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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRYAN STORMS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. ISSUES PRESENTED

1. If the trial court was unpersuaded by defense counsel's request to impose a reduced, albeit exceptional sentence on remand, can the defendant establish ineffective assistance of counsel alleging his trial counsel should have requested presumptive, concurrent sentences on remand if that request would have resulted in a lesser sentence than the sentence requested by his trial counsel on remand?

2. Was the trial court's decision to impose a reduced term of 36 years' incarceration on remand, when compared to the original sentence of 37.33 years, vindictive and violative of the defendant's due process rights?

II. STATEMENT OF THE CASE

Procedural history.

A jury found the defendant guilty of vehicular homicide,¹ including finding the "multiple offenses" aggravating circumstance (Count I); vehicular assault of Ronald Martel, with the "multiple offenses" aggravating circumstance (Count II); vehicular assault of Lynn Blumer including the aggravating circumstances of "multiple offenses" and

¹ The State had alleged three different alternatives for the commission of the offense: namely, while under the influence of intoxicating liquor or any drug, reckless driving, and driving in disregard for the safety of others. CP 5-6.

Ms. Blumer's injuries substantially exceeding the level of bodily injury necessary to satisfy the elements of vehicular assault (Count III); and failure to remain at the scene of an accident – fatality (Count IV).² CP 5-6.

At the original sentencing, the trial court found substantial and compelling reasons to impose an exceptional sentence upward of 448 months (37.33 years) based upon multiple current offenses of the defendant going unpunished and Ms. Blumer's injuries substantially exceeding the level of bodily harm necessary to satisfy the elements of vehicular assault. CP 118-19. The court ran counts one, two, and three consecutive to each other to arrive at the sentence, and ordered count four to run concurrent to the other current offenses. CP 118-19.

On appeal, this Court affirmed the convictions in an unpublished opinion and found sufficient evidence supported the basis for the exceptional sentence regarding Ms. Blumer's injuries, but remanded for re-sentencing. In doing so, this Court found insufficient evidence supported the "under the influence of alcohol or any drug" prong of the vehicular homicide conviction. *State v. Storms*, 2017 WL 420349, 197 Wn. App. 1058 (2017). However, the Court found sufficient evidence supported the

² The defendant pleaded guilty to the driving while license suspended charge (Count V) before trial. CP 108-12.

alternative “reckless manner” and “driving in disregard for the safety of others” prongs of the vehicular homicide. *Id.*

On remand for resentencing, the trial court³ imposed an exceptional sentence upward of 432 months (36 years), running all counts consecutive to each other, based upon the aggravating factors of multiple current offenses going unpunished based upon a high offender score and Ms. Blumer’s injuries substantially exceeding the level of bodily harm necessary to satisfy the elements of vehicular assault. CP 26, 48. This appeal timely followed.

III. ARGUMENT

A. THE DEFENSE ATTORNEY’S DECISION TO NOT REQUEST CONCURRENT SENTENCES WAS TACTICAL AND WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

The defendant first argues defense counsel provided ineffective assistance of counsel by not requesting the trial court impose presumptive, concurrent sentences for the separate offenses.

³ The Honorable Annette Plese of the Spokane Superior Court presided over the original trial and sentencing, and the sentencing on remand.

Standard of review.

An ineffective assistance of counsel claim is a mixed question of law and fact which an appellate court reviews de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

The Sixth Amendment protects defendants from ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish a claim of ineffective assistance of counsel, a defendant bears the burden to establish (1) that counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. *State v. Carson*, 184 Wn.2d 207, 216, 357 P.3d 1064 (2015). A defendant's failure to establish either prong defeats an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687)

Deficiency allegation.

When determining whether counsel's performance was deficient, an appellate court begins with a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's performance is deficient if it falls below an objective standard of reasonableness under all the circumstances. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865-66, 16 P.3d 610 (2001). But counsel's

performance is not deficient if it can be characterized as a legitimate trial tactic. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Vehicular homicide and vehicular assault committed in a reckless manner are classified as violent offenses. RCW 9.94A.030(55)(xiii) and (xiv). Hit and run-death is classified as a nonviolent offense. RCW 9.94A.030(34). There is a statutory presumption that violent and nonviolent offenses run concurrently, unless the sentencing court imposes an exceptional sentence based upon substantial and compelling reasons. RCW 9.94A.589(1)(a); *State v. Smith*, 74 Wn. App. 844, 851, 875 P.2d 1249 (1994), *review denied*, 125 Wn.2d 1017 (1995) (sentences imposed for multiple current offenses must be served concurrently, unless an exceptional sentence is imposed by the court).

Here, the defendant points to nothing in the record to suggest the trial court was unaware of the statutory presumption of concurrent sentences for multiple, current violent and nonviolent offenses. To the contrary, the trial court acknowledged as much when it found substantial and compelling reasons to impose an exceptional sentence upward when imposing consecutive sentences.

