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NO. 36066-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS SWARERS

Appellant.

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

The Honorable Alexander Ekstrom, Judge
The Honorable Bruce A. Spanner, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	3
C. <u>ARGUMENTS</u>	5
1. SWARERS WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.	5
a. <u>Swarers’ Counsel’s Performance was Deficient</u>	6
i. <u>Applicable statute and standard of review</u>	7
ii. <u>Swarers’ two offenses constitute “same criminal conduct.”</u>	8
b. <u>Counsel’s Deficient Performance Prejudice Swarers</u>	11
2. THE \$200 FILING FEE MUST BE STRICKEN BASED ON INDIGENCY.....	12
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Adame</u> 56 Wn. App. 803, 785 P.2d 1144 (1990) <u>review denied</u> , 182 Wn.2d 1022 (2015)	8
<u>State v. Burns</u> 114 Wn.2d 314, 788 P.2d 531 (1990).....	9, 10
<u>State v. Calvert</u> 79 Wn. App. 569, 903 P.2d 1003 (1995).....	9
<u>State v. Chenoweth</u> 185 Wn.2d 218, 370 P.3d 6 (2016).....	8
<u>State v. Garza</u> 150 Wn.2d 360, 77 P.3d 347 (2003).....	8
<u>State v. Haddock</u> 141 Wn.2d 103, 3 P.3d 733 (2000)	10
<u>State v. Kloepper</u> 179 Wn. App. 343, 317 P.3d 1088 <u>review denied</u> , 180 Wn.2d 1017, 327 P.3d 55 (2014).....	8
<u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	6
<u>State v. Nitsch</u> 100 Wn. App. 512, 997 P.2d 1000 (2000).....	8
<u>State v. Phuong</u> 174 Wn. App. 494, 299 P.3d 37 (2013).....	8
<u>State v. Porter</u> 133 Wn.2d 177, 942 P.2d 974 (1997).....	10
<u>State v. Ramirez</u> __ Wn.2d __, __ P.3d __, 2018 WL 4499761 (Sept. 20, 2018).....	2, 12, 13

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Robinson</u> 153 Wn.2d 689, 107 P.3d 90 (2005).....	6
<u>State v. Saunders</u> 120 Wn. App. 800, 86 P.3d 232 (2004).....	12
<u>State v. Stockmyer</u> 136 Wn. App. 212, 148 P.3d 1077 (2006).....	10
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	2, 6
<u>State v. Vike</u> 125 Wn.2d 407, 885 P.2d 824 (1994).....	9
 <u>FEDERAL CASES</u>	
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	6
<u>United States v. Cronic</u> 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	6
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783).....	12
Laws of 2018, ch. 269, § 17.....	12
RCW 9.94A.510	11
RCW 9.94A.515	11
RCW 9.94A.525.....	7
RCW 9.94A.533	11
RCW 9.94A.589.....	7, 8

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 10.101.010	12, 13
RCW 10.101.010	12
RCW 36.18.020	12
U.S. Const. amend. VI	6
Wash. Const. art. I, § 22.....	6

A. ASSIGNMENTS OF ERROR

1. Appellant was deprived of his right to effective assistance of counsel at sentencing.

2. The \$200 criminal filing fee should be stricken from the judgment and sentence.

Issues Pertaining to Assignments of Error

1. Appellant was charged and convicted of two counts of attempted first degree child rape. The charges arose after Appellant exchanged electronic messages with undercover officers pretending to be a mother soliciting men to have sex with her two daughters, ages six and eleven, and eventually went to an apartment to engage in that sex, only to be arrested upon entering. There were no actual children involved.

(a) Do Appellant's crimes constitute "same criminal conduct" for purposes of sentencing when they occurred at the same time and place, involved the same criminal intent, and were against the same victim – the general public?

(b) Was Appellant deprived of his constitutional right to effective assistance of counsel at sentencing when counsel failed to assert his convictions should be treated as "same criminal conduct," and when the sentence that was imposed exceeds the high end of the standard range sentence if the convictions are treated as "same criminal conduct"?

