FILED
Court of Appeals
Division II
State of Washington
8/21/2018 3:45 PM

NO. 51342-1-II

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

STATE OF WASHINGTON, Respondent

v.

TYLER DAVID ROBB, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00868-6

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. The trial court did not err in amending the judgment and sentence.

II. Robb had the benefit of effective counsel.

STATEMENT OF THE CASE

Tyler Robb (hereafter 'Robb') was convicted by a jury of Rape of a Child in the Second Degree and Child Molestation in the Second Degree. CP 3-4. The convictions arose from a single incident wherein Robb lay down in bed with his sick, 13-year-old stepdaughter and put his hand on her stomach, her breast, and underneath her pajama bottoms and underwear, penetrating her vagina with his finger. CP 4. The trial court did not score the Rape of a child and the child molestation convictions against each other, finding they encompassed the same criminal conduct, and calculated Robb's standard sentence range with an offender score of zero at 78 to 102 months. CP 36-37. The court sentenced Robb to 90 months. CP 38. Robb directly appealed his convictions, arguing erroneous admission of a DNA expert's testimony, erroneous admission of the victim's out-of-court statements, prosecutorial misconduct in closing argument, that his convictions for both child molestation and rape of child

violated double jeopardy, and improper imposition of sentencing conditions. CP 3-4. This Court denied most of Robb's claims, accepted the State's concession that Robb's convictions violated double jeopardy and that the child molestation conviction should be vacated, and found a few of the sentence conditions should be stricken. *Id.* Accordingly, this Court affirmed Robb's conviction for rape of a child, and remanded "for the trial court to vacate Robb's conviction for second degree child molestation and to strike the sentencing conditions regarding controlled substances and sexually explicit material." CP 30-31. This Court's opinion was filed on January 4, 2017. On October 6, 2017 this Court issued a mandate stating the matter was "mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion." CP 1.

On December 11, 2017 the Superior Court entered an order amending the felony judgment and sentence vacating count 2, child molestation in the second degree, and striking two community custody conditions. CP 32-33; RP 3-4. At the hearing wherein the superior court entered the order amending the judgment and sentence, Robb's attorney indicated that Robb wanted a full new sentencing hearing, but that in his opinion the decision from the Court of Appeals did not anticipate a new sentencing hearing. RP 3-4. The superior court entered the order amending

the judgment and did not hold a new sentencing hearing. *Id.* Robb filed a notice of appeal and has alleged the trial court failed to recognize it had the discretion to hold a new sentencing hearing, and that his attorney was ineffective for indicating that a new sentencing hearing was not within the scope of the remand from the Court of Appeals. The State herein submits its response brief addressing those claims.

ARGUMENT

I. The trial court properly entered an order amending the judgment and sentence.

Robb contends the trial court erred on remand by not holding a new sentencing hearing after his original direct appeal of his conviction. However, this Court did not remand for a new sentencing hearing, and the trial court correctly understood this Court's remand to be ministerial. The trial court did not err in failing to resentence Robb.

A trial court's discretion on remand is limited by the scope of the appellate court's remand order. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009) (referred to as *Kilgore II*). A defendant may raise a sentencing issue on a second appeal, if, after the first appeal, the appellate court vacated the original sentence or remanded for an entirely new sentencing hearing. *State v. Toney*, 149 Wn.App. 787, 792, 205 P.3d 944 (2009) (discussing *State v. Kilgore*, 141 Wn.App. 817, 172 P.3d 373

(2007) (referred to as *Kilgore I*) and *State v. McNeal*, 142 Wn.App. 777, 175 P.3d 1139 (2008)). However, if the appellate court remands for the trial court to enter only a correction of the original judgment, then a defendant may not raise a sentencing issue in a second appeal. *Id.* The issue then is whether this Court's remand from Robb's original direct appeal was for a new sentencing hearing or for a ministerial correction. If this Court issued an "open-ended" remand, then the trial court would have had the discretion to hold a new sentencing hearing, but if this Court issued a direct remand regarding ministerial matters, then the trial court would not have the discretion to hold a new sentencing hearing.

In *Toney*, this Court found that the defendant's sentence was not final and therefore he could address a sentencing issue in a second appeal because the remand from the first direct appeal had clearly been a "remand for resentencing." *Toney*, 149 Wn.App. at 792 (quoting its unpublished decision from the original appeal, 1999 WL 294615 at *1). In *Kilgore I*, this Court found that its "remand for further proceedings" was an open-ended remand to the trial court, giving the trial court the discretion to either hold a new sentencing hearing or enter an amended judgment vacating two convictions. *Kilgore I*, 141 Wn.App. at 824-25. Yet in *State v. Ramos*, the Court found that an appellate remand to "state the specific term of community placement" would be a purely ministerial remand

"since the length of community placement is dictated by statute" and it would therefore not be an "open-ended" remand which would give the trial court discretion. *State v. Ramos*, 171 Wn.2d 46, 49, 246 P.3d 811 (2011).

