

NO. 35752-6-II
Cowlitz Co. Cause NO. 05-1-01467-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Appellant,

v.

DAPHNE LYNN KRAABELL,

Respondent.

BRIEF OF RESPONDENT

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington.

II. SHORT RESPONSE TO ASSIGNMENT OF ERROR

(1) The trial court did not error when it granted a mistrial in this case. The parties agreed to the mistrial.

(2) The appellant was not denied effective assistance of counsel for failing to request an accomplice testimony jury instruction.

(3) The appellant was not denied effective assistance of counsel at sentencing.

III. COUNTERSTATEMENT OF THE CASE

The State completely rejects the appellant’s statement of the case since the statement contains argument and fails to provide a “fair statement of the facts and procedure relevant to the issues presented for review . . .” RAP 10.3(a)(5).

A. First Trial:

The first trial started on November 20, 2006. The mistrial in the first trial occurred on the second day of trial, November 21, 2006. Trial defense counsel waived any 3.5 issue at the start of the trial. 1RP at 22. The trial court characterized the first day as a “merry-go-round” and “disjointed”. 1RP at 143, 139. Much of the “disjointed” nature of the first day was due to unexpected issues concerning new packaging procedures

by the Washington State Patrol Crime lab. 1RP at 113, 155. The police were unable to authenticate the drugs due to the repackaging. 1RP at 111-12.

On the second day of trial defense counsel raised several issues. First, trial defense counsel moved to suppress testimony concerning a dog sniff-test of cash located in pants attributed to the defendant. 1RP at 150. The court asked for case law concerning the issue. 1RP at 153. The State presented the testimony of Connie Fauver who worked for the Cowlitz County jail. 1RP at 157. Trial defense counsel objected on the grounds of voluntariness to possible statements made by the defendant to Ms. Fauver. 1RP at 160-61. The State noted that the defense waived any 3.5 issue prior to trial. 1RP at 164. The Court then started the 3.5 hearing, but there was no resolution to that hearing. 1RP at 170-77.

Later that morning both the State and the defense discussed the possibilities of a mistrial. Trial defense counsel noted that the defense was not concerned about the repackaging of drugs, or interviewing State's witnesses about the box, but was mainly concerned about the jury rushing to make a decision. 1RP at 178. The State noted that the objection to the dog handler should have been addressed prior to trial, and that the State could not have anticipated that the drugs had been repackaged in a way that the police could not say they were in substantially the same condition

as when it was sent to the crime lab. 1RP at 180. The State also raised the jury deliberating the Wednesday of Thanksgiving week, and how it is not appropriate for the jury to hold it against somebody. 1RP at 180.

The defense also raised the issue that the defendant “has indicated that there may be additional witnesses who could rebut some of the evidence that had been presented” and confirmed the defense would “absolutely” have additional witnesses, and “so that is another incentive for my client to agree to a mistrial.” 1 RP at 180.

“THE COURT: So what you’re – and, Ms. Ellavsky, you’re indicating, or at least you indicated to me in chambers, that at the time that you were told this was going you didn’t feel like you were ready to go at that point.

[Defense Counsel]: That’s correct.

THE COURT: And –

[Defense Counsel]: We had made best efforts to get ready, but that is certainly true.

THE COURT: And that now you have additional witnesses.

[Defense Counsel]: Uh-huh.

THE COURT: All right. And you’ve discussed this with Ms. Kraabell; is that correct?

[Defense Counsel]: Yes, I did.

THE COURT: And you’re asking for a mistrial and waiving any objections under jeopardy?

[Defense counsel]: Yes.

THE COURT: Is that correct, Ms. Kraabell? Have you discussed this with your attorney?

MS. KRAABELL: Yes.

THE COURT: Is that right?

MS. KRAABELL: Yes.

THE COURT: All right. And you're agreeing with this? You're agreeing with a mistrial?

(ATTORNEY/CLIENT DISCUSSION OFF THE RECORD)

Ms. KRAABELL: Yes.”

1RP at 182-83.

The trial court granted the mistrial. 1RP at 183.

