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NO. 51870-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES DEWAYNE GARDNER,

Appellant.

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

The Honorable Stanley J. Rumbaugh, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. James Dewayne Gardner was denied his right to effective representation when his attorney failed to argue that any of his three convictions for child molestation in the third degree involved the same criminal conduct and should be scored as a single offense for sentencing.

2. The trial court erred in imposing the \$200 criminal filing fee and interest on these and other legal financial obligations.

Issues Pertaining to Assignments of Error

1. The conduct underlying at least two of Gardner's convictions for third degree child molestation involved the same time, same place, same victim, and same intent. Yet, at sentencing, these crimes were treated as separate offenses when calculating Gardner's offender scores and standard ranges, resulting in an offender score of 6 when Gardner had no prior felony history. Given that at least two of these crimes should have been scored as a single offense under the "same criminal conduct" provisions of RCW 9.94A.589(1)(a), was counsel ineffective for failing to make this argument at sentencing?

2. Under recent legislative amendments that apply to cases currently pending on appeal per the Washington Supreme Court's decision in State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), must the \$200

criminal filing fee and the interest accrual provision be stricken from Gardner's judgment and sentence?

B. STATEMENT OF THE CASE

The state charged James Gardner with four counts of child molestation in the third degree, alleged to have occurred sometime during the period of June 1, 2016 through September 30, 2016. CP 3-4.

At trial the state presented the testimony of A.R., Kelly Stevenson (A.R.'s step-mother), Kevin Stevenson (A.R.'s father), Theresa Penny (A.R.'s mother), S.G. (Gardner's biological daughter), Officer Bradley Graham, Officer Matthew Waters, and Tamra Napier (SANE nurse). 5RP 19-181; 5RP 8-116; 7RP 12-116.¹

A.R. testified that her mother, Theresa Penny, started dating Gardner when A.R. was 12 or 13 years old. 5RP 32. She testified that Penny moved in with Gardner when A.R. was in seventh grade. 5RP 35. A.R. generally stayed with her maternal grandmother because it was closer to school, but would go back and forth between her grandmother's home and Gardner's apartment in Tacoma. 5RP 37-40. In the summer after eighth grade, A.R. was still staying at both her grandmother's house and Gardner's apartment. 5RP 44. That summer, Gardner's three biological daughters traveled from

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP—March 5, 2018; 2RP—March 6, 2018; 3RP—March 7, 2018; 4RP—March 8, 2018; 5RP—March 12, 2018; 6RP—March 13, 2018; 7RP—March 14, 2018; 8RP—March 15, 2018; 9RP—March 19, 2018; 10RP—May 11, 2018.

their home in Wyoming: S.G., Jamie, and Aleca. 5RP 45-46. Penny and Gardner both worked the graveyard shift and Emerald Queen Casino, and A.R. testified that she would sometimes be tasked with watching the girls at night while they worked. 5RP 47.

A.R. testified that Gardner first touched A.R. during that summer, when her mother was at work. 5RP 48-49. She then corrected herself, testifying that the first time Gardner touched her was at Five Mile Lake when her mother and Gardner's daughters were also there, but not close by. 5RP 50, 57. Gardner was teaching A.R. to swim and she did not think the touching was on purpose. 5RP 57.

Later that evening, Penny went to work and A.R. and S.G. watched a movie in Gardner's and Penny's bedroom. 5RP 58. A.R. testified that the lights were off in the room and that Gardner was initially seated at his desk drinking beer. 5RP 60, 62. A.R. and S.G. made popcorn to eat during the movie and got into bed, with A.R. in the middle of the bed and S.G. on one side. 5RP 60-61. According to A.R., Gardner got into bed on the other side of A.R., grabbed her waist with both hands and pulled her close to him, and touched her vagina over her clothing. 5RP 62-64.