In *In re the Personal Restraint Petition of Sorenson*, 200 Wn.App. 692, 403 P.3d 109 (2017), this Court found that its remand order from the defendant's direct appeal "left the trial court with no discretion as to the actions it could take on remand." *In re PRP of Sorenson*, 200 Wn.App. at 699. From the direct appeal in Sorenson's case, the mandate indicated "this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion." *State v. Sorenson*, COA No. 43199-8-II (Mandate issued August 12, 2014). In the opinion accompanying that mandate, this Court had remanded to the trial court to correct the judgment and sentence to reflect correct dates of when crimes were committed. *In re PRP of Sorenson*, 200 Wn.App. at 694-95 (quoting its opinion from Sorenson's direct appeal). Thus when a mandate from a direct appeal indicates the superior court is to conduct "further proceedings in accordance with the attached true copy of the opinion," and the opinion specifies certain action to be taken on remand, that remand order leaves the trial court with no

discretion except to act as the appellate court instructed in its opinion. *See id.*

In Robb's case, on his direct appeal, this Court's mandate stated, "this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion." CP 1. That is the exact language as used by this Court in Sorenson's mandate from his first appeal. *State v. Sorenson*, COA No. 43199-9-II. From *In re PRP of Sorenson*, *supra, Kilgore I, supra*, and *Toney, supra*, it is clear that an appellate court's mandate for further proceedings in accordance with the opinion limits the superior court's ability to act. In such a situation, the superior court may only take action in so far as the appellate court's opinion dictates. The appellate court remand was not open-ended as it was in *Kilgore I, supra*. Whereas the *Kilgore I* Court instructed the trial court to engage in "further proceedings" without dictating any other restrictions, this Court in Robb's first appeal instructed the trial court to vacate the second degree child molestation conviction and to strike the sentencing conditions regarding controlled substances and sexually explicit material. CP 30-31. The Court's direction to the trial court on what to do at Robb's further hearing was not an open-ended, vague order which allowed the trial court to decide what kind of hearings it wanted to hold. Instead, the opinion specifically told the trial court what

action to take, all actions that were ministerial in nature. This Court directed the superior court to 1) to vacate a conviction, and 2) to strike certain community custody conditions. *Id.* The remand order did not allow the superior court to hold an entirely new sentencing hearing, thus the trial court did not have the discretion to re-sentence Robb as he argues it did. Because this Court's remand was specific as to action, and Robb did not have a right to resentencing (*see Kilgore*, 141 Wn.App. at 823 (finding no resentencing hearing was required when two convictions had been vacated on appeal, but the standard sentencing range remained the same)), the trial court did not err in finding it was limited in acting within the scope of the Court of Appeals' remand order.

II. Robb had the benefit of effective assistance of counsel.

All defendants are guaranteed the right to effective assistance of counsel; however, Robb was not deprived of that right as he claims. An attorney does not need to make frivolous arguments in order to be effective. Robb's attorney correctly informed the trial court of the court's authority within the appellate court's remand order; he was not ineffective by choosing not to make a frivolous argument. Robb's claim of ineffective assistance of counsel fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a

criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant 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. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course

of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029,

145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

"Counsel's performance is not deficient for failing to file frivolous motions..." and a defendant "is not prejudiced by his counsel's refusal or failure to file a meritless motion." *State v. Kirwin*, 137 Wn.App. 387, 394, 153 P.3d 883 (2007). As discussed above, Robb's attorney was correct in his representation to the superior court as to the extent of its authority to act on the remand from Robb's appeal. As he was correct and an attorney is not deficient for failing to make frivolous or meritless requests of the court, Robb cannot show he was denied effective assistance of counsel, or

that the outcome would have been different – that the trial court would have held a sentencing hearing given the state of the law discussed above and the directives from this Court on remand. Robb cannot show ineffective assistance of counsel. His claim fails.

CONCLUSION

The trial court correctly acted within the bounds of this Court's remand order by entering an order amending the judgment and sentence instead of holding a new sentencing hearing, and Robb received effective assistance of counsel. Accordingly, Robb's appeal should be denied.

DATED this 21st day of August, 2018.

Respectfully submitted:

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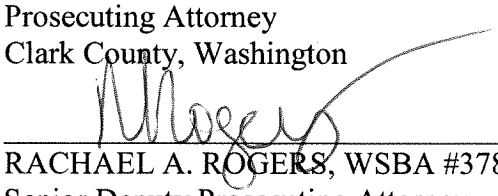
By: 

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August 21, 2018 - 3:45 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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Superior Court Case Number:	14-1-00868-6

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