B. Second Trial

1. Factual background

The second trial commenced on December 11, 2006. 2RP at 4. Detective Chris Trevino of the Longview Police Street Crimes Unit testified about working with an informant, Lenore Smith, to conduct an investigation of Daphne Kraabell. 2RP at 45. Trevino contracted with Ms. Smith to conduct five controlled buys of drugs. 2RP at 49.

Detective Trevino testified about working with Ms. Smith to conduct sales on November 1, 2005, November 3, 2005, and November 6, 2005. 2RP at 53-57, 57-63, 64-68. Each time Ms. Smith called phone

number 270-4718, was searched, given money to purchase drugs, driven to 1537 Nichols Blvd in Longview. Ms. Smith was watched entering and leaving the address, and returned with crystalline substance. 2RP at 73-68. On November 1, 2005, Detective Trevino found 4 pills on Ms. Smith, and those pills were taken away from Ms. Smith. 2RP at 53.

Detective Trevino also testified that on November 18, 2005, he served a search warrant on 1537 Nichols Blvd. 2RP at 69-70. Detective Trevino testified that he returned to 1537 Nichols Blvd, and saw Sgt. Rehaume arrest Kraabell, and saw Rehaume show Detective Trevino a 35mm film canister. 2RP at 73. Detective Trevino identified Kraabell in the courtroom. 2RP at 77. Detective Trevino also testified that usually there are just four required buys, and that informants are required to be clean. 2RP at 79-82. Detective Trevino testified that he had no concern that Ms. Smith was under the influence when the drugs were found, and if he was concerned, he would have told the informant that he would not use you today. 2RP at 84-87.

Sergeant Steve Rehaume of the Longview Police testified that he was working with Detective Trevino, and on November 1, 2005, went to 1537 Nichols. Sgt. Rehaume saw Det. Trevino search Ms. Smith, and saw Trevino find 4 pills on Ms. Smith. 2RP at 95-96. Sgt. Rehaume saw Ms. Smith walk to the residence, then return with crystal substance which Ms.

Smith handed to Det. Trevino. Sgt. Rehaume logged in the evidence which weighed 1.26 grams (gross weight), and marked the material. 2RP at 100-03. Sgt. Rehaume testified that he showed Ms. Smith a photo with identification blocked, and Ms. Smith identified both Ms. Volenski and Ms. Kraabell. 2RP at 106-07. Sgt. Rehaume also testified about similar transactions which happened on November 3, 2005 and November 6, 2005. 2RP at 109-19. Sgt. Rehaume was also involved in the execution of the search warrant on November 18, 2005, at which he took multiple photos. 2RP at 123-29.

Sgt. Rehaume also testified about arresting Ms. Kraabell on November 23, 2005 at 1537 Nichols Blvd. 3RP at 133-35. When arrested, Ms. Kraabell had a 35mm film canister on her which she confirmed contained methamphetamine, but that it wasn't all for her. 3RP at 137.

Officer Connie Fauver testified that she worked for the Cowlitz County jail, that she recognized Ms. Kraabell, that she recalled asking Kraabell if she had any drugs, and that Ms. Kraabell removed from her pants a small clear baggy. 3RP at 147.

Lenore Smith testified that her drug of choice was 'heroin', that it was a problem and constant struggle since she was 14 years old. 3RP at 182. Ms. Smith testified that she was facing second degree burglary

charges for shoplifting from a place where she was trespassed, and contracted with the Street Crimes Unit for 4 or 5 buys. 3RP at 184. She acknowledged her prior convictions for possessing stolen property and forgery. 3RP at 185-86.

Ms. Smith gave detectives the name of Daphne, and identified Ms. Kraabell in court as Daphne. 3RP at 187. Ms. Smith testified that she knew both Ms. Volenski and Ms. Kraabell, and recognized their voices. 3RP at 188. Ms. Smith admitted to knowing the rules of her contract, that she did have methadone with her that first buy, but that she was not under the influence and was clean during her contract. 3RP at 189-90.

