

NO. 64398-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHERWIN GRINGO CORALES,

Appellant.

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DIVISION I
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY P. CANOVA

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Was the appellant's trial attorney ineffective at sentencing in not having asked the trial court to consider the current convictions for Residential Burglary and Theft of a Firearm as "same criminal conduct" under RCW 9.94A.589(1)(a)?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On March 30, 2009, Sherwin Gringo Corales (appellant) was charged by information with one count of Residential Burglary and one count of Unlawful Possession of a Firearm in the Second Degree. CP 1-2. On June 12, 2009, the information was amended to charge one count of Burglary in the First Degree, one count of Unlawful Possession of a Firearm in the Second Degree, and one count of Theft of a Firearm, with an "enhancement" allegation under RCW 9.94A.533(3) that the appellant was armed with a firearm during the commission of Burglary in the First Degree. CP 5-6. The same information was again filed on July 17, 2009. CP 7-8.

At the start of trial on September 9, 2009, in the court of the Honorable Gregory P. Canova, the appellant waived his right to a jury trial and requested that the case be tried directly to the bench. RP 5-7, CP 9. At that time, the information was again amended to

charge Residential Burglary, Unlawful Possession of a Firearm in the Second Degree, and Theft of a Firearm, without any "enhancement" allegations, RP 11-12, CP 10-11.

Trial was conducted on September 9, September 10, and September 14, RP 13-339. On September 14, 2009, the trial court found the appellant guilty as charged of all three counts, RP 339-345, CP 20-28.

On October 9, 2009, the appellant was sentenced to 29 months on Count 1 (Residential Burglary), 13 months on Count 2 (Unlawful Possession of a Firearm in the Second Degree), and 33 months on Count 3 (Theft of a Firearm), RP 355, CP 15. Pursuant to RCW 9.94A.587(1)(c), the sentences for Counts 2 and 3 were run consecutively to each other and concurrently with the sentence for Count 1, for a total confinement of 46 months. Id.

These sentences were all within the standard range as determined by the appellant's felony offender score of "5" on Count 1 and "4" on Counts 2 and 3, CP 13. The trial court accepted these felony offender scores presented by the State, RP 347, with the agreement of the appellant's trial counsel, RP 352, CP 38-40. They were based on the appellant's two prior felony convictions (two points), his having been on community placement at the time of the

crimes (one point), and the current offenses (two points for Count One, one point for Counts Two and Three), CP 12-13, 18, RP 347.

2. SUBSTANTIVE FACTS

On the evening of March 22, 2009, Seattle Police Officer Adley Shepherd responded with his partner Jake Brisky to 3803 South Juneau, the address initially associated with an in-progress burglary. RP16-17. Upon exiting their patrol car and walking toward the house, they saw a young Asian male, later identified as Melchor Lucas, coming out from the back of the house and then sprinting back behind the house upon seeing the officers. RP 17-18.

At that point, the officers were alerted that the correct victim address was 5814 Renton Avenue South, RP 19, owned by Roger Sprague, RP 231. His neighbor had seen someone in his house and called him while he was in his recording studio. RP 232-233. He verified that it was not a friend of his, and his neighbor then called the police. RP 233. Sprague drove back home. Id.

Relocating to the victim residence, Officer Shepherd saw the door forced open, the glass window in the door shattered. RP 20. Officers David Ellithorpe, Christopher Gregorio, and Ryan Huteson also responded to that address. RP 47-48, 178-179, 266-268. The officers searched the house and found that it was ransacked. RP 20,

48-49, 180-181. Officer Gregorio noted that the bedroom contained shotgun shell casings, leading him to believe a gun could be kept there. RP 181. Lifting up the mattress, he saw the imprint of what appeared to be a rifle or shotgun. RP 181-182. He broadcast this information over the radio. RP 182.

Meanwhile, the Anti-Crime Team including Officer Clayton Agate dispatched itself to the crime scene. RP 195-196. Upon arriving at the victim home, they were pointed across the street to 3803 South Juneau where the suspect had been seen running in the back. RP 196-198. Officer Agate went to the back of that house to look for the suspect and to take a position of containment. RP 198.

