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STATE OF WASHINGTON

Respondent

v.

GAYLON THIEFAULT,

Petitioner

ANSWER TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

The defendant was convicted of Attempted Second Degree Rape and Indecent Liberties on June 29, 2001. 1 CP 38. He was sentenced on August 10, 2001. At sentencing the State presented a sentencing memorandum and attached documents which established the defendant had prior convictions in Montana for Attempted Robbery and in Federal Court for Rape (Aggravated Sexual Assault). 2 CP 50-153.

The documents relating to the Montana conviction included a Motion for Leave to File Information with an attached affidavit of probable cause, dated December 21, 1983 and a Judgment. The Judgment noted the defendant pled guilty to an Information charging Attempted Robbery and Unauthorized Use of Motor Vehicle filed December 22, 1983. Those were the same charges referenced in the Motion for Leave to File Information, filed one day earlier.

At sentencing the State relied upon those documents to support its argument that the defendant was a persistent offender. In her presentation defense counsel stated “[y]our Honor, unfortunately I don’t believe the court has any discretion about the

sentence here.” In effect, counsel conceded that the prior Montana and Federal convictions were comparable to Washington offenses.

The defendant appealed his conviction. The sentence was overturned on the basis that convictions for the Indecent Liberties charge and attempted Rape 2 charge violated double jeopardy and that the Federal conviction could not be counted for purposes of the two strikes law. See Court of Appeals Opinion, case no. 53214-6-I at page 2-3.

At re-sentencing the defendant was represented by a different attorney. The defendant’s second attorney did not challenge the comparability analysis previously conducted by the court. 9-30-03 RP 39. The court incorporated by reference its previous statements regarding comparability and found the defendant was a persistent offender. The court then sentenced the defendant to life imprisonment without the possibility of parole. 9-30-03 RP 44-45.

The defendant appealed his sentence on various grounds. The Court of Appeals affirmed the sentence but remanded for correction of two scrivener’s error in the judgment and sentence. COA no. 53214-6-I. The defendant’s motion for reconsideration was denied.

II. ARGUMENT

A. THE COURT OF APPEALS DID NOT ERR WHEN IT FOUND THE DEFENDANT WAS NOT PREJUDICED BY TRIAL COUNSEL'S CONDUCT AT SENTENCING.

To establish ineffective assistance of counsel the defendant must show that (1) his attorney's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances and (2) that because of defense counsel's deficient representation there is a reasonable probability that the result of the proceeding would be different. State v. Mc Farland, 127 Wn.2d 322, 334-35, 889 P.2d 1251 (1995). There is a strong presumption that counsel rendered effective representation. In re Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

The defendant argued that his second trial counsel was ineffective because he waived a comparability analysis of the

foreign convictions. He alleged that the elements of the Montana and Washington attempted Robbery charges were different and that the documents from Montana did not show what facts the defendant admitted when he pled guilty. Supplemental Brief of Appellant at 8-15.

The Court of Appeals found that Montana's attempted robbery statute was broader than Washington's comparable statute. See opinion at page 17. The court then stated the documents provided to the trial court were insufficient to determine whether the defendant had admitted to facts which would have constituted attempted second degree robbery in Washington because it did not have the actual information before it. Opinion at page 19. Nonetheless the court found no prejudice to the defendant because he had not shown that if challenged at the time of the re-sentencing hearing, the trial court would not have granted leave for the State to attempt to get the actual information. Opinion at 1920.

The defendant argues this conclusion is in error because the State tried twice to get the actual information and failed. He points to the prosecutor's statement that the documents were "all the information that was sent to me from Montana." 9-30-03 RP 40.

This argument is misleading. The re-sentencing hearing was originally scheduled for July 16, 2003. At that time the defendant's original counsel raised an issue regarding proof that the defendant was the person convicted in Montana. The court granted the State additional time to secure documents that would establish that the defendant was the person referenced in the Montana documents. Furthermore the prosecutor's comments were in reference to the question raised by the defendant's second attorney regarding whether the defendant had been represented by counsel at the plea and sentencing. That question was in regard to the facial validity of the conviction. None of the parties were discussing the sufficiency of the documents presented to the court for the purposes of the comparability analysis.

Furthermore there is reason to believe that had the documents been challenged and the State sought the actual Information it would have been obtained, and it would not have shown any different facts than those alleged in the Motion for Leave to File Information. An Information did exist, because it was referenced in the Judgment. The parties and the trial judge believed that the Information would not show that the defendant pled guilty to any facts other than those in the Motion for Leave to

File Information. This was a reasonable conclusion because the documents were filed within one day of each other.

The defendant failed to show that even if defense counsel should have challenged the sufficiency of the documents from the Montana conviction, that the result would have been any different. The Court of Appeals did not err when it affirmed the defendant's sentence on this issue.

B. OTHER ISSUES PRESENTED BY THE DEFENDANT

The remaining issues argued by the defendant in his Petition for Review are adequately addressed by the Court of Appeals in its opinion filed August 1, 2005. The State relies on the Court of Appeals reasoning in that opinion to support its request that the Court deny the defendant's petition.

III. CONCLUSION

For the forgoing reasons, the State requests that the Court deny the defendant's petition for review.

Respectfully submitted on October 27, 2005.

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