

FILED
Court of Appeals
Division II
State of Washington
5/18/2018 3:52 PM

No. 51172-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ALAN WUCO,

Appellant.

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

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT 3

 1. Remand is necessary for the trial court to consider
 concurrent sentences for the possession of a firearm
 and theft of a firearm convictions..... 3

 2. Alternatively, Mr. Wuco’s trial attorney rendered
 constitutionally deficient representation when he
 failed to move the court to enter concurrent sentences
 for theft of a firearm and possession of a firearm. 6

E. CONCLUSION 8

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend VI..... 2, 6, 7

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 22..... 2, 6

FEDERAL CASES

Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)..... 6

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)..... 6

McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)..... 6

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) 6

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)..... 6, 7

WASHINGTON CASES

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005)..... 3

State v. McFarland, 189 Wn.2d 47, 399 P.3d 1106 (2017)..... passim

State v. McGill, 112 Wn.App. 95, 47 P.3d 173 (2002)..... 5, 7, 8

State v. Osman, 157 Wn.2d 474, 139 P.3d 334 (2006) 3

State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009)..... 7

State v. Williams, 149 Wn.2d 143, 65 P.3d 1214 (2003)..... 3

STATUTES

RCW 9.41.040 4

RCW 9.94A.585 3

A. ASSIGNMENTS OF ERROR

1. Mr. Wuco's sentence must be remanded under *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017), for the trial court to consider concurrent sentences for the unlawful possession of a firearm and theft of a firearm convictions.

2. Alternatively, Mr. Wuco's attorney rendered deficient representation in failing to argue for an exceptional sentence of concurrent sentences for the theft of a firearm and unlawful possession of a firearm counts under *McFarland*.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under *McFarland* the trial court has discretion to impose an exceptional sentence below the standard range for firearm-related offenses for which the statute requires consecutive sentences. In addition, the request for an exceptional sentence of concurrent sentences can be made for the first time on appeal under *McFarland*. Here, Mr. Wuco was sentenced to consecutive firearm sentences and no request for an exceptional sentence was made. Is Mr. Wuco entitled to remand of his sentence for the trial court to consider an exceptional sentence of concurrent sentences?

2. A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant who is denied the effective assistance of counsel and is prejudiced by that failure at sentencing is entitled to remand for a new sentencing hearing. Here, counsel failed to seek an exceptional sentence of concurrent sentences under *McFarland*, for the theft of a firearm and unlawful possession of a firearm counts. Was Mr. Wuco prejudiced by his attorney's deficient representation, thus requiring remand for resentencing for the trial court to consider concurrent sentences?

C. STATEMENT OF THE CASE

Kenneth Wuco was charged and, following a jury trial, convicted of one count of unlawful possession of a firearm in the first degree, one count of theft of a firearm, and one count of vehicle prowling in the second degree, all arising out of the same incident. CP 5-6, 54-56.

At sentencing, Mr. Wuco sought, and the trial court imposed, a prison-based Drug Offender Sentence Alternative. CP 67; RP 523, 530-37, 555-56. Defense counsel did not seek an exceptional sentence of concurrent sentences; defense counsel agreed the sentences were

required to be consecutive. RP 532. The court did not consider an exceptional sentence, presumed the sentences were required to be consecutive, and imposed consecutive sentences on the unlawful possession of a firearm and theft of a firearm counts. CP 67; RP 555-56.

D. ARGUMENT

1. Remand is necessary for the trial court to consider concurrent sentences for the possession of a firearm and theft of a firearm convictions.

A defendant generally cannot appeal a standard range sentence. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). But a defendant “may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements.” *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). “While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). “The failure to consider an exceptional sentence is reversible error.” *Id.* at 342.

Under RCW 9.94A.589, the presumption here was Mr. Wuco would be sentenced to consecutive sentences for the theft of a firearm and unlawful possession of a firearm counts.¹ This is the sentence Mr. Wuco received. CP 67. Defense counsel did not argue for an exceptional sentence downward based on *McFarland*. The error in failing to do so is still subject to review. *McFarland* is directly on point on this issue.

