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No. 51342-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Tyler Robb,

Appellant.

County Superior Court Cause No. 14-1-00868-6

The Honorable Judge Gregory M. Gonzales

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by failing to consider whether Mr. Robb should be resentenced on remand.

> **ISSUE 1:** When a conviction is vacated on appeal, the sentencing court may resentence the offender on any remaining convictions unless the appellate mandate prohibits resentencing. Did the trial judge fail to exercise his discretion by considering whether Mr. Robb should be resentenced?

2. Mr. Robb was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
3. Defense counsel provided ineffective assistance by failing to recognize the trial court's discretion to resentence Mr. Robb.
4. Defense counsel provided ineffective assistance by erroneously suggesting that the trial court could not resentence Mr. Robb on remand.
5. Defense counsel provided ineffective assistance by refusing his client's request for resentencing following vacation of one of Mr. Robb's two convictions.

> **ISSUE 2:** Defense counsel provides ineffective assistance when the client is prejudiced by the attorney's deficient performance. Was Mr. Robb deprived of his right to the effective assistance of counsel at sentencing?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Tyler Robb appealed from his conviction for two sex offenses. CP 1-31. The Court of Appeals found a double jeopardy violation and ordered one conviction vacated. CP 25, 30.

The Court of Appeals "remand[ed] for the trial court to vacate Robb's conviction for second degree child molestation." CP 30. The court did not indicate whether or not Mr. Robb should be resentenced. CP 30.

In his original sentencing, Mr. Robb's range was 78 to 102 months, based on the two convictions comprising the same criminal conduct. CP 1-31. While not adding points to the offender score, both sex offenses were the subject of a finding of guilt by the jury and both were considered by the trial court. The trial court had sentenced Mr. Robb to 90 months. CP 1-31.

When Mr. Robb came back for resentencing, the score and range were unchanged. But a felony sex offense was vacated. CP 1-31. Following remand, the trial court held a hearing. The prosecutor told the judge that the hearing was "to enter an order to memorialize the court of appeals decision which were reprimanded [sic] for an amended felony judgment and sentence to be entered." RP (12/11/17) 3. According to the prosecutor, vacating one conviction was merely a formality: "the remaining count of rape child in the second degree is the one on which the

sentence now rests, but it doesn't change anything else about the terms or length of the sentence." RP (12/11/17) 3.

Mr. Robb wanted his attorney to argue for a shorter prison term. RP (12/11/17) 4. He believed the judge might impose a more lenient sentence for one conviction than he had for two convictions. RP (12/11/4) 4.

However, rather than making the argument requested by his client, defense counsel agreed with the prosecutor. RP (12/4/17) 3. According to Mr. Robb's lawyer,

> The court of appeal's decision did not anticipate the sentencing [sic]. So I don't think I… have the authority to request that.
> RP (12/4/17) 3-4.

The trial judge accepted the prosecutor's summary and defense counsel's concession:

> Very Well. We have nothing to do at this point. I believe the full remaining count stands? … And the sentence will be applied to that?
> RP (12/4/17) 4

The prosecuting attorney answered 'yes' to both questions. RP (12/4/17) 4. Defense counsel signed an agreed order. CP 32-33.

The court entered the order without giving Mr. Robb an opportunity to speak. RP (12/4/17) 4-5; CP 32-33.

Mr. Robb timely appeals. CP 34.

ARGUMENT

I. THE TRIAL JUDGE FAILED TO EXERCISE HIS DISCRETION AT THE HEARING ON REMAND.

The trial judge erroneously believed he lacked discretion to resentence Mr. Robb. Because of this, the case must be remanded for a new sentencing hearing.

