

29456-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID J. EATON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF COLUMBIA COUNTY

APPELLANT'S BRIEF

Julia A. Dooris
Attorney for Appellant

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PO Box 9166
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by imposing an exceptional sentence.
2. The jury's determination that Mr. Eaton was guilty of rapid recidivism was in error.
3. Mr. Eaton received ineffective assistance of counsel.
4. Defense counsel's performance was deficient when counsel failed to move to suppress Mr. Eaton's pre-arrest statements relating to the trailer.
5. Defense counsel's performance was deficient when counsel failed to object to the admission of Mr. Eaton's prior criminal convictions.

B. ISSUES

1. When a criminal defendant is released from prison for 18 months, and then as a result of two minor violations of community custody is temporarily incarcerated again, is the defendant "recently released from incarceration" under RCW 9.94A.535(3)(t) and thus subject to an aggravating factor of "rapid recidivism"?

2. Does a criminal defendant receive ineffective assistance of counsel when his trial lawyer fails to move to suppress the defendant's pre-arrest incriminating statements?
3. Does a criminal defendant receive ineffective assistance of counsel when his trial lawyer fails to object, when the State introduces the defendant's multiple prior convictions?

C. STATEMENT OF THE CASE

David J. Eaton, a self-professed "scrapper" was trying to make a living in Dayton, Washington. (RP 315) On May 21, 2010, he found some old railroad track at the end of the line. The tracks were not connected, so Mr. Eaton thought they were scrap. (RP 314) He began to cut the rails with a saw, and loaded them into his truck to try to sell as scrap. (RP 315-16)

Jennifer Dickinson, the manager of the Port of Columbia in Dayton learned that Mr. Eaton was at the railroad yard, and she went to the location, saw Mr. Eaton, and called the police. (RP 70-82)

When the police arrived, Mr. Eaton offered to pay for the rails. (RP 113) Instead, he was arrested. (RP 84)

Sometime in January, 2010, a large utility pole was blown down by the weather. (RP 164-66) During the school holiday, John Hutchens,

the maintenance supervisor, allowed the pole to stay on the ground.

Several days later, Mr. Hutchens returned to the pole and noticed that the conduit, the meter base, a night switch and a little amp box from the pole were all missing. (RP 170) Mr. Hutchens called the police. (RP 171)

Six months later, Mr. Hutchens noticed these items on the property of an uninhabited mobile home lot not far from the school. (RP 172) Mr. Eaton was the former resident of the mobile home. (RP 194)

In April, 2010, Dayton resident Larry Block noticed his trailer was missing. (RP 219) The trailer had been parked behind McQuary's grocery store for sometime. (RP 303)

On April 24, 2010, Deputy Sheriff Dan Foley saw Mr. Eaton's pickup pulling a trailer. (RP 242) The Deputy was aware that recently a trailer was reported stolen. (RP 242) The Sheriff recognized Mr. Eaton's truck, activated his overhead police lights and stopped Mr. Eaton. (RP 242-43) The Deputy instructed Mr. Eaton to produce his license, registration, and proof of insurance. (RP 244) He arrested Mr. Eaton. (RP 247)

Mr. Eaton was ultimately charged in two separate cases, consolidated for trial, with (1) third degree theft related to the May 21, 2010 railroad rails incident; (2) second degree theft for the April 24, 2010 incident related to the trailer; (3) second degree theft for the January 1,

2010 incident related to the switch and meter box; (4) second degree malicious mischief related to the May 21, 2010 railroad incident. (CP 88-90)

Defense counsel did not move to suppress Mr. Eaton's pre-arrest statements.