Ms. Smith testified that on November 1, 2005, she called phone 270-4718, and that Daphne answered. Ms. Smith asked for ½ T, and Ms. Kraabell said there was none there, but somebody in the house has some. 3RP at 193-94. Ms. Smith testified that she went to the house, and that “Daphne” recognized Ms. Smith’s voice. Ms. Smith went to the downstairs bedroom, and spoke with Ms. Volenski about the separation. Ms. Smith handed Ms. Volenski money, and Ms. Smith took the substance. 3RP at 197-200.

Ms. Smith testified about similar transactions that happened on November 3, 2005 and November 6, 2005, each started with a phone call to 270-4718, each time answered by Ms. Kraabell. 3RP at 202-210. For

the third call Ms. Smith testified that Ms. Kraabell told her to ‘call Sherrie’. 3RP at 210.

Ms. Volenski testified that Ms. Kraabell was her girlfriend, and they lived at 1537 Nichols in Longview. Ms. Volenski identified the defendant in court. 3RP at 227-28. Ms. Volenski admitted to a drug history, that she had been using methamphetamine for 7 years, and that her use of drugs affected her choices. 3RP at 228-29. Ms. Volenski testified that the phone number 270-4718 belonged to Ms. Kraabell. 3RP at 232.

Ms. Volenski testified that she had an agreement with the Street Crimes Unit that if she testified she would do 90 days in county jail, pleading to three felonies. 3RP at 234.

Ms. Volenski testified that she did conspire with Ms. Kraabell. 3RP at 234. Ms. Volenski remembered meeting with Ms. Smith on November 1, 2005, that Ms. Kraabell yelled downstairs that “Lenore’s on her way over” and that Ms. Kraabell threw a bag downstairs that was a ‘teener of dope’ and said “give it to her”. 3RP at 235. Ms. Smith arrived, and Ms. Volenski heard Ms. Kraabell stop Ms. Smith from going up stairs. Ms. Smith threw the money on the bed, and Ms. Smith leaves after asking about the living arrangements. 3RP at 237-38.

Ms. Volenski testified that she could not remember specifically about transactions that happened on November 3, 2005 or November 6,

2005. 3RP at 238-40. She also testified that she did not purchase the drugs that were sold, but they came from Ms. Kraabell's supplier. 3RP at 241.

Bruce Siggins from the Washington State Patrol crime lab testified that the various exhibits contained methamphetamine. 3RP at 275, 277, 278, 280, 282.

Ms. Kraabell testified about her romantic relationship with Ms. Volenski, and that Ms. Volenski had a drug problem. She testified that they lived together at 1537 Nichols. 3RP at 301. She further testified that she knew Ms. Smith, and that Ms. Smith called on November 1, 2005, but that she never talked drugs with her. 3RP at 305. She testified that she told Ms. Smith that Ms. Volenski was downstairs when Ms. Smith was coming upstairs. 3RP at 306. Ms. Kraabell testified about having drugs on her when she was arrested on November 18, 2005, that she had \$900 on her because she had gotten paid. 3RP at 309. She again testified that when she was arrested again on November 23, 2005, she had \$3,000 on her to bail out Ms. Volenski, and that Ms. Volenski came home that day wanting to get high, and that she took drugs away from Ms. Volenski. 3RP at 311. Ms. Kraabell testified that she did have the phone 270-4718, and that she put in the video monitor system. 3RP at 320, 328.

2. Procedural Background

On December 13, 2006, a Cowlitz County jury found the appellant guilty of three counts of delivering methamphetamine, one count of possessing methamphetamine, and one count of possessing methamphetamine with intent to deliver. CP at 75. On December 26, 2006, the Cowlitz County Superior Court, the Honorable Judge James Stonier, sentenced the appellant to a standard range sentence of 48 months on the three delivering counts, 18 months on the possessing methamphetamine count, and 48 months on the possessing methamphetamine with intent to deliver. CP at 77, 80.¹

IV. ARGUMENT

A. THERE WAS NO DOUBLE JEOPARDY VIOLATION

The appellant claims that the trial court lacked good cause to declare a mistrial, and as such, there was a violation of double jeopardy. The appellant claims that Ms. Kraabell “should not be deemed to have freely consented to the mistrial.” Br. of App. at 16.