While in that backyard, Officer Agate saw a covered structure open at both ends so he could see through the whole structure. RP 198-199. Inside, he saw a flat screen television which he suspected had been taken in the burglary. RP 199-200. There was also a small table with four open cans of beer, still cold, partially full. RP 200-203. And there was a guitar case, a leather jacket, and a bag of DVDs, all of which Officer Agate suspected were taken in the burglary. RP 201.

Officer Agate then heard that a shotgun may have been taken in the burglary. RP 205. He was looking behind a piece of drywall

leaning against the inner wall of the shed when he saw a shotgun on the ground and a latex glove. Id.

Upon hearing that some of the stolen property was located by ACT team officers behind 3803 South Juneau Street, Officers Shepherd, Ellithorpe, and Huteson went back there. RP 21, 50-51, 268-269. The homeowners at that residence allowed the officers to enter. RP 21. The appellant, Melchor Lucas, and two other individuals were located inside and were brought out. RP 21-22, 51-52, 270-273. Officer Ellithorpe advised them of their rights, which the appellant said he understood. RP 52-53.

Officer Agate heard that Sprague was particularly concerned about some missing computer equipment. RP 208. Recognizing Melchor Lucas from prior contacts, Officer Agate asked Lucas for help finding this equipment. Id. Lucas directed Officer Agate to a dog kennel on the side of the 3803 South Juneau and said the computer was in the kennel. Id. Officer Agate looked in the kennel and retrieved some computer equipment, some cords, and some power tools. RP 209.

The recovered items were all returned to Sprague. RP 212. He was able to identify it all as having been taken from inside his home in the burglary that night. RP 241. This included the television,

Id.; the bag with DVDs, Id.; guitar, leather jackets, Chuck Taylors, and snowboarding gear, RP 242; the shotgun, Id., power conditioner, nail gun, grinder, Mac Pro work station, power cable, air compressor, circular saw, computer screen, power drill, and keyboard, RP 242-243. He estimated that the value of the items taken was at least \$16,000. RP 238-239. Some items were not recovered, and some were recovered damaged. RP 244-245.

Later, after again acknowledging and waiving his rights, the appellant gave a written statement to Officer Shepherd, RP 26-29, in which he admitted to participating in the burglary by breaking the glass window on the door, entering the home, and taking items from the home. CP 24-25. While he said that "Jr." was the one who found the shotgun, he admitted that he had taken the shotgun from the home to the shed behind his cousin's home. CP 25.

At the time of the incident, the appellant had felony convictions for Forgery and Violation of the Uniform Controlled Substances Act-- Possession of Methamphetamine. CP 26.

C. **ARGUMENT**

THE APPELLANT HAD EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THERE WAS A STRATEGIC REASON NOT TO ASK FOR A FINDING THAT THE RESIDENTIAL BURGLARY AND THEFT OF A FIREARM WERE "SAME CRIMINAL CONDUCT" UNDER RCW

9.94A.589(1)(A) AND BECAUSE THE RESULT OF THE SENTENCING WOULD NOT HAVE BEEN DIFFERENT EVEN IF COUNSEL HAD REQUESTED SUCH A FINDING.

A challenge to effective assistance of counsel is reviewed *de novo*. State v. Rainey, 107 Wn. App.129, 135, 28 P.3d 10 (2001), review denied 145 Wn.2d 1028, 42 P.3d 974 (2002). To sustain a claim of ineffective assistance of counsel, a defendant must prove *both* that counsel's representation was "'deficient'" *and* that the "'deficient'" representation "'prejudiced the defense.'" State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987), citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984), rehearing denied 467 U.S. 1267, 104 S. Ct. 3562 (1984). However, the reviewing court can consider the prongs in either order and need not reach the issue of deficiency if the defendant was not prejudiced. Strickland, 466 U.S. at 697.

To satisfy the first deficiency prong, an appellant must show that "'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" Thomas, 109 Wn.2d at 225, quoting Strickland, 466 U.S. at 687. "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Id. at 226. The appellant must show that "there

were no 'legitimate strategic or tactical reasons' behind defense counsel's decision." Rainey, 107 Wn. App. at 135-136, quoting State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995), reconsideration denied (1995).

