

FILED
Court of Appeals
Division II
State of Washington
11/13/2017 12:44 PM

NO. 50581-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL NAILLIEUX,

Appellant.

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

The Honorable Gary B. Bashor, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	1
	Issues pertaining to assignments of error.....	1
B.	STATEMENT OF THE CASE.....	2
C.	ARGUMENT.....	3
	1. THE COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN CALCULATING NAILLIEUX’S OFFENDER SCORE.	3
	2. THE TRIAL COURT ERRED IN IMPOSING THE DISCRETIONARY JURY DEMAND FEE AND DRUG FUND ASSESSMENT WITHOUT CONSIDERATION OF NAILLIEUX’S INDIGENCY.	6
	a. The court appears to have mistakenly believed that the jury demand fee and drug fund assessment were mandatory.	6
	b. In the alternative, defense counsel’s failure to object to non- mandatory fees constitutes ineffective assistance of counsel.....	7
D.	CONCLUSION.....	9

TABLE OF AUTHORITIES

Washington Cases

<i>In re Pers. Restraint of Johnson</i> , 131 Wn.2d 558, 933 P.2d 1019 (1997)..	5
<i>State v. Carter</i> , 56 Wn. App. 217, 783 P.2d 589 (1989).....	8
<i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289, <i>cert. denied</i> , 510 U.S. 944 (1993).....	8
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	9
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005)	7
<i>State v. Hathaway</i> , 161 Wn. App. 634, 251 P.3d 253 (2011).....	6
<i>State v. Hunter</i> , 102 Wn. App. 630, 9 P.3d 872 (2000).....	7
<i>State v. Johnson</i> , 180 Wn. App. 92, 320 P.3d 197 (2014).....	5
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	8
<i>State v. McGill</i> , 112 Wn. App. 95, 47 P.3d 173 (2002).....	9
<i>State v. Mutch</i> , 171 Wn.2d 646, 254 P.3d 803 (2011).....	5
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	7, 8
<i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	8

Federal Cases

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	7, 8
--	------

Statutes

RCW 10.46.190	6
RCW 36.18.016(3)(b).....	6
RCW 9.94A.030(31).....	7

RCW 9.94A.525(5)(a) 4, 5

RCW 9.94A.589(1)(a) 4

Constitutional Provisions

U.S. Const. amend. VI 7

Wash. Const. art. I, § 22..... 7

A. ASSIGNMENTS OF ERROR

1. The trial court applied an erroneous legal standard in determining that appellant's prior offenses did not encompass the same criminal conduct.

2. The trial court erred in imposing discretionary legal financial obligations.

3. Defense counsel's failure to object to discretionary legal financial obligations amounts to ineffective assistance of counsel.

Issues pertaining to assignments of error

1. Where the trial court applied an erroneous legal standard in determining whether appellant's prior offenses encompassed the same criminal conduct, is remand required for calculation of the offender score using the appropriate standard?

2. The trial court expressed its intention to impose only mandatory legal financial obligations, but it included two discretionary assessments in appellant's LFOs, apparently under the mistaken belief that they were mandatory. Must the discretionary LFO's be stricken?

3. Where defense counsel failed to object to discretionary LFOs despite the court's stated intention to impose only mandatory costs, did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

Appellant Michael Naillieux was convicted in Cowlitz County Superior Court on one count of possession of a controlled substance with intent to deliver and one count of resisting arrest. CP 46-47, 73, 75, 89-102.

In 2008, Naillieux was convicted of three felonies committed on October 18, 2018: manufacturing methamphetamine, possession with intent to manufacture methamphetamine, and unlawful storage of anhydrous ammonia. Sentencing Exhibit 10, at 19-20. The prosecutor's statement of Naillieux's criminal history in this current case lists three convictions from the 2008 cause number but erroneously includes a conviction for possession with intent to deliver methamphetamine and omits the conviction for manufacturing methamphetamine. CP 93.

Naillieux argued at sentencing in this case that the three convictions from 2008 encompassed the same criminal conduct and should therefore be counted as one offense in his offender score. RP 364, 368. The prosecutor responded that they were separate convictions, "all three of which would require different elements to be proven at trial." RP 364. He further argued, "Even though they're all on the same date and the same criminal investigation, ... those are three different crimes, three different proof requirements, and three different statutory elements that

have to be proven so therefore they would not be considered same criminal conduct.” RP 368-69.

The court agreed with the State, reasoning that “one is intent to deliver, one is storage, one is attempt to manufacture. Those would not seem to be identical.” RP 371. The court included the three 2008 convictions as separate offenses in Naillieux’s offender score, calculating the score as 10 points. RP 372; CP 91.

No evidence was presented at sentencing as to Naillieux’s ability to pay legal financial obligations, the State made no argument that he had the ability or likely future ability to pay any non-mandatory fines or fees, and the court made no such findings. When the court pronounced sentence, it said it was imposing “standard costs, they’re nonwaivable.” RP 382. In addition to the \$500 victim assessment, \$200 criminal filing fee, and \$100 DNA fee, the court imposed a \$250 jury demand fee and a \$500 drug enforcement fund assessment. CP 97.

Naillieux filed a timely notice of appeal. CP 103.

C. ARGUMENT

1. THE COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN CALCULATING NAILLIEUX’S OFFENDER SCORE.

Under the sentencing reform act, the sentencing court is required to determine whether prior offenses which were not sentenced as same

criminal conduct but for which sentences were served concurrently shall be counted as one offense or separate offenses. RCW 9.94A.525(5)(a). In making this determination the court must use the “same criminal conduct” analysis in RCW 9.94A.589(1)(a):

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations[.]

