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NO. 36664-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

BILLYJO DALAGER,
Appellant.

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

The Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

LISE ELLNER, WSBA No. 20955
SPENCER BABBITT, WSBA No. 51076
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090

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A. ASSIGNMENT OF ERROR

Mr. Dalager was denied his constitutional right to effective assistance of counsel at sentencing when trial counsel failed to request an exceptional sentence downward while possessing evidence showing that Mr. Dalager exhibited multiple mitigating factors justifying such a sentence under RCW 9.94A.535(1).

Issue Presented on Appeal

Was Mr. Dalager denied effective assistance of counsel at sentencing where trial counsel failed to request an exceptional sentence downward in light of the available mitigating factors justifying such a sentence under RCW 9.94A.535(1)?

B. STATEMENT OF THE CASE

BillyJo Dalager spent July 30, 2016 with his brother and fiancé at a house on East Central Avenue in Spokane. CP 3-4. Mr. Dalager consumed marijuana and methamphetamine into the early morning hours of July 31. CP 3-4. Mr. Dalager had a dispute with a man named Don Meilike over a set of stereo speakers that Mr. Dalager borrowed from Mr. Meilike. CP 3. In the past, Mr. Meilike

had threatened Mr. Dalager with violence including once with a gun. CP 99.

At about 4:00 am on July 31, the mother of Mr. Dalager's fiancé arrived at the house and told Mr. Dalager that Mr. Meilike wanted his speakers back. CP 4, 6-7. Mr. Dalager became angry and decided to confront Mr. Meilike. CP 4. Mr. Dalager and his fiancé exited the house, got into Mr. Dalager's car, and began to drive eastbound on Central Avenue looking for Mr. Meilike. CP 3-7.

Mr. Dalager located Mr. Meilike riding his bike on the north side of Central Avenue. CP 3-4. Mr. Dalager tossed the speakers out of the car as he drove past Mr. Meilike, but after made a u-turn and drove back towards Mr. Meilike. CP 3-5. Mr. Meilike and Mr. Dalager yelled at each other as Mr. Dalager drove past the second time. CP 5. Mr. Meilike threw one of the speakers at Mr. Dalager's car and shattered the windshield. CP 4. Mr. Dalager made another u-turn and accelerated towards Mr. Meilike. CP 4-8. Mr. Dalager drove onto the curb and ran over Mr. Meilike. CP 4-6, 8. Paramedics pronounced Mr. Meilike dead at the scene of the collision. CP 8.

The state originally charged Mr. Dalager in the alternative:

with one count of murder in the first degree or one count of felony murder in the second degree. CP 1. Mr. Dalager reached an agreement with the state to plead guilty to one count of murder in the second degree. 12/18/18 RP 12-13. The plea agreement contained the following statement of facts:

On July 31, 2016, in Spokane, Washington, while committing or attempting to commit the crime of Second Degree Assault, and in the course of and in furtherance of said crime and in immediate flight therefrom, I caused the death of Don F. Meilike, who was not a participant in the Second Degree Assault. At the time, I believed I was acting in self-defense and in the defense of others based on threats by Mr. Meilike, who was known to carry a gun. I reacted to my fear and took what I believed were the actions necessary to protect myself and my family. I realize that a jury may find my actions to be an incomplete defense and that I could be convicted of this, or the more serious First Degree Murder, and thus am taking responsibility and entering this plea.

CP 60. The parties did not agree to a sentencing recommendation. 2/8/19 RP 23.

Mr. Dalager underwent a forensic psychological evaluation prior to sentencing. CP 82. Dr. Mindy Mechanic diagnosed Mr. Dalager with post-traumatic stress disorder (PTSD) and major depressive disorder. CP 96-97. Dr. Mechanic also opined that Mr. Dalager's mental illnesses contributed to his actions in this case:

In short, chronic exposure to severe and chronic maltreatment and trauma, of the type suffered by Mr. Dalager throughout his entire childhood resulted in significant developmental arrest . . . Mr. Dalager's history of early childhood trauma, consequent substance abuse to self-medicate, and his lack of fully formed neurocognitive brain development all contributed to his impulse-driven actions in this case. . . . Notably, the amount of time between the windshield shattering and seeing blood on [his fiancé's] face and Mr. Dalager running over Don with his vehicle was only seconds. . . . under such conditions, there is no luxury of contemplation-only reacting in response to threat to ensure survival.

