mr. Wells had this case dismissed and he was released. While this case was on appeal, Mr. Wells was confined on another matter for a total of 91 days. Unlike a wealthy person, Mr. Wells did not bail out during these 91 days. His dismissed case was then revived by this Court on appeal. Mr. Wells pleaded guilty, but he did not receive credit for the 91 days he was confined while this case was on appeal.

As explained in the Opening Brief, this violated due process and equal protection. Br. of App. at 8-12. Given the circumstances, a rich person in Mr. Wells' position could have bailed out during the 91 days that Mr. Wells was incarcerated. Consequently, this hypothetical rich person's effective sentence would have been less than Mr. Wells' sentence. Due process and equal protection principles forbid this kind of disparity between rich and poor. See Lewis, 184 Wn.2d at 204-05,; State v. Medina, 180 Wn.2d 282, 292-93, 324 P.3d 682 (2014); Reanier v. Smith, 83 Wn.2d 342, 349, 352, 517 P.2d 949 (1974).

The State asserts this argument is "untethered" from Washington precedent. Br. of Resp't at 8-9. It is not. That Mr. Wells was not technically confined in this case during the pendency of his appeal should not matter. What matters is whether Mr. Wells is being treated differently than a wealthy person without any (let alone rational) justification. Accordingly, the refusal to grant Mr. Wells 91 days of credit flunks rational basis review, and violates due process and equal protection guarantees. See Lewis, 184 Wn.2d at 205; Medina, 180 Wn.2d 292-93, Reanier, 83 Wn.2d at 346.

In support of its contrary argument, the State relies primarily on State v. Stewart, 136 Wn. App. 162, 149 P.3d 391 (2006). Br. of Resp't at 7-8. Stewart, however, did not involve facts analogous to this case.

Stewart, 136 Wn. App. at 164-65; Br. of Resp't at 7-8. Stewart also did not involve a due process or equal protection argument.

The State cursorily argues that Mr. Wells was not punished for successfully exercising his constitutional rights at the trial court level and obtaining dismissal. Br. of Resp't 11. It remains a fact, however, that if Mr. Wells had been unsuccessful and not obtained dismissal, he would have received 91 more days of credit. Br. of App. at 11-12. It is not rational to treat Mr. Wells differently simply because a trial court agreed his constitutional rights were violated and dismissed his case.

Under due process and equal protection principles, Mr. Wells is entitled to be credited 91 additional days. The Court should order he be credited this additional amount.

2. Due to trial counsel's ineffective assistance, Mr. Wells' period of incarceration was increased. Remand is necessary to remedy this injustice.

The State agrees Mr. Wells was constitutionally entitled to effective assistance of counsel for his sentencing proceedings. Br. of Resp't 10. The State also appears to agree as to the relevant law and the pertinent facts. The State argues that Mr. Wells was not deprived of effective assistance of counsel.

a. Counsel's agreement to delay sentencing was unreasonable and resulted in Mr. Wells' period of incarceration being increased.

Concerning the sentencing delay, the State does not disagree that in delaying sentencing, Mr. Wells' actual period of incarceration was increased by 34 days. Br. of App. at 13-15; Br. of Resp't at 11-14. The State also does not defend trial counsel's belief that delaying sentencing would have no impact on his client. See RP 14 (where defense counsel states that delaying sentencing did not matter because "It's not like [my client is] going to get out.>").

Rather, the State contends counsel's "decisions were part of a legitimate tactic to attempt to obtain additional credit for time served for Mr. Wells." Br. of Resp't at 13. But to be legitimate, a tactic must be reasonable. 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."). "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). In Kyлло, our Supreme Court held it was deficient performance for counsel to propose a pattern instruction because it was actually an incorrect statement of the law and made it easier for the State to convict counsel's client. Kyлло, 166 Wn.2d 863-65.

Here, counsel's argument in favor of additional credit was not only unsupported by the law, it was contrary to it. Lewis, 184 Wn.2d at 206; State v. Watson, 63 Wn. App. 854, 859-60, 822 P.2d 327 (1992); accord 13B Wash. Prac., Criminal Law § 3603 (2016-2017 ed.) (“[T]ime credited on a charge for which the offender has been sentenced cannot be credited towards other crimes for which sentencing has not yet occurred.”). The Court should reject the State's argument that trial counsel acted reasonably by repeatedly agreeing to delay sentencing.

