

NO. 49855-3-II

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

STATE OF WASHINGTON, Respondent

v.

MICHAEL FREDERICK WELLS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01975-2

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. When a case is dismissed a defendant who is in jail for an unrelated case is not being held on the dismissed case and the denial of that credit for time served when the dismissed case is reinstated does not raise due process or equal protection concerns.**
- II. Mr. Wells received the effective assistance of counsel during the sentencing phase of his case.**
- III. The trial court did err when it ordered Mr. Wells to pay a discretionary \$2,000 drug enforcement fund fee after it waived all discretionary financial obligations due to indigence.**

STATEMENT OF THE CASE

On October 22, 2013, Michael Wells was charged with two counts of Possession of a Controlled Substance with Intent to Deliver. CP 3. Mr. Wells spent 3 days in custody before bailing out. On May 12, 2014, while the 2013 case was pending, Mr. Wells was again arrested and he was charged with additional drug crimes. CP 49. At this point, Mr. Wells was held in custody for both the 2013 case and the 2014 case and would remain in custody for 22 days before bailing out on both on June 4, 2014. CP 49, 54. Thus, by the time Mr. Wells bailed out on June 4, 2014 he had spent a total of 25 days in jail on the 2013 case.

On October 14, 2014, the trial court dismissed the 2013 case pursuant to a successful suppression motion filed by Mr. Wells. CP 9-11,

55. Following the dismissal, the State filed a notice of appeal. CP 11, 55. In August of 2016, the State's appeal resulted in the reversal of the suppression motion and the 2013 case was reinstated. CP 7-16. 55-56.

In the interim, however, Mr. Wells's 2014 case was still pending and he was having trouble complying with the conditions of his supervised release. CP 49-52. He was, therefore, booked into jail on two occasions: between October 23, 2014 and November 10, 2014 for a total of 18 days and between May 12, 2015 and July 24, 2015, the day on which he pleaded guilty and was sentenced on the 2014 case, for a total of 73 days. CP 49-52. Mr. Wells was sentenced to 40 months in prison on the 2014 case. Brief of Appellant, Appendix at pg. 4. In total, Mr. Wells spent 91 days in custody on his 2014 case while the 2013 was dismissed.

In 2016, Mr. Wells and the State entered into a plea agreement on the 2013 case wherein the parties would agree to a term of 24 months in prison concurrent with the sentence in the 2014 case, a sentence Mr. Wells was still serving. RP 7-8, 16; CP 25. The only disputed issue was the amount of credit for time served to which Mr. Wells was entitled. *See generally* RP; CP 40-48, 58-59. The parties briefed and argued the issue, with the State arguing that Mr. Wells was entitled only to credit for time served on the 2013 case for time he served in custody on that case prior to

the case's dismissal. CP 40-42. Mr. Wells, on the other hand, made two separate arguments: 1) that he was entitled to credit for time served, in addition to the pre-dismissal time in custody, for any and all time he spent in custody since the mandate issued on the 2013 case, which was August 15, 2016, even though he had been under sentence for the 2014 case prior to the issuance of the mandate; 2) that he was entitled to credit for time served, in addition to the pre-dismissal time in custody, for any and all time he spent in custody after being sentenced in the 2014 case, which occurred in 2015. CP 43-48, 58-59; RP 17-18. Notably, Mr. Wells never made the argument he now makes: that he is entitled to credit for time served for the time he was in custody on the 2014 case prior to pleading on that case and while the 2013 case was dismissed. *See* RP; CP 43-48, 58-59.

The trial court agreed with the State's legal argument, rejected Mr. Wells', and awarded Mr. Wells with 25 days of credit for time served. RP 28-30; CP 75. The trial court also found Mr. Wells presently indigent with limitations on his ability to pay and indicated that it intended to waive the non-mandatory financial obligations. RP 22, 30; CP 65. Nonetheless, Mr. Wells' Judgement and Sentence included the imposition of a discretionary, \$2,000 drug enforcement fund fee. CP 65.

