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Court of Appeals
Division I
State of Washington

NO. 73947-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARC MCKEE,

Appellant.

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

The Honorable Michael E. Rickert, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress evidence obtained with an invalid warrant.

2. Appellant was denied his right to effective representation when his attorney failed to argue that his convictions for Possessing Depictions of Minors Engaged in Sexually Explicit Conduct in the First and Second Degrees involved the "same criminal conduct" and should be scored as a single offense for sentencing.

Issues Pertaining to Assignments of Error

1. Law enforcement obtained a warrant permitting them to search through the entirety of the content of appellant's cell phone, including information unrelated to the suspected crimes and information protected by the First Amendment.

a. Was there probable cause to believe appellant had committed the crime of Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct, one of the crimes listed on the search warrant?

b. Did the trial court err when it found the warrant did not violate the particularity requirements of the Fourth Amendment?

2. The conduct leading to appellant's convictions for Possessing Depictions of Minors Engaged in Sexually Explicit Conduct involved the same time, same place, same victim, and same

intent. Yet, at sentencing, these crimes were treated as separate offenses when calculating appellant's offender scores and standard ranges. Given that these crimes should have been scored as a single offense under the "same criminal conduct" provisions of RCW 9.94A.589(1)(a), was counsel ineffective for failing to make this argument at sentencing?

B. STATEMENT OF THE CASE

In 2012, 16-year-old A.Z. lived with her mother, Brenda Brickley, and older brother Robert Gora. 4RP[1] 89-92. All three were drug addicts who regularly used heroin and methamphetamine. 4RP 95-104; 6RP 60-63; 7RP 9. In January 2012, Brickley introduced A.Z. to 40-year-old Marc McKee, whom she had met during a drug deal. 4RP 104; 6RP 57-58; CP 23. Thereafter, McKee spent considerable time with the family, supplied them drugs, and often got high with them. 4RP 105-106, 112-132; 6RP 59-60; 7RP 11.

In late summer 2012, A.Z.'s relationship with McKee became sexual during a three-day drug binge at a Burlington motel. 4RP 128-132; 5RP 5-10. And, shortly thereafter in September 2012, the two

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[1] This brief refers to the verbatim report of proceedings as follows: 1RP – November 21, 2014; 2RP – December 3, 2014; 3RP – June 1, 2015 (voir dire); 4RP – June 1, 2015 and June 2, 2015 (a.m. session); 5RP – June 2, 2015; 6RP – June 3, 2015 (a.m. session); 7RP – June 3, 2015 (p.m. session); 8RP – June 4, 2015; 9RP – June 5, 2015; 10RP – June 8, August 5, and September 1, 2015.

spent three days together at a home in Clear Lake, where McKee was staying at the time. 5RP 11-13. The two got high on methamphetamine and heroin. 5RP 13-16. They also had sex again and, using his cell phone camera, McKee created three short video clips and some still shots to memorialize some of those acts. 5RP 17, 29-43.

The following month, in October 2012, one of A.Z.'s friends – J.P. – was looking for heroin and called A.Z, who suggested she contact McKee. 8RP 13, 29-34. J.P. texted McKee, explained that she did not have any money, and agreed to have sex with McKee in exchange for drugs. 8RP 34-37. Although J.P. was 15 years old at the time, she lied and told McKee she was 16 when he asked her age. 8RP 13, 38. McKee arrived with heroin and methamphetamine. 8RP 41-42, 48. J.P. used the substances and shared some of her heroin with a friend, 16-year-old M.G., who also was present in the home. 8RP 41-49, 142, 157-167. Before McKee left, J.P. had sex with him. 8RP 47.

A.Z.'s mother (Brickley) suspected that A.Z. and McKee were having sex, but A.Z. denied it. 6RP 75-77. These suspicions were confirmed, however, on October 28, 2012. A.Z. and Brickley argued that day and A.Z. left home claiming she was going to see a friend.