At the time Deputy Foley pulled over Mr. Eaton for pulling the trailer, the deputy asked Mr. Eaton "if he owned the trailer or not." (RP 244) Mr. Eaton admitted that he did not own the trailer, and said he had borrowed it. (RP 244) The deputy further inquired about who had loaned Mr. Eaton the trailer. (RP 244) The deputy testified at trial that Mr. Eaton said his friend by the name Nutt-Nutt owned it, and that Nutt-Nutt's mother Dixie had given him permission. (RP 245-46)

Mr. Eaton denied that he said anything about Nutt-Nutt or Dixie. Instead, Mr. Eaton said he told the officer he had borrowed the trailer from George Waltermire. (RP 324-25) Mr. Waltermire corroborated Mr. Eaton's version of events and explained that while fixing his trailer near McQuary's grocery, he told Mr. Eaton that he could borrow the trailer. (RP 295)

At trial, Mr. Eaton admitted he cut the railroad rails, and explained he thought that the material was simply scrap. (RP 315)

During Mr. Eaton's cross examination, the State repeatedly raised Mr. Eaton's prior criminal convictions, with no objection from defense counsel. (RP 335-39) The State asked multiple questions, lasting several minutes, without a single objection:

Q You're a convicted felon aren't you?

* * *

Q Okay. Isn't it true that in August of 2000 you were convicted of possession of a stolen vehicle felony?

* * *

Q Isn't it true that in March of 2000 you were convicted of two counts of taking of a motor vehicle without the owner's permission?

* * *

Q Isn't it true in February of 2001 you were also convicted of two counts of taking a motor vehicle without permission in Washington State.
(RP 335-36)

Q Okay. Let's turn to the front and see what counts you were convicted of...

A. Taking a motor vehicle without the owner's permission.

Q. How many counts of that crime?

A. Two times. 11/28/2000. That's what it says right there date of crime.

* * *

Q. So let's see we are up to five felony convictions for taking things that weren't yours, right?
(RP 337)

Q: I'm handing you what's been marked "P73". I'd like you to look at page 7 and page 8 of "P73" and tell me if you recognize anything on them.

A 12/17/99 motor vehicle without the owner's permission.

Q Did you recognize anything on those last two pages?

A Ah let's see.

Q You recognized your signature on the last Judgment and Sentence...

A Yeah.

Q ...convicting you of two crimes.

A Yes.

Q Okay and what are the two crimes that you're convicted of in this Judgment and Sentence?

A Oh taking a motor vehicle without the owner's permission, attempting to elude the police.

Q And is that all of the counts?

A Oh is there another taking a motor vehicle without the owner's permission? How could I do it twice? That, that's what I'm saying your records are messed up.

(RP 338)

* * *

Q And isn't it true that you've also been convicted of burglary in the second degree?

A Yes.

Q I don't have any further questions.

(RP 335-339)

The jury convicted Mr. Eaton of third degree theft, second degree malicious mischief, and two counts of second degree theft. (RP 407-08)

The court, over defense counsel objection, presented the jury with an aggravating factor: rapid recidivism. (RP 418) The jury heard testimony and returned a verdict on each count answering the single question: "Whether the defendant committed the crime shortly after being released from incarceration?" in the affirmative. (CP 181-83)

Based upon the aggravating factor, the court gave Mr. Eaton an exceptional sentence of 60 months. (CP 204-13) He appeals.

D. ARGUMENT

1. THE COURT IMPROPERLY IMPOSED AN EXCEPTIONAL SENTENCE BECAUSE MR. EATON DID NOT COMMIT THE CURRENT OFFENSE SHORTLY AFTER BEING RELEASED FROM INCARCERATION.

The appellate court reviews de novo a trial court's determination that an aggravating factor justifies an exceptional sentence. RCW 9.94A.585(4); *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). At issue in this case, is whether the State proved that Mr. Eaton was guilty of rapid recidivism. RCW 9.94A.535(3)(t) lists the rapid recidivism aggravating factor as: "The defendant committed the current offense shortly after being released from incarceration."

Recently, this court found that the "rapid recidivism factor does not apply to an attempting to elude offense committed six months after release from incarceration." *State v. Combs*, 156 Wn. App. 502, 505, 232 P.3d 1179 (2010). The Combs court noted that while the gravamen of the offense is disdain for the law, the statutory requirement is that the new current offense be committed "shortly after being released from incarceration." *Id.*, citing RCW 9.94A.535(3)(t).