ARGUMENT

I. When a case is dismissed a defendant who is in jail for an unrelated case is not being held on the dismissed case and the denial of that credit for time served when the dismissed case is reinstated does not raise due process or equal protection concerns.

a. Waiver

Because Mr. Wells did not make his current argument regarding credit for time served to the trial court he waived the right to now raise the argument. The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 514, 265 P.3d 982 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995)). This “rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal . . .” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998) (citation omitted).

An exception to this rule exists, however, for manifest errors affecting a defendant’s constitutional rights. RAP 2.5(a)(3); *Hayes*, 165 Wn.App. at 514. Nevertheless, “RAP 2.5(a)(3) does not permit all asserted constitutional claims to be raised for the first time on appeal, but only certain questions of ‘manifest’ constitutional magnitude.” *State v.*

Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007) (citation omitted). “In order to benefit from this exception, ‘the [defendant] must identify a constitutional error and show how the alleged error actually affected the [defendant]’s rights at trial,’” i.e., show that the error is manifest. *State v. Grimes*, 165 Wn.App. 172, 180, 267 P.3d 454 (2011) (alterations in original) (quoting *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)) (quoting *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). Consequently, a defendant cannot meet his burden if he “simply assert[s] that an error occurred at trial and label[s] the error ‘constitutional. . . .’” *Grimes*, 165 Wn.App. at 186.

Here, Mr. Wells argues he is entitled to additional credit for time served on the 2013 case for the time he was in custody on the 2014 case prior to pleading on that case and while the 2013 case was dismissed. Because Mr. Wells failed to make this current credit for time served argument to the trial court and does not address RAP 2.5(a)(3) or issue preservation at all, he has waived the right to have this Court consider his new argument. Instead, he “simply assert[s] that an error occurred . . . and label[s] the error constitutional” because it allegedly affected his right to due process and equal protection. *Id.* at 186; Br. of App. at 8-12. This is insufficient. Moreover, our courts have held that the “[d]enial of credit for unrelated charges does not raise due process, equal protection, or double

jeopardy concerns.” *In re Albritton*, 143 Wn.App. 584, 594 FN 6, 180 P.3d 790 (2008) (citing *State v. Stewart*, 136 Wn.App. 162, 165, 149 P.3d 391 (2006)). Thus, the alleged error about which Mr. Wells now complains cannot rise to the level of a manifest error affecting his constitutional rights. This Court should deny review of the issue.

b. In the event that this court addresses the credit for time served argument on the merits, the trial court correctly calculated the amount of credit for time served that Mr. Wells was due.

The law requires that the presentence detention time a defendant serves is to be credited against the sentence ultimately imposed. *State v. Speaks*, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992); RCW 9.94A.505(6) (“The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.”). So long as a defendant is held in custody on a case, and not serving a sentence on another case, he is entitled to credit for time served on that case. *See State v. Lewis*, 184 Wn.2d 201, 355 P.3d 1148 (2015); *State v. Watson*, 63 Wn.App. 854, 859, 822 P.3d 327 (1992) (holding that the Sentencing Reform Act “implements a defendant’s constitutional right to receive credit for any time that he has been held in custody by reason of that charge”). This principle ensures that the long-standing rule from *In re*

Reanier v. Smith—that “a person unable to obtain pretrial release may not be confined for a longer period of time than a person able to obtain pretrial release without violating due process and equal protection”—is followed. *Lewis*, 184 Wn.2d at 205 (citing *In re Reanier v. Smith*, 83 Wn.2d 342, 346 517 P.2d 949 (1974)). Thus, a defendant who is held in custody on multiple cases, but not serving a sentence, is entitled to credit on each of those cases in which he is being held. See *Lewis*, 184 Wn.2d 201; *Stewart*, 136 Wn.App at 164-66.