¹ It appears that the J&S indicates that court imposed 48 months on count IV the simple VUCSA possession charge, and 18 months on the Count V the VUCSA intent to deliver charge. This appears to be a clerical error, and that actually the court intended to impose 48 months on count V, the VUCSA intent to deliver charge, and 18 months on count IV, the simple VUCSA charge.

The appellant cites to *State v. Juarez*, 115 Wn. App. 881, 887 (Div. 3, 2003), to support that a defendant's consent to a mistrial must be freely given. Br. of App. at 14.

(1) Discussion

(a) Standard of Review

The standard of review for determining if the defendant consented to a mistrial for double jeopardy is whether the defendant retained primary control over the course to be followed. *State v. Jones*, 33 Wn.App. 865, 869-70 (1983), citing *United States v. Dinitz*, 424 U.S. 600, 609, 96 S.Ct. 1075, 1080 (1976). There is no requirement that the consent to mistrial be 'knowing, intelligent and voluntary'. *United States v. Dinitz*, 424 U.S. at 609 note 11.

Under the test established for determining whether the defendant consented to a mistrial for the purpose of the Double Jeopardy Clause, the defendants consented here. In ascertaining whether defendants consented to a mistrial, [t]he important consideration, for purposes of the Double*870 Jeopardy Clause, is that the defendant retain primary control over the course to be followed ... [*United States v. Dinitz*, [424 U.S. 600] at 609, 96 S.Ct. [1075] at 1080 [(1976)]. (Footnote omitted.) In this case, both defendants expressly agreed to the mistrial before the trial court granted it. They retained the power to continue or stop the trial. They consented to the mistrial.

State v. Jones, 33 Wn.App. 865, 869-70, 658 P.2d 1262 (1983). The omitted footnote from *United States v. Dinitz*, reads:

The respondent characterizes a defendant's mistrial motion as a waiver of "his right not to be placed twice in jeopardy" and argues that to be valid the waiver must meet the knowing, intelligent, and voluntary standard set forth in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1692, 82 L.Ed. 1461. This approach erroneously treats the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel. It fails to recognize that the protection against the burden of multiple prosecutions underlying the constitutional prohibition against double jeopardy may be served by a mistrial declaration and the concomitant relinquishment of the opportunity to obtain a verdict from the first jury. This Court has implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right. See *Breed v. Jones*, 421 U.S. 519, 534, 95 S.Ct. 1779, 1788, 44 L.Ed.2d 346, 358; *United States v. Wilson*, 420 U.S. 332, 343-344, n. 11, 95 S.Ct. 1013, 1021-1023, 43 L.Ed.2d 232, 242-243; *United States v. Jorn*, 400 U.S. 470, 484-485, n. 11, 91 S.Ct. 547, 556-557, 27 L.Ed.2d 543, 556-557 (plurality opinion); *United States v. Tateo*, 377 U.S., at 466, 84 S.Ct., at 1589, 12 L.Ed.2d, at 450.

U. S. v. Dinitz, 424 U.S. Note 11 at 609.

**(b) The Defendant Freely Consented to the
Mistrial**

The defendant here freely consented to the mistrial.² 1RP at 182-83. The trial defense attorney indicated that there were additional witnesses, and that trial defense attorney discussed the matter with Ms. Kraabell. 1RP at 182. The following colloquy occurred:

“THE COURT: And you’re asking for a mistrial and waiving any objections under jeopardy?”

[Defense counsel]: Yes.

THE COURT: Is that correct, Ms. Kraabell? Have you discussed this with your attorney?

MS. KRAABELL: Yes.

THE COURT: Is that right?

² The appellant claims that Ms. Kraabell did not freely consent to this mistrial. “Her consent was the product of incompetent, if not fraudulent advice from her attorney, as well as unusual pressure from the court to have both attorneys state they were not prepared for trial.” Br. of App. at 17.

The appellant’s attorney accusation of fraud directed at trial defense counsel appears to violate the Rules of Professional Conduct.

“A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official actions, it is also a lawyer’s duty to uphold legal process.”