This court held that an eluding offense committed six months after release from prison for drug possession was not an offense committed

“shortly after being released.” *Combs*, 156 Wn. App. at 506-07. The court ruled that “[s]ix months is not a short period of time[,]” but declined to “set an outer time limit on what constitutes a short period of time.” *Id.* The court concluded that “[t]hat period will vary with the circumstances of the crime involved.” *Id.*

In this case, Mr. Eaton was released from his term of incarceration on April 28, 2008. (RP 433) He violated two minor conditions of his community custody, and he was returned to prison. Mr. Eaton testified that he was returned for 20 days, and served 14, and subsequently was returned again to serve 42 days and served 30. Mr. Eaton explained the first violation was for failing a UA test, and the second was because he spent the night at his girlfriend’s house without informing his corrections officer. (RP 436-37) The final date Mr. Eaton was released was November 25, 2009. (RP 433)

The first crime was alleged to have been committed sometime in early January, for the theft of the switch and conduit. This material was abandoned at the mobile home property where Mr. Eaton no longer resided. The pole had blown over due to weather, and was left lying on the ground for several days. These items looked damaged, and it was not clear that they could be reused. Even if Mr. Eaton was the person who took these items, this crime does not evidence disdain or a total disregard

for the law. Instead, it appears that a “scraper” found abandoned, potentially worthless items.

Second, it was not clear the exact date that the items were taken. Mr. Hutchens could not give the court an exact date, but he believed that the pole blew over on January 1, 2010, and many days later when he returned, the box was gone. Even if the theft occurred in mid-January, and the court uses the late November release date, Mr. Eaton was out in the community for nearly two months before he landed in trouble again.

Finally, the court should not use the November release date. In considering the circumstances of this case, the court should recognize that Mr. Eaton was first released in April, 2008. It was only after he was incarcerated for two minor community custody violations – not “crimes – that resulted in his release in November. Mr. Eaton was in the community, not committing any crimes, from April, 2008 until January, 2010. This does not constitute rapid recidivism. The court should reverse the exceptional sentence and remand for a standard range sentence.

2. MR. EATON'S COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT MR. EATON WAS PREJUDICED AND IS ENTITLED TO A NEW TRIAL.
 - a. Trial Counsel's Performance Was Deficient When He Neglected To Move To Exclude Mr. Eaton's Pre-Arrest Statements Under CrR 3.5.

A criminal defendant has the right to assistance of counsel under the Sixth Amendment to the United States Constitution. *State v. Crawford*, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006). This right is “the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (*quoting McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

To show that counsel provided ineffective assistance, a defendant must show: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Failure to bring a plausible motion to suppress

can constitute ineffective assistance of counsel. *State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001).

In determining the proper standard for evaluating ineffective assistance of counsel claims, the United States Supreme Court explained that counsel's deficient conduct "more likely than not altered the outcome" is not the correct standard, because it is too high and presumes that all the essential elements of an accurate and fair proceeding were present. *Strickland*, 466 U.S. at 694. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694.

Instead, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

The Supreme Court cautioned that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

*Miranda*¹ warnings are required during pre-arrest questioning when the questioning involves custodial interrogation by a state agent. *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 599 (1992).

A person is in custody if an objectively reasonable person in similar circumstances would not feel free to leave. *State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989). In other words, a person is seized when, by means of a show of force or authority, his or her freedom of movement is restrained. *State v. Mendez*, 137 Wn.2d 208, 222, 970 P.2d 722 (1999).

Miranda warnings are required when police ask questions “designed to elicit incriminating statements.” *State v. Moreno*, 21 Wn. App. 430, 434, 585 P.2d 481 (1978).

