

FILED
Court of Appeals
Division II
State of Washington
7/25/2018 1:16 PM

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

STATE OF WASHINGTON,

Respondent,

vs.

ISAAC MAURICE NETTLES,
Appellant.

Appeal No. 51766-3-II

MOTION TO WITHDRAW AS
COUNSEL PURSUANT TO
ANDERS v. CALIFORNIA,
RAP 15.2(h) & RAP 18.3(a)

I. IDENTITY OF MOVING PARTY

STEPHANIE C. CUNNINGHAM, court-appointed counsel for Appellant ISAAC MAURICE NETTLES, is the moving party and seeks the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Withdrawal of counsel pursuant to RAP 15.2(i) and 18.3(a).

III. GROUNDS FOR RELIEF

This motion is brought pursuant to the requirements of *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1977), RAP 15.2(i) (allowing counsel to withdraw on appeal if counsel can find no basis for a good faith argument for review) and RAP 18.3(a) (directing that counsel appointed to represent an indigent defendant must file a motion to withdraw if counsel can find no basis for a good faith argument on review).

IV. ISSUES THAT COULD BE ARGUED

1. Did the trial court impose an exceptional sentence when it sentenced Appellant to the high end of his standard range, plus an additional 36-month firearm enhancement and 18-month term of community custody?
2. Did the trial court violate Nettles' right to be present when it denied his Motion to Correct Judgment and Sentence without holding a hearing where Nettles could appear and present his arguments in person?

V. REFERENCES TO THE RECORD

On July 2, 2016, Isaac Maurice Nettles pleaded guilty to an Amended Information charging one count of second degree manslaughter (RCW 9A.32.070(1)) with a deadly weapon (firearm) enhancement (RCW 9.94A.533(3)). (CP 3, 5-14; RP 12-14) In his written plea statement, Nettles acknowledged that he “negligently caused the death of my friend, by holding a gun pointed at him and fired (*sic.*) in his direction, killing him. I will never forgive myself for what I did. It was not intended, and I should have been aware of the risk. I thought the gun was empty.” (CP 13) Nettles also acknowledged that his standard range sentence would be 21-27 months plus a consecutive 36-month firearm enhancement, and that he would be subject to an 18-month term of community custody after release from confinement. (CP 6; RP 13-14, 16-17)

The trial court accepted his plea and imposed a term of confinement totaling 63 months (27 months plus a 36-month firearm enhancement) to be followed by 18 months of community custody. (CP 24-25; RP 19, 33) Nettles did not file a direct appeal.

On January 30, 2018, Nettles filed a pro se Motion to Correct Judgment and Sentence. (CP 36-56) Nettles asserted that his Judgment and Sentence is facially invalid because he was unlawfully sentenced to an exceptional sentence. (CP 37, 39) Nettles argued that his standard range was 21-27 months, and that 27 months was therefore the “statutory maximum” sentence the court could impose. According to Nettles, the additional 36-month firearm enhancement and 18-month community custody terms constituted an improper exceptional sentence above the “statutory maximum.” (CP 36-43) Nettles asked to be resentenced to no more than 27 months of confinement and community custody, and to be transferred to the Superior Court for a hearing on his motion. (CP 36-39)

The trial court entered an ex-parte order denying Nettles’ motion. (CP 57) The court explained that the motion was denied because:

[T]here is nothing to correct. The defendant was sentenced to a standard range sentence (27 months) plus an additional sentence for the firearm sentencing enhancement (36 months). The firearm sentencing enhancement does not act as an exceptional sentence, but is authorized under the law to be an additional sentence. He was also sentenced to 18 months of Community Custody. The total amount of time that he was sentenced to, including community custody, was 81 months. The statutory maximum sentence for Manslaughter in the Second Degree is 120 months.

(CP 57) Nettles filed a timely notice appealing this order. (CP 58-60)

This motion is brought pursuant to the requirements of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, *rehearing denied*, 388 U.S. 924, 87 S. Ct. 2094, 18 L. Ed. 2d 1377 (1977).

VI. CITATIONS OF AUTHORITY RELEVANT TO THE ISSUES¹

A. DID THE TRIAL COURT IMPOSE AN EXCEPTIONAL SENTENCE WHEN IT SENTENCED NETTLES TO THE HIGH END OF HIS STANDARD RANGE, PLUS AN ADDITIONAL 36-MONTH FIREARM ENHANCEMENT AND 18-MONTH TERM OF COMMUNITY CUSTODY?

The Legislature has the authority to set the appropriate punishments for criminal offenses. State v. Jeffries, 105 Wn.2d 398, 717 P.2d 722, *cert. denied*, 479 U.S. 922, 107 S. Ct. 328, 93

¹ This is presented “without argument” pursuant to RAP 18.3(a)(2).

L.Ed.2d 301 (1986); State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980). “Whether the sentencing court has exceeded its statutory authority under the Sentencing Reform Act of 1981, chapter 9.94A RCW (SRA), is an issue of law.” In re West, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005) (citing State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003)).

“In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing[.]” RCW 9.94A.530(2).

Under the SRA, the sentencing court uses the defendant’s prior convictions to determine an offender score, which along with the “seriousness level” of the current offense establishes his or her presumptive standard sentencing range. RCW 9.94A.525, 9.94A.530; State v. Arndt, 179 Wn. App. 373, 377, 320 P.3d 104, 108 (2014) (citing State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999)).

