

FILED
Court of Appeals
Division II
State of Washington
5/31/2018 12:33 PM

NO. 51248-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JESUS SOLIS VAZQUEZ,

Appellant.

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

The Honorable Gary Bashor, Judge
The Honorable Michael H. Evans, Judge
The Honorable Stephen M. Warning, Judge

MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS IN
THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW

E. RANIA RAMPERSAD
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E. Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
I. <u>IDENTITY OF MOVING PARTY</u>	1
II. <u>STATEMENT OF RELIEF SOUGHT</u>	1
III. <u>FACTS RELEVANT TO MOTION</u>	1
IV. <u>GROUND FOR RELIEF</u>	2
V. <u>BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW</u>	2
A. <u>POTENTIAL ASSIGNMENTS OF ERROR</u>	2
<u>Issues Pertaining to Potential Assignments of Error</u>	3
B. <u>STATEMENT OF THE CASE</u>	4
1. <u>Charges</u>	4
2. <u>Convictions & Initial Sentencing</u>	5
3. <u>Initial Appeal</u>	6
4. <u>Re-Sentencing & Second Appeal</u>	7
C. <u>POTENTIAL ARGUMENTS</u>	7
1. <u>THE TRIAL COURT ERRED IN FAILING TO CONSIDER WHETHER MITIGATING CIRCUMSTANCES WARRANTED AN EXCEPTIONAL SENTENCE</u>	7
2. <u>SOLIS-VAZQUEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL</u>	11
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Brown</u> 139 Wn.2d 20, 983 P.2d 608 (1999).....	8-9
<u>State v. Bonisisio</u> 92 Wn. App. 783, 964 P.2d 1222 (1998), <u>review denied</u> , 137 Wn.2d 1024, 980 P.2d 1285 (1999)	10
<u>State v. Garrett</u> 124 Wn.2d 504, 881 P.2d 185 (1994).....	12
<u>State v. Grier</u> 171 Wn.2d 17, 246 P.3d 1260 (2011).....	12
<u>State v. Houston-Sconiers</u> 188 Wn.2d 1, 391 P.3d 409 (2017).....	9
<u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	12
<u>State v. McFarland</u> 127 Wn.2d 322, 899 P.2d 1251 (1995)	12
<u>State v. McFarland</u> 189 Wn.2d 47, 399 P.3d 1106 (2017).....	8-9
<u>State v. McGill</u> 112 Wn. App. 95, 47 P.3d 173 (2002).....	10
<u>State v. Mierz</u> 127 Wn.2d 460, 901 P.2d 286 (1995).....	11
<u>State v. Pollard</u> 66 Wn. App. 779, 834 P.2d 51 <u>review denied</u> , 120 Wn.2d 1015 (1992).....	2
<u>State v. Sutherby</u> 165 Wn.2d 870, 204 P.3d 916 (2009).....	11

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Theobald</u> 78 Wn.2d 184, 470 P.2d 188 (1970).....	2
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	11, 12
 <u>FEDERAL CASES</u>	
<u>Anders v. California</u> 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).....	1, 2
<u>Roe v. Flores-Ortega</u> 528 U.S. 470, 120 S.Ct. 1029, 145 L. Ed. 2d 985 (2000).....	12
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).....	11, 12
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
Former RCW 9.94A.310(4)(e).....	9
RAP 15.2.....	1, 2
RAP 18.3.....	1, 2
RCW 9.94A.533(3)(e)	9
RCW 9.94A.535.....	8
RCW 9.94A.585.....	8
U.S. CONST., AMEND. VI.....	11
WASH. CONST., ART. I, SEC. 22.....	11

I. IDENTITY OF MOVING PARTY

Nielsen, Broman & Koch, appointed counsel for appellant, respectfully requests the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

Appointed counsel for appellant requests permission to withdraw pursuant to RAP 15.2(i) and 18.3(a).

III. FACTS RELEVANT TO MOTION

By order filed November 17, 2017, the Cowlitz County Superior Court authorized appointment of appellate counsel, and on December 20, 2017, this Court appointed Nielsen, Broman & Koch to represent appellant in his appeal.

In reviewing the case for issues to raise on appeal, appellate counsel did the following:

- (a) read and reviewed the verbatim report of proceedings;
- (b) read and reviewed all the clerk's papers and exhibits;
- (c) researched all pertinent legal issues and conferred with the attorney who represented Mr. Solis-Vazquez in the Superior Court concerning legal and factual bases for appellate review;
- (d) communicated with appellant, including through a letter dated May 30, 2018, explaining the Anders procedure and appellant's right to file a *pro se* supplemental brief.