2. Under the Supreme Court's recent decision in *State v. Ramirez*,¹ must the \$200 filing fee be stricken?

B. STATEMENT OF THE CASE

1. Procedural Facts

In July 2017, the Benton County Prosecutor charged appellant Thomas Swarers with two counts of attempted first degree child rape. CP 1-2. The prosecution alleged Swarers took a substantial step in an attempt to have sex with what he believed were six and eleven year old girls, but who were in fact only fictitious entities created by undercover law enforcement officers. *Id.*

A trial was held April 2-6, 2018, before the Honorable Judge Bruce A. Spanner. 2RP² 4-623. A jury convicted Swarers as charged. CP 72-73; 2RP 617-18.

Swarers was sentence on May 17, 2018. The court rejected Swarers request for a mitigated exceptional sentence. 2RP 634-37. Instead, the court imposed concurrent mandatory minimum terms of 108

¹ *State v. Ramirez*, __ Wn.2d __, __ P.3d __, 2018 WL 4499761 (Sept. 20, 2018).

² There are five volumes of verbatim report of proceeding referenced herein as follows: 1RP – February 28, 2018 (pretrial before the Honorable Judge Alexander C. Ekstrom); and 2RP – four-volume consecutively paginated set for the dates of April 2-6, 2018 (trial) and May 17, 2018 (sentencing).

months (9 years) for each count, based on an offender score of “3” and a standard minimum range of 90 to 120 months. CP 79, 83; 2RP 637. The court noted, “I will not make a finding of ability to pay legal financial obligations[,]” but then imposed “the mandatory \$500.00 victim assessment, \$200.00 criminal case filing fee and a \$100 felony DNA collection fee for a total of \$800.00.” CP 80-81; 2RP 638.

Swarers appeals his judgment and sentence. CP 92-93. The court found Swarers “indigent” and therefore authorized pursuit of his appeal at public expense. 2RP 640-41; CP 96-97.

2. Substantive Facts

Washington State Patrol Detective Sergeant Carlos Rodriguez is a member of the Missing and Exploited Children Task Force (MECTF). 2RP 375. MECTF was created in 1999 to address the sexual exploitation of minors. 2RP 378. In August 2015, METCTF started engaging in an operation called “Net Nanny.” 2RP 379. According to Rodriguez, Net Nanny is intended to “recover children, and then also identify who is looking to sexually exploit children[.]” Id. Part of the Net Nanny operation involves posting ads on Craigslist pretending to be someone offering taboo sex, such as sex with children. 2RP 397-99.

In July 2017, Rodriguez and others on his team conducted a Net Nanny operation in the Tri-Cities area. 2RP 409. This involved renting

three apartments to run the operation, one for a command post, one as an “undercover house” to send potential arrestees to, and a third for conducting post-arrest interviews. 2RP 409-10. It also involved posting an ad on Craigslist that read,

Mommy likes to watch – young family fun – 420 friendly – w4m (kpr)
Still looking for that special man. Young family fun.
Experience with taboo is best. Replies with phone numbers
get answers from me more quickly. change the subject line
to your name and favorite color so I know you are not a
bot. 2 dau 1 son

Lg for daddy here

CP 12; see also 2RP 433-34.

On July 7, 2017, at about 6:24 a.m., Swarers responded to the ad. CP 12-13. A WSP “Probable Cause Statement” sets forth the exchange that followed between Swarers and Rodriguez and others METCFT team members, who were pretending to be “a single mother with a six-year old daughter, an 11year [sic] daughter, and a 13year [sic] son.” CP 12-17. The exchange led Swarers to agree to come to the undercover apartment to meet the mom and her children, with the clear implication from the message exchange being that Swarers would potentially engage in sex with the two daughters, and possibly the son. Id.

When Swarers showed up at the undercover apartment he was immediately arrested. 2RP 507-08. In a post-arrest interview, Swarers

denied any intention of having sex with children, claiming instead he was only there to meet the mother in hopes of developing an intimate relationship with her, but not her children. 2RP 554-55. Swarers did not testify at trial, but his post-arrest interview was played for the jury, albeit with some redactions. 2RP 549-50.

