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NO. 51291-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANDRE T. TAYLOR

Appellant.

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

The Honorable Michael Evans

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ASSIGNMENTS OF ERROR

1. In violation of article I, § 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution, the two convictions for failure to register as a sex offender violated the prohibition against double jeopardy where the two counts encompassed a single unit of prosecution.

2. The trial court erred by adopting stipulated Finding of Fact II(1) in cause no. 16-16-1-01305-5 and a stipulated Finding of Fact II(1) cause no. 16-1-00147-2 insofar as the appellant challenges the court's denial of his motion to dismiss each count of failure to register. (Clerk's Papers (CP) 106; Stipulations, Findings of Fact, and Conclusions of Law at 3).

3. The trial court erred by adopting stipulated finding of fact II(2) insofar as the appellant challenges the court's denial of his motion to dismiss the bail jumping charge.

4. The trial court erred in concluding appellant was guilty of two counts of failure to register as a sex offender and one count of bail jumping. (CP 106-07).

5. The trial court erred in denying the appellant's motion to dismiss the charges.

6. Constitutional due process forbids appellant's convictions for Failure to register and bail jumping.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The double jeopardy clauses of the Fifth Amendment to the United States Constitution and Article I, section 9 of the Washington Constitution prohibit multiple convictions based on a single unit of prosecution for failure to register. This course of conduct is failure to comply with the ongoing duty to report, not each separate failure to report. Andre Taylor was convicted of two counts of failure to register, premised on his failure to report on two different dates. Did the artificial division of the offense into two counts based on two instances of failing to register violate the prohibition against double jeopardy? Assignment of Error 1.

2. Due process prohibits convictions that do not comport with fundamental conceptions of justice and fairness. Does due process require reversal of appellant's convictions for failure to register as a sex offender and for bail jumping because appellant consistently received ineffective assistance of prior counsel regarding the ability to petition the court for relief from the obligation to register as a sex offender. Assignments of Error 2-5.

C. STATEMENT OF THE CASE

1. Procedural facts:

Andre Taylor was adjudicated as a juvenile for second degree rape in King County Superior Court on November 25, 1992 for an offense

that occurred on July 31, 1991. Report of Proceedings¹ (RP) at 4, 114. The conviction required Mr. Taylor to register as a sex offender. The offense of second degree rape was formerly categorized as a class B felony. Former RCW 9A.44.050 (second degree rape) was elevated to a class A felony in 1990. See Laws of 1990, ch. 3, § 901. In 1990, the legislature enacted RCW 9A.44.130, which required sex offenders to register. “Any adult or juvenile residing in this state who has been found to have committed or has been convicted of any sex offense ... shall register with the county sheriff for the county of the person's residence.” RCW 9A.44.130(1).

The registration requirement for those convicted of a class A felony never terminates unless the offender petitions for and obtains an order of relief from superior court. RCW 9A.44.140(1)(a) and (3). RCW 9A.44.140(4) allows a juvenile to petition for the waiver of the sex offender registration requirement.

Mr. Taylor has largely complied with the registration

¹The record of proceedings is designated as follows: January 28, 2016, February 9, 2016 (arraignment, cause no. 16-1-00147-2), March 1, 2016, March 17, 2016, March 24, 2016, (change of plea hearing), April 5, 2016, April 26, 2016, May 10, 2016, May 24, 2016; June 21, 2016, July 19, 2016, August 9, 2016 (motion to withdraw guilty plea); August 30, 2016, (release hearing); September 2016, October 10, 2016 (preliminary appearance, Cause no. 16-1-01305-5), October 25, 2016 (arraignment), November 14, 2016, November 21, 2016, November 29, 2016 (waiver of speedy trial, cause no. 16-1-00147-2), December 20, 2016, January 12, 2017, April 6, 2017, June 15, 2017 (jury trial waiver in cause no. 16-1-00147-2), June 21, 2017, (motion hearing). June 22, 2017, June 27, 2017 (trial continuance); July 6, 2017 (trial continuance, waiver jury trial in 16-1-01305-5); July 20, 2017 (trial readiness); July 27, 2017 (stipulated facts trial); August 1, 2017 (sentencing) August 8, 2017 (sentencing), August 17, 2017 (presentation); and August 22, 2017 (presentation/argument to modify sentence).

requirements, however, he was convicted of failing to register on January 14, 2004 in Snohomish County, on April 25, 2008 in Snohomish County, March 6, 2009 in Snohomish County, and April 30, 2012 in Pierce County. CP 2-3.

