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MAY 26, 2015
Court of Appeals
Division III
State of Washington

NO. 32324-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DREW ANTHONY ZISSEL,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes two assignments of error. These can be summarized as follows;

1. The offender score was not correctly calculated.
2. Trial counsel for Zissel was ineffective.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no error regarding the offender score used to impose the sentence in this case.
2. Trial counsel was not ineffective.

II. STATEMENT OF THE CASE

The only issues presented pertain to a very small section of the verbatim report of proceedings. The Appellant has set forth the substantive and procedural facts adequately in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed to address the allegations that have been raised.

III. ARGUMENT

RESPONSE TO ALLEGATION ONE

Appellant claims that this issue is one that may be raised for the first time on appeal. This Court addressed this issue at length in State v.

Naillieux, 158 Wn.App. 630, 638-9, 241 P.3d 1280 (Wash.App. Div. 3 2010);

Mr. Naillieux argues that we should review his assignments of error in the first instance because these errors are manifest constitutional errors. Appellant's Br. at 12, 23. He, thus, essentially invites us to review his case de novo. See State v. Walters, 146 Wash.App. 138, 144, 188 P.3d 540 (2008) ("We review de novo claims of manifest constitutional error"). The problems this argument presents are spelled out clearly by Judge Marshall Forrest in his thoughtful opinion in State v. Lynn, 67 Wash.App. 339, 342-46, 835 P.2d 251 (1992). And given the increasing frequency with which these assignments of error show up in this court, the problems bear repeating.

We sit as a court of review which, of course, means that we do not preside over trial proceedings de novo. Our function is to review the validity of claimed errors by a trial judge who presided over a trial. That function assumes that counsel preserve the error by objecting to something the trial judge did or did not do. We do not, and should not, be in the business of retrying these cases. It is a wasteful use of judicial resources. *Id.* at 344, 835 P.2d 251; State v. Bashaw, 169 Wash.2d 133, 146, 234 P.3d 195 (2010); State v. Labanowski, 117 Wash.2d 405, 420, 816 P.2d 26 (1991). And it encourages skilled counsel to save claims of constitutional error for appeal so a defendant can get a new trial and second chance at a not guilty verdict if the first trial does not end in his favor. Lynn, 67 Wash.App. at 343, 835 P.2d 251. Most errors in a criminal case can be characterized as constitutional. *Id.* at 342-43, 835 P.2d 251.

Appellant has cited State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) as the legal basis for this court to allow this matter to be considered for the first time on appeal. As stated in Ross;

We have established that "illegal or erroneous sentences may be challenged for the first time on appeal."

Ford, 137 Wash.2d at 477, 973 P.2d 452 (citing State v. Moen, 129 Wash.2d 535, 543-48, 919 P.2d 69 (1996); In re Pers. Restraint of Fleming, 129 Wash.2d 529, 532, 919 P.2d 66 (1996)). In State v. Paine, the Court of Appeals aptly stated that:

A justification for the rule is that it tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. 69 Wash.App. 873, 884, 850 P.2d 1369 (1993).

If a defendant has been erroneously sentenced, we remand his case to the sentencing court for resentencing. Ford, 137 Wash.2d at 485, 973 P.2d 452.

The error in Zissel's analysis and reliance on Ross is that there must be an illegality regarding the judgment being challenged. In Zissel's case there is nothing "illegal" about the sentence imposed by the trial court, the court exercised its discretion and sentenced Appellant pursuant to a valid statute, a statute that is not mentioned nor challenged by Appellant. Therefore there is no basis for this court to waive the requirements of RAP 2.5.

The first allegation was addressed by the trial court at the time of sentencing;

I am going to impose the top of the range here. As to Count I - fifty-four months and as to Count II- thirty-four months for a total sentence of fifty four months. The burglary anti-merger statute operates in this particular instance to -- although the -- under the Sentencing Reform Act these two convictions would normally be considered the same criminal conduct and would not count one against the other; the burglary anti-merger statute causes them to

count one against the other and consequently Mr. Zissel's offender score is -- is elevated by that -- by that arithmetic.

RP 585

The statute commonly referred to as the "anti-merger" statute is set forth at RCW 9A.52.050. Other crime in committing burglary punishable;

Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.

This clear language permits the trial court to punish "any other crime" committed during the course of a burglary, even where the burglary and the additional crime encompass the same criminal conduct.

State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992) The application of RCW 9A.52.050 is discretionary with the sentencing judge. Lessley, 118 Wn.2d at 782; see also State v. Davis, 90 Wn.App. 776, 783, 954 P.2d 325 (1998) (trial court has discretion to apply the statute or to refuse to apply it).