Following the jury's guilty verdicts on April 6, 2018, sentencing was set for May 2018. 2RP 622. On April 30, 2018, Swarers' counsel filed a sentencing memorandum seeking a mitigated exceptional sentence. CP 74-77. The first page of that memorandum states, "STANDARD RANGE: 90-120 months." CP 74.

C. ARGUMENTS

1. SWARERS WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Swarers was deprived of his right to effective assistance of counsel at sentencing because his two convictions constitute "same criminal conduct" for purposes of sentencing, and his counsel failed to make this winning argument on his behalf. Swarers was prejudiced by counsel's deficient performance because the resulting sentence (108 months) exceeds the high end of the correct standard minimum sentence range (92.25 months) by 15.75 months. Therefore, his sentence should be reversed and remanded for resentencing.

Defendants have the right to effective assistance of counsel at every critical stage of a criminal proceeding. U.S. Const. amend. VI; Wash. Const. art. I, § 22; United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Sentencing is a “critical stage” of a criminal proceeding. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005).

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

a. Swarers’ Counsel’s Performance was Deficient

It was well established that Swarers had no prior criminal history. Pretrial, both sides litigated whether that fact could be revealed to the jury. See CP 43 (defense moves to prevent prosecution from redacting from Swarer’s post-arrest statement his statements about lack of criminal history); 2RP 11-13 (court grants prosecution’s motion to exclude

reference to Swarers' lack of criminal history). That both the prosecution and Swarer's counsel agreed the standard minimum sentence range was 90 to 120 months also shows they both assumed his offender score should be "3." That score can only be reached in this case given Swarers' lack of criminal history, by counting each current offense as three points against the other, which is consistent with the scoring procedures set forth under RCW 9.94A.525(17).³ But that assumption was incorrect because it failed to recognize that Swarers' two crime of conviction constitute "same criminal conduct" for purposes of calculating his offender score and standard minimum range sentence.

i. Applicable statute and standard of review.

When a person is sentenced for 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" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a). "Same criminal conduct" means crimes that involved the same victim, were committed at the same time and place, and involved the same criminal intent. Id.

³ This section provides, "If the present conviction is for a sex offense, count priors as in subsections (7) through (11) and (13) through (16) of this section; however **count three points for each adult and juvenile prior sex offense conviction.**" Emphasis added.

Whether two crimes constitute the same criminal conduct involves a determination of fact as well as the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000 (2000). A trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003).

- ii. Swarers’ two offenses constitute “same criminal conduct.”

“Same criminal conduct” means crimes that require the same intent, were committed at the same time and place, and involved the same victim. RCW 9.94A.589(1)(a). “Intent, in this context, is not the particular mens rea element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (quoting State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)), review denied, 182 Wn.2d 1022 (2015); accord State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088, review denied, 180 Wn.2d 1017, 327 P.3d 55 (2014); cf. State v. Chenoweth, 185 Wn.2d 218, 223, 370 P.3d 6 (2016) (comparing statutory intents to preclude same criminal conduct finding).⁴ This includes whether the crimes were part of

⁴ The Supreme Court’s decision in Chenoweth, 185 Wn.2d 218, does not change the objective criminal intent standard. There, the Court held that first degree incest and third degree child rape were not the same criminal

the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995). “The test takes into consideration how intimately related the crimes committed are” and whether one crime furthered the other. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Swarers’ convictions constitute “same criminal conduct” under this analysis.

There can be no dispute that Swarers’ crimes were committed at the same time and place. The act constituting the crimes was Swarers showing up at the METCFT undercover apartment on July 7, 2017, with various sex aids and Slurpees. 2RP 506-518.

