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No. 52538-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMAL SMITH,
Appellant.

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

The Honorable Carol A. Murphy, Judge
Cause No. 03-1-00304-6

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Smith's trial counsel acted strategically in arguing for a 38 years reduction from the original sentence that Smith was serving and obtaining an overall reduction of 30 years.

2. Whether the trial court abused its discretion by imposing a single firearm enhancement, while imposing a downward exceptional sentence that did not apply RCW 9.94A.589(1)(b) and eliminated two previously ordered firearm enhancements.

3. Whether any of the claims raised in Smith's Statement of Additional Grounds are meritorious.

B. STATEMENT OF THE CASE.

In 2004 19-year-old Jamal Smith was sentenced to 700 months (58 years 4 months) in prison for attempted first degree murder (count I), first degree robbery (count II), possession of marijuana (count III), unlawful possession of a firearm (count IV), a second charge of attempted first degree murder (count V), residential burglary (count VI), and three, 60-month, firearm enhancements for counts I, II, and III. CP 12-13. Counts I-IV were committed prior to Smith's 18th birthday; Counts V-VI occurred after his 18th birthday. CP 12.

In 2017, this Court granted Smith's personal restraint petition and remanded for a resentencing hearing in which the trial court could consider Smith's youth as a mitigating factor. Matter of Smith, 200 Wn. App. 1033, 2017 WL 3723086 *4 (2017)¹, unpublished. In the decision, this Court summarized the underlying facts of the Smith's crimes, stating:

On February 15, 2003, 17-year-old Smith shot Jason Fonder [in the face] as part of a failed drug deal. Smith evaded law enforcement until he was eventually arrested in May 2004, when he was charged as an adult with attempted first degree murder . . . first degree robbery . . . , possession of over 40 grams of marijuana . . . , all with firearm enhancements, and possession of an illegal firearm Miraculously, Fonder survived the gunshot injury and was expected to testify against Smith at trial. On July 18, the day before trial was to begin and after Smith's 19th birthday, Smith facilitated a break-in of Fonder's house with the intent to kill Fonder to prevent him from testifying at Smith's trial. Smith's trial was delayed, and the State amended the information to add a second charge of attempted first degree murder . . . and a residential burglary."

Id. at 1-2.

A resentencing hearing was held to address Smith's youth as was directed by this Court. RP (10/1/18 and 10/2/18) (hereinafter RP). In addition to its sentencing memorandum, the

¹ As Smith's brief notes, this decision is unpublished and is therefore governed by GR 14.1. However, this decision is binding on these proceedings as it is the law of *this* case.

defense offered the testimony of Dr. Harry Dudley and a statement from Smith's family member Suprice Jackson. CP 182-557; RP 10; RP 63.

The prosecution then recommended a sentence of 622 months including 60 months for a single firearm enhancement. RP 95. In discussing the firearm enhancement, the prosecutor stated that

[i]n all fairness to Mr. Smith, he brought one gun, shot one time, and that was the attempted murder charge. That 60 months, your Honor, I would argue to this court is mandatory for the initial 60 months. The additional stacking is discretionary with the court. I think the rulings that have come down from the Supreme Court and the Court of Appeals give this Court ultimate discretion in regards to those firearm enhancements.

RP 89-90.

Smith's counsel recommended the trial court impose 180 months for the substantive crimes and just one of the three firearm enhancements. RP 99. He requested that the sentences be imposed concurrently. RP 99. In making the defense recommendation for sentencing, Smith's counsel noted that the previous sentencing Court believed it was bound to run the serious offenses consecutively and bound to run the firearm enhancements consecutively, and then stated, "As the Court knows, the Court is

not bound by those. The Court can grant an exceptional sentence down, and the Court - - the defense is asking the Court to do that.” RP 99.

The trial court concluded that “Smith’s youth and traumatic childhood provided mitigating circumstances which warranted a downward departure from the standard range sentence.” CP 690. Although the standard sentencing range was 308.25 to 411 months on count I the trial court imposed 280 months as an exceptional downward departure. CP 679-80. The trial court stated,

And even though I find that the Court is justified in an exceptional sentence downward, I cannot impose the sentence recommended by the defense. The Court finds that these crimes were very serious and that Mr. Smith’s culpability, while maybe less than originally thought by Judge Tabor without having all of this information, he is still culpable, and so the Court’s overall sentence will be 280 months plus the 60 months of mandatory time.

RP 118. Thus, Smith’s original sentence of 700 months was reduced to a total sentence of 340 months. Additional facts follow in the argument.

C. ARGUMENT

1. Smith’s counsel strategically argued for a reasonable sentence and successfully obtained a significant downward departure from the standard range that Smith faced.

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient, and that the deficient representation was prejudicial. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260, 1268 (2011). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Finally, "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first]." *Id.* at 697.