5RP 50-54. Instead, McKee picked her up and took her to a home in Mr. Vernon owned by Gary Ness, with whom McKee was staying. 5RP 54-57. When Brickley discovered A.Z.'s whereabouts, she, Gora, Chris Deason (one of Gora's friends), and Chris Seifert (a longtime father figure to A.Z. and Gora) drove to Ness's home to retrieve A.Z. 4RP 92-93; 6RP 77-88; 7RP 29-31, 58, 62-63, 114-115. Once there, they beat McKee, stole his cell phone, and removed A.Z. from the premises. 6RP 90-95, 133-142; 7RP 35-41, 67-69, 116-121.

On McKee's phone, Gora found the video clips of A.Z. and McKee having sex at the house in Clear Lake and found the still shots of A.Z. without clothing. 7RP 41-45. He gave the phone to Brickley, who turned it over to law enforcement. 6RP 96-102, 113-114. Brickley also learned about McKee's contact with J.P. and passed on that information to police. 6RP 108-109. Thereafter, the family obtained a restraining order preventing McKee from contacting A.Z. 9RP 99. There was no further contact until May 2013, when McKee called A.Z., telling her to move on, that he was not mad at her, and that none of what happened was her fault. 5RP 76-78, 92-96.

At one point, McKee was facing 13 criminal offenses filed by the Skagit County Prosecutor's Office. See CP 17-22. However,

following successful double jeopardy arguments by defense counsel, the number of charges was reduced to 9. CP 37-38, 234.

In counts 1 through 3, McKee was charged with Possessing Depictions of Minors Engaged in Sexually Explicit Conduct in the First Degree based on the three video clips from his phone depicting sex with A.Z. CP 23-24; 9RP 114-124.

In count 4, McKee was charged with Possessing Depictions of Minors Engaged in Sexually Explicit Conduct in the Second Degree based on the still images from his phone depicting A.Z. unclothed. CP 24; 9RP 125-130.

In count 5, McKee was charged with Commercial Sex Abuse of a Minor for providing J.P. with heroin and methamphetamine in exchange for sex. CP 25; 9RP 131-134.

In counts 6 through 8, McKee was charged with Distribution of Methamphetamine and/or Heroin to a Person Under Age Eighteen for providing these drugs to A.Z. (during a ten-month period in 2012) and to J.P. and M.G. (in October 2012). CP 25-26; 9RP 134-147.

Finally, in count 9, McKee was charged with Violation of a No Contact Order for the phone contact with A.Z. in May 2013. CP 26; 9RP 147-150.

The defense moved to suppress the evidence found on McKee's cell phone based on several grounds, including that the warrant authorizing the search was not supported by probable cause and failed to satisfy the particularity requirement of the Fourth Amendment. CP 191-230; 2RP 2-25. The motion was denied. CP 233.[2]

Jurors found McKee guilty on all counts except count 7 (delivery to M.G.), on which he was acquitted. CP 253-262. Using an offender score of 16 for counts 1 through 5 and a score of 8 for counts 6 and 8, the Honorable Michael Rickert imposed standard range sentences totaling 110 months. He then added an additional 3 months for the misdemeanor no-contact order violation, resulting in a total sentence of 113 months. CP 142-144, 152. McKee timely filed his Notice of Appeal. CP 231.

C. ARGUMENT

1. THE WARRANT PERMITTING A SEARCH OF McKEE'S PHONE WAS NOT SUFFICIENTLY PARTICULAR TO SATISFY THE FOURTH AMENDMENT.

Individuals have a recognized privacy interest in cell phones and their stored content, which includes vast amounts of intimate and

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[2] Rather than file detailed findings and conclusions under CrR 3.6, Judge Rickert merely entered this summary order denying the motion.

personal information. Police may not search a cell phone without a valid warrant or recognized exception to a warrant. State v. Samalia, ___ Wn.2d ___, 375 P.3d 1082, 1085-1087 (2016).

The Fourth Amendment to the United States Constitution provides, "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The particularity requirement has three purposes: "[1] prevention of general searches, [2] prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and [3] prevention of the issuance of warrants on loose, vague, or doubtful bases of fact." State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992).