State v. Elmore, 154 Wn.App. 885, 900, 228 P.3d 760 (2010);

The plain language of RCW 9A.52.050 shows that the legislature intended that crimes committed during a burglary do not merge when the defendant is convicted of both. State v. Sweet, 138 Wash.2d 466, 478, 980 P.2d 1223 (1999); see also State v. Bonds, 98 Wash.2d 1, 15, 653 P.2d 1024 (1982) (" [T]he anti-merger statute is an express statement that the legislature intended to punish separately any other crime committed during the course of a burglary."); State v. Michielli, 132 Wash.2d 229, 237, 937 P.2d 587 (1997) (when the words in a statute are clear and

unequivocal, a court must apply the statute as written). In Sweet, the Supreme Court held that, although the assault charged was also an element of first degree burglary, the unambiguous anti-merger statute allowed the State to charge the two crimes separately and the trial court to punish them separately. Sweet, 138 Wash.2d at 479, 980 P.2d 1223.

RCW 9.94A.030. Definitions a “conviction” is defined as follows;

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.
(9) "Conviction" means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

The basis for determining the offender score of a defendant are prior and concurrent convictions, see RCW 9.94A.525 Offender score

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1)A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589 .

The actions of the trial court were well within its discretion, were based on the rules of evidence and case law. That discretion is evidenced by the courts statements before sentence was imposed;

THE COURT: Okay. Alright. Well, it was clear to me from the testimony at the trial that -- that this event was a -- was an extremely violent

event that -- that the victim, Ms. Rainford, ends up with some I believe some bruised or broken ribs as a result of the assault that she -- was inflicted upon her, all over money, \$1,500.00 worth of cash on the -- from the -- from the coffee shop, coffee stand. It -- it seems to me that it was a lot more violent than it ever needed to be. And hopefully she's and her family will be able to move forward from -- from this point, from the point of the event to even from this point and with -- with some degree of -- of a return to normalcy.
RP 584.

The judge then imposed the sentence as indicated above;

I am going to impose the top of the range here. As to Count I - fifty-four months and as to Count II- thirty-four months for a total sentence of fifty four months. The burglary anti-merger statute operates in this particular instance to -- although the -- under the Sentencing Reform Act these two convictions would normally be considered the same criminal conduct and would not count one against the other; the burglary anti-merger statute causes them to count one against the other and consequently Mr. Zissel's offender score is -- is elevated by that -- by that arithmetic.
RP 585

There is no merit to this claim, initially Appellant has not met his burden with regard to the procedural ability to even bring this issue before this court for the first time. And, for sake of argument, if this court were to review the allegation clearly the "anti-merger" statute is applicable and was properly used by the trial court. The discretionary action of the trial court at sentencing is fully supported both by the facts and the law. This court should not disturb the trial courts action, review should be denied.

Further, Zissel does address or allege that the actions of the court were a violation of its discretionary powers.

RESPONSE TO ALLEGATION TWO.

The second issue raised by Appellant is that a very brief statement made by his trial counsel at the time of sentencing was such that it negated all of his previous actions in this case. The verbatim report of proceedings is five hundred eighty-nine pages long consisting of in excess of 105,000 words. Of this record the alleged ineffective actions of trial counsel is found in the following statement to the court at the time of sentencing;

MR. CROWLEY: Your Honor thank you. Your Honor I know the Court heard from Mr. Zissel at sentencing --

THE COURT: At trial?

MR. CROWLEY: -- excuse me, at trial. And I can say that I obviously heard from the -- her family. Her fear is real, it's completely justified and my guess is it's had some long-lasting effects on not just Kennedy but probably on the family that will last for easily a lifetime, possibly, maybe not.

On the other hand, Drew Zissel has no history at all, no criminal history. He's in all respects that I've known him he's a respectful person. His family cares for him a great deal, they're here in court today. I know that Mrs. Zissel came to trial and Drew's dad is here also.

The Court is probably aware that there's an anti-merger statute there that is [inaudible on tape -- muffled]. These are consecutive sentences and this -- in addition to that the burglary charge is a class A felony and there is very small amount of time for good behavior on that, ten percent.

If you think that a forty-one month sentence on the burglary and twenty-six month sentence consecutive is a

substantial and very, very, very huge amount of time. Obviously Mr. Zissel will have a great deal of time to think but I --

THE COURT: Well, I -- I don't think that they run consecutively. I mean, they run concurrently but they count against each other even though they are the same criminal conduct. Am I correct in that regard Mr. Ramm?

MR. RAMM: You are correct Your Honor.

THE COURT: Okay.

MR. RAMM: And they're violent offenses as opposed to serious violent and I don't think they have the same good time limitation of -- of ten percent that serious violent has.