To show that defense counsel's representation was deficient the defendant must show that it fell "below an objective standard of reasonableness." Strickland, 466 U.S. at 688. The defendant must overcome "a strong presumption that counsel's performance was reasonable." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177, 181 (2009). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* at 863. Lastly, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's

challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

Smith has failed to demonstrate that his counsel's performance was deficient or that the sentencing recommendation prejudiced the outcome of the proceedings. Smith's counsel informed the trial court that she had discretion with regard to the firearm enhancements. He stated "[a]t the time of the sentencing in 2004, the parties believed . . . the court was bound to run the firearm enhancements consecutively. As the Court knows, the Court is not bound by those." RP 99.

The decision to argue for one firearm enhancement was strategic in that it took into account the fact that the underlying facts of the case involved shooting the victim in the face. Counsel pointed out Houston-Sconiers, both during his argument and in his sentencing memorandum. RP 98; CP 186. His argument recognized the purposes of the Sentencing Reform Act and acknowledged that Smith's actions deserved punishment. RP 99, 105. Counsel's argument was intended to persuade the trial court to not run the serious violent offenses consecutively. In effect, the recommendation that the defense made asked for a reduction of over 38 years from the original sentence. It is important to keep in

mind that Smith had already served approximately 15 years at the time of sentencing.

Simply because the law allows an argument to be made does not mean that it is advisable and strategic to make it. Smith's argument is the "distorting effect[] of hindsight" that Strickland directed courts not to consider when evaluating claims of ineffective counsel. Strickland, 466 U.S. at 689. Counsel capably and effectively managed to obtain a sentence that was 30 years less than Smith's original sentence. Smith cannot demonstrate deficient performance of his counsel.

Likewise, Smith fails to demonstrate prejudice. To do so, the defendant must show that there is a 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.

The record reveals that the trial court was not likely to implement a lower sentence, even if Smith's counsel had requested all three firearm enhancements be waived. The trial court held that the defense counsel's sentencing recommendation was too low even with the added 60-month firearm enhancement. RP

116. The trial court stated “even though I find that the Court is justified in an exceptional sentence downward, [the Court] cannot impose the sentence recommended by the defense. The Court finds that these crimes were very serious and that Mr. Smith[] . . . is still culpable.” RP 118. If Smith’s defense counsel had requested that all the firearm enhancements be waived his recommendation would have been even lower and the trial court would have clearly rejected it.

2. The trial court did not abuse its discretion by applying a single firearm enhancement

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.* A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view that “no reasonable person would

take,” and arrives at a decision “outside the range of acceptable choices.” *Id.*

When sentencing, courts must consider youth as a potential mitigating factor because young people are different than adults. State v. Houston-Sconiers, 188 Wn.2d 1, 9, 391 P.3d 409, 414 (2017) (citing Miller, 567 U.S. at 481 (“children are different”)). The trial court “must have absolute discretion to depart as far as they want below otherwise applicable . . . sentencing enhancements when sentencing juveniles in adult court.” Houston-Sconiers, 188 Wn.2d at 9. In Houston-Sconiers the Washington Supreme Court reversed two juveniles’ sentences because the trial court was unaware that it had absolute discretion to limit the number of sentence enhancements it applied to children’s sentences. *Id.* at 9, 13, 23.

Similarly, in State v. O'Dell the Washington Supreme Court held that the defendant’s must be resentenced as the trial court had abused its discretion by failing to consider youth as a mitigating factor at all. State v. O'Dell, 183 Wn.2d 680, 689, 358 P.3d 359, 363 (2015). However, discretion does not require that the trial court eliminate all sentence enhancements. Discretionary simply means

“involving an exercise of judgment and choice.” Black’s Law Dictionary (10th ed. 2014) at 565.

A defendant may be resentenced when the trial court “erroneously believed it could not impose . . . [lower] sentences, and the record demonstrates that it might have done so had it recognized its discretion.” State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106, 1110 (2017). In McFarland the Supreme Court of Washington held that the defendant’s sentence must be reversed and remanded because the trial court had erroneously believed it was required to run all firearm enhancements consecutively and had expressed that it would have implemented an exceptional sentence downward if it could have. McFarland, 189 Wn.2d at 56. Conversely, in State v. Ramirez², the Court of Appeals held that the defendant should not be resentenced even though the trial court did not know they had discretion to run sentences concurrently because the trial court did not have any misgivings about imposing consecutive sentences. State v. Ramirez, 5 Wn.App.2d 118, 425 P.3d 534, 544 (2018), as amended on reconsideration in part (Oct. 23, 2018), review denied, 192 Wn. 2d 1026, 435 P.3d 266 (2019).

² This comes from an unpublished portion of State v. Ramirez and is not offered as precedential authority. Rather it is offered as persuasive as The Court of Appeals finds it to be. GR 14.1.

In this case, both parties pointed out the relevant law to the trial court. The prosecutor indicated that the trial court had “ultimate discretion” with regard to the firearm enhancements. RP 90. The defense attorney pointed out that the trial court was “not bound” by the mandatory provisions of the law. RP 99. The trial court clearly understood her discretion and appropriately exercised it.