RPC, Preamble at para. 5.

While court rules requires the appellant’s attorney to provide zealous advocacy, RPC 8.4(k) provides that an attorney is not to violate the oath of attorney, which includes, in part, that an attorney is to “abstain from all offensive personalities”. APR 5(e)(7), RPC 8.4(k).

Even in a case involving allegations of ineffective assistance of counsel, an allegation that an attorney is engaged in fraud is possibly defamatory and libelous, is offensive, unprofessional, and is beyond the scope of proper representation.

MS. KRAABELL: Yes.

THE COURT: All right. And you're agreeing with this? You're agreeing with a mistrial?

(ATTORNEY/CLIENT DISCUSSION OFF THE RECORD)

Ms. KRAABELL: Yes.”

1RP at 182-83.

The defendant here retained primary control over the course to be followed in the trial. *Jones*, 33 Wn.App. at 869-70, *United States v. Dinitz*, 424 U.S. at 609, note 11. This colloquy indicates that the defendant indeed was free to consent or not consent to the mistrial. There is nothing in the colloquy to indicate that the defendant was not in primary control over the course to be followed, despite the suppositions of the appellant.³

The appellant provides no authority to support that the appellant here did not consent to the mistrial, or that the appellant was not in primary control of the course of her trial. An appellate court need not

³ The appellant fails to explore the second standard of review in a consented mistrial case, which is whether a second trial is barred because the State's conduct was motivated "in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects for an acquittal." *Jones*, 33 Wn.App. at 870, citing *United States v. Dinitz*, 424 U.S. at 611. The appellant has not assigned error or argued this on appeal. Even should the court consider this, a review of the record here will not indicate any bad faith on the part of the state, or any indication that the State goaded the appellant here into requesting a mistrial.

consider an argument that is not supported by authority. *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991) (citation omitted), *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 545, 869 P.2d 1045 (1994).

B. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

(1) Standard of Review

To establish ineffective assistance of counsel, a defendant must demonstrate both that his or her counsel's representation was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The reviewing court indulges in a strong presumption that counsel's representation falls within the wide range of proper professional assistance. *State v. Lord*, 117 Wash.2d 829, 883, 822 P.2d 177 (1991). To overcome this presumption, the defendant must show that counsel had no legitimate strategic or tactical rationale for his or her conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To establish prejudice, the defendant must show that but for counsel's deficient performance, the result would have been different. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). See also *State v. Gallagher*, 112 Wn.App. 601, 611-12, 51 P.3d 100 (Div. 2, 2002)

(2) Accomplice Testimony Jury Instruction Not Required – Failure to Request Not Ineffective Assistance of Counsel

The appellant claims she was denied effective assistance of counsel since trial defense counsel failed to request an accomplice testimony jury instruction. Br. of App. at 17-21, citing primarily *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984). The appellant claims that such an instruction is mandatory when the State relies solely on the uncorroborated testimony of an accomplice. Br. of App. at 18, citing *State v. Sherwood*, 71 Wn.App. 481, 485, 860 P.2d 407 (1993).

In this case the State did not rely ‘solely’ on the uncorroborated testimony of an accomplice. The appellant does note that Ms. Smith ‘was not charged as an accomplice and was in fact working as a state agent’, but the appellant fails to indicate how Ms. Smith was actually an accomplice in this case. Further, the appellant apparently concedes that the State did not rely solely on the uncorroborated testimony of any accomplice when she states that “Although use of this instruction was not mandatory . . .” Br. of App. at 21. Use of the accomplice testimony jury instruction here indeed was not mandatory because there was extensive testimony from Ms. Smith that she purchased drugs from Ms. Volenski, and that the defendant arranged for the sale of drugs working with Ms. Volenski.

Ms. Smith testified that on November 1, 2005, that Ms. Smith called the defendant and asked for “half T” of methamphetamine, that the defendant said she didn’t have anything there, but that “there’s somebody in the house that has some”, and that the defendant said it was okay for Ms. Smith to come by in five to ten minutes. 3RP at 192-95. Ms. Smith then testifies that she proceeded to the residence, that she was initially told to proceed upstairs, then the defendant tells her to go to Ms. Volenski’s room downstairs where Ms. Volenski sells crystalline substance to Ms. Smith. 3RP at 197-99.