IV. GROUNDS FOR RELIEF

RAP 15.2(i) and 18.3(a) allow an attorney to withdraw on appeal where counsel can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970), and State v. Pollard, 66 Wn. App. 779, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Mr. Solis-Vazquez to proceed *pro se*. Counsel submits the following brief to satisfy her obligations under Anders, Theobald, Pollard, RAP 15.2(i), and RAP 18.3(a).

V. BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW

A. POTENTIAL ASSIGNMENTS OF ERROR

1. The sentencing court erred in failing to exercise its discretion to meaningfully consider whether mitigating circumstances justified an exceptional sentence, specifically, whether Solis-Vazquez’s four firearm sentencing enhancements should be run concurrent to one another.

2. Defense counsel’s performance was deficient where he failed to alert the sentencing court to its discretion to run the firearm enhancements consecutively or to otherwise argue for an exceptional sentence in light of mitigating circumstances.

Issues Pertaining to Potential Assignments of Error

1. Did Solis-Vazquez's circumstances display qualities of youthfulness or other mitigating circumstances justifying an exceptional sentence downward?

2. Did the trial court accept the defense counsel's sentencing recommendations or make other comments on the record showing an openness to considering mitigating circumstances and an exceptional sentence downward?

3. Did the trial court have discretion to run the four firearm enhancements concurrent to one another, or to otherwise impose an exceptional sentence in light of mitigating factors?

4. If yes to issue 3 above, was the trial court's failure to meaningfully consider this discretion a fundamental defect resulting in a miscarriage of justice that requires resentencing?

5. If yes to issue 3 above, was defense counsel's performance deficient for failing to point out this discretion to the sentencing court, or to otherwise fail to argue for an exceptional sentence? Did counsel's failure result in prejudice that warrants remand for resentencing?

B. STATEMENT OF THE CASE

1. Charges

The Cowlitz County Prosecutor's Office charged Solis-Vazquez with the following:

- Count I: violation of the uniform controlled substances act – possession of methamphetamine with intent (including four firearm enhancements),
- Count II: first degree unlawful possession of firearm,
- Count III: third degree assault of a law enforcement officer,
- Count IV: third degree assault of a law enforcement officer,
- Count V: disarming a law enforcement officer, and
- Count VI: first degree criminal impersonation.

CP 13.

The State alleged that on or about December 12, 2014, Solis-Vazquez possessed methamphetamine with intent to deliver while he or an accomplice possessed four firearms. CP 14. The State further alleged that Solis-Vazquez had a prior serious offense conviction that prohibited him from possessing a firearm. CP 14. The State also alleged Solis-Vazquez assaulted two police officers, Jeff Gann and Bradly Spaulding, and Solis-Vazquez removed Spaulding's firearm from his person while the two officers were performing their duties. CP 14-15. Finally, the State alleged Solis-Vazquez presented the passport of another, Genaro Pedraza-Martinez, in an attempt to avoid identification and apprehension. CP 15.

2. Convictions & Initial Sentencing

A jury convicted Solis-Vazquez of counts I, III, IV, and VI, and found he or his accomplices were armed with four firearms during the commission of count I. CP 37, 64. Count V was dismissed and the jury hung on count II. State v. Jesus Solis-Vazquez, No. 47593-6-II, RP 640 (jury trial day four).

On defense counsel's motion, the initial sentencing court vacated two of the firearm enhancements for lack of sufficient evidence, and imposed a total of 92 months of confinement. CP 37. Specifically, the court vacated the enhancements for the two firearms found in the front seat, but maintained the enhancements for the two firearms found in the back seat near where Solis-Vazquez was seated. Id., No. 47593-6-II, RP 663-64.

During the initial sentencing hearing, defense counsel argued the court should impose 92 months, the low end of the standard range plus the two consecutive firearm enhancements, on the basis of equity where co-defendants and accomplices had either not been prosecuted or received considerably shorter sentences. Id., No. 47593-6-II, RP 667-68. The State asked for the high end of the sentencing range on all counts, including 132 months on count I. Id., No. 47593-6-II, RP 666-67.

The court imposed the defense recommendation, and in doing so expressed sympathy for the defense arguments stating, "I don't know

exactly what happened. The jury made some determinations of what happened ... that night. I think the equity argument is a strong one. So I'll follow that and impose 92 months on Count 1." Id., No. 47593-6-II, RP 669.

