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Court of Appeals
Division II
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NO. 49957-6-II

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

STATE OF WASHINGTON, Respondent

v.

STACIA N STROOP, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01928-1
AND 16-1-01477-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Stroop cannot show her guilty pleas were constitutionally invalid as the statute of limitations had not run prior to the filing of the charges in the 2016 cause number.**
- II. **Stroop's attorney was not ineffective for failing to make a meritless claim.**

STATEMENT OF THE CASE

On October 17, 2013, Stacia Stroop (hereafter 'Stroop') was charged by information in Clark County Cause No. 13-1-01928-1 with possession of a controlled substance with the intent to deliver with a school zone enhancement, possession of a controlled substance, and unlawful possession of a firearm in the second degree. CP 1. The superior court issued a warrant for Stroop's arrest on this matter because the State was unable to locate a current address for her so she was unable to be summonsed. Supp 2 CP ____ (Order Authorizing Issuance of Warrant of Arrest; Warrant of Arrest).¹ The sheriff's return on the arrest warrant shows Stroop was arrested on this warrant on December 23, 2014, more

¹ The State filed a supplemental designation of clerk's papers on April 13, 2018, designating several documents from Cause No. 13-1-01928-1. Those documents in the State's supplementation are referred to as "Supp 2 CP ____ ([name of document])."

The original Clerk's Papers in this case are numbered from 1 to 159. The Supplemental Clerk's Papers are numbered from 153. Due to the overlap in numbers between the original CP and the first supplemental CP, the State will refer to the original CP as "CP ____" and the first supplemental CP as "Supp 1 CP ____."

than 14 months after the warrant was authorized for her arrest. Supp. 2 CP ____ (Return of Service). When Stroop was arrested and taken to the Clark County Jail, she was interviewed by the Corrections unit for screening on bail and release issues. Supp. 2 CP ____ (Corrections Release Unit Information). At that time, Stroop indicated her home address was in Portland, Oregon, a location outside the state of Washington. *Id.* Stroop also told the interviewer that she was living with her sister in Portland for the past year. *Id.*

While Stroop was pending trial for the charges in case no. 13-1-01928-1, she was charged by information in Clark County Cause No. 16-1-01477-1, with three counts of delivery of a controlled substance – methamphetamine, with each offense having an enhancement that the crime occurred within 1,000 feet of a school bus route stop. Supp. 1 CP 109-10. The State filed the information in the 2016 case on July 12, 2016. Supp. 1 CP 109-10. It alleged the three counts occurred between February 1 and April 3, 2013. Supp. 1 CP 109-10.

While the matter was pending in Clark County Superior Court, Stroop did not mention the statute of limitations with regards to Cause No. 16-1-01477-1, and never filed a motion to dismiss the charges due to an alleged violation of the statute of limitations. Instead, Stroop entered a guilty plea pursuant to a plea agreement that encompassed both cases. CP

121-36; Supp. 1 CP 116-31. Stroop was sentenced pursuant to the agreed recommendation. CP 141-55; Supp. 1 CP 135-49. Stroop then filed a notice of appeal in each case, and her appeals have been consolidated. CP 156; Supp. 1 CP 150.

ARGUMENT

Stroop argues for the first time on appeal that her guilty plea and convictions in this matter should be vacated as the information that was filed in cause no. 16-1-01477-1 was filed at a time after the statute of limitations had expired in this matter. She also argues her defense attorney was ineffective for failing to address this issue at the trial court. This issue presents a classic situation that evidences why parties should not be allowed to raise issues for the first time on appeal. The record below was not developed on this issue as Stroop failed to raise it below. Had it been addressed at the trial court level, the irrefutable facts would have shown that for a period of over a year in 2013 and 2014, Stroop had a warrant out for her arrest in another felony case, she was known to be in the State of Oregon, she was actively avoiding apprehension by police, and that she was not “usually and publicly resident within this state.” *See* RCW 9A.04.080. As such, the State would have easily proven that the charges were filed within the allowed time for filing as the statute of limitations