RCW 9.94A.525(5)(a). The statutory “same criminal conduct” analysis in RCW 9.94A.589(1)(a) defines “same criminal conduct” as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

In this case, the defense argued at sentencing that Naillieux’s three 2008 convictions encompassed the same criminal conduct and asked the court to count them as one offense in Naillieux’s offender score. The

prosecutor opposed the defense position, arguing that the three offenses could not be the same criminal conduct because they required proof of different elements, even though they all occurred on the same date and were part of the same criminal investigation. The standard by which the prosecutor urged the court to reject the defense argument is not the standard dictated by statute. *See Id.*

Instead of applying the statutory “same criminal conduct” analysis as required under RCW 9.94A.525(5)(a) and RCW 9.94A.589, the court adopted the prosecutor’s analysis. It refused to find Naillieux’s 2008 convictions encompassed the same criminal conduct because they were not identical. RP 371. The court also misidentified two of the 2008 offenses, muddying the analysis further. RP 371.

A sentencing court acts without authority when it imposes a sentence based on a miscalculated offender score. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). Appellate courts review an offender score calculation *de novo* but review a same criminal conduct determination for abuse of discretion or misapplication of the law. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011); *State v. Johnson*, 180 Wn. App. 92, 100, 320 P.3d 197 (2014). A trial court abuses its discretion if its decision was reached by applying the wrong

legal standard and thus was made for untenable reasons. *Johnson*, 180 Wn. App. at 100.

The court below used an incorrect legal standard in determining whether Naillieux's 2008 convictions encompass the same criminal conduct. It therefore abused its discretion. This Court should vacate Naillieux's sentence and remand for recalculation of his offender score, employing the statutorily mandated same criminal conduct analysis.

2. THE TRIAL COURT ERRED IN IMPOSING THE DISCRETIONARY JURY DEMAND FEE AND DRUG FUND ASSESSMENT WITHOUT CONSIDERATION OF NAILLIEUX'S INDIGENCY.

a. **The court appears to have mistakenly believed that the jury demand fee and drug fund assessment were mandatory.**

At sentencing, the court below expressed its intention to impose only mandatory legal financial obligations, stating it was imposing "standard costs, they're nonwaivable." RP 382. Nonetheless, the court included two discretionary fees in Naillieux's legal financial obligations: a \$250 jury demand fee and a \$500 drug enforcement fund assessment. CP 97.

A sentencing court is permitted, but not required, to impose a jury demand fee of \$250. RCW 36.18.016(3)(b); RCW 10.46.190; *State v. Hathaway*, 161 Wn. App. 634, 653, 251 P.3d 253 (2011). Legal financial

obligations may also include a drug fund assessment. RCW 9.94A.030(31). But, again, this assessment is discretionary, and the amount must be based on the costs of the investigation. *State v. Hunter*, 102 Wn. App. 630, 635, 9 P.3d 872 (2000).

It does not appear that the court below intended to impose these discretionary legal financial obligations but included them on the mistaken belief that it lacked discretion to waive them. The sentencing court's failure to exercise discretion is an abuse of discretion. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). This Court should vacate the discretionary financial obligations and remand for the court to exercise its discretion in consideration of Naillieux's ability to pay.

b. In the alternative, defense counsel's failure to object to non-mandatory fees constitutes ineffective assistance of counsel.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. A defendant is denied effective assistance when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for

the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland*, 466 U.S. at 687-88), *cert. denied*, 510 U.S. 944 (1993).

To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Jones*, 183 Wn.2d at 339. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694.

Defense counsel's failure to object to discretionary LFO's constitutes deficient performance. A defense attorney has an obligation to know and understand the relevant law, and his failure to do so constitutes deficient performance. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has duty to know relevant law); *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present an available defense was unreasonable); *State v. Carter*, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules).

Defense counsel was required to know which LFOs were discretionary as well as the requirement that the court consider Naillieux's ability to pay discretionary LFOs before imposing them, and that failing to object to discretionary LFOs waives a challenge to them on appeal. *See State v. Blazina*, 182 Wn.2d 827, 833, 837-38, 344 P.3d 680 (2015). There is no legitimate strategic reason for counsel to fail to object to the discretionary LFOs in this case; thus counsel's performance was deficient.

Moreover, defense counsel's failure to alert the court to its discretion regarding the jury demand fee and drug fund assessment prejudiced Naillieux. As noted above, the court expressed its intention to impose only mandatory LFOs. "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." *State v. McGill*, 112 Wn. App. 95, 102, 47 P.3d 173 (2002). There is a reasonable probability the outcome of sentencing would have been different but for defense counsel's failure to object to the discretionary LFOs. This court should strike the jury demand fee and drug fund assessment or remand for the trial court to do so.

D. CONCLUSION

For the reasons discussed above, this Court should vacate the sentence and remand for recalculation of the offender score and consideration of Naillieux's ability to pay discretionary legal financial obligations.

DATED November 13, 2017.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibit in *State v. Michael Naillieux*, Cause No. 50581-9-II as follows:

Michael Naillieux DOC# 937834
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

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



Catherine E. Glinski
Done in Manchester, WA
November 13, 2017

GLINSKI LAW FIRM PLLC

November 13, 2017 - 12:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50581-9
Appellate Court Case Title: State of Washington, Respondent v. Michael W. Naillieux, Appellant
Superior Court Case Number: 16-1-01244-0

The following documents have been uploaded:

- 7-505819_Briefs_20171113124416D2010566_7457.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 50581-9 State v Naillieux Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- Jurvakainen.ryan@co.cowlitz.wa.us

Comments:

Sender Name: Catherine Glinski - Email: glinskilaw@wavecable.com
Address:
PO BOX 761
MANCHESTER, WA, 98353-0761
Phone: 360-876-2736

Note: The Filing Id is 20171113124416D2010566