On the other hand, there should be “no dispute that [a defendant] is not entitled to receive credit for the time he spent in jail on unrelated offenses.” *In re Albritton*, 143 Wn.App. at 594 (citing *Stewart*, 136 Wn.App. at 165; *In re Phelan*, 97 Wn.2d 590, 597, 647 P.2d 1026 (1982); *State v. Williams*, 59 Wn.App. 379, 382, 796 P.2d 1301 (1990)). Thus, the “[d]enial of credit for unrelated charges does not raise due process, equal protection, or double jeopardy concerns.” *Id.* at 594 FN 6. Accordingly, a defendant “should be given credit only for presentence time he has actually served on a charged offense.” *Stewart*, 136 Wn.App. at 165.

State v. Stewart is instructive. 136 Wn.App. 162. In *Stewart*, the defendant was charged with various crimes encompassed in three different cases and remained in custody from the time he was originally booked on the first case until the time he was sentenced on all three. He was booked

on the first case on July 9, 2004. He was booked and charged on the second case on August 4, 2004. He was booked and charged on the third case on December 22, 2004. *Id.* at 163. As mentioned above, he was then sentenced on all three cases on the same day. *Id.*

The defendant contended that he should be given credit for time served on all three cause numbers from the first moment he was booked into jail, July 9, 2004, even though the latter two cases did not exist at that time. *Stewart*, 136 Wn.App. at 165. The Court of Appeals rejected that argument and affirmed the trial court, which awarded credit for time served in each case in the exact amount of time between the day he was booked on each case and the date of sentencing. *Id.* at 166-69. *Stewart* concluded that the language of RCW 9.94A.505(6), *supra*, “indicates that [the defendant] should be given credit only for presentence time he has actually served on a charged offense” and that there was no statutory authority or case law directing a trial court to award credit for time served on a case that a defendant was “not charged with or incarcerated for . . .”. *Id.* at 165, 169.¹

Here, Mr. Wells’ argument is untethered from the holdings in *Reanier* and *Lewis*. Explicit in each of those cases and in *Stewart* is that

¹ Similarly, when the defendant in *Lewis* was sentenced on his third case he did not receive credit for time served for time in confinement on his other cases prior to being booked and charged on the third case even though each of the cases were sentenced concurrently. 184 Wn.2d at 202-05.

defendant actually has to be confined on the case in order to receive credit for time served on said case. For this very reason, the “[d]enial of credit for unrelated charges does not raise due process, equal protection, or double jeopardy concerns.” *In re Albritton*, 143 Wn.App. at 594 FN 6. That is, nobody, rich or poor, is entitled to take confinement time spent only on one case and apply that credit to that case and then apply it again to another case in which they were not confined. From that analysis it necessarily follows that Mr. Wells was also not “punished” for exercising his right to file a suppression motion when he was not awarded the credit for time served at issue.

That the 2013 case was sentenced concurrent to the 2014 case does not change the analysis. When a sentence is ordered to run concurrent with another sentence, concurrency is prospective, not retrospective. *Watson*, 63 Wn.App. at 859 (holding “‘concurrently,’ as used in regard to prior sentences, can only mean that the last sentence imposed will overlap the prior sentences, not that it will terminate at the same time”). Thus, the trial court properly did not award, in the 2013 case, credit for time served for the time in confinement that Mr. Wells spent on the 2014 case within the almost two years in which the 2013 was dismissed and on which he was not confined.