On August 28, 2015, Mr. Taylor reported to the Cowlitz County Sheriff's Office and registered to a fixed address, and signed registration requirements that require persons without a fixed address to report weekly to the sheriff's office on a specified date. CP 2.

On November 6, 2015, Mr. Taylor registered as "transient" at the Cowlitz County Sheriff's Office, indicating that he had no fixed address. According to Cowlitz County Deputy Darren Ullmann, Mr. Taylor was required to report in person each Tuesday to the Cowlitz County Sheriff's Office. He checked in at the Cowlitz County Sheriff's Office on Tuesday, November 10, 2015, was in custody on November 17, 2015, checked in with the Sheriff's office on November 19, and November 24, 2015, was in custody again on December 1, 2015. He checked in on December 8, and was in custody on December 22, 2015, and checked in on December 28, 2015. He did not check in on January 5, January 12, and January 19, 2016. CP 2-3.

Mr. Taylor was arrested on January 27, 2016 for failure to check in each week as required and he remained in custody until he was released on personal recognizance on August 30, 2016. RP at 65-67. CP 3.

a. Cause no. 16-1-00147-2

On February 1, 2016, the State charged Mr. Taylor with one count of failure to register as a sex offender, alleging a violation of the registration requirements between August 28, 2015 and January 19, 2016. RCW 9A.44.130(1), (4)(a), (4)(b), (5)(a) and (5)(b), RCW 9A.44.132(1)(b). CP 4-5. The State filed an amended information on March 17, 2016. CP11-12. Mr. Taylor waived his right to jury trial on March 17, 2016 and pleaded guilty to the charge on March 24, 2016. CP 14-28. Mr. Taylor moved to withdraw his plea on June 17, 2016, and the motion was heard on August 4, 2016. Defense counsel argued that Mr. Taylor was not advised of his ability to move to withdraw the registration requirement by attorneys who represented him in his subsequent cases involving failure to register in 2004, 2008, 2009 and 2012 did not inform him of the ability to vacate his original plea and that counsel did not inform him that he was eligible to petition the court for release from the registration requirement under RCW 9A.44.140. RP at 60-61; CP 30-37. After hearing argument, the court granted Mr. Taylor's motion to withdraw his guilty plea. RP at 63.

Mr. Taylor was released on personal recognizance on August 30, 2016. RP at 65-67.

b. Cause no. 16-1-01305-5

On October 12, 2016, the State filed an information charging Mr.

Taylor with failure to register as a sex offender following his release from custody in Cowlitz County cause no. 16-1-01305-5. Mr. Taylor was arrested in October 2016 and released on October 25, 2016. He did not check in with the Sheriff's office. CP 2-3. He appeared for hearings on September 20, 2016, October 10, 2016, October 25, 2016. RP at 69-84. Mr. Taylor did not appear at the hearing on November 14, 2016 and the court issued a bench warrant. RP at 85-86.

The State filed a second amended information on June 22, 2016, alleging that Mr. Taylor did not register between October 11, 2016 and November 20, 2016, and adding a charge of bail jumping, alleging that he did not appear for the hearing on November 14, 2016. RP at 85-86.

Defense counsel moved for dismissal of the charges, arguing that the original conviction for second degree rape was a Class B felony at the time of the offense and that he was given incorrect information from his attorneys regarding his eligibility to vacate the original conviction and subsequent convictions for failure to register. RP at 114; CP 87-96.

