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Court of Appeals
Division II
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NO. 54341-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

DARRELL BERRIAN,
Appellant.

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

The Honorable Jerry T. Costello, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. Mr. Berrian was denied his constitutional right to effective assistance of counsel when his counsel failed to argue for an exceptional sentence downward that included imposing the deadly weapon enhancement concurrent with his other sentence.

Issue Presented on Appeal

1. Was Mr. Berrian denied his constitutional right to effective assistance of counsel when his counsel failed to argue for the imposition of an exceptional sentence downward that included imposing the deadly weapon enhancement concurrent with his other sentence?

B. STATEMENT OF THE CASE

This appeal relates to Darrell Berrian's conviction for assault in the first degree with a deadly weapon enhancement following a jury trial held in August of 2014. CP 925. While police were investigating that assault, Mr. Berrian was arrested and charged with attempted robbery in the first degree and unlawful possession of a firearm based on a separate incident. 12/20/19 RP 8-9. Soon

after the state charged Mr. Berrian for the attempted robbery, it also charged him with the assault that is the subject of this appeal. CP 1-2.

Mr. Berrian proceeded to trial on the attempted robbery and unlawful possession of a firearm charges. 12/20/19 RP 9. A jury convicted him, and he was sentenced to prison. 12/20/19 RP 9. Mr. Berrian then proceeded to trial in this case, where the jury convicted him of assault in the first degree and returned a special verdict that he used a deadly weapon during the crime. CP 925.

Mr. Berrian received a standard range sentence at his first sentencing for the assault. CP 343. This court affirmed his convictions and sentence after a direct appeal. CP 425-39. Mr. Berrian then filed a Personal Restraint Petition (PRP) seeking relief on several grounds, and this court remanded his case for resentencing after holding that the trial court miscalculated his offender score as five when it should have been four. CP 670-72.

On remand, the trial court imposed another standard range sentence and ordered that it be served consecutive to the sentence Mr. Berrian was already serving for the attempted robbery and unlawful possession of a firearm charges. 2/16/18 RP 11-12. Mr.

Berrian filed another direct appeal to challenge his sentence. CP 732-44. This court reversed his sentence and remanded the case for another resentencing hearing because the trial court applied an incorrect presumption when it determined that Mr. Berrian's sentence for the assault should run consecutive to the sentence from the other case. 12/20/19 RP 3.

At Mr. Berrian's most recent resentencing, his counsel argued that the trial court would have to find a basis for an exceptional sentence on the assault conviction in order to run that sentence consecutive to the other case. 12/20/19 RP 11-12.

The trial court disagreed, ruling that RCW 9.94A.589(3) requires it to presume that the sentences from the two cases are to run concurrently but noted that case law provided it with total discretion to run the sentences consecutive to each other so long as consecutive sentences are expressly ordered. 12/20/19 RP 15-16.

The trial court without considering if the sentence enhancement could be run concurrent to the other charges and without any argument from counsel for an exceptional sentence, ordered that the sentences and enhancements be served

consecutive to each other so as to not diminish the sentence from the attempted robbery case. 12/20/19 RP 15-16. Mr. Berrian filed a timely notice of appeal. CP 944-59.

C. ARGUMENT

1. MR. BERRIAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO ARGUE FOR HIS SENTENCING FIREARM ENHANCEMENTS TO RUN CONCURRENTLY TO HIS OTHER CHARGES

Mr. Berrian was denied effective assistance of counsel at his second resentencing because his counsel failed to argue that the trial court had discretion to impose the deadly weapon enhancements concurrent to the other charges.

A defendant's right to effective assistance of counsel is constitutionally guaranteed at all "critical stages" of a criminal proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005) (citing *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987)). Sentencing is a critical stage of any criminal proceeding. *Robinson*, 153 Wn.2d at 694 (citing *Rupe*, 108 Wn.2d at 741). Counsel is considered ineffective if (1) their performance was

deficient, and (2) the deficient performance prejudiced the defendant. *In re Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient when it falls below an "objective standard of reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To prove prejudice, the defendant must demonstrate that there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Kylo*, 166 Wn.2d at 862 (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)). A defendant must prove both deficient performance and prejudice to prevail on a claim of ineffective assistance of counsel. *Kylo*, 166 Wn.2d at 862.