A.R. testified that this made her uncomfortable and she asked Gardner what he was doing. 5RP 64. Gardner apologized, and A.R. left the room. 5RP 64. A.R. tried unsuccessfully to call her mother. 5RP 65. She

testified that she stood in the kitchen for a few minutes before S.G. came out and asked if A.R. was coming back to the room. 5RP 65-66. A.R. then returned to Gardner's bedroom and asked to switch places with S.G. on the bed. 5RP 66. She testified that she got back on the bed in between S.G. and Gardner. 5RP 70. A.R. testified that Gardner pulled her to him again, reaching under her pants and cupping his hand over her vagina over her underwear. 5RP 71-72. A.R. did not believe that S.G. had noticed what was happening and that she was just watching the movie. 5RP 73. A.R. testified that she left the room and called her mom again, who again did not pick up the phone. 5RP 72. She decided to go into the bedroom where Gardner's other daughters, Jamie and Aleca, were sleeping. 5RP 72. There were two mattresses in that bedroom, and Jamie and Aleca were both asleep on one mattress. 5RP 75. A.R. testified that she rolled herself up in blankets and fell asleep on the other mattress. 5RP 75.

A.R. testified that the next morning, she woke up with Gardner on top of her. 5RP 75. She recalled his upper body being over her legs and that his hand was in her pants touching her vagina over her underwear. 5RP 75. She "freaked out" and Gardner said he was sorry and that she should stop watching horror movies. 5RP 77. A.R. recalled that Gardner "was slurry in his voice." 5RP 83. After Gardner returned to his room, A.R. testified that she called her mother again at around 5:00 or 6:00 in the morning. 5RP 84.

Upon arrival, Penny told A.R. to wait outside and confronted Gardner. 5RP 85. Penny then drove A.R. to her grandmother's house. 5RP 86. A.R. testified that all three incidents of touching occurred between a point late one evening around 11:00 p.m. and between 5:00 and 6:00 a.m. the next morning. 5RP 57, 63, 66, 70, 72, 74, 75, 84. All three incidents of touching occurred in Gardner's apartment, with two occurring in Gardner's room and one incident occurring in the second bedroom. 5RP 57-77

Three or four weeks later, A.R. started visiting her mother at Gardner's apartment again. 5RP 89. After repeatedly testifying that Gardner touched her vagina over her underwear, upon being confronted with the transcript of a prior interview, A.R. testified that Gardner touched her vagina underneath her underwear. 5RP 95.

A.R. testified that she moved to North Carolina in September 2016 to be with her biological father and step-mother, Kevin and Kelly Stevenson. 5RP 98. After living there for about six months, A.R. testified that she told her step-mother about Gardner's actions. 5RP 101. Her step-mother told A.R.'s father, who called the police. 5RP 102. After the disclosure, A.R. talked with "medical people." 5RP 102-03. A.R. was examined by Nurse Tamra Napier. 7RP 74.

On cross-examination, A.R. testified that she had wanted to move to North Carolina before that summer and that A.R.'s mother had told A.R. she

would see what she could do. 5RP 117. After A.R. told her mother that Gardner touched her inappropriately, her mother agreed that she should move. 5RP 118.

Stevenson, A.R.'s step-mother, testified that she began communicating with A.R. around 2014, when A.R. was about 12 years old. 5RP 144. She testified that around Thanksgiving of 2016, A.R. shared with her that Gardner touched her inappropriately. 5RP 152. She told A.R.'s father that night and A.R.'s father spoke with a detective, who told them to call and set up a medical appointment. 5RP 155. A babysitter took A.R. to the appointment because Stevenson was ill.

Penny, A.R.'s biological mother, testified that she sent A.R. to North Carolina because of the situation with Gardner. 6RP 56-57. She testified that during the summer of 2016 A.R. was fourteen years old. 6RP 69.

Nurse Napier, a pediatric nurse practitioner, testified that she worked in a specialized unit at a child advocacy center and saw children who alleged some form of abuse. 7RP 55-56. She explained that "delayed disclosure" is "when a child has had an experience and they just choose not to tell it right off." 7RP 66. She estimated that in over 50 percent of cases, delayed disclosure occurs. 7RP 66. Nurse Napier testified that teenagers or older children tend not to disclose as readily as younger children because "they know it's not something that you should go talk about." 7RP 68. She further

testified that the perpetrator being a sort of parental figure contributes to a child's delayed disclosure of abuse. 7RP 68-69.