II. Mr. Wells received the effective assistance of counsel during the sentencing phase of his case.

Mr. Wells argues that his trial counsel was ineffective in four ways during the sentencing proceedings in this 2013 case: 1) he did not seek an immediate sentencing on December 2, 2016, the date of his guilty plea; 2) he acquiesced to a delay in the sentencing from December 23, 2016 to January 4, 2017; 3) he again acquiesced to a delay in the sentencing from January 4, 2017 to January 5, 2017; and 4) he failed to argue that Mr. Wells receive a low end sentence of 20 months. These arguments fail.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That said, a defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of

counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

a. Deficient Performance

The analysis of whether a defendant’s counsel’s performance was deficient starts from the “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 217, 211 P.3d 441 (2009) (“Judicial scrutiny of counsel’s performance must be highly deferential.”) (quotation and citation omitted). Thus, “given the deference afforded to decisions of defense counsel in the course of representation” the “threshold for the deficient performance prong is high.” *Grier*, 171 Wn.2d at 33. On the other hand, a defendant “can rebut the presumption of reasonable performance by demonstrating that ‘there is no conceivable legitimate tactic explaining counsel’s’” decision. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

1. The sentencing delays, to the extent that defense counsel sought them or did not object, were part of a legitimate tactic to attempt to obtain credit for time served.

On December 2, 2016, Mr. Wells pleaded guilty pursuant to an agreed plea offer. RP 7-8. The parties, however, were not able to agree as to the amount of credit for time served that Mr. Wells was due. RP 8, 11-

12; CP 40-48. Thus, the parties agreed to ask for a set over of sentencing so each could brief the issue and defense counsel could argue for a “great deal” more credit than the State was advocating. RP 8, 11-12. While the State thought Mr. Wells was entitled to 29² days credit, defense counsel argued for anywhere from 142 days to 567 days credit. RP 13-14, 18. CP 40-42, 58-59. The new sentencing date was set to December 23, 2016 and the State and defense filed sentencing memoranda on December 21, 2016 and December 22, 2016, respectively. RP 11-12; CP 40-48.

On December 23, 2016, the assigned deputy prosecuting attorney (“DPA”) was out of the office so the State asked for a set over of the sentencing so that the assigned DPA could argue the sentencing issue. RP 13. The trial court remarked “there’s a big enough difference of opinion here between the two sides, I think -- it’s unfortunate [the assigned DPA] isn’t here. I think he has an argument that needs to be made that I need to hear, as I make an assessment with this.” RP 14. The trial court asked defense counsel about moving the sentencing to January 4, 2017, and as Mr. Wells accurately states, defense counsel acquiesced. RP 14. The trial court then remarked again that “we can’t do anything today about [the assigned DPA’s absence. But it is argument that I think I need to hear from both sides.” RP 14.

² This amount was either a miscalculation or an inadvertent error. The correct amount of time due based on the State’s argument, and the trial court’s ruling, is 25 days.

On January 4, 2017, defense counsel filed a “Supplemental Memorandum on Sentencing.” CP 58-59. Additionally, the parties showed up in court as scheduled and made arguments to the trial court regarding the credit for time served issue. RP 16-19. Following the arguments, the trial court spoke preliminarily about the relevant issues but determined that “since I just received the supplemental memorandum . . . I think I want to take just a brief little bit of time to take a look at that narrow issue and make a determination on it.” RP 20. Consequently, and following no objections by the parties, the court set over the sentencing to the next day.

On January 5, 2017, Mr. Wells was sentenced. RP 21-32. Here, the delays in Mr. Wells’ sentencing were due mostly to the disagreement over the amount of credit for time served that Mr. Wells was entitled and the trial court’s desire to hear argument and rule correctly on the issue. To the extent that defense counsel sought the original delay or did not object to the latter two, these decisions were part of a legitimate tactic to attempt to obtain additional credit for time served for Mr. Wells. Mr. Wells argues that had sentencing occurred on December 2, 2016 that his prison term would have been shortened by 34 days. Br. of App. at 13-15. And while this true, Mr. Wells has not only failed to argue that his defense counsel’s role in the delays was not part of a legitimate tactic, he has completely failed to “rebut the presumption of reasonable performance

by demonstrating that ‘there is no conceivable legitimate tactic explaining counsel’s’” decisions. *Grier*, 171 Wn.2d at 33 (quoting *Reichenbach*, 153 Wn.2d at 130).