"By describing the items to be seized with particularity, the warrant limits the discretion of the executing officer to determine what to seize." State v. Besola, 184 Wn.2d 605, 610, 359 P.3d 799 (2015) (citing Perrone, 119 Wn.2d at 546). It also serves to inform the person subject to the search what items may be seized. Id. at 610-611 (citing State v. Riley, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993)).

Use of a general description of items to be searched is not a per se constitutional violation – with one important caveat: "the use of

a generic term or general description is constitutionally acceptable only when a more particular description of the items to be seized is not available at the time the warrant issues." Perrone, 119 Wn.2d at 616 (citing cases). And while a detailed affidavit in support of a warrant may cure the warrant's overbreadth, it only does so "where the affidavit and the search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with 'suitable words of reference'." Riley, 121 Wn.2d at 29 (quoting Bloom v. State, 283 So.2d 134, 136 (Fla.Dist.Ct.App. 1973)).

Moreover, when a search warrant implicates materials that may be protected by the First Amendment, "the degree of particularity demanded is greater" and must "'be accorded the most scrupulous exactitude.'" Perrone, 119 Wn.2d at 547-48 (quoting Stanford v. Texas, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965)). Similarly, "the search of computers or other electronic storage devices gives rise to heightened particularity concerns." State v. Keodara, 191 Wn. App. 305, 314, 364 P.3d 777 (2015) (citing Riley v. California, ___ U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014); United States v. Galpin, 720 F.3d 436 (2nd Cir. 2013)), review denied, 185 Wn.2d 1028, 377 P.3d 718 (2016).

Whether a search warrant contains a sufficiently particularized description is an issue this Court reviews de novo. Perrone, 119 Wn.2d at 549; Keodara, 191 Wn. App. at 312.

The warrant issued in this case by the Skagit County District Court listed two suspected crimes: Sexual Exploitation of a Minor and Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct. CP 228. It authorized a search of McKee's phone for:

> Images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/internet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the above listed crimes. If compatible, the phone content will be copied from the phone using forensic hardware and software that retrieves basic identifier information about the phone and can forensically download images, video, text messages, contacts, audio recordings, and other additional data for the investigator to examine depending on support for that particular phone. It is also possible to conduct a physical dump on some supported phones obtaining all of the memory of the phone for examination. If the cell phone is not supported by any forensic tools, the phone will be examined manually.

CP 229. For several reasons, this warrant provided an unconstitutional level of discretion to searching officers and thus failed to satisfy the particularity requirement.

First, while the affidavit in support of the warrant contains detailed information concerning the suspected crimes and evidence

law enforcement hoped to collect from McKee's phone, CP 226-227, there is no indication this affidavit was attached to the warrant, and the warrant contains no language incorporating the affidavit by reference. See CP 228-229 (merely noting the existence of "an affidavit on oath"). Therefore, the warrant stands on its own when assessing particularity. Riley, 121 Wn.2d at 29.

On its own, the warrant provides precious little guidance for law enforcement. It does not contain any specific information from the affidavit regarding McKee or what he supposedly had done. And while the warrant lists the names of the two suspected crimes and ties the items sought to those "showing evidence of the above listed crimes," this still fails to provide necessary guidance in the absence of specific circumstances of this case. Without additional circumstances from the warrant affidavit, what remains is a broad list of items not inherently associated with the listed crimes, including documents, calendars, notes, tasks, data/internet usage, and "any other electronic data." This is insufficient. See Keodara, 191 Wn. App. at 309-310, 316-317 (despite listing suspected crimes, warrant authorizing collection of broad range of items from cell phone violated particularity requirement where list essentially imposed no limit on information to be searched and permitted "phone to be searched for

items that had no association with any criminal activity and for which there was no probable cause whatsoever."); State v. Higgins, 136 Wn. App. 87, 90-94, 147 P.3d 649 (2006) (broad grant of authority to search for "certain evidence of a crime, to-wit: 'Assault 2nd DV' RCW 9A.36.021" unconstitutional where more specific descriptions of items sought and crime suspected clearly possible based on supporting affidavit); State v. Jones, 174 Wn. App. 1005 (2013)[3] (identifying suspected crime and listing items to be searched in connection with crime still insufficient to satisfy particularity requirement in absence of specific details from supporting affidavit providing contextual information about crime).