In *McFarland*, Mr. McFarland argued for the first time on appeal that the sentencing court erred by failing to recognize its discretion to impose an exceptional mitigated sentence by running multiple firearm-related sentences concurrently. *McFarland*, 189 Wn.2d at 49. Defense counsel had not sought an exceptional sentence and had agreed the sentences were required to be consecutive. *Id.* at 50-51. The Court of Appeals had refused to consider this issue, noting that

¹ RCW 9.94A.589(1)(c) provides:

If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

the sentencing judge “cannot have erred for failing to do something he was never asked to do.” *Id.* at 49. The Supreme Court reversed and remanded for resentencing to allow the trial court the opportunity to consider whether to impose a mitigated sentence by running the firearm-related sentences concurrently. *Id.* at 50.

What the Court of Appeals did not consider is the authority of an appellate court to address arguments belatedly raised when necessary to produce a just resolution. Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values.

Id. at 57. The same applies in Mr. Wuco’s case. Under *McFarland*, the argument can be raised for the first time on appeal.

“Remand for resentencing is often necessary where a sentence is based on a trial court’s erroneous interpretation of or belief about the governing law.” *State v. McGill*, 112 Wn.App. 95, 100, 47 P.3d 173 (2002). Resentencing is appropriate where “the record suggests at least the possibility” that the sentencing court would have considered a different sentence had it understood its authority to do so. *McFarland*, 189 Wn.2d at 59. As in *McFarland*, there is at least a possibility that the trial court would have imposed concurrent sentences had it properly understood its discretion to do so. Mr. Wuco therefore, requests remand

for resentencing so that the trial court may consider a request for concurrent sentences for the two firearm related offenses.

2. Alternatively, Mr. Wuco’s trial attorney rendered constitutionally deficient representation when he failed to move the court to enter concurrent sentences for theft of a firearm and possession of a firearm.

A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 47, 53 S.Ct. 55, 77 L.Ed. 158 (1932). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective lawyer. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When

raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed 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.

Strickland, 466 U.S. at 687.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed *de novo*." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Here, despite the decision in *McFarland*, defense counsel did not seek an exceptional sentence of concurrent sentences. *McFarland* gave the court the discretion to impose concurrent sentences had counsel requested it. Counsel's omission cannot be deemed a reasonable tactical decision in light of the discretion granted the trial court had counsel requested an exceptional sentence.

Where counsel fails to apprise the court of the relevant case law and use it to argue for an exceptional sentence down, the trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. *McGill*, 112 Wn.App. at 101-02.

In the instant matter, counsel's deficient performance in failing to apprise the trial court of the decision in *McFarland*, and seek an exceptional sentence under that case resulted in prejudice to Mr. Wuco. The remedy is to reverse his sentence and remand for resentencing. *McGill*, 112 Wn.App. at 101-02.

E. CONCLUSION

For the reasons stated, Mr. Wuco asks this Court to remand his sentence for the trial court to consider concurrent sentences for the unlawful possession of a firearm and theft of a firearm convictions.

DATED this 18th day of May 2018.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

Washington Appellate Project – 91052

1511 Third Avenue, Suite 701

Seattle, WA. 98101

(206) 587-2711

Fax (206) 587-2710

tom@washapp.org

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 51172-0-II
)	
KENNETH WUCO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF MAY, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] MICHELLE HYER, DPA [PCpatcecf@co.pierce.wa.us] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171</p>	<p>() () (X)</p>	<p>U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL</p>
<p>[X] KENNETH WUCO 354220 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF MAY 2018.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

May 18, 2018 - 3:52 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51172-0
Appellate Court Case Title: State of Washington, Respondent v Kenneth Alan Wuco, Appellant
Superior Court Case Number: 17-1-00419-9

The following documents have been uploaded:

- 511720_Briefs_20180518155111D2362863_3758.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.051818-02.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Thomas Michael Kummerow - Email: tom@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180518155111D2362863