Defense counsel did not request an exceptional sentence below the standard range or ask for the firearm enhancements to run concurrent with one another. However, in arguing for the two firearms enhancements to be vacated, she presented argument on several mitigating factors: that the jury hung on whether Solis-Vazquez had in fact possessed a firearm (count II), that evidence at trial suggested he was an accomplice, not the primary actor, and that the evidence suggested he did not have knowledge that any or all of the firearms were in the vehicle. Id., No. 47593-6-II, RP 651-52, 659-60. The initial sentencing court was persuaded by some of these arguments, and concluded that the evidence was insufficient to find Solis-Vazquez knew of the two guns in the front seat when he was seated in the back seat, and so vacated the two front-seat firearm enhancements on this basis. Id., No. 47593-6-II, RP 663-64.

3. Initial Appeal

Solis-Vazquez appealed various issues, including the sufficiency of the two remaining back-seat firearm enhancements, and the State cross-appealed the Superior Court's decision to vacate the two front-seat firearm

enhancements. CP 37, 40-46. The Court of Appeals rejected all of Solis-Vazquez's claims, affirmed his convictions, ordered the two vacated firearm enhancements reinstated, and remanded for resentencing. CP 21.

4. Re-Sentencing & Second Appeal

On remand, the parties agreed that Solis-Vazquez's criminal history was uncontested and that the Court of Appeals had dictated the new sentence was to be the same as the original, with the addition of the third and fourth firearms enhancements on count I. RP 14-15. The sentencing court imposed 164 months on count I (representing the original low-end sentence plus four firearm enhancements run consecutively) and maintained the original sentences on the remaining counts. RP 15; CP 58.

Solis-Vazquez timely appealed from his second sentencing hearing. CP 29.

C. POTENTIAL ARGUMENTS

1. THE TRIAL COURT ERRED IN FAILING TO CONSIDER WHETHER MITIGATING CIRCUMSTANCES WARRANTED AN EXCEPTIONAL SENTENCE.

Here, on remand, the sentencing court imposed a standard range sentence, consisting of the low-end of the standard range plus consecutive terms for four firearms enhancements. RP 15; CP 58. The court did not consider whether an exceptional sentence below the standard range was

appropriate, or whether it had discretion to impose the firearm enhancements concurrent to one another on the basis of mitigating factors.

Standard range sentences are generally not appealable. RCW 9.94A.585(1). However, in two cases the Washington State Supreme Court has held that re-sentencing was appropriate despite the imposition of a standard range sentence. State v. McFarland, 189 Wn.2d 47, 59, 399 P.3d 1106 (2017); In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007). In both cases, the sentencing court expressed on the record some sympathy or openness toward an exceptional sentence below the standard range, but categorically declined to do so out of a mistaken belief that it lacked discretion. McFarland, 189 Wn.2d at 57-59 (sentencing court's failure to consider discretionary exception authorized by RCW 9.94A.535 to run serious violent offenses concurrently) (citing Mulholland, 161 Wn.2d at 332-33 (failure to consider drug offender sentencing alternative request)). The McFarland Court noted that although the failure to exercise such discretion did not amount to an abuse of discretion, it was a “‘fundamental defect’ resulting in a miscarriage of justice” that justified resentencing. McFarland, 189 Wn.2d at 58 (quoting Mulholland, 161 Wn.2d at 332).

The Washington Supreme Court initially held that courts must impose all firearm sentencing enhancements consecutively. State v. Brown,

139 Wn.2d 20, 29, 983 P.2d 608 (1999) (citing mandatory firearm enhancement language in Former RCW 9.94A.310(4)(e)); see also RCW 9.94A.533(3)(e). However, in the context of juveniles, this holding no longer applies. For juvenile defendants, even those sentenced in adult court, sentencing courts necessarily have discretion to consider “the mitigating qualities of youth” and to impose a sentence less than any otherwise mandatory standard range or sentencing enhancement. State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017).

At least one Justice has expressed the belief that sentencing courts in all cases—not merely in juvenile sentencing—have discretion to impose an exceptional sentence below any purportedly mandatory sentencing statute based on mitigating circumstances. Houston-Sconiers, 188 Wn.2d at 35 (Madsen, J., concurring) (would hold that Brown, 139 Wn.2d at 29 was wrongly decided and courts always have discretion to impose an exceptional sentence below that required by any purportedly mandatory sentencing statute).