In addition, if the defendant had requested a presumptive, standard range sentence, it could have drastically undermined his strategy and credibility with the court in his effort to obtain a reduced sentence. It is

apparent counsel's strategy was to acknowledge the high offender score and seriousness of the injuries, emphasize the defendant's purported remorse for his conduct, and request a sentence taking these factors into account to bolster his request for leniency from the sentencing court. A deficiency claim does not survive if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, the defendant cannot establish his lawyer's strategy was deficient and he fails to establish this prong.

Prejudice.

A defendant is prejudiced by counsel's deficient performance if, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 34.

In his briefing and argument to the sentencing court, the defense requested:

If the court were to resentence Mr. Storms and impose the high end of the Reckless Driving prong on each of the three charges, the sentence would be 144 months on the Vehicular Homicide, and 84 months on each of the Vehicular Assault charges, for a total of 312 months. The defense respectfully requests that the court sentence Mr. Storms to low end consecutive sentences. Since the court of appeals upheld the aggravators, the consecutive sentences would be upheld as well. A sentence using the low end of the sentencing range would result in 108 months for the Vehicular Homicide, and 63

months for each of the Vehicular Assault charges for a total of 234 months

CP 16.

The lower court acknowledged and rejected defense counsel's argument that the defendant should receive a sentence of 234 months.⁴ In doing so, the sentencing court discussed the defendant's high offender score, the violent nature of the collision, its impact on the victims, and the continuing circumstance of Ms. Blumer's injuries:

COURT: I went through both counsel's briefs. I was the trial judge. I do remember the trial, remember the testimony, the jury verdict. I went back and actually looked through the sentencing paperwork that the Court sentenced and went back through and read the higher court's decision.

As you look at his history, he has 11 prior felonies. So he technically would be a 16, nine being the highest. So the Court does find that based on his prior criminal history, his punishment, which basically give him free crimes after nine.

So when the Court sentenced him, the Court looked at the prior history, looked at the aggravator of the free crimes and, also, the aggravation that the aggravator that the jury found as far as the injuries to Ms. Blumer, her bodily injury, the severe head injury that she suffered. Looking at all the factors, the Court does find substantial and compelling reasons to sentence him on the high end of each of these charges with the reckless prong being 108 to 144.

RP 9-10.

⁴ The standard range sentence for the vehicular homicide was 108 – 144 months. CP 46.

THE COURT: Mr. Storms, one of the things I just want to emphasize this wasn't an accident. This was an actual collision, and the collision was caused by you trying to get away from the police. I know I remember you said that you had some problems with the law in the past. Looking at the 11 prior felony convictions, you had a lot of history with the police and coming after you, but it's hard to get over the fact that you have at least two prior convictions for attempting to elude the police, running from them and then here you kill Mr. Smith. Mrs. Smith was a total mess when she was here for trial and testified. She doesn't get to hug him anymore. He doesn't get to hug his family or his kids, and I know Mr. Martel, the other passenger in your vehicle, I know he passed away, but he, also, remembered that the pain and suffering that he went through. Also, Ms. Blumer at this point.

Looking at that, that's why they set up the statute under the statute about the free crimes when you commit crimes, and you're well over that nine high, and you end up with four convictions, and I'm going to sentence you in the range.

The range is the 108 months to 144 months for the vehicular homicide under that new prong, but I do believe that you deserve the high end of that based on that 16 convictions and -- or a score of 16.

So I am going to sentence you on Count I to the 144 months, on Count II and III to the 84 months and Count IV to the 120 months for a total sentence of 432 months. I do believe that there are substantial and compelling reasons based on that RCW, based on the injuries Ms. Blumer sustained, and this wasn't an accident.

This is an intent where you went out and ran from the police and didn't want to get caught and caused that accident killing Mr. Smith, injuring the two passengers in your vehicle and then getting out and running from the scene.

So the Court does stand on its earlier sentence. I lowered the sentence because the standard range is lower, but I do believe they should all run consecutive based on both of those aggravating factors.

RP 14-15.

Here, if defense counsel had asked the sentencing court for a standard range sentence, the sentence would have resulted in no additional incarceration for the defendant's high offender score and not taken Ms. Blumer's significant injuries into consideration.

Based on the sentencing court's rejection of defense counsel's request for a substantially reduced, exceptional sentence on remand, which was substantially lower than the original sentence imposed, there is no reasonable probability that the sentencing court would have ordered a reduced sentence, if requested, by imposing concurrent sentences. *See Grier*, 171 Wn.2d at 34 (a defendant establishes prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors). Because the defendant cannot establish that the outcome of the proceedings would have been different if his counsel had requested presumptive concurrent sentences, his ineffective assistance claim fails.

B. THERE IS NO PRESUMPTION OF VINDICTIVENESS AS THE SENTENCING COURT IMPOSED A REDUCED SENTENCE ON REMAND. FURTHERMORE, THE AGGRAVATING CIRCUMSTANCES CITED BY THE RESENTENCING JUDGE ARE SUFFICIENT TO REBUT ANY CLAIM OF VINDICTIVENESS.

