

**FILED**

MAR 25, 2013

Court of Appeals  
Division III  
State of Washington

No. 31143-1-III

IN THE COURT OF APPEALS  
OF WASHINGTON STATE  
DIVISION III

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STATE OF WASHINGTON, Respondent

v.

JUSTIN JAMES HARDGROVE, Appellant

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BRIEF OF RESPONDENT

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## **RESTATEMENT OF THE ISSUE**

1. Did the Appellant receive ineffective assistance of counsel at sentencing?

## **BRIEF ANSWER**

1. No. The Appellant relies on case law regarding multiple offenses affecting the standard sentence range under the Sentencing Reform Act. However, in this case, there was only one concurrent offense which did not affect the standard sentence range.

## **STATEMENT OF THE CASE**

Mr. Hardgrove was found guilty after a jury trial of two counts of delivering Methamphetamine. RP 246-47. Both deliveries were made to an informant named Violet Smith, who was working with the Quad Cities Drug Task Force. RP 26-150, 177-203. During sentencing, the state addressed the Defendant's offender score of nine, with felony convictions starting as a Juvenile in 1995, followed by further convictions in 1996, 1999, 2001, 2002, 2003, 2005, 2006, and 2009. RP 255-257. The State also raised the issue of the failed Drug Offender Sentence Alternative (DOSA) granted in the 2009 conviction. *Id.* In addition, the State submitted certified copies of each judgment and sentence from the previous felonies which were reviewed on the record, showing Mr. Hardgrove's wide

array of criminal history. RP 255-57, 269-72. In essence, the State argued that Mr. Hardgrove was a danger to the community because he demonstrated 17 years of regular felony activity.

Mr. Hardgrove and his attorney, Steve Martonick, argued for the low end of the range of 60 months, citing to several factors in RCW 9.94A.535 as mitigating reasons, without actually arguing for a sentence below the standard range. RP 257-63, 267-69. Mr. Martonick argued RCW 9.94A.535(1)(a), that the victim was an initiator or willing participant, and (1)(d), that Mr. Hardgrove, with no apparent pre-disposition to do so, was induced by the government to participate in the crime. *Id.* Appropriately, Mr. Martonick did *not* raise the issue that the operation of the multiple offense policy pursuant to RCW 9.94A.589 would have resulted in a different standard sentence range had the current offenses not been scored.

The Court very carefully considered Mr. Hardgrove's criminal history and his ultimate offender score. RP 266-67, 269-76. The court found an aggravating factor in that Mr. Hardgrove had two previous methamphetamine-related convictions and that the most recent resulted in the failed DOSA. RP 276. The Judge went on to

emphasize that even with an offender score of six (rather than an eight or nine), he would be facing the same range of 60-120 months, and that would be a good reason to "look more towards the high end than the low end" of the range. RP 276-77.

However, the Court found Mr. Martonick's argument partially effective as the Judge found a mitigating factor to include the small amount of methamphetamine delivered. RP 277. The Judge considered the fact that there were two controlled buys initiated by the government, and stated that Mr. Hardgrove was ready, willing and able, and had a propensity to make his friends happy by selling them drugs. *Id.*

The Court sentenced Mr. Hardgrove to the mid-point of 90 months, stating that was likely being lenient given the offender score, and waived certain fines and imposed the minimum costs. RP 278-79.

## **ARGUMENT**

I. The ineffective assistance of counsel claim fails because Mr. Hardgrove's attorney at sentencing was not deficient in his performance, nor was there any prejudice to Mr. Hardgrove.

The right to counsel is guaranteed by the constitution at all critical stages of a criminal proceeding, including during sentencing. Wash. Const., art. 1 § 22; *State v. Robinson*, 153 Wn.2d 689, 694 (2005). The right to counsel necessarily includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "Effective assistance of counsel" does not mean 'successful assistance of counsel.'" *State v. White*, 81 Wn.2d 223, 225 (1972). In order to establish ineffective assistance of counsel, the defendant must show: 1) their "attorney's performance was deficient and not a matter of trial strategy or tactics," and 2) the defendant was prejudiced. *State v. Mannering*, 150 Wn.2d 277, 285 (2003) (citing *State v. Hendrickson*, 129 Wn.2d 61, 77-78 (1996)). In order to show prejudice, the reviewing court must determine that but for Counsel's deficient performance, the outcome would have been different. *State v. Hendrickson*, 129 Wn.2d 61, 79 (1996). The appellant has the burden of showing prejudice. *Id.* If either of the two prongs of the test are not satisfied, the claim fails. *Mannering*, 150 Wn.2d at 285-86.

Under the SRA, to determine the "Standard Sentence

Range" for a given individual, the sentencing court must intersect the column defined by the offender score with the row defined by the offense seriousness score. RCW 9.94A.530. The offender score of the individual and seriousness level of the crime itself are determined by RCW 9.94A.520 and RCW 9.94A.525, respectively. Drug crimes have a different way of defining their seriousness level and a specific sentencing grid for those crimes. RCW 9.94A.517; RCW 9.94A.518. Delivery of methamphetamine carries a seriousness level of two. RCW 9.94A.518. The offender score of a convicted defendant is determined by their prior criminal history and the number of current offenses for the crime for which they are being sentenced. RCW 9.94A.525; RCW 9.94A.589. For a seriousness level of two, the presumptive range for a drug offender with an offender score of six or higher is 60+ to 120 months in prison. RCW 9.94A.517.