Nurse Napier testified that A.R. identified the perpetrator as Gardner and told her that Gardner touched her vaginal area four times. 7RP 77-78. A.R. told Nurse Napier that the touching occurred in July 2016 and that A.R. was fourteen at the time. 7RP 78. Nurse Napier testified that A.R. told her that she disclosed to her mother, to Gardner's daughter S.G., and later to her father and step-mother in North Carolina a few months after moving there. 7RP 79. She testified that another doctor conducted the physical examination of A.R. while Nurse Napier was present and that the examination was normal. 7RP 81.

Gardner testified that he was born on a reservation near Riverton, Wyoming, and that he is full-blooded Native American of the Northern Arapaho and Crow tribes. 7RP 92-93. He moved to Tacoma, Washington in 2014. 8RP 93. He testified that he met Penny in May of 2015 while they were both working at Emerald Queen Casino and she gradually moved in with him at his apartment in Tacoma. 7RP 98. In the summer of 2016, Gardner's own three children came to stay with him for the summer, and A.R. was also staying in the apartment "[a]most 100% of the time." 7RP 101. Gardner recalled watching a movie in his bedroom with his daughters and A.R. but denied inappropriately touching A.R. 7RP 103-15.

The jury convicted Gardner of three counts of third degree child molestation (II through IV), returning a not guilty verdict on count I. CP 62-65. Defense did not present a presentence report at sentencing. The state requested that the court impose “the high end, which is 54 months.” 10RP 4. The judgment and sentence provides that Gardner’s offender score for counts II through IV is 6, that the seriousness level for the convictions is V, and that the total standard range for the convictions is 41-54 months. CP 71.

Defense counsel stated that his client understood that much of what the state was requesting in terms of sentencing was “required by law.” 10RP 8. He added “I don’t see any reason to give the client the high end of the range when the mid range or the lower end of the range is appropriate. . . I’d ask you for the low end in this case.” 10RP 9-11. The trial court responded, “So 46-54 months?” 10RP 11. Counsel replied, “Yes.” 10RP 11. The trial court sentenced Mr. Gardner as follows: “[Y]ou have no prior criminal history, and so I’m going to go to the middle of the range, 50 months.” 10RP 14. The court imposed a \$200 criminal filing fee and a provision indicating that the legal financial obligations “shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.” CP 73. The court found that Gardner was indigent and signed Gardner’s indigency order, which stated that Gardner lacks sufficient funds to prosecute an appeal. 10RP 16; CP 96-97.

Gardner timely appeals. CP 91.

C. ARGUMENT

1. GARDNER WAS DENIED EFFECTIVE REPRESENTATION WHEN HIS ATTORNEY FAILED TO ARGUE THAT GARDNER'S CHILD MOLESTATION OFFENSES INVOLVED THE "SAME CRIMINAL CONDUCT" AT SENTENCING

Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). The standard of review for an ineffective assistance claim involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To satisfy the first prong, the defendant must show counsel's performance fell below an objective standard of reasonableness. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). To satisfy the second prong, the defendant must show that there is a reasonable probability that the outcome would have been different but for counsel's deficient performance, and that that probability is sufficient to undermine confidence in the outcome. Id. "[A] 'reasonable probability' is lower than the preponderance standard." Id.

Gardner received ineffective assistance of counsel because his attorney failed to argue that some or all of his convictions for child

molestation in the third degree involved the same criminal conduct and should be scored as a single offense, despite the fact that the conduct underlying at least two of the convictions occurred at the same time, at the same place, with the same victim, and with the same intent. Given these facts, there is a reasonable probability that but for his attorney's deficient performance, Gardner's offender score and corresponding standard sentencing ranges would have been significantly lower.

A defendant's current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses "encompass the same criminal conduct." RCW 9.94A.589(1)(a). If the trial court finds that some or all of the current offenses encompass same criminal conduct, then those offense are counted as one crime. Id. "Same criminal conduct" means crimes that require the same intent, were committed at the same time and place, and involved the same victim. Id.