Before his arrest and long before the officer read him his *Miranda* rights, the deputy, suspecting that the trailer was stolen, asked Mr. Eaton if he owned it. This question was purposeful, and designed to elicit an incriminating response, and thus Mr. Eaton was entitled to have his responses suppressed because he had not received *Miranda* warnings.

Moreover, Mr. Eaton was in custody, because the deputy activated his lights, and stopped Mr. Eaton. He was not free to leave.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

Finally, Mr. Eaton introduced evidence that George Waltermire had agreed to loan him his trailer, which was parked near the trailer Mr. Eaton was using at the time he was stopped. If trial counsel had moved to suppress Mr. Eaton's alleged statements, the officer would have been precluded from testifying that Mr. Eaton allegedly said he borrowed the trailer from "Nutt-Nutt" or "Dixie." Mr. Waltermire's testimony would have been unrebutted, and thus likely would have created reasonable doubt.

Indeed, two of the three jury questions for Mr. Waltermire were: "Do you go by the name Nutt Nutt?" and "Is your mother's name Dixie?" (RP 309) Because counsel did not move to suppress Mr. Eaton's pre-arrest statements, Mr. Eaton was prejudiced. The deputy is the only witness who testified that Mr. Eaton claimed he borrowed the trailer from Dixie and Nutt-Nutt. That testimony made Mr. Waltermire's testimony significantly less credible. The jury considered the deputy's testimony – the only testimony that contradicted the defense Mr. Eaton presented at trial – and obviously relied upon the deputy's version of what Mr. Eaton had said about the borrowed trailer in finding Mr. Eaton guilty. A reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and therefore Mr. Eaton is entitled to a new trial.

b. Trial Counsel's Performance Was Deficient When He Failed To Object, To The Admission of Mr. Eaton's Prior Convictions.

Under ER 609(a)(1), prior convictions are inadmissible unless it is proven that the prior conviction bears on the witness's credibility and its probative value outweighs the prejudicial impact. *State v. Hardy*, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997). In a criminal prosecution, the State carries the burden of proving that the defendant's prior conviction is admissible. *State v. Calegar*, 133 Wn.2d 718, 722, 947 P.2d 235 (1997). Before admitting a prior conviction under ER 609, the court must conduct an on-the-record balancing of following factors: (1) length of defendant's criminal record;(2) remoteness of prior conviction; (3) nature of prior crime; (4) age and circumstances of defendant; (5) centrality of credibility issue; and (6) impeachment value of prior convictions. *Calegar*, 133 Wn.2d at 72.

Under ER 609(a) evidence that the witness has been convicted of a crime may be admitted only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom

the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

In this case, counsel failed to obtain a ruling from the court related to whether Mr. Eaton's prior convictions were admissible, and whether under the balancing test, the convictions should be allowed.

The State introduced convictions for possession of a stolen vehicle, seven convictions for taking a motor vehicle without the owner's permission, attempting to elude police and second degree burglary. At one point during cross-examination, the State explicitly made a propensity argument, by pointedly asking, "So let's see we are up to five felony convictions for taking things that weren't yours, right?" (RP 337)

The introduction of ten of Mr. Eaton's prior convictions, without requiring the court to balance, on the record, the six factors, and to allow an extensive cross-examination on these convictions without objection, constituted deficient performance.

Because the State explicitly made propensity arguments both in cross-examination and again closing by referring to Mr. Eaton as a "criminal"², a reasonable probability exists that, but for counsel's unprofessional errors, the result of this proceeding would have been different. Mr. Eaton is entitled to a new trial.

²See RP 384.

E. CONCLUSION

Mr. Eaton did not commit these crimes “shortly” after he was released from incarceration. His exceptional sentence should be reversed and this court should remand for imposition of a sentence within the standard range.

Mr. Eaton also received ineffective assistance of counsel, which prejudiced him. He is entitled to a new trial.

Dated this 25th day of April, 2011.

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29456-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
DAVID J. EATON,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on April 25, 2011, I caused to be mailed copies of Appellant's Brief in this matter to:

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Signed at Spokane, Washington on April 25, 2011.


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