2. Defense counsel did not argue that Mr. Wells be sentenced to 20 months because the parties agreed to recommend a 24 month sentence.

Mr. Wells faults his trial counsel for not recommending that he be sentenced to 20 months, the low end of the sentencing range, and claims that the plea agreement did not forbid him from asking for a lower sentence than 24 months. Br. of App. at 15-16. This claim is belied by the record.³ During Mr. Wells’ plea of guilty the trial court and defense counsel discussed the agreement:

Court: The parties have had discussion as far as *an agreement on a recommendation* for sentencing purposes is concerned. That recommendation would be -- let me see what --

Defense: 24 months concurrent.

Court: 24 months with both, that would happen on a concurring sentence.

RP 7-8 (emphasis added). Similarly, on January 4, 2017, when both parties made their sentencing arguments the State noted in its preliminary

³ The formal plea offer itself, which is existent, was not filed and is not contained in the record. When a defendant’s claim of ineffective assistance of counsel “rests on ‘evidence or facts not in the existing trial record,’ filing a personal restraint petition is the appropriate step.” *In re Hutchinson*, 147 Wn.2d 197, 206-07, 53 P.3d 17 (2002) (quoting *State v. McFarland*, 127 Wn.2d 322, 355, 899 P.2d 1251 (1995)).

remarks that “[t]he *agreed recommendation* on the case was for 24 months concurrent with” the 2014 case. RP 16 (emphasis added). Moreover, when the trial court imposed sentence in the case it stated it was “going along with the *agreed recommendation* between the parties.” RP 30 (emphasis added). Thus, defense counsel’s sentencing recommendation was to follow the plea agreement; a plea agreement that resulted in the dismissal of aggravators and enhancements. *Compare* CP 17-18 *with* CP 19. Arguing for a 20 month sentence, on the other hand, would have violated the plea agreement and allowed the State to move to withdraw the plea subjecting Mr. Wells to the real possibility of significantly more prison time. Thus, defense counsel’s performance, in recommending 24 months, was not deficient.

b. Prejudice

In order to prove that deficient performance prejudiced the defendant, “the defendant must establish that ‘there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.’” *State v. Greer*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Kyllo*, 166 Wn.2d at 862).

Even assuming Mr. Wells’ trial attorney was deficient in one of the ways he alleges, he cannot meet his burden to show that but for counsel’s deficient performance, the outcome of the proceedings would have been

different. Here the sentencing was not going to happen sooner even if defense counsel requested due to the need of both parties to brief the legal issue regarding Mr. Wells' credit for time served. Moreover, the trial court wanted to hear argument on the issue and adequately review the filed pleadings before rendering a decision due to the very large difference in credit for time served that each party argued.

Nor is there any evidence to suggest that the trial court would have sentenced Mr. Wells to 20 months in prison if it had been asked. Mr. Wells was already receiving a substantial reduction by having the aggravators and enhancements dismissed, an agreed sentence recommendation very near the low end, and an agreement to run the sentence concurrent to the 2014 case on which he had been sentenced 1 and 1/2 years earlier.

III. The trial court did err when it ordered Mr. Wells to pay a discretionary \$2,000 drug enforcement fund fee after it waived all discretionary financial obligations due to indigence.

The State concedes this issue. The trial court found Mr. Wells presently indigent with limitations on his ability to pay and indicated that it intended to waive the non-mandatory financial obligations. RP 22, 30; CP 65. Nonetheless, Mr. Wells' Judgment and Sentence included the imposition of a discretionary, \$2,000 drug enforcement fund fee. CP 65.

The imposition of this fee contradicted the court's ruling and is not supported by a finding that Mr. Wells would be able to pay as the court did not inquire into his ability to work or work history.

CONCLUSION

For the reasons argued above, Mr. Wells' sentence should be affirmed by the case should be remanded to the trial court to strike the \$2,000 drug enforcement fund fee.

DATED this 5 day of Oct, 2017.

Respectfully submitted:

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