The State argued that the original offense took place in 1991 and the adjudication for rape was in 1992. RP at 115. The State argued that second degree rape was a Class A felony at that time following amendment of the statute in 1990. RP at 115. Because it was a Class A felony, he was required to register for life. RP at 115. The trial court denied the motion

to dismiss, stating:

It may well be that Mr. Taylor received subsequent inaccurate information, but I don't think I have a remedy that I'm permitted to give at this point, so I have to deny the Motion. Whether that's ultimately found to be an accurate statement of the law, we'll have to see what the Court of Appeals says, because it seems like this should be in front of them. But I think at this point I've got to deny the Defense motion.

RP at 117.

Mr. Taylor waived his right to a jury trial in both cause numbers. Following entry of stipulated facts, the trial court found Mr. Taylor guilty of failure to register as a sex offender and bail jumping on July 27, 2017. RP at 142. Stipulated findings of fact were filed July 27, 2017. CP 104-07.

The court granted the defense request for an exceptional sentence below the standard range in cause no. 16-1-00147-2, and \$500.00 victim assessment. CP 109-124. In cause no. 16-1-01305-5, the court also imposed a downward departure of 24 months in Count 1, and a standard range sentence of 51 months for Count II, to be served concurrently, and to be served concurrently with cause no. 16-1-00147-2. The court's basis for an exceptional sentence downward was that Mr. Taylor was eligible to be relieved of the registration requirement, "but essentially received bad legal advice that prevented him from doing so." RP at 156.

Timely notice of appeal was filed September 12, 2017. CP 125. This appeal follows.

D. ARGUMENT

1. THE TWO CONVICTIONS FOR FAILURE TO REGISTER VIOLATE DOUBLE JEOPARDY BECAUSE THE ACTS CONSTITUTED A SINGLE UNIT OF PROSECUTION

Under the double jeopardy provisions of the United States and Washington constitutions, an accused may not be convicted more than once under the same criminal statute if only one “unit” of the crime has been committed. U.S. Const. amend. V; Const. art. I, § 9; *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). Under the double jeopardy doctrine, a criminal defendant is protected from being “(1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense.” *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006). Double jeopardy principles protect a defendant from being convicted more than once under the same statute for a single unit of the crime. *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). When a defendant is convicted of multiple violations of the same statute, the double jeopardy question depends on the unit of prosecution that is punishable under the statute. *Id.*

The proper remedy for a double jeopardy violation is to vacate the

convictions that violate double jeopardy. *State v. Knight*, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008). The “unit of prosecution” analysis applies when a defendant is convicted multiple times under the same statutory provision; the analysis asks “what act or course of conduct has the Legislature defined as the punishable act.” *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).

Division One determined in *State v. Durrett*, 150 Wn. App. 402, 406, 208 P.3d 1174 (2009) that the unit of prosecution for failure to weekly register as a sex offender is a course of conduct when the violation is a failure of the requirement to report. In *Durrett*, the defendant failed multiple times to report weekly in violation of RCW 9A.44.130(6)(b). 150 Wn. App. at 407. The court concluded that “the punishable offense would be a course of conduct – the failure to comply with the ongoing duty to report – rather than each separate failure to report.” *Id.* at 410. *Durrett* was required to register as a sex offender. *Id.* at 405. He had no fixed residence and so he was required to check in weekly at the sheriff’s office. *Id.* *Durrett* reported to the sheriff’s office for two consecutive weeks after his release from jail. *Id.* He then failed to report for two weeks. *Id.* *Durrett* reported again for the next two weeks. *Id.* Then, he failed to report for two months, until he was arrested. *Id.* The State charged *Durrett* with two counts

of failure to register for the two periods of nonreporting: November 6, 2006 through November 17, 2006, and December 6, 2006 through January 22, 2007, and he was convicted as charged. *Id.*

On appeal, Durrett argued that his failure to report weekly during the charged time periods constituted a single unit of prosecution. *Id.* at 405–06. The Court rejected the State’s factual argument that more than one unit of prosecution was actually present. *Id.* at 410-11. The Court determined that the period of the defendant's failure to report ran from the date of his first failure to report until his arrest. *Id.* at 411. The court stated that the fact that the defendant reported for two weeks in the middle of that period of noncompliance did not subject him to two convictions. *Id.*