Manslaughter in the second degree is a class B felony. RCW 9A.32.070(2). An offender with no criminal history who is convicted of second degree manslaughter faces a standard range

sentence of 21 to 27 months of incarceration. RCW 9.94A.510, RCW 9.94A.515. And as a class B felony, the statutory maximum sentence for second degree manslaughter is “confinement in a state correctional institution for a term of ten years [120 months.]” RCW 9A.20.021(1)(b).

The SRA provides that time shall be added to the standard range under certain circumstances, such as when the offender is armed with a deadly weapon or firearm:

The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 ... (b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both[.]

RCW 9.94A.533(3). The SRA mandates that “additional time for deadly weapon findings ... shall be added to the entire standard sentence range.” RCW 9.94A.530(1).

The SRA also provides that, “[a] court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense[.]” RCW

9.94A.701(2).² “[T]he presumptive sentence ranges for total confinement do not include periods of community placement.... Nor is the addition of community placement an exceptional sentence.” Matter of Caudle, 71 Wn. App. 679, 680, 863 P.2d 570 (1993).

RCW 9.94A.505(5) restricts a trial court from imposing a combined term of confinement and community custody that exceeds the statutory maximum. Therefore, “[t]otal punishment for an offense, including imprisonment and community custody, may not exceed the statutory maximum.” State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004).

In Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the Supreme Court held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. Subsequently, in Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Court explained that “the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge

² Second degree manslaughter is a “violent offense.” (RCW 9.94A.030(55)(a)(iv).

may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant....* In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without any additional findings.*” (Citations omitted, emphasis in original.)

But, as subsequent Washington State appellate courts explained:

Blakely does not require us to find that “statutory maximum” means the high end of the presumptive standard sentence range.... [A]fter Blakely, Washington courts have consistently determined the “statutory maximum” of a crime by looking to RCW 9A.20.021, not the high end of the standard range under the SRA. See, e.g., State v. Bobenhouse, 143 Wn. App. 315, 331, 177 P.3d 209 (2008), *review granted*, 164 Wash.2d 1021, 195 P.3d 957 (2008) (statutory maximum for first degree child rape is life) (citing RCW 9A.20.021); State v. Thompson, 143 Wn. App. 861, 871, 181 P.3d 858 (2008) (maximum sentence for murder is life imprisonment) (citing RCW 9A.20.021); State v. Adams, 138 Wn. App. 36, 51, 155 P.3d 989 (2007) (statutory maximum for class A felony is life imprisonment) (citing RCW 9A.20.021); [State v.] Knotek, 136 Wn. App. [412,] 425, 149 P.3d 676 [2006] (finding that Blakely “does not nullify life imprisonment as the statutory maximum for a Class A offense,” but “... reduce[s] the maximum terms of confinement to which the court could sentence” without a jury fact finding). We conclude that RCW 9A.20.021 provides the statutory maximum.

State v. Toney, 149 Wn. App. 787, 795-96, 205 P.3d 944 (2009)

(some citations omitted).

B. DID THE TRIAL COURT VIOLATE NETTLES' RIGHT TO BE PRESENT WHEN IT DENIED HIS MOTION TO CORRECT JUDGMENT AND SENTENCE WITHOUT HOLDING A HEARING WHERE NETTLES COULD APPEAR AND PRESENT HIS ARGUMENTS IN PERSON?

A criminal defendant's right to be present derives from the federal and state constitutions and court rule. Wash. Const. art. I, § 22 ("In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel"); U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); CrR 3.4(a) ("The defendant shall be present ... at every stage of the trial ... and at the imposition of sentence").

The constitutional right to be present extends to any stage of the criminal proceedings where the defendant's "substantial rights might be affected." State v. Walker, 13 Wn. App. 545, 557, 536 P.2d 657 (1975). This includes sentencing. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). The right to be present also applies at resentencing if the court has discretion to determine the terms of a new sentence. See State v. Davenport, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007); State v. Rupe, 108 Wn.2d 734,

743, 743 P.2d 210 (1987). But, where the court merely makes a ministerial correction, the right to be present does not apply. State v. Ramos, 171 Wn.2d 46, 48, 246 P.3d 811 (2011).

An accused need not be present during arguments on questions of law (State v. Walker, 13 Wn. App. 545, 557, 536 P.2d 657 (1975)), or on a motion for new trial (State v. Hager, 157 Wn. 664, 666, 290 P. 230 (1930)), or on a motion for arrest of judgment and for a new trial in a criminal action (State v. Grier, 11 Wn. 244, 248, 39 P. 874 (1895)).

VII. CONCLUSION

Based on the above, Nettles respectfully requests that this court independently review the record to determine whether this appeal is “wholly frivolous.” Anders, supra.

DATED: July 25, 2018



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Isaac Maurice Nettles

CERTIFICATE OF MAILING

I certify that on 07/25/2018, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Isaac M. Nettles, DOC# 392254, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



STEPHANIE C. CUNNINGHAM, WSBA #26436

July 25, 2018 - 1:16 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Isaac Maurice Nettles, Appellant
Superior Court Case Number: 15-1-03225-1

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