MR. CROWLEY: Well, we think that -- since the forty-one months on the robbery and twenty-six months on the burglary would be -- considering his lifetime respect for the law. Drew was working when this trial was ongoing. He was obviously taken into custody at the jury verdict and he's going to have a very substantial amount of time to do here.

I'm hopeful that he'll engage in programs and do everything that he can to not come back. I don't believe he will come back. His family support is excellent. They are very hurt by this and they passed on a lot of feelings that they had about the Rainford's as well, that they could see the pain that they were going through and understand that it's very difficult for Kennedy and her family also. That's all I have to say.

Appellant states;

At sentencing, defense counsel attempted to argue that Mr. Zissel's standard range sentences would run consecutively, resulting even at the low end in a very long sentence, perhaps with the intention of suggesting the court should impose an exceptional sentence: (Appellant's brief at 2)

Counsel was obviously not asking for an exceptional sentence for his client. That can be readily ascertained from the entire text of the

counsel's statements to the court. What is also obvious is that counsel was addressing the consecutive nature of the sentences because he was under the belief that these crimes were both "serious violent" offenses which are by statute mandated to be run consecutively with one of the crimes receiving a "score" of zero.

This is obvious based on the statement of the Chief Criminal Deputy Prosecutor Ramm's statement;

MR. RAMM: And they're violent offenses as opposed to serious violent and I don't think they have the same good time limitation of -- of ten percent that serious violent has.

Trial counsel Crowley was advocating for a sentence that was clearly not an exceptional sentence. RCW9.94A.589. Consecutive or concurrent sentences;

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

This alleged error is not supported by the record nor the law. State v. Knight, 176 Wn.App. 936, 957-8, 309 P.3d 776 (2013) a case recently decided by this court addressed the issue of effectiveness of counsel in a sentencing setting as is alleged by Zissel;

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) her counsel's representation was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance prejudiced her. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009) (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984))). A petitioner's failure to prove either prong ends our inquiry. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

A standard range sentence is generally not appealable. RCW 9.94A.585(1). Nevertheless, a defendant may appeal the trial court's procedure in imposing his sentence. State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986). Here, Knight encompasses her sentencing challenge within an ineffective assistance of counsel claim.

Even assuming, without deciding, that the trial court could have imposed an exceptional sentence downward under former RCW 9.94A.535 (2008), we hold that (1) Knight fails to show that her counsel's failure to inform the court of this possibility prejudiced her, and (2) her reliance on State v. McGill is misplaced. The trial court in McGill "erroneously believed it could not depart from a standard range sentence even though it expressed a desire to do so." McGill, 112 Wn.App. at 97. Here, in contrast with McGill, there is no indication that the trial court would have considered or imposed even a low end standard sentence, let alone an exceptional sentence downward. Instead, the trial court's imposition of a high-end standard-range sentence expressed quite the opposite. Knight has failed to show that her counsel's failure to inform the court of the possibility of an exceptional sentence downward prejudiced

her. Accordingly, her ineffective assistance of counsel challenge fails.

There is absolutely nothing in the record that is before this court would indicate that (1) Zissel's counsel's representation was deficient, that is fell below an objective standard of reasonableness; and (2) the if there was deficient performance that deficient performance prejudiced him. The misapprehension that a class "A" felony sentence was to be served consecutively as opposed to concurrently is understandable given the complex nature of the sentencing statutes. Because it occurred in front of a Judge and during a sentencing hearing it had no impact on Zissel's case, the conviction nor the sentence imposed. The court and counsel for the State corrected the error and therefore the sentence imposed was correct.

The additional allegation that Zissel's counsel was ineffective because he did not argue that the crimes were "same course and conduct" is disprove in the argument above that addresses the nature and effect of the "anti-merger" statute what specifically allows for imposition of the sentence that was given to Zissel. There can be no error when a specific law supports the action taken by the court.

IV. CONCLUSION

For the reasons set forth above this court should deny this appeal. This action of the trial court at the time of the resentencing was a

discretionary act. The trial court followed the law regarding sentencing Appellant and the misstatement or misunderstanding that the crimes were violent not serious violent which resulted in concurrent rather than consecutives was not a demonstration that trial counsel was ineffective. This case should not be overturned. The actions of the trial court should be upheld and this appeal should be dismissed.

Respectfully submitted this 26th day of May 2015,

s/ David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry state that on April May 26, 2015, I emailed a copy, by agreement of the parties, of the Respondent' Brief, to Ms. Jan Gemberling at admin@gemberlaw.com .

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

DATED this 26th day of May, 2015 at Spokane, Washington,

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