Ms. Smith testified about similar purchases on November 3, 2005, where again the defendant, appellant herein, answered the phone, and Ms. Smith asks for “a 16th of crystal” or a “teener”. 3RP at 202. Ms. Smith testified that she recalled asking the defendant about the prices, and that the defendant responded with prices. 3 RP at 203. Ms. Smith had “no doubt” that the person answering was the defendant. 3 RP at 204. Ms. Smith proceeds to the residence, and speaks with the defendant on the intercom, even sharing a joke about food. 3RP at 206. Ms. Volenski then sells drugs to Ms. Smith. 3 RP at 207.

Ms. Smith testified that she called the same number on November 6, 2005, and the phone was answered by the defendant, and Ms. Smith asked the defendant for a “half-T”. 3RP at 210. Ms. Smith testified that

the defendant said she was at work, but that Ms. Smith should call Ms. Volenski, and she would take care of Ms. Smith. 3RP at 210. Ms. Smith then conducts a drug deal with Ms. Volenski. 3RP at 213-14.

All this indicates that Ms. Smith was purchasing the drugs from Ms. Volenski and the defendant. A person who purchases drugs does not deliver drugs. *State v. Morris*, 77 Wn.App. 948, 950, 896 P.2d 91 (Div. 2, 1995). Since a person who purchases drugs does not deliver drugs, then the person who purchases drugs cannot be an accomplice to the drug sale. Therefore, Ms. Smith was not an accomplice to the sale of drugs by Ms. Volenski and the appellant. Since the State did not rely solely on the uncorroborated testimony of an accomplice (in this case Ms. Volenski), then the accomplice testimony jury instruction is not mandated here. See *State v. Sherwood*, 71 Wn.App. at 485.

Indeed, in *Sherwood* the facts are similar to those present here, and the court concluded that the police informant conducting the purchase corroborated the testimony of the accomplice, and thus it was not mandatory that the court give an accomplice jury instruction. *Sherwood*, 71 Wn.App. at 485. Similar to this case, the defendant raised the challenge as part of an ineffective assistance of counsel claim, which the court rejected. *Sherwood*, 71 Wn.App. at 483-86.

(3) Remedy

The appellant claims that the remedy is reversal and dismissal with prejudice, but fails to cite to any authority. The remedy should there be a reversible error on jury instructions is reversal, not reversal and dismissal with prejudice.

(4) Failure to Request Exceptional Downward Sentence Is Not Ineffective Assistance of Counsel

The appellant claims that trial defense counsel should have requested a downward departure of Ms. Kraabell's sentence, and cites to *State v. Sanchez*, 69 Wn.App. 255, 848 P.2d 208 (Div. 2, 1993). Br. of App. at 22-23.

In *Sanchez* the trial court imposed an exceptional sentence downward. *Sanchez*, 69 Wn.App. at 257. On appeal the court found that the trial court was permitted to consider the multiple use policy in the Sentencing Reform Act to impose an exceptional sentence downward.

Because the difference between the first buy and all three buys was trivial or trifling, the sentencing judge was permitted to use RCW 9.94A.390(1)(g) in order to reconcile (1) the absence of additional effects from the second and third buys with (2) the multiple use policy of RCW 9.94A.400(1)(a). Thus, the sentencing judge did not err when he imposed a sentence greater than the standard range for one delivery, but less than the standard range for three deliveries.

Sanchez, 69 Wn.App. at 262.

The appellant fails to cite to any authority that supports the claim that trial defense counsel is ineffective if counsel fails to request an exceptional sentence downward. In *Sanchez* the Court of Appeals upheld the trial court's imposition of an exceptional sentence downward under the provisions now codified under RCW 9.94A.535(1)(g). That provision is not mandatory on the court ("the 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)).