Applying the rule of lenity, the Court determined that the punishable offense was a course of conduct rather than each weekly failure to register. *Id.*

Similarly, in *State v. Green*, 156 Wn. App. 96, 230 P.3d 654 (2010), this Court determined that Green - a level II sex offender who was required to register every 90 days - that the duty to register every 90 days created an ongoing course of conduct that could not support separate charges. *Id.* at 101. In *Green*, the defendant failed multiple times to register every 90 days in violation of RCW 9A.44.130(7). 156 Wn. App. at 98-99. On appeal, this

Court addressed the unit of prosecution for a violation of RCW 9A.44.130. *Id.* at 99-100. Relying on *Durrett*, the Court stated that “we construe the duty to register every 90 days as creating an ongoing course of conduct that cannot support separate charges.” *Id.* at 101. The Court concluded that the defendant “committed an ongoing and continuing offense” from the time he first failed to report until he registered again. *Id.*

The same analysis utilized in *Durrett* and *Green* applies here. After not registering on January 5, 2016 (count I), Mr. Taylor again did not register, when he was released from jail. He did not register on January 5, 2016, January 12, 2016, and January 19, 2016 as required.

As in *Durrett*, the multiple charges were premised on Mr. Taylor’s partial compliance by reporting irregularly. Under *Durrett*, this violates double jeopardy. Accordingly, assuming the Court is not persuaded by argument contained in Section 2, below, the Court should vacate one count and the case should be remanded for resentencing on a single count. *Durrett*, 150 Wn. App. at 413, *Green*, 156 Wn. App. at 98-99.

2. THE CONVICTIONS FOR FAILURE OT REGISTER AND FOR BAIL JUMPING VIOLATE FUNDAMENTAL DUE PROCESS CONCEPTIONS OF JUSTICE AND FAIRNESS UPON WHICH OUR CRIMINAL JUSTICE SYSTEM IS BASED

Sex offenders have a duty to register under RCW 9A.44.130(1)(a).

RCW 9A.44.140 permits a person having a duty to register under RCW 9A.44.130 to petition the superior court to be relieved of that duty. The statute provides, however, that the court “shall consider the nature of the registrable offense committed, and the criminal and relevant noncriminal behavior of the petitioner both before and after conviction” and may grant the petition “only if the petitioner shows, with clear and convincing evidence, that future registration of the petitioner will not serve the purposes of RCW 9A.44.130, 10.01.200, 43.43.540, 46.20.187, 70.48.470, and 72.09.330.” RCW 9A.44.140(3)(a). Once a petitioner has shown by clear and convincing evidence that registration as a sex offender will not serve the purpose of the statute, waiver is within the trial court's discretion. RCW 9A.44.140 provides that the court may relieve the petitioner of the duty to register.

Mr. Taylor received a juvenile disposition of a maximum of 30 weeks following his adjudication for second degree rape. When the offense occurred Mr. Taylor was 17 years, eight months old and had just turned 19 years old when he was adjudicated. CP 31.

Mr. Taylor was subsequently convicted of failure to register as a sex offender in 2004 in Snohomish County, which was his first conviction for this offense. He was then convicted of failure to register two more

times in Snohomish County in 2008 and 2009. Mr. Taylor was then convicted of failure to register as a sex offender in Pierce County in 2012.

Mr. Taylor's trial counsel, following inquiry of Mr. Taylor's prior attorneys in 2004, 2008, 2009, and 2012, filed an affidavit stating that he found no evidence that any of his four previous attorneys advised Mr. Taylor that he was eligible to seek relief from the duty to register by petitioning the juvenile court. CP 31-32. If any of Mr. Taylor's previous attorneys for his four failures to register matters had properly researched the law regarding sex offender registration, and had properly advised Mr. Taylor, it is possible that he would not have been found guilty of failing to register, and that he would not have faced the current charges, nor incurred the charge for bail jumping. It is apparent that none of prior attorneys noticed that his underlying sex offense was a juvenile matter, and that he was under the age of eighteen at the time of the offense, nor did they review the statutes affecting his case. Moreover, it is reasonable to assume that at this late date---after the passage of approximately 25 years---Mr. Taylor would no longer have been under the registration requirements during the time of one or more of the prior four convictions for Failing to Register and would also not have faced the current two charges, as well as the attendant bail jumping charge.