The due process clause of the Fourteenth Amendment to the United States Constitution prohibits a judge from vindictively imposing an

increased sentence to punish a defendant for successfully exercising his constitutional right to appeal. *North Carolina v. Pearce*, 395 U.S. 711, 723-25, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Under *Pearce*, a more severe sentence on remand establishes a rebuttable presumption of vindictiveness. *State v. Franklin*, 56 Wn. App. 915, 920, 786 P.2d 795 (1989), *review denied*, 114 Wn.2d 1004 (1990). Where the presumption applies, the court must point to an “on-the-record, wholly logical, nonvindictive reason for the sentence.” *Texas v. McCullough*, 475 U.S. 134, 140, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986).

However, where the sentence imposed following appeal is less severe than the sentence originally imposed, there is no presumption of vindictiveness. For example, in *Franklin*, the trial court originally imposed concurrent sentences at the high end of the standard range following the defendant’s conviction for robbery (144 months) and attempted murder conviction (411 months). On appeal, this Court affirmed the convictions but remanded for resentencing because of a miscalculated offender score. Upon remand, the standard range for the attempted murder was adjusted downward by approximately 90 months. The sentencing court reimposed the original sentence for the robbery and imposed an exceptional sentence of 411 months for the attempted murder, citing the aggravating factors of

deliberate cruelty and multiple injuries to the victim. *Franklin*, 56 Wn. App. at 918.

This Court rejected the defendant's pro se argument that the trial court violated his due process rights by using previously rejected aggravating factors to impose an exceptional sentence on remand. This Court found it significant that the trial court regarded the multiple stabbings to be the significant factor in fixing and maintaining the sentence at 411 months. *Id.* at 920.

Similarly, in *State v. Havens*, 70 Wn. App. 251, 258, 852 P.2d 1120 (1993), the defendant argued the trial court erred when it imposed an exceptional sentence of 136 months after a retrial of a first-degree rape of a child charge, when he was originally sentenced to 60 months after the first trial. On remand, the sentencing judge was different than the judge who imposed the original sentence. On the second appeal, Havens argued there was a presumption of vindictiveness when a judge imposes a more severe sentence following a successful appeal. *Id.* at 258-59.

This Court found the exceptional sentence on remand was supported by four unchallenged aggravating factors and any presumption of vindictiveness was rebutted by the unchallenged aggravating factors supporting the exceptional sentence. *Havens*, 70 Wn. App. at 259; *see also State v. Larson*, 56 Wn. App. 323, 328, 783 P.2d 1093 (1989) (no *Pearce*

presumption arose where “revised aggregate sentence is less severe than [defendant’s] original aggregate sentence” and revised sentence “is fully explained by the trial court’s original sentencing intent”); *United States v. Bay*, 820 F.2d 1511, 1514 (9th Cir. 1987) (no presumption of vindictiveness where total sentence reduced).

The defendant relies on *State v. Ameline*, 118 Wn. App. 128, 75 P.3d 589 (2003), a Division Two case that applied the *Pearce* presumption to argue that the aggravating factors are not sufficient to rebut a presumption of vindictiveness. There, the defendant was tried and sentenced three times by the same judge. The judge sentenced Ameline within the standard range after the first two trials, but following the third trial, the judge imposed an exceptional sentence, without explanation. The reviewing court held that the presumption of vindictiveness applied and remanded the case for resentencing. In ordering the remand, the court stated:

In sum, we vacate the third sentence and remand for resentencing before a different judge. Although we do not foreclose that judge from considering an exceptional sentence, he or she may do that only if he or she identifies, relies on, and embodies in written findings, specific and objective facts drawn from the record of the third trial or sentencing and not known when the first and second standard-range sentences were imposed. If the only new fact is that Ameline has again succeeded on appeal, the new sentence may not be more harsh than the first and second ones.

Id. at 134.

As illustrated in *Franklin* and *Havens*, any allegation of vindictiveness in the present case is rebutted by the lower court's reliance on the aggravating circumstances to justify the reduced, albeit exceptional sentence. In that regard, the present case is distinguished from the facts in *Ameline* where the trial court did not provide any justification for an increased sentence on the third remand.

Moreover, there is no presumption of vindictiveness in the present case because the lower court imposed a less severe sentence on remand. Originally, following trial, the court imposed a total determinate sentence of 448 months (37.33 years), with counts one, two and three running consecutive to each other, and count four running concurrently. On remand, the court sentenced the defendant to 432 months (36 years), with all counts running consecutive to each other.

The defendant provides no authority that the mechanism used by the lower court to devise the sentence (i.e., concurrent vs. consecutive sentences) when determining the total determinate sentence, constitutes a presumption of vindictiveness. Even assuming the presumption applies, it is rebutted by specific, nonvindictive reasons for the new, lower sentence. When the court resentenced the defendant, it reimposed an exceptional sentence based upon the two aggravating factors. This claim has no merit.

IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted his 18 day of December, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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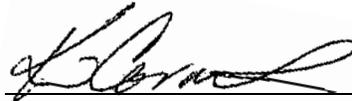
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I certify under penalty of perjury under the laws of the State of Washington, that on December 18, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Dennis Morgan
nodblspk@rcabletv.com

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SPOKANE COUNTY PROSECUTOR

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