A. The Court of Appeals should consider this error of law *de novo.*

Questions of law are reviewed *de novo. Barr v. Snohomish Cty. Sheriff*, No. 50623-8-II, Slip Op. at *5 (Wash. Ct. App. June 12, 2018). This case involves the scope of the trial court's authority following remand. This is a legal issue, and review is *de novo. Id.*

B. The trial court's failure to exercise discretion was an abuse of discretion.

A trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). A mandate that does not explicitly authorize resentencing may be considered "open-ended." *Id.* (internal quotation marks and citation omitted). Such a mandate gives the trial court discretion: the court may consider resentencing the offender on remand. *Id.*

Here, the Court of Appeals issued an open-ended mandate. CP 1, 25, 30. It "remand[ed] for the trial court to vacate Robb's conviction for second degree child molestation." CP 30.

In light of this mandate, the trial court had discretion to resentence Mr. Robb. *Id.* The trial judge should have exercised that discretion.

A court's "failure to exercise discretion is itself an abuse of discretion subject to reversal." *State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015). Here, the trial judge erroneously believed that he lacked the authority to resentence Mr. Robb.

The trial judge was not required to resentence Mr. Robb. Instead, he was required to *consider* imposing a different sentence. *Id.; Kilgore*, 167 Wn.2d at 42. By failing to exercise his discretion, he abused his discretion. *O'Dell*, 183 Wn.2d at 697. This failure to exercise discretion requires reversal *Id.*

II. MR. ROBB WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Robb asked his attorney to argue for a lower sentence. Defense counsel erroneously believed he didn't "have the authority to request that." RP (12/4/17) 3-4. In fact, the trial judge did have discretion to resentence Mr. Robb. *Kilgore*, 167 Wn.2d at 42. Defense counsel's

erroneous concession violated Mr. Robb's right to the effective assistance of counsel.

An accused person is entitled to the effective assistance of counsel at sentencing. U.S. Const. Amend. VI, XIV; *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). To prevail on an ineffective assistance claim, the appellant must show deficient performance and prejudice. *State v. Phuong*, 174 Wn. App. 494, 546-47, 299 P.3d 37 (2013).

Here, defense counsel erroneously believed he lacked authority to request a lower sentence. RP (12/4/17) 3-4. In fact, the trial court had the authority to resentence Mr. Robb. *See Kilgore*, 167 Wn.2d 28, 42,

The Court of Appeals issued an open-ended mandate, directing the trial court to "vacate Robb's conviction for second degree child molestation." CP 30. It placed no limitation on the trial court's authority to resentence Mr. Robb.

Under these circumstances, the trial court was authorized to resentence Mr. Robb. *Kilgore*, 167 Wn.2d at 42. Trial counsel's erroneous concession amounted to deficient performance. *Phuong*, 174 Wn. App. at 546-547.

The error prejudiced Mr. Robb. Because of counsel's erroneous concession, Mr. Robb lost the opportunity to ask for a lower sentence. *Id.*

In *Phuong*, for example, trial counsel failed to make a same-criminal-conduct argument at sentencing. *Id.*, at 547. The appellate court found prejudice based on the *possibility* of a favorable ruling. *Id.* The court used language reflecting this: "a sentencing court *could determine*… the court *could conclude*… the court *could determine*." *Id.*, at 547-548.

Here, a sentencing court "could conclude"[1] that Mr. Robb deserved a lighter sentence for one offense, rather than the 90-month prison term he'd received for two convictions.[2] CP 1-31. Furthermore, his attorney could have presented mitigating evidence and made additional arguments on his client's behalf.

Because the sentencing court "could conclude" that resentencing was appropriate, counsel's deficient performance prejudiced Mr. Robb. He was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Id.* The case must be remanded to allow the judge to consider resentencing Mr. Robb.

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[1] *Id.*, at 547-548.

[2] Ultimately, the decision to impose a different sentence rested with the trial court. Defense counsel's deficient performance deprived the trial judge of his opportunity to exercise his discretion.

CONCLUSION

For the foregoing reason, the case must be remanded for a new sentencing hearing. The trial judge must consider resentencing Mr. Robb.

Respectfully submitted on June 22, 2018,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Tyler Robb, DOC #383965
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
cntypa.generaldelivery@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 22, 2018.

Jodi R. Backlund, WSBA No. 22917
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