Criminal defendants have the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 674 (1984).

The constitutional guarantee of effective assistance of counsel "is meant to assure fairness in the adversary criminal process." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (citation omitted).

To establish ineffective assistance, a defendant must show (1) his attorney's performance was deficient and (2) he was prejudiced by the deficiency. *Strickland*, 466 U.S. at 687; *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Deficient performance is that which falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Defense counsel has a basic duty to provide competent advice to the defendant and is presumed to know the law. *Id.* at 687-88; *Cronin*, 466 U.S. at 658 (lawyer is presumed "competent to provide the guiding hand that the defendant needs.").

Knowing how to petition for removal a sex offender from the duty to register is something that all trial attorneys who are faced with that

problem should be able to perform, and failing to challenge this issue, as what happened in Mr. Taylor's matters by his attorneys, is ineffective assistance of counsel.

To show prejudice, there must be a reasonable probability that but for counsel's performance, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The continuing and probably avoidable difficulties that he continues to suffer as a result of his previous attorneys' failure to provide effective representation have caused him significant and unjustified sanctions and incarceration. Mr. Taylor clearly has been prejudiced by the incarcerations, including his current sentence of 51 months.

The unique circumstances inherent in Mr. Taylor's current convictions for failure to register merit dismissal. Our criminal justice system is based on fundamental principles of fairness, and the contours of due process are thus defined by "the community's sense of fair play and decency." *State v. Cantrell*, 111 Wn.2d 385, 389, 758 P.2d 1 (1988); *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Due process is violated when an action offends those canons of decency and fairness "so rooted in the traditions and conscience of our people as to be ranked as

fundamental" or "implicit in the concept of ordered liberty." *Rochin v. California*, 342 U.S. 165, 169, 72 S. Ct. 205, 96 L. Ed. 183 (1952). If his previous attorneys researched the law, given the nature of his offense and his age when the offense was committed, prosecuted, and adjudicated in juvenile court, the obligation to be aware of the applicable law at the time of was essential to his ability to provide effective representation. *State v. Kylo*, 166 Wn2d 856, 215 P.3d 177 (2009), specifically held: "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." *Kylo*, 166 Wn.2d at 862. "Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, the attorney's performance is constitutionally deficient. . . . Indeed, an attorneys ignorance of a point of law that is fundamental to his case, combined with his failure to perform research on that is a quintessential example of unreasonable performance under Strickland." *In the Pers. Restraint of Yung Chen Tsai*, 183 Wash 2d 91, 351 P.3d 138 (2015).

CrR 7.8(b)(5) allows for relief from a judgment for, "Any other reason justifying relief from operation of the judgment". Because Mr. Taylor should have been apprised of the potential to be relieved of his duty to register instead of being convicted, Mr. Taylor requests this Court to

recognize a basis for relief of operation of the judgment, based on ineffective assistance of prior counsel, and reverse the court's ruling denying his motion to dismiss.

E. CONCLUSION

For the foregoing reasons, Mr. Taylor respectfully requests this Court reverse and remand the convictions for failure to register and bail jumping for dismissal.

DATED: May 10, 2018.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Andre Taylor

CERTIFICATE

The undersigned certifies that on May 10, 2018, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and Mr. David Phelan and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

Mr. David Phelan
Cowlitz County Prosecutor's Office
312 SW 1st Ave. Rm 105
Kelso, WA 98626-1799
pheland@co.cowlitz.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Andre T. Taylor
DOC# 829569
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 10, 2018.



PETER B. TILLER-WSBA 20835

THE TILLER LAW FIRM

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