Concerning prejudice, the State asserts that sentencing would have not happened sooner “due to the need of both parties to brief the legal issue regarding Mr. Wells' credit for time served.” Br. of Resp't at 16. But had trial counsel acted reasonably and not pursued a frivolous argument, he would not have agreed to a delay. There is a reasonable probability that sentencing would have commenced immediately following the guilty plea. Contrary to the State's argument, no delay was necessary. For example, the trial court could have simply ordered that the jail calculate Mr. Wells' credit. There was certainly no need for counsel to acquiesce to a second delay in late December 2016. This delay cost his client 13 days of his freedom. Br. of App. at 14-15.

The Court should hold that Mr. Wells was deprived of effective assistance of counsel. The Court should remand with instruction that Mr.

Wells be credited 34 more days. Alternatively, the Court should at least remand with instruction that Mr. Wells be credited 13 more days because counsel was ineffective in acquiescing to the second delay in sentencing. Br. of App. at 15.

b. The trial court had discretion to sentence Mr. Wells to 20 months rather than 24 months. Because the court was not aware of its discretion to consider time served on other charges, remand is appropriate.

The State does not disagree that the trial court had discretion to impose 20 months rather than 24 months. Time served on other charges is a relevant factor that a sentencing court may consider in exercising its discretion on where to sentence a defendant within the standard range. Watson, 63 Wn. App. at 859-60 (“Insofar as time served on other charges is relevant, the court may consider that factor in exercising its discretion within the standard range”). As argued, it was deficient performance for counsel to not point this discretion out to the sentencing court given this record. Br. of App. at 15-17.

Mr. Wells reiterates his arguments that trial counsel could have properly pointed out to the trial court it had this discretion and asked for a 20 month sentence without violating the plea agreement. Br. of App. at 15-17. The actual guilty plea documents submitted do not state that Mr. Wells was forbidden from asking for a lower sentence. CP 20-36. The

oral remarks that the State points to indicating that there was an agreed recommendation are therefore not dispositive. Br. of Resp't at 14-15.

Moreover, breach does not occur when a lawyer, acting as an officer of the court, simply points out the law to the sentencing judge. See State v. Sledge, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997); (“The prosecutor, as an officer of the court, is obliged to participate in the sentencing proceedings, candidly answer[] the court’s questions . . . and hold[] back no relevant information.”); State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998). This Court should reject the State’s argument that defense counsel would have breached the plea agreement by pointing out that the trial court had discretion to consider time served on other charges.

But if this Court disagrees with the foregoing, the Court should nevertheless instruct the Court on remand to reconsider its sentence in light of Watson. It does not appear that the trial court was aware that time served on other charges is a relevant factor in picking where on the range to sentence a person. Assuming this Court accepts the State’s concession as to legal financial obligations, this case will be remanded to the trial court. Following our Supreme Court’s directive in McFarland, it is appropriate for the trial court to reconsider its sentence because the record shows the court was not aware that it had discretion to consider time

served on other charges in crafting a sentence. See McFarland, 189 Wn.2d 57 (remanding for resentencing because record suggested possibility that sentencing court would have considered lesser sentence had it understood its discretion).

3. The trial court erred by ordering Mr. Wells to pay \$2,000 in legal financial obligations for a “drug enforcement fund.” The court should remand with instruction that it be stricken.

Despite waiving all discretionary legal financial obligations due to Mr. Wells’ indigence, the trial court improperly ordered Mr. Wells to pay \$2,000 as part of a discretionary drug enforcement fund fee. Br. of App. at 17-21. The State properly concedes error. Br. of Resp’t at 16-17. This Court should accept the concession, remand, and order the trial court to strike this legal financial obligation.

B. CONCLUSION

This Court should remand for further proceedings. At these proceedings, the \$2,000 in legal financial obligations should be stricken. Mr. Wells should be credited 91 more days. Due to counsel’s ineffectiveness, Mr. Wells’ should be credited 34 more additional days credit. The sentencing court should also reconsider whether to impose a lesser sentence in light of the time Mr. Wells served on other charges.

DATED this 6th day of November, 2017.

Respectfully submitted,

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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 49855-3-II
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)	
MICHAEL WELLS,)	
)	
Appellant.)	

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