does not run when an offender is not “usually and publicly resident within this state.” However, Stroop failed to allow the State the opportunity to develop the record on this issue, and failed to allow the trial court the ability to make factual findings and rule on this issue. Instead, this Court is left to use the limited information available in the record, specifically the second supplementation of clerk’s papers, to assess whether Stroop has demonstrated reversible error. From the information available to this Court, it is clear the information filed in cause no. 16-1-01477-1 was timely filed, within the time provided by the statute of limitations. As such, this Court should reject Stroop’s claims on appeal.

I. The State can prove the information was filed within the time period provided for in RCW 9A.04.080.

The evidence that exists in the record is sufficient to show that the State timely filed the charges in cause no. 16-1-01477-1. Additional evidence exists outside the record on appeal that would further prove the statute of limitations on these crimes were tolled pursuant to RCW 9A.04.080. RCW 9A.04.080(2) provides that the time for filing does not run when the defendant is not “usually and publicly resident within this state.” Thus the statute of limitations is tolled during that time period. *State v. King*, 113 Wn.App. 243, 54 P.3d 1218 (2002). When a defendant lives outside of the state of Washington, the statute of limitations is tolled.

Id. In *State v. Ansell*, 36 Wn.App. 492, 675 P.2d 614 (1984), the Court found that a defendant's "mere absence," whether or not he had an intent to conceal himself, from this State was sufficient to toll the statute of limitations. *Ansell*, 36 Wn.App. at 496. In *State v. Clarke*, 86 Wn.App. 447, 936 P.2d 1215 (1997), the Court held that "a defendant who has been a fugitive from justice should receive no benefit from fleeing to avoid prosecution." *Clarke*, 86 Wn.App. at 452.

Stroop asks this Court to reverse her convictions because, as she alleges, the statute of limitations had run prior to filing of the charges in her case. Because Stroop never challenged the statute of limitations at the trial court level below, the State did not present evidence to prove it had filed the charges within the statutorily permitted time period. However, documents in the superior court's file show Stroop had been living outside of the State of Washington for at least a year during the period between October 2013 and December 2014. Supp. 2 CP ____ (Corrections Release Unit Information). The fact that Stroop was living for at least a year in another state tolls the statute of limitations for filing the charges in cause no. 16-1-01477-1 pursuant to RCW 9A.04.080(2). To find that the statute of limitations is tolled pursuant to RCW 9A.04.080(2), it is sufficient to show the defendant was living in another State. *See King*, 113 Wn.App. at 293; *see also Ansell*, 36 Wn.App. at 496. Stroop admitted on December

24, 2014 that she had been living in Portland, Oregon for the last year. Supp. 2 CP ____ (Corrections Release Unit Information). Thus, if we presume Stroop relocated to Oregon by December 24, 2013, at that time only ten and a half months had passed since the beginning of the charging period in the 2016 case. If we then give Stroop the benefit of the doubt and presume she started living in Washington again once she was released after her arrest on December 24, 2014, the three-years statute of limitations would not have run on these crimes until February 2017. The State, having filed its charges in 2016 did not charge after the time for filing had expired. Stroop can obtain no relief by arguing that the statute of limitations barred the filing of the 2016 case because the statute of limitations was tolled for a year pursuant to RCW 9A.04.080(2) and thus the information was timely filed.

Indeed, Stroop's request is essentially to allow her to benefit from her failure to raise an issue at the trial court level, where the State would have been able to respond by introducing evidence at its disposal. Instead, Stroop raises this issue in a forum and in a way that restrains the State to the evidence contained in the record below. Stroop's request also asks this Court to now ignore the evidence contained in the court file, designated by the State, that proves Stroop was living outside the State of Washington for a year during the time that the statute of limitations would be running

if Stroop were usually and publicly residing in this State. Granting this claim would run afoul of the ends of justice.