To satisfy the second prong, an appellant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694.

Appellate courts will not consider "evidence or facts" not in the trial record. McFarland, 127 Wn.2d at 335. The burden is on an appellant to show both prongs of the Strickland test based on the record below. Id. at 335-338.

The appellant maintains that his trial counsel was ineffective by failing to ask the court to find his convictions for Residential Burglary and Theft of a Firearm constitute "same criminal conduct". Brief of Appellant at 7-9. "'Same criminal conduct' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

When determining "same criminal conduct" with regard to burglary, however, the anti-merger statute contained in RCW 9A.52.050 "gives the sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct," State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). The trial court also has discretion to "refuse to apply the burglary antimerger statute based on the facts of the case before it," State v. Davis, 90 Wn. App. 776, 784, 954 P.2d 325 (1998).

The appellant's argument fails both prongs of the test for ineffective assistance of counsel. It fails the deficiency prong in that trial counsel had a legitimate strategic reason in not requesting the court find same course of conduct. He was trying to persuade the court to give the appellant a Drug Offender Sentencing Alternative, RP 352-353. A trial court is more likely to grant such an option if it believes the offender sincerely takes responsibility for his crimes and wishes to address substance abuse issues at their root. Such a posture would be negated should the offender also seek to persuade the court to use its discretion and essentially not punish for one of the crimes committed.

The appellant's argument also fails the prejudice prong of the test for ineffective assistance of counsel. It is his burden to establish a "reasonable probability" based on the record below that the outcome would have been different had trial counsel asked the court to find that the Residential Burglary and Theft of a Firearm constituted the same course of conduct. Strickland, 466 U.S. at 694; McFarland, 127 Wn.2d at 335.

There is simply nothing in the record below indicating any hint that the trial court likely would have exercised its discretion in this manner. The trial court was firm when giving its verdict, finding that the appellant and the others

were aware that it was a firearm that was being stolen and actively and fully participated in the theft of the firearm as well as equally participating in the theft of all of the other items that were taken in the burglary

RP 344. In imposing sentence, the court noted that though the appellant "was not the one who originally thought of the idea, *he was, according to the evidence, actively and affirmatively involved in the crimes,*" RP 355 (emphasis added). These comments make it clear the trial court was not inclined to be particularly lenient.

An interesting counter-example is presented in State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002), where this Court did

uphold a claim for ineffective assistance of counsel. In that case, the trial court both indicated a desire to impose a sentence below the standard range and an incorrect understanding that it lacked authority to do so, Id. at 98-101. Under these circumstances, this court held that trial counsel was ineffective for failing to advise the trial court of its proper authority. Id. at 101-102.

The current case is distinguishable from McGill for two reasons. First of all, unlike in McGill, where “the trial court’s comments indicate[d] it would have considered an exceptional sentence had it known it could,” Id. at 100, there is nothing in the record below indicating the trial court in the current case had any inclination to use its discretion to mitigate the appellant’s sentence. In fact, unlike in McGill, where the trial court imposed a low end sentence, Id. at 99, the trial court in the current case followed the State’s recommendation in imposing a sentence three months *higher* than the minimum, RP 348, 355, CP 13, 15.

Secondly, unlike in McGill, there is nothing in the record below indicating the trial court lacked knowledge of its ability to use its discretion to mitigate the appellant’s sentence.

For these reasons, even if trial counsel’s performance were to be found deficient, the appellant cannot show he was prejudiced

by any alleged deficiency. His claim of ineffective assistance counsel therefore fails.

D. **CONCLUSION**

For the above reasons, remand for re-sentencing is not required.

DATED this 15th day of June, 2010.

RESPECTFULLY submitted,

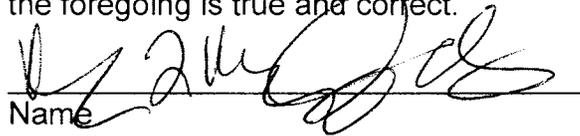
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kari Dady and David B. Koch, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. SHERWIN GRINGO CORALES, Cause No. 64398-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name

6/15/10
Date

Done in Seattle, Washington