The "multiple offense policy" applies when a person is being sentenced for two or more current offenses, if there are two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender

score. RCW 9.94A.589. If the operation of the "multiple offense policy" of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of the Sentencing Reform Act (SRA), a court can find that counsel was ineffective for not citing the issue and relevant case law to the sentencing court. *State v. McGill*, 112 Wn.App. 95, 97 (2002). It should be noted that the term "Standard Sentence Range" as defined in RCW 9.94A.530 was previously referred to by the state legislature as the "presumptive sentence." RCW 9.94A.370, re-codified as RCW 9.94A.530 by Laws 2001, ch. 10, § 6. Therefore, when *State v. McGill* and other cases are referring to the "presumptive sentence" the term can be interchanged with "standard sentence range."

In the case at bar, Mr. Hardgrove had a Standard Sentence Range (or presumptive sentence) of 60-120 months, because Mr. Hardgrove had an offender score of nine, and the standard range is determined by an offender score of six to nine. RCW 9.94A.517. The Court found that Mr. Hardgrove had eight prior convictions, and one concurrent offense. RP 266-67, 269-76. The Appellant's entire brief focuses on the "multiple offense policy" and the fact that Mr. Hardgrove's attorney was deficient in his performance because

he did not cite relevant case law regarding this issue. However, as the Appellant's brief concedes, the sentencing range would have been the same even without the second count, or current offense, raising the offender score from an eight to a nine. Brief of Appellant, 12. Therefore, it would actually have been inappropriate for the Appellant's attorney, Mr. Martonick, to raise that issue with the Court at sentencing and encourage the court to issue an exceptional sentence below the standard range. In fact, Mr. Martonick appropriately used the facts of the case and fresh testimony to argue for the low end of the range, which the law permitted. However, Mr. Martonick wisely avoided asking for an exceptional sentence, which would have been misleading to the court. While Mr. Martonick relied on the mitigating factors noted in RCW 9.94A.535, which notes various ways to depart from the Standard Range, he used them in an illustrative way, rather than actually asking for an exceptional sentence. RP 257-263.

The Appellant's brief relies on the belief that Mr. Martonick could have asked for an exceptional sentence under RCW 9.94A.535, but that was not possible in the case at bar. Because the Appellant fails to establish the first prong, that his sentencing

attorney was deficient, the claim of ineffective assistance of counsel fails. However, even if the court were to find that the first prong is met, the second prong, showing prejudice, also fails. "Remand is not mandated when the reviewing court is confident that the trial court would impose the same sentence when it considers only valid factors." *State v. McGill*, 112 Wn.App at 100. In *McGill*, the court found that the sentencing judge clearly felt constrained to use the standard sentence range, and imposed the low end of the range. *Id.* at 98-102. However, that court was not bound by the standard sentence range the sentencing was free to look at an exceptional sentence based on RCW 9.94A.535. *Id.* at 101.

In the case at bar, the Court was bound by the standard sentence range, and properly stayed within that range. Furthermore, the Judge considered other factors, including looking closely at the two concurrent charges in Mr. Hardgrove's case and taking into consideration the small amounts delivered. In fact, the Judge knew very well from the trial and the testimony given at sentencing, the history between Mr. Hardgrove and the CI, Ms. Smith. Taking all that into consideration, along with the factors that

the Court found aggravating, the Judge sentenced Mr. Hardgrove to the middle of the standard range. There is no reason to believe that on remand, the Court would issue any different sentence.

### CONCLUSION

The State respectfully requests that this court find that the ineffective assistance of counsel claim fails, and affirm the sentence given in the court below.

Dated this 25th day of March, 2013.

  
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IN THE COURT OF APPEALS, DIVISION III  
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff,	Court of Appeals No. 31143-1-III No. 12-1-00027-6
v.  JUSTIN JAMES HARDGROVE, Defendant,	AFFIDAVIT OF DELIVERY

STATE OF WASHINGTON )  
COUNTY OF WHITMAN )

AMANDA PELISSIER , being first duly sworn, deposes and says as follows: That on the 25TH DAY OF MARCH, I caused to be delivered a full, true and correct copy(ies) of the original Brief of Respondent on file herein to the following named person(s) using the following indicated method:

-EMAILED TO: Dana Nelson @ nelsond@nwattorney.net

DATED this 25TH DAY OF MARCH, 2013. Amanda Pelissier  
AMANDA PELISSIER

SIGNED before me on the 25TH DAY OF MARCH, 2013. Jan Ed Wails  
NOTARY PUBLIC in and for the State of  
Washington, residing at: Oakesdale Colfax  
My Appointment Expires: ~~03-09-2015~~  
10-1-2014