The statute of limitations was tolled for the period of time during which Stroop was not “usually and publicly resident within this state.” Upon the record before it, this Court has sufficient evidence to find the information in the 2016 case was timely filed. Indeed, Stroop herself admitted to the necessary facts to show the statute of limitations was tolled for a period of time. However, if this Court needs additional evidence, the more appropriate vehicle for bringing a claim that has not been developed on the record and for which evidence outside the record is needed is a personal restraint petition. Thus the Court could dismiss this appeal and allow Stroop to file a personal restraint petition. Or, in the interests of judicial economy, this Court could remand the matter for a reference hearing at which point both Stroop and the State will be able to present evidence on the issue of whether the statute of limitations had run.

In *State v. Walker*, 153 Wn.App. 701, 224 P.3d 814 (2009), the record was incomplete as neither party had an opportunity to present evidence in superior court about whether the statute of limitations had run. *Walker*, 153 Wn.App. at 708. While the Court noted the appropriate vehicle for the appellant to obtain relief in that instance would be a personal restraint petition, wherein additional evidence could be

introduced, it found that remanding the matter to the superior court for an evidentiary hearing would be an efficient use of judicial resources. *Id.* at 709 (citing RAP 7.3). Applying the *Walker* Court's reasoning here, this Court could either deny Stroop's appeal and allow her to file a personal restraint petition addressing this issue, or remand the matter to the superior court for an evidentiary hearing.

II. Trial counsel was not ineffective for failing to raise a motion upon which they would not succeed.

Stroop alleges her attorney was ineffective for failing to raise the issue of the expiration of the statute of limitations at the trial court level. However, as shown above, the information was timely filed and any motion regarding the statute of limitations would have failed. Defense counsel is not ineffective for failing to raise frivolous motions. Further, Stroop can show no prejudice as her claim would not have succeeded at the trial court level.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth

Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kylo*,

166 Wn.2d 856, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings

would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Key to a successful ineffective assistance of counsel claim is that the complained-of conduct by counsel actually resulted in prejudice to the defendant. As indicated above, the State would have prevailed at a motion to dismiss the charges filed in the 2016 case based on an allegation that the statute of limitations had elapsed. Stroop cannot show that had her attorney made a motion on this issue that the trial court would have granted it. Thus Stroop is unable to prove prejudice from her counsel’s conduct. Furthermore, Stroop is unable to prove that her attorney was not aware of the fact that Stroop was not publicly resident in the state as Stroop had the same attorney on both cases, and she had a warrant for her arrest outstanding for more than a year in the 2013 case, and she had admitted in her Corrections Release Unit interview to living in Portland for a year. Her attorney also was in possession of discovery from the State

which included reports detailing efforts to find and arrest Stroop in Oregon. Stroop's attorney is presumed to be aware of the law and therefore the existence of the tolling provision in RCW 9A.04.080.

Attorneys are not required to make frivolous arguments in order to be effective. Had Stroop's attorney filed a motion based on an argument that the statute of limitations barred filing the charges in the 2016 case against Stroop it would have failed. Stroop's attorney's choice not to file a baseless motion is not grounds for ineffective assistance of counsel. This claim fails.

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CONCLUSION

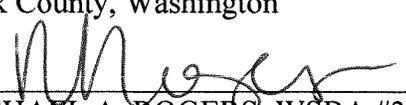
Stroop's claims should not be granted as the record affirmatively shows the tolling provision in RCW 9A.04.080(2) applies and the charges in cause no. 16-1-01477-1 were timely filed. Stroop cannot show that the statute of limitations had run, and thus her claimed basis for why her guilty pleas were improperly entered is not valid. At most, this Court should remand for a reference hearing to develop additional facts from the evidence in the State's possession that would go further in showing Stroop was not "usually and publicly resident" in this State for at least a year during the time between 2013 and 2014, thus extending the time allowed for filing the charges in cause no. 16-1-01477-1.

DATED this 13 day of April, 2018.

Respectfully submitted:

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