There can similarly be no dispute that both crimes involved the same objective intent; to have sexual intercourse with a child under 13 years of age. See CP 58-59 (Instructions 8 & 9, the second element of these to-convict instructions provide: “That the act was done with intent to commit rape of a child in the first degree). “The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In applying this test, courts consider whether the crimes are linked, whether one crime

conduct because “[t]he intent to have sex with someone related to you differs from the intent to have sex with a child.” Id. at 223. But those crimes are strict liability offenses with no mens rea elements. RCW 9A.64.020 (1)(a); RCW 9A.44.079 (1). The Chenoweth Court therefore did not create a new rule that courts must look to the statutory mens rea elements in determining criminal intent for the purposes of same criminal conduct.

furthered the other, and whether both crimes were part of the same scheme or plan. Burns, 114 Wn.2d at 318. Crimes may involve the same criminal intent if they were part of a “continuing, uninterrupted sequence of conduct.” State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997). Here the crimes were linked and part of the same scheme or plan because they both involved the same fictitious mother, occurred at the same time and place, and therefore involved the same objective intent.

The only potential dispute is whether the crimes involved the same victim. The respondent is likely to argue the crimes involved separate “victims” because one was a fictitious six year old and the other a fictitious 11 year old. This Court should reject such a claim.

The only “victim” here was the “general public,” just like the crime of unlawful possession of a firearm. State v. Stockmyer, 136 Wn. App. 212, 218 n.9, 148 P.3d 1077 (2006) (citing State v. Haddock, 141 Wn.2d 103, 110–11, 3 P.3d 733 (2000)). There were no actual children involved and any reliance on fictitious children to argue separate victims would be misplaced. This Court should reject any claim there was more than one victim to Swarers’ crimes.

Because under the applicable legal standard the two offenses clearly encompassed the same criminal conduct, Swarers’ counsel’s failure to make this argument on his behalf constitutes deficient performance.

b. Counsel's Deficient Performance Prejudice Swarers

Because counsel failed to argue Swarers' offenses constituted "same criminal conduct," Swarers was sentence based on an offender score of 3 instead of zero, and therefore faced a higher minimum standard range sentence than warranted. CP 79.

The standard range sentence for an attempted crime, "is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent." RCW 9.94A.533(2). The seriousness level for first degree child rape is "XII." RCW 9.94A.515. With an offender score of "3," the standard range for first degree child rape is 120 to 160 months. RCW 9.94A.510. Seventy-five percent of that is 90 to 120 months, as calculated by Swarers' counsel and as employed by the sentencing court. CP 74, 79.

If, however, Swarers' offender score is corrected to zero because he has no prior offenses and his two current offenses constitute "same criminal conduct," then the standard range for the completed crime would be 93 to 123 months. RCW 9.94A.510. Seventy-five percent of that produces a range of 69.75 to 92.25 months.

Swarers is currently sentenced to a minimum term of 108 months. CP 83. This is 15.75 months longer than the maximum minimum term

sentence using the correct offender score of zero. Thus, Swarers was prejudiced by counsel's failure to correctly calculate his offender score and correct standard minimum range sentence. This Court should remand for resentencing at which counsel should correctly argue that the two convictions should score as a single offense. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

2. THE \$200 FILING FEE MUST BE STRICKEN BASED ON INDIGENCY.

In State v. Ramirez, the Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases currently on appeal. Ramirez, WL 4499761 at *3, 6-8.

HB 1783 amended RCW 36.18.020(2)(h), which now states the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. Under RCW 10.101.010(3)(a) through (c), a person is "indigent" if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.

This amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Ramirez, at *8. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id. Here, the record indicates Swarers is indigent under RCW 10.101.010(3). CP 96-97. Because HB 1783 applies prospectively to his case, the sentencing court similarly lacked authority to impose the \$200 filing fee.

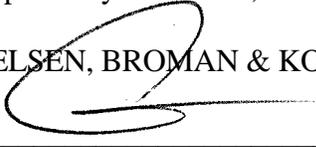
D. CONCLUSION

This Court should remand for resentencing based on an offender core of zero and to strike the \$200 filing fee.

DATED this 30th day of October, 2018.

Respectfully submitted,

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