The appellant here received a standard range sentence, and is attempting to 'back door' an appeal on the standard range sentence by arguing ineffective assistance of counsel for failing to ask for an exceptional downward sentence. The appellant cites to no case to support that trial counsel is ineffective for failing to ask for an exceptional downward sentence, or for failing to ask for an exceptional downward sentence where there are multiple offenses and thus the discretionary multiple offense policy of RCW 9.94A.535 (1)(g) may be invoked.

The *Sanchez* principle does not apply where the court imposes a standard range sentence.

Although the *Sanchez* principle permitted an exceptional sentence downward, it was not controlling since the court in its discretion could, and did, impose a standard range sentence.

State v. Hernandez-Hernandez, 104 Wn.App. 263, 266, 15 P.3d 719 (Div. 3, 2001)

The appellant had a prior felony criminal conviction for possession of a controlled substance with intent to deliver. CP at 76. The appellant received a sentence of apparently 20 months in that prior case. (4RP at 422 indicates 21 months, but the range for possession with intent to deliver first offense is 12+ to 20 months. RCW 9.94A.517.)

Trial defense counsel argued for a low end sentence of 20 months. 4RP at 419. Trial counsel argued that the appellant's accomplice received a sentence of 90 days, and that it would be unconscionable for the appellant to receive 60 months. 4RP at 420. Trial defense counsel also argued that the court should impose a DOSA sentence. 4RP 420-22.

The defendant was facing a standard range sentence of 20+ months to 60 months. RCW 9.94A.517. The trial court imposed a standard range sentence of 48 months on the three VUCSA delivery counts, 48 months on the VUCSA intent to deliver count, and 18 months on the VUCSA possession charge, the time on all charges to run concurrently. CP at 80. The total time imposed in confinement was 48 months.

The appellant here is required to show prejudice, that is 'but for' counsel's deficient performance the result would have been different. *McNeal*, 145 Wn.2d at 362. The appellant claims that since this was a

post-trial sentencing “there is never a justification for a defense attorney to simply accept the State’s recommendation and fail to advocate for her client.” Br. of App. at 23. However, this argument fails to accurately or even remotely reflect the actual record in this case.

The record will show that trial defense counsel argued for a bottom range sentence of 20 months. 4RP at 419. Trial defense counsel did not “simply accept the State’s recommendation and fail to advocate for her client” but rather noted the discrepancy between appellant’s bottom range (20 months) and the 90 days for the co-defendant Ms. Volenski. 4RP at 420. Trial defense counsel also advocated for a DOSA sentence, noting the appellant’s drug problem. 4RP at 420-21.

The trial court here had authority to impose an exceptional sentence downward, with or without trial defense counsel’s request, and did not do so. Trial defense counsel here argued mitigating factors to support a low-end standard range sentence. 4RP at 419-21.

Assuming counsel was deficient, Mr. Hernandez-Hernandez cannot show the requisite prejudice. His counsel argued the mitigating factors in seeking a low-end standard range sentence. The court had the discretion to impose an exceptional sentence downward with or without counsel’s request; it did not. The prejudice, if any, was slight. Under the circumstances, we are not convinced the outcome would have been different had defense counsel argued *Sanchez* to support an exceptional sentence. Mr. Hernandez-Hernandez did not receive ineffective assistance.

State v. Hernandez-Hernandez, 104 Wn.App. 263, 266, 15 P.3d 719 (Div. 3, 2001).

The sentencing court noted that there were “numerous deliveries of methamphetamine.” 4RP at 424. The court here also noted that the appellant had a prior conviction for possessing with intent to deliver “and here you are again.” 4RP at 424.

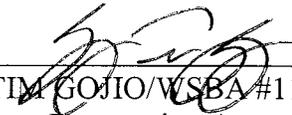
The appellant has failed to show the requisite prejudice so the claim of ineffective assistance of counsel fails.

V. CONCLUSION

The appellant has failed to show there was a lack of legitimate strategic or tactical rationale for the conduct of trial defense counsel. The appellant has also failed to show any prejudice. Further, there is no showing that dismissal is a proper remedy in this case. The Court should affirm the conviction of the appellant.

Respectfully submitted this 6th day of November, 2007

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