Smith takes the quote “mandatory time” out of context. The trial court stated:

And even though I find that the Court is justified in an exceptional sentence downward, I cannot impose the sentence recommended by the defense. The Court finds that these crimes were very serious and that Mr. Smith’s culpability, while maybe less than originally thought by Judge Tabor without having all of this information, he is still culpable, and so the Court’s overall sentence will be 280 months plus the 60 months of mandatory time.

RP 118. The reference to mandatory time is simply a reference to the firearm enhancement statute.

RCW 9.94A.533(3)(e) states “all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions.” The trial court’s use of the word “mandatory” was not signifying a misunderstanding of her discretion, rather it was

describing the 60 month term that she was exercising her discretion to impose.

The entire re-sentencing hearing was aimed at addressing Smith's youth. The trial court understood her discretion and exercised it in a very meaningful way by not imposing consecutive sentences pursuant to RCW 9.94A.589. There was no abuse of discretion.

3. Statement of Additional Grounds

The State recognizes that it is not required to respond to Smith's statement of additional grounds (SAG) unless requested to do so; however, having received the SAG before completion of the Brief of Respondent, the State elects to briefly address the issues raised.

- a. The calculation of Smith's offender score on Count V was correct because the trial court exercised its discretion in not running the serious violent offenses consecutively.

When imposing a consecutive sentence pursuant to RCW 9.94A.589(1)(b), other serious violent offenses are scored using an offender score of zero. This is because the operation of the law then requires that the other serious violent offenses be run

consecutive to the offense with the highest seriousness level.
RCW 9.94A.589(1)(b).

In Smith's case, the trial court exercised its discretion to not apply RCW 9.94A.589(1)(b). Therefore, the trial court correctly scored the offense under the rules of RCW 9.94A.525 and ran the sentence in Count V concurrent to that in Count 1. CP 679-680; 688-691. There was no error.

- b. Smith is correct that the trial court should have imposed a fixed term of 36 months of community custody for Counts I and V.

At the time Smith was originally sentenced, community custody was codified in RCW 9.94A.715 (2001), which provided, "the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850, or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2); whichever is longer." At that time, RCW 9.94A.850 (2002), authorized the sentencing guidelines commission to propose the community custody range to the legislature. The ranges were adopted in WAC 437-20, and for a serious violent offense, such as murder in the second degree, the community custody range was 24 to 48 months.

The legislature repealed RCW 9.94A.715 in 2008. Laws of 2008, Ch. 231, § 57(3). That legislation added former RCW 9.94A.701(2008), which also included a variable term of community custody. Laws of 2008, ch. 231, § 6-7. RCW 9.94A.701 was amended in 2009 to require fixed terms of community custody. RCW 9.94A.701 (2009); Laws of 2009, ch. 375 §5. Section 20 of ESSB 5288 stated,

This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department or sentenced after the effective date of this section.

Laws of 2009, ch. 375, § 20.

In State v. Franklin, 172 Wn.2d 831, 841, 263 P.3d 585 (2011), the State Supreme Court stated, “when read in the context of the entire section, it is clear that this directive applies only to the court’s calculation of the community custody term when it first imposes the sentence.” Because Smith was re-sentenced, the retroactive and prospective provisions of RCW 9.94A.701 applied. Under the current version of the law, he is correct that the trial court should have imposed a fixed term of community custody of 36 months. RCW 9.94A.701(1)(b).

c. The trial court's imposition of the \$500 crime victim compensation and restitution was correct.

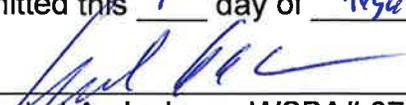
The court imposed no discretionary legal financial obligations. CP 699. Smith's claim that the trial court was required to conduct an independent inquiry into his ability to pay, when the only financial portions of his sentence were the crime victim's assessment and restitution, is incorrect. State v. Stoddard, 192 Wn.App. 222, 224-225, 366 P.3d 474 (2016); State v. Lundy, 176 Wn.App. 96, 102-103, 308 P.3d 755 (2013); State v. Catling, 193 Wn.2d 252, 259-260, 438 P.3d 1174 (2019).

D. CONCLUSION.

The entire purpose of the resentencing hearing that is at issue in this appeal was for the trial court to take Smith's youth at the time of the offense into consideration. The trial court properly exercised its discretion in this regard. Further, Smith fails to demonstrate that his trial counsel's performance was deficient or that it prejudiced him in any way. Trial counsel's performance successfully resulted in a sentence 30 years less than that which Smith previously faced. The State concedes that the term of community custody should have been fixed, and does not oppose a direction that the trial court enter an order modifying the community

custody term to 36 months on Counts 1 and V. In all other aspects, the State respectfully requests that this Court affirm the sentence that was imposed.

Respectfully submitted this 7th day of August, 2019.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

Electronically filed – Court of Appeals Division II

Lise Ellner, Attorney for Mr. Smith

Erin Sperger, Attorney for Mr. Smith

AND VIA USPS MAIL

JAMAL SMITH
DOC #870926
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 7 day of August 2019, at Olympia,

Washington.



NANCY JONES HEGG, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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