Second, one of the crimes listed on the warrant – and therefore supposedly defining the bounds of officers' authority to search the contents of McKee's phone – was not supported by probable cause. Under RCW 9.68A.050:

> (1)(a) A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree when he or she:
>
> (i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells a visual or printed matter that depicts a minor engaged in an act of

[3] Pursuant to GR 14.1(a), McKee cites the unpublished decision in Jones solely as persuasive authority.

sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e);[4] or

(ii) Possesses with intent to develop, duplicate, publish, print, disseminate, exchange, or sell any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e).

"Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). In McKee's case, there is nothing in the affidavit for search warrant indicating or even suggesting that he had developed, duplicated, published, printed, disseminated, exchanged, or sold any of the depictions seen on his phone. Nor is there anything in the affidavit indicating he intended to do so. See CP 225-227.

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[4] RCW 9.68A.011(4) defines "sexually explicit conduct" as "actual or simulated":

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
(b) Penetration of the vagina or rectum by any object;
(c) Masturbation;
(d) Sadomasochistic abuse;
(e) Defecation or urination for the purpose of sexual stimulation of the viewer[.]

While the described images of A.Z. qualified as depictions of a minor engaged in sexually explicit conduct, and there was probable cause to believe he *possessed* these images, this is clearly not the same as *dealing* in the images, the listed crime. By nonetheless authorizing officers to search for and seize evidence of such dealing (including "data/internet usage"), the warrant necessarily and improperly expanded the scope of the search for evidence of those acts. It made the warrant less particular. See Higgins, 136 Wn. App. at 93 (warrant's overly broad description of suspected crime improperly expanded scope of evidence officers could seek); State v. Griffith, 129 Wn. App. 482, 488-489, 120 P.3d 610 (2005) (in case involving nude photos of 16-year-old girl on defendant's computer, warrant authorizing search for defendant's internet use overly broad where affidavit failed to make connection between suspected criminal activity and internet), review denied, 156 Wn.2d 1037, 134 P.3d 1170 (2006).

In a related problem, RCW 9.68A.011(4)(a)-(e) defines "sexually explicit conduct" broadly, including sex with animals and sex involving defecation and urination. And although the warrant affidavit does not allege or suggest that McKee engaged in these particular activities, the warrant itself does not limit the search for evidence of

"sexually explicit conduct" to any particular definitions of the term. Law enforcement was authorized to search anywhere on McKee's cell phone and for anything on the phone related to every definition of the term, whether relevant to this case or not. In this additional way, the warrant improperly expanded the scope of materials subject to search and seizure.

Third, because the warrant potentially subjected to seizure items protected by the First Amendment, such as writings, drawings, photographs, and the like, the degree of particularly had to satisfy the heightened standard of scrupulous exactitude. Stanford, 379 U.S. at 485; Besola, 184 Wn.2d at 611; Perrone, 119 Wn.2d at 547-48. That police sought to search an electronic storage device also triggered a heightened standard. Keodara, 191 Wn. App. at 314. Rather than employing scrupulous exactitude, however, the warrant in McKee's case not only lists protected classes of items, it then ultimately permits "a physical dump . . . obtaining all of the memory of the phone for examination."

Indeed, because the warrant ultimately authorizes collection of the entirety of the phone's memory ("a physical dump") for examination of its content, it contains no limitations whatsoever on what officers could seize and examine. They were free to find and

seize items entitled to First Amendment protection as well as any other materials legally possessed and electronically stored on the phone. This broadest grant of authority in the warrant was not tied to any particular crime or crimes and rendered any more precise language preceding it, including reference to "the above listed crimes," mere surplusage. See Besola, 184 Wn.2d at 614-615 (where identification of suspected crime on warrant "does not modify or limit the list of items that can be seized via the warrant," identified crime does not render warrant sufficiently particular); Riley, 121 Wn.2d at 28 (warrant overbroad and invalid where it authorized "the seizure of broad categories of material and was not limited by reference to any specific criminal activity.").