At least two of the molestation crimes charged in this case resulting in convictions involved the same time, the same place, the same victim, and the same intent. While the charging period for all three counts was lengthy—June 1, 2016 through September 30, 2016—A.R. testified that all three incidents of touching occurred between a point late one evening around 11:00 p.m. and between 5:00 and 6:00 a.m. the next

morning. CP 3-4; 5RP 57, 63, 66, 70, 72, 74, 75, 84. A few minutes separated the first two incidents. 5RP 65. All three incidents of touching occurred in Gardner's apartment, with two occurring in Gardner's room and one incident occurring in the second bedroom. 5RP 57-77. And all three incidents of touching involved A.R. 5RP 57-77. Moreover, all three incidents of touching involved the same intent on behalf of Gardner: knowingly touching A.R. for the purpose of sexual gratification. CP 49; 8RP 19.

Because at least two of Gardner's convictions involved the same time, place, victim, and intent, defense counsel performed deficiently when he failed to ask the sentencing court to make a same criminal conduct finding under RCW 9.94A.589(1)(a). Instead, counsel was silent on the issue. At sentencing, counsel referenced the low-, mid-, and high-end of the "standard sentencing range," ultimately asking the court "for the low end" but never himself articulated the applicable numerical standard sentencing ranges or a numerical sentencing request. 11RP 8-11. When the trial court asked, "So 46 to 54 range?" defense counsel inexplicably answered "Yes" despite the fact that the state alleged that the standard sentencing ranges were 41-54 months based on an offender score of 6. CP 71. The trial court stated its intent to sentence Gardner to the middle of the range based on his lack of

prior criminal history, but used the erroneous 46-54 range as agreed to by defense in imposing 50 months of confinement. 11RP 14.

Defense counsel's statements arguably waived the issue of same criminal conduct. See In re Pers. Restraint of Shale, 160 Wn.2d 489, 496, 158 P.3d 588 (2007) (issue waived when defendant "failed to ask the court to make a discretionary call of any factual dispute regarding the issue of 'same criminal conduct' and he did not contest the issue at the trial level."); In re Personal Restraint of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002) (agreement that offender score had been properly calculated waives "same criminal conduct" issue for appeal). But the issue can still be raised—as manifest constitutional error under RAP 2.5—if counsel's failure denied Gardner the effective assistance of counsel. See State v. Saunders, 120 Wn. App. 800, 824-825, 86 P.3d 232 (2004).

The duty to provide effective assistance includes the duty to research relevant statutes and relevant law. Estes, 188 Wn.2d at 460 (citing In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015)); State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). A cursory review of the applicable law should have revealed the arguments made above. At sentencing, defense counsel made no argument regarding same criminal conduct and apparently did not realize what Gardner's standard ranges were as alleged by the state, apparently agreeing with the judge that

the low point of Gardner's standard range was five months higher than that set out in the Sentencing Reform Act of 1981 ("SRA") based on an offender score of 6. CP 71 (judgment and sentence showing range of 41 to 54 months); 11RP 11; RCW 9.94A.510. The trial court then sentenced Gardner to the "middle of the range," using an incorrect sentencing range. CP 75; 11RP 14. Defense counsel's failure to prepare for sentencing by reviewing the applicable statutes, resulting in a failure to make any same criminal conduct argument, constituted deficient performance. That this omission resulted from a failure to research applicable law in preparing for sentencing and not some other motive is underscored by counsel's apparent mistake regarding something as fundamental as Gardner's standard range based on his alleged offender score, which counsel appeared to orally agree was higher than the standard range as set out in the SRA. RCW 9A.44.089; RCW 9.94A.515; RCW 9.94A.510; 9.94A.525; see also, e.g., Estes, 188 Wn.2d at 463 (defense counsel's failure to familiarize himself with a key aspect of the Persistent Offender Accountability Act was objectively unreasonable).

While performance is not deficient if it can be characterized as legitimate trial strategy or tactics, performance is not reasonable where there is no conceivable legitimate tactic explaining counsel's actions. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260, 1269 (2011). No conceivable legitimate tactic exists which could explain counsel's failure to ask the

sentencing court to make a same criminal conduct finding under RCW 9.94A.589(1)(a) in this case. Given that at least two of Gardner's convictions satisfy the test for same criminal conduct, there is at least a reasonable probability that the trial court would have treated them as a single offense. If treated as a single offense, Gardner's offender score would have been significantly lower. 11RP 14 (Gardner had "no prior criminal history").