CP 100-01. Dr. Mechanic concluded that "Mr. Dalager was in a state of anxious apprehension when he ran over Don with his vehicle, unintentionally taking his life." CP 101.

At sentencing, the state recommended the high-end of Mr. Dalager's standard range. 2/8/19 RP 25-26. Mr. Dalager recommended the low-end of his standard range based on the incomplete defenses of self-defense and defense of others and because his mental illness prevented him from conforming his conduct to the law under RCW 9.94A.535(1)(e). CP 74-78.

Mr. Dalager did not request an exceptional sentence downward. CP 72. The trial court sentenced Mr. Dalager to a standard range sentence. 2/8/19 RP 43. The trial court found that Mr. Dalager's mental illness likely contributed to the offense. CP

123. Mr. Dalager filed a timely notice of appeal. CP 144-45.

C. ARGUMENT

1. MR. DALAGER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING WHEN HIS TRIAL COUNSEL FAILED TO REQUEST AN EXCEPTIONAL SENTENCE BASED ON THE MITIGATING FACTORS ENUMERATED IN RCW 9.94A.535(1)

a. Standard of review for claims of ineffective assistance of counsel.

A defendant's right to effective assistance of counsel is constitutionally guaranteed at all "critical stages" of a criminal proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005) (citing *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987)). Counsel is considered ineffective if (1) their performance was deficient, and (2) the deficient performance prejudiced the defendant. *In re Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient if it falls below an "objective standard of reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d

177 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To prove prejudice, the defendant must demonstrate that there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Kyllo*, 166 Wn.2d at 862 (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)). A defendant must prove both deficient performance and prejudice to prevail on a claim of ineffective assistance of counsel. *Kyllo*, 166 Wn.2d at 862.

"Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient." *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015). A defendant proves deficient performance if he or she "demonstrates an absence of any legitimate strategic or tactical reasons" for trial counsel's challenged conduct. *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006) (citing *McFarland*, 127 Wn.2d at 336).

- b. Counsel was deficient by failing to request an exceptional sentence downward despite the presence of mitigating circumstances.

Mr. Dalager's trial counsel was deficient at sentencing

because she failed to request an exceptional sentence downward despite the presence of multiple mitigating factors in Mr. Dalager's case. A trial court "may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). Possible mitigating circumstances include that "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a). A trial court may also impose an exceptional sentence downward if "[t]he defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct," or if "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(c, e).

The record establishes that Mr. Dalager, while suffering from PTSD trauma, committed this crime because he felt threatened by Mr. Meilike's act of throwing one of the stereo speakers at Mr. Dalager's car. In Mr. Dalager's plea statement, he expressed that he was afraid of Mr. Meilike before this incident due to prior threats

of violence, including one involving a gun. CP 60. During this incident, Mr. Meilike threw one of the stereo speakers at Mr. Dalager's car, thereby shattering the windshield with Mr. Dalager and his fiancé inside. CP 4.

Mr. Dalager admitted that a jury may find his response to Mr. Meilike's conduct was unreasonable and convict him, but even an incomplete defense can form the basis for an exceptional sentence downward. RCW 9.94A.535(1)(c). Dr. Mechanic's forensic psychological evaluation suggests that Mr. Dalager was acting out of fear for his own and his fiancé's safety after Mr. Meilike threw the speaker at their vehicle. CP 101-02. Mr. Dalager's trial counsel failed to request an exceptional sentence downward despite evidence in the record showing that Mr. Dalager acted out of genuine fear for himself and his fiancé's safety when he hit Mr. Meilike.