In the end, law enforcement chose to exercise the warrant's broad authority for a "physical dump" and seizure of "all of the memory of the phone for examination." The "Receipt of Execution of Search Warrant" indicates that, on November 6, 2012, an officer executed a "Cellebrite Dump of Phone."[5] CP 230. This confirms that officers obtained and executed an unconstitutional general warrant.

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[5] As explained at trial by Mount Vernon Detective Jerrad Ely, the prosecution's digital forensics expert, Cellebrite is a combination of hardware and software permitting extraction and examination of the entire stored contents of a phone, including some deleted information. 8RP 181, 184-186.

Because the search warrant was unnecessarily broad and left too much discretion to law enforcement officers in deciding what to search, it violated McKee's Fourth Amendment rights. "'When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.'" State v. Kinzy, 141 Wn.2d 373, 393, 5 P.3d 668 (2000) (quoting State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)), cert. denied, 531 U.S. 1104, 121 S. Ct. 843, 148 L. Ed. 2d 723 (2001). Therefore, all fruits from the search of McKee's phone – which formed the basis for the charges in counts 1 through 4 – should have been suppressed. McKee's convictions on these counts should be reversed and dismissed.

2. McKEE WAS DENIED EFFECTIVE REPRESENTATION WHEN HIS ATTORNEY FAILED TO ARGUE THAT HIS POSSESSION OFFENSES INVOLVED THE "SAME CRIMINAL CONDUCT" FOR SENTENCING.

Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). The standard of review for an ineffective assistance claim involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466

U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To satisfy the first prong, the defendant must show counsel's performance fell below an objective standard of reasonableness. To satisfy the second prong, the defendant must show prejudice, meaning a reasonable probability that but for counsel's performance, the result would have been different. State v. Townsend, 142 Wn.2d 838, 843-44, 847, 15 P.3d 145 (2001).

McKee received ineffective assistance of counsel because his attorney failed to argue his convictions for Possessing Depictions of Minors Engaged in Sexually Explicit Conduct in the First and Second Degrees involved the "same criminal conduct" and should be scored as a single offense. While defense counsel did an admirable job reducing the number of charges McKee faced under double jeopardy principles, double jeopardy determinations do not settle issues of same criminal conduct. See State v. Chenoweth, 185 Wn.2d 218, 222, 370 P.3d 6 (2016) (reaffirming prior decisions that double jeopardy determinations are not dispositive of "same criminal conduct" determinations).

"[W]henever a person is to be 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: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a).

"Same criminal conduct" means crimes that require the same intent, were committed at the same time and place, and involved the same victim. Id. "'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, 347 P.3d 458 (2015). But see Chenoweth, 185 Wn.2d at 223 (comparing statutory intents to preclude same criminal conduct finding).

All four of the possession crimes charged in this case involved the same time, the same place, and the same victim. All occurred "on or about October 28, 2012." CP 58-60, 62. All of the images were located on McKee's phone. 5RP 29-43; 7RP 41-45; 8RP 183, 195-217. And all of the images were of A.Z. 5RP 29-43. Moreover, all of the images were possessed with the same intent,

whether one looks at McKee's objective intent or statutory intent. First or second degree, the images were possessed "for the purpose of sexual stimulation of the viewer." CP 61. And here, that viewer was McKee – the person who shot the videos, took the photos, and apparently is the only person ever to view them prior to the theft of his phone.

Because McKee's offenses in counts 1 through 4 involved the same time, place, victim, and intent, defense counsel performed deficiently when he failed to ask the sentencing court to make a same criminal conduct finding under RCW 9.94A.589(1)(a). Instead, counsel silently accepted the State's calculation that McKee had an offender score of 16 for counts 1 through 5 and a score of 8 for counts 6 and 8. See 10RP 17-19, 25-41. This arguably waived the issue. See In re Pers. Restraint of Shale, 160 Wn.2d 489, 496, 158 P.3d 588 (2007) (issue waived when defendant "failed to ask the court to make a discretionary call of any factual dispute regarding the issue of 'same criminal conduct' and he did not contest the issue at the trial level."); In re Personal Restraint of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002) (agreement that offender score had been properly calculated waives "same criminal conduct" issue for appeal). But the issue can still be raised – as manifest constitutional error

under RAP 2.5 – if counsel's failure denied McKee the effective assistance of counsel. See State v. Saunders, 120 Wn. App. 800, 824-825, 86 P.3d 232 (2004).