At a minimum, competent counsel should be familiar with the facts of the case and have researched the applicable law to provide effective representation. *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). "[W]here an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's

performance is constitutionally deficient.” *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015).

Here, Mr. Berrian was denied effective assistance of counsel when his counsel at resentencing failed to request that the trial court impose an exceptional sentence downward to run the deadly weapon enhancement concurrent to his other sentences.

In *McFarland*, the court examined the SRA and determined that while it dictated that standard range sentences include consecutive firearm-related sentences, nothing in the SRA precluded trial courts from imposing an exceptional sentence in a case involving a firearm-related offense. *McFarland*, 189 Wn.2d at 53-54.

In *McFarland*, the defendant was convicted of 13 firearm-related offenses. *McFarland*, 189 Wn.2d at 50. The trial court ran the sentences for these convictions consecutive to each other based on its interpretation of the Sentencing Reform Act (SRA). *McFarland*, 189 Wn.2d at 50-51. The defendant appealed her sentence, arguing that the trial court erroneously believed it did not have the discretion to impose concurrent firearm-related offenses. *McFarland*, 189 Wn.2d at 51.

Our state Supreme Court agreed and held that trial courts have the discretion to impose concurrent firearm-related sentences by imposing an exceptional sentence. *McFarland*, 189 Wn.2d at 55. Thus, when consecutive firearm-related sentences result in a presumptive sentence that is excessive under the SRA, a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences. *McFarland*, 189 Wn.2d at 55. The court remanded the case for resentencing so the trial court could consider imposing concurrent sentences. *McFarland*, 189 Wn.2d at 59.

The statutes governing sentencing for firearm and deadly weapon enhancements are virtually identical. See RCW 9.94A.533(3)(e); RCW 9.94A.533(4)(e). Based on the logic of *McFarland*, nothing in the SRA prohibits a trial court from imposing an exceptional sentence to run a deadly weapon enhancement concurrent to other sentencing provisions.

Mr. Berrian's counsel did not request that the trial court impose the deadly weapon enhancement concurrent to his other sentencing provisions as an exceptional sentence downward. Instead, he only argued against an exceptional sentence upward by

claiming that the court must find a basis for an exceptional sentence to deviate from the presumption of concurrent sentences in RCW 9.94A.589(3). RP 11-12. As the trial court pointed out, this argument is without merit in light of this court's holding in *State v. Linderman*.¹

Fulfillment of counsel's duty to research and apply the relevant law would have revealed *McFarland* and its insight into how a defendant can avoid consecutive sentences for an offense involving a firearm or other deadly weapon.

The record contains no discussion of *McFarland* or whether imposing the enhancement consecutive to the other sentence was mandatory under the SRA's exceptional sentence provisions. The trial court did not differentiate between the enhancement and base sentence when discussing consecutive or concurrent sentences. 12/20/19 RP 15-16.

Because counsel failed to advance an argument in favor of imposing concurrent sentences specific to the enhancement, the trial court never considered the possibility. Mr. Berrian was facing an additional four years of prison time solely because of the deadly weapon enhancement. 12/20/19 RP 13. Counsel's failure to at least

¹ 54 Wn. App. 137, 772 P.2d 1025 (1989).

advance the argument that Mr. Berrian was facing an excessively lengthy presumptive sentence due to the deadly weapon enhancement falls below an objective standard of reasonableness and constitutes deficient performance. *Tsai*, 183 Wn.2d at 102.

There is also a reasonable probability the outcome of Mr. Berrian's resentencing would have been different had his counsel advanced the argument that the deadly weapon enhancement should be imposed concurrent to his other sentence. For this reason, this court should reverse his sentence and remand for another resentencing. *Kyllo*, 166 Wn.2d at 871.

D. CONCLUSION

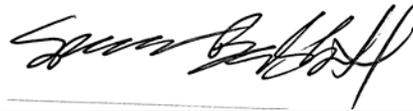
Mr. Berrian was denied his constitutional right to effective assistance of counsel at his resentencing because had counsel argued for a concurrent sentencing enhancement to the other charges, there is a possibility that his sentence would have been different. Mr. Berrian respectfully requests that this court reverse his sentence and remand his case for resentencing.

DATED this 17th day of June 2020.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcef@co.pierce.wa.us and Darrell Berrian/DOC#377195, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on June 17, 2020. Service was made by electronically to the prosecutor and Darrell Berrian by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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