If Gardner had taken advantage of a plea bargain involving an agreed sentencing recommendation or the state's agreement to not file additional charges, perhaps some conceivable tactic for his attorney agreeing that his client should be sentenced to more prison time could be argued. But that hypothetical stands in stark contrast to the case at hand, where Gardner was convicted at trial and his attorney and the prosecutor did not present an agreed sentencing recommendation to the trial court. Counsel argued for the low end of the standard range (but seemed to agree with the trial court that Gardner's range was higher than that set out by statute or alleged by the state), and the state argued for the high end. 10RP 4; CP71. There is simply no explanation for his attorney's performance at sentencing except that it was deficient.

Gardner suffered prejudice as a result of the deficient performance. Because at least two of Gardner's convictions satisfy the test for same criminal conduct, there is a reasonable probability that the trial court would

have treated them as a single offense at sentencing had it simply been asked to do so. This would have produced significantly lower standard ranges. Unfortunately, in requesting the low end of the standard sentencing ranges, defense counsel overlooked this available and viable option under RCW 9.94A.589(a)(1).

Applying “same criminal conduct” analysis, Gardner’s offender score on counts II through IV is either 3 (if counts II and III are considered “same criminal conduct” but not count IV) or 0 (if counts II, III, and IV are all considered “same criminal conduct”). See 9.94A.525(17) (sex offenses score as 3 points against other sex offenses). As a result, his standard range for counts II through IV is either 15-20 months (if Gardner’s offender score is 3) or 6-12 months (if Gardner’s offender score is 0). See RCW 9.94A.517; 9.94A.525. Gardner was sentenced to 50 months of confinement. CP 75.

Gardner was denied his constitutional right to effective representation at sentencing. As a result, his sentence should be vacated. The matter should be remanded so that the trial court can resentence Gardner using the proper offender score and significantly shorter standard ranges.

2. THE \$200 FILING FEE AND INTEREST ACCRUAL PROVISION MUST BE STRICKEN FROM THE JUDGMENT AND SENTENCE BASED ON INDIGENCY

In Ramirez, the Washington Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash.

2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases currently on appeal. Ramirez, 191 Wn.2d at 745-49.

HB 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” Ramirez, 191 Wn.2d at 746 (citing LAWS OF 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”). Under RCW 10.101.010(3)(a) through (c), a person is “indigent” if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.

HB 1783 also amended RCW 36.18.020(2)(h), which now states the \$200 criminal filing fee “shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c).” LAWS OF 2018, ch. 269, § 17. This amendment “conclusively establishes that courts do not have discretion” to impose the criminal filing fee against those who are indigent at the time of sentencing. Ramirez, 191 Wn.2d at 749. The Ramirez court accordingly struck the criminal filing fee due to indigency. Id. at 735.

The record here indicates Gardner is indigent under RCW 10.101.010(3). RP; CP 96-97. Because HB 1783 applies prospectively to his case, the sentencing court lacked authority to impose the \$200 filing fee.

HB 1783 also eliminated interest accrual on nonrestitution LFOs.² LAWS OF 2018, ch. 269, § 1 (codified as amended at RCW 10.82.090); Ramirez, 191 Wn.2d at 747. Although interest must accrue on restitution amounts, “[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1).

The provision in the judgment and sentence requiring accrual of interest violates the HB 1783. CP 17 (requiring interest to accrue on “[t]he financial obligations imposed in this judgment”). The amendment to RCW 10.82.090 applies prospectively to cases not yet final on appeal. Ramirez, 191 Wn.2d at 747. Accordingly, this court should strike the interest accrual provision from the judgment and sentence.

Under Ramirez and HB 1783, this court should strike the \$200 criminal filing fee and interest accrual provision from Gardner’s judgment and sentence.

² No restitution was imposed in this case.

D. CONCLUSION

Defense counsel was ineffective for failing to argue these convictions involved the “same criminal conduct” for sentencing purposes. As a result, Gardner’s felony sentences are incorrect and excessive. Alternatively, the criminal filing fee and interest accrual provision must be stricken from Gardner’s judgment and sentence.

DATED this 16th day of April, 2019.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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