Furthermore, the record demonstrates that Mr. Dalager suffers from PTSD and major depressive disorder, and that these conditions impair his ability to conform his behavior to the law. CP 84-92, 100-02. Dr. Mechanic opined that Mr. Dalager's mental condition contributed to his "impulse-driven" behavior in running

over Mr. Meilike. CP 101. According to Dr. Mechanic, Mr. Dalager's fight or flight instincts are "not the product of deliberation or contemplation but instead, are automatic." CP 101. The record establishes that Mr. Dalager's mental illness prevented him from conforming his response to the perceived threat to the law. Instead, his survival instinct took over and drove him to run over Mr. Meilike.

Despite being in possession of a psychological evaluation showing that Mr. Dalager suffers from debilitating mental illness and believed he was acting in self-defense, Mr. Dalager's trial counsel failed to request an exceptional sentence downward pursuant to RCW 9.94A.535(1)(c) or RCW 9.94A.535(1)(e). The record does not contain any indication that trial counsel strategically elected not to pursue an exceptional sentence as part of the plea agreement. Instead, the record shows that trial counsel failed to request an exceptional sentence despite having multiple bases for doing so. Trial counsel's performance at sentencing was deficient and deprived Mr. Dalager of his Sixth Amendment right to counsel.

c. Trial counsel's performance prejudiced Mr. Dalager.

There is a reasonable probability that the outcome of Mr. Dalager's sentencing would have been different had trial counsel

requested an exceptional sentence downward because Dr. Mechanic's evaluation provided an adequate basis under RCW 9.94A.535(1)(c) or RCW 9.94A.535(1)(e). The record also demonstrates that Mr. Dalager's mental health and incomplete defenses were discussed extensively at sentencing, but the trial court never considered them in the context of an exceptional sentence because trial counsel only cited them as reasons to impose a sentence at the low-end of the standard range. 2/8/19 RP 36-37; CP 74-78.

The trial court never considered an exceptional sentence or indicated whether it believed one was appropriate because Mr. Dalager's trial counsel declined to request one. CP 72. Even though the trial court did not impose an exceptional sentence, the court recognized and accepted that the Mr. Dalager's mental health and PTSD enhanced fear contributed to the offense. Considering the court's findings reflect this understanding, there was no possible tactical reason for counsel not to request an exceptional sentence downward. In light of the court's understanding of Mr. Dalager's mental status, it is more probable than not that the court would have agreed to impose an exceptional sentence downward if

counsel had moved for an exceptional sentence downward. For this reason, Mr. Dalager was prejudiced by counsel's performance.

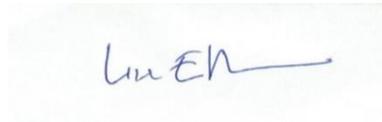
This court should vacate his sentence and remand the case to the trial court for resentencing.

D. CONCLUSION

Mr. Dalager received ineffective assistance of counsel at sentencing when his trial counsel failed to request an exceptional sentence downward despite multiple, persuasive, mitigating factors in support of an exceptional sentence. Mr. Dalager respectfully requests that this court vacate his sentence and remand his case to the trial court for resentencing.

DATED this 11th day of September 2019.

Respectfully submitted,

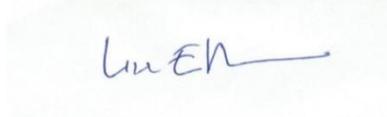
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LISE ELLNER, WSBA No. 20955
Attorney for Appellant

A handwritten signature in black ink, appearing to read "Spencer Babbitt", is written in a cursive style.

SPENCER BABBITT, WSBA No. 51076
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Spokane County Prosecutor's Office SCPAappeals@spokanecounty.org and BillyJo Dalager/DOC#414049, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326 a true copy of the document to which this certificate is affixed on September 11, 2019. Service was made by electronically to the prosecutor and BillyJo Dalager by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

Signature

LAW OFFICES OF LISE ELLNER

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