In addition, where the court has discretion to impose an exceptional sentence below the statutory minimum, but fails to recognize this discretion or to meaningfully consider mitigating circumstances, this “constitutes a ‘fundamental defect’ resulting in a miscarriage of justice” and requires remand for resentencing. McFarland, 189 Wn.2d at 58 (quoting

Mulholland, 161 Wn.2d at 332). This is so even where defense counsel fails to recognize or explicitly request an exceptional sentence. See McFarland, 189 Wn.2d at 51, 58. Such a claim is particularly strong where the sentencing court accepts defense counsel's sentencing recommendation, expresses discomfort with the lengthy duration of the supposedly mandatory sentence, or otherwise indicates "some openness" to consideration of mitigating factors. McFarland, 189 Wn.2d at 50, 51, 58 (citing Mulholland, 161 Wn.2d at 334; State v. McGill, 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002); State v. Bonisisio, 92 Wn. App. 783, 797, 964 P.2d 1222 (1998), review denied, 137 Wn.2d 1024, 980 P.2d 1285 (1999)).

On appeal, Solis-Vazquez could argue that the record shows relevant mitigating circumstances, such as youthful characteristics expressed by his getting into the vehicle with people he did not know well, being at most an accomplice rather than the primary actor, lacking knowledge of the guns in the vehicle ... etc. Solis-Vazquez could also argue the record shows the sentencing court's initial and ultimate adoption of defense counsel's low-end recommendation and initial decision to vacate two of the sentencing enhancements shows the sentencing courts (both initially and on remand) were open to the possibility of an exceptional sentence, such as running the firearms enhancements concurrent to one another, but that on remand, the court mistakenly believed it lacked

discretion to depart from the standard sentencing range or presumably mandatory and consecutive sentencing enhancements. Solis-Vazquez could further argue this failure to meaningfully consider mitigating circumstances or a potentially authorized exceptional sentence, resulted in a miscarriage of justice that requires remand for resentencing.

2. SOLIS-VAZQUEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the U.S. Constitution guarantees “the right to the effective assistance of counsel” in state criminal proceedings. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)) (internal quotations omitted)). Washington’s Constitution, art. I, sec. 22 also guarantees a right to effective assistance of counsel. State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

“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). Washington has adopted the two-prong Strickland test to determine whether counsel’s assistance was ineffective. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 687)).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient

representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing Thomas, 109 Wn.2d at 225-26 (applying Strickland, 466 U.S. at 687)).

Performance is deficient where “there is no conceivable legitimate tactic explaining counsel’s performance.” State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011) (citing State v. Kyлло, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)). “Not all strategies or tactics on the part of defense counsel are immune from attack.” Grier, 171 Wn.2d at 33-34. ““The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.”” Id. at 34 (quoting Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L. Ed. 2d 985 (2000)).

Here, on remand, defense counsel did not object to the State’s argument that the Court of Appeals left no discretion for the court’s sentencing decision. RP 14. Moreover, defense counsel did not argue for an exceptional sentence or for the firearm enhancements to be run concurrent with one another, at either the first or second sentencing hearing. See RP 14-15; Solis-Vazquez, No. 47593-6-II, RP 667-68.

On appeal, Solis-Vazquez could argue that defense’s counsel’s failure to argue for the firearm sentencing enhancements to be run

concurrent with one another, or to otherwise argue for an exceptional sentence based on mitigating circumstances, and particularly the failure to so argue on remand, was deficient performance that prejudiced the outcome of his second sentencing hearing and requires remand for resentencing.

VI. CONCLUSION

Counsel respectfully moves this Court for permission to withdraw as attorney of record and to permit Solis-Vazquez to proceed *pro se*.

DATED this 31st day of May, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



E. RANIA RAMPERSAD

WSBA No. 47224

Office ID No. 91051

Attorney for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

May 31, 2018 - 12:33 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51248-3
Appellate Court Case Title: State of Washington, Respondent v. Jesus Vazquez, Appellant
Superior Court Case Number: 14-1-01468-3

The following documents have been uploaded:

- 512483_Briefs_20180531123217D2881125_7931.pdf
This File Contains:
Briefs - Anders
The Original File Name was Anders BOA 51248-3-II.pdf

A copy of the uploaded files will be sent to:

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

Comments:

copy mailed to: Jesus Solis-Vazquez, 365324 Coyote Ridge Corrections Center PO Box 769 Connell, WA 99326

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Elizabeth Rania Rampersad - Email: rampersadr@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20180531123217D2881125