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978); Strickland, 466 U.S. at 690-91. Even a cursory review of the charges in counts 1 through 4 and applicable law should have revealed the arguments made above. At sentencing, defense counsel expressed his belief that he could not argue same criminal conduct as to counts 1 through 3 (Possession of Depictions in the First Degree) because the Legislature had made clear, under RCW 9.68A.070(1), that for double jeopardy purposes each depiction should be treated as a separate unit of prosecution. 10RP 39. This was not the proper analysis, however. As indicated above, double jeopardy and same criminal conduct analysis are not the same. See Chenoweth, 185 Wn.2d at 222 (noting distinctions in analysis). Defense counsel's failure to make any same criminal conduct argument for counts 1 through 4 was deficient performance.

Moreover, McKee suffered prejudice. Because McKee's convictions in counts 1 through 4 satisfy the test for same criminal conduct, there is a reasonable probability Judge Rickert would have treated them as a single offense at sentencing had he simply been asked to do so. This would have produced significantly lower standard ranges in a case where the judge was already inclined to impose low-end sentences.

Applying "same criminal conduct" analysis, McKee's offender score is 7 on counts 1 through 5 (instead of 16) and 5 on counts 6 and 8 (instead of 8). See 9.94A.525(17) (sex offenses score as 3 points against other sex offenses; otherwise, all offenses count 1 point under RCW 9.94A.525(7)); Supp. CP ___ (sub no. 194, State's Sentencing Memorandum). As a result, his standard range for counts 1 through 3 is 57-75 months (rather than 77-102 months), his range on count 4 is 43-57 months (rather than 60 months), his range on count 5 is 77-102 (rather than 108-120), and his range on counts 6 and 8 is 68-100 months (rather than 100-120). See RCW 9.94A.517; 9.94A.525.

At sentencing, defense counsel unsuccessfully sought to convince Judge Rickert that exceptional sentences below the standard ranges were appropriate. 10RP 33-41, 60-61.

Unfortunately, in attempting to obtain the shortest possible sentences for McKee, defense counsel overlooked the available and far more viable option under RCW 9.94A.589(1)(a).

McKee was denied his constitutional right to effective representation at sentencing. As a result, his felony sentences are excessive and should be vacated. The matter should be remanded so that Judge Rickert can resentence McKee using the proper offender scores and significantly shorter standard ranges.

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found McKee to be indigent and entitled to appointment of our office's services at public expense. Supp. CP ___ (sub no. 191, Order of Indigency). This was appropriate because McKee owns no real or personal property, has no income, and cannot contribute financially toward the expenses of review. Supp. CP ___ (sub. No 190, Motion For Order of Indigency). Moreover, he currently is serving a 113-month prison sentence. CP 144. Because his prospects for paying appellate costs are extremely poor, he asks that no costs of appeal be authorized under title 14 RAP if he does not substantially prevail in this Court. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Judge Rickert found that McKee would have a limited ability to make payments on his financial obligations and waived all discretionary fines and fees. 10RP 64; CP 146. Similarly, this Court should not assess discretionary appellate costs against McKee in the event he does not substantially prevail on appeal.

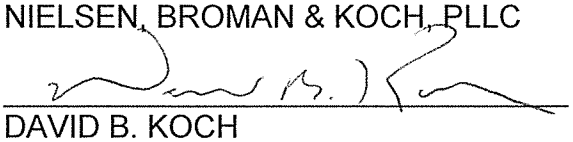
D. CONCLUSION

McKee's convictions on counts 1 through 4 should be vacated based on the faulty warrant. Moreover, defense counsel was ineffective for failing to argue these convictions involved the "same criminal conduct" for sentencing purposes. As a result, McKee's felony sentences are incorrect and excessive.

DATED this 16th day of September, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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