IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ADAN E. GUZMAN, Defendant.	)	NO. 37302-5-II STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

FILED
COURT OF APPEALS
DIVISION II
08 SEP 15 PM 12:38
STATE OF WASHINGTON
BY
DEPUTY

I, Adan E.Guzman, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUNDS I

THE SENTENCING COURT FAILED TO APPLY THE MERGER DOCTRINE TO MR. GUZMAN'S CONVICTIONS AND MR. GUZMAN WAS UNLAWFULLY PLACED IN DOUBLE JEOPARDY WHEN THE JURY CONVICTED HIM OF FELONY HARASSMENT AND THE SECOND DEGREE ASSULT OF MR. RAYMOND REYES, SR.

The Fifth and Fourteenth Amendment of the United State Constitution and Article I, §9 of the Washington State Constitution prohibits Double Jeopardy, guaranteeing that the State cannot prosecute or punish a person twice for the same offense. State v. Murawski, 142 Wn.App. 278, 284 (2007).

The issue here raised implicates Double Jeopardy of Guzman's Count III-Assult in the Second Degree RCW 9A.36.021 and Count IV

-Felony Harassment RCW 9A.46.020, since its a Double Jeopardy review is de novo. City of Auburn v. Hedlund, 137 Wn.App. 494, 503, 155 P.3d 149 (2007).

Mr. Guzman argues that he was unlawfully placed in Double Jeopardy when the jury convicted him of both charges Felony-harassment and Second Degree Assult Conviction because the Felony-harassment conviction was incidental to the second degree assult conviction.

The two statutes governing felony-harassment and second degree assult, RCW 9A.46.020 and RCW 9A.36.021, respectively, do not contain specific provisions expressly authorizing seperate punishments for the same conduct. see e.g. In re Pers. Restraint of Burchfield, 111 Wn.App. 892,896, 46 P.3d 840 (2002).

The State had to prove the same facts for both crimes, that Mr. Guzman committed Felony-Harassment. It relied on the same evidence to prove both Guzman's threat to kill Mr. Raymond reyes Sr. and the fear that he would carry out the threat

Under the same evidence test, the convictions were the same in fact and in law. see e.g., State v. Freeman, 153 Wn.2d 765,777, 108 P.3d 753 (2005)(We do not consider the criminal elements in that abstract to determine whether each statute requires proof of a fact that the other one does not).

In State v. Lemming, 133 Wn.App. 875, 889, 138 P.3d 1095 (2007)(The Court held that Felony-Harassment and Second Degree Assult subject Lemming to multiple punishments for the same offense and , therefore, violated his State and Federal Constitutional rights to be free from Double Jeopardy. see In re Pers. Restraint of Orange, 152 Wn.2d 795, 820, 100P.3d 291

(2004)(Double Jeopardy is violated when the evidence required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other.)(quoting State v. Reiff, 14 Wash. 664, 667, 45 P. 318(1896).

The sentencing Court should have applied the merger doctrine to these crimes.

Mr. Guzman should be remanded and the charge second degree assult and felony-harassment should merged or dismissed under double jeopardy.

ADDITIONAL GROUNDS II

THE THRUSTON COUNTY SUPERIOR COURT ABUSED ITS AUTHORITY AND DENIED MR. GUZMAN HIS DUE PROCESS AND EQUAL PROTECTION CONSTITUTION RIGHTS UNDER THE WASHINGTON STATE AND UNITED STATES CONSTITUTION WHEN THE SENTENCING COURT ORDERED MR. GUZMAN TO SERVE A TERM OF COMMUNITY PLACEMENT WHICH EXCEEDED THE STATUTORY MAXIMUM.

Due process protects against the deprivation of life, liberty or property. U.S. Const. Amend. 5 and 14, §1.

In Benton v. Maryland, 395 U.S. 784 (1969), the United States Supreme Court held that the Fourteenth Amendment's Due process and Equal Protection Clauses extend to state prosecutions.

The Washington State Constitution provides the same protections. Wash. Const. Art. I, § 3; Detention of Albrecht, 147 Wn.2d 1, 7 (2002)(citing In re Pers. Restraint of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993).

The threshold question in any due process challenge is whether the challenger has been deprived of a protected liberty interest in life, liberty or property. Personal Restraint of Cashaw, 123 Wn.2d 138, 143, 866 P.2d 8 (1994)(citing In re J.H.,

117 Wn.2d 460, 472-73, 815 P.2d 1380 (1991).

Liberty interest may arise from either of two sources, the Due Process Clause and state laws. Personal Restraint of Cashaw, supra at 123 Wn.2d 144,(citing Hewitt v. Helms, 459 U.S. 560, 566 (1983).

A trial Court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The standard range sentence in Washington are governed by the Sentencing Reformed Act of 1981. see 9.94A. RCW.

Generally, a defendant cannot challenge the trial Court's imposition of a standard range sentence on appeal. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003).

"When a Statute authorize community custody, [the] trial Court may impose community custody as long as the term does not exceed the statutory maximum. State v. Sloan, 121 Wn.App. 221, 87 P.3d 1214 (2004); State v. Desantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003)("[The total sentence, including enhancement, remains presumptively limited by the statutory maximum for underlying offense unless the offender is a persistent offender").

The sentencing Court sentenced Mr. Guzman who had no prior convictions to a standard range sentence of 16 months count II; to a standard range sentence of 33-months on count III; to a standard range sentence of 16 months on IV; to a standard range of 33 months on count V and a standard range sentence of 33-

months on count VI with all sentences running concurrently. Additionally, the Court also imposed the two 36-months deadly weapon enhancement running consecutively to the underlying sentence. Plus a term of community custody of 18 to 36 months on count III, V and VI a total sentence of 141-months.

In Mr. Guzman's case, Mr. Guzman sentence was imposed under RCW 9.94A.505 and 9.94A.510. Under 9.94A.510 his maixmum standard range was calculated to be 33-43 months. His entire sentence had to be within 33-43 months this including the enhancement and community custody.

Unless, the Court had the urge to impose an exceptional sentence and that would be the maximum for a class B-felony 120 months. State v. Thomas, 150 Wn.2d 666, 80 P.3d 168 (2003); Blakely v. Washington, 542 U.S. at 303, 124 S.ct. 2531, 159 L.Ed.2d 404 (2004)

Which in Mr. Guzman's case, the Court did not have the ability to impose an exceptional sentence because it did not take the proper procedures to impose a sentence beyond standard sentencing range Of 33-43 months.

"A life sentence is posssible for a class A-felony, only if the trier of fact specifically finds beyond a reasonable doubt, or the defendant admits to aggravating facts supporting an exceptional life sentence. Otherwise, [t]he effective maximum for a class A-felony is the top end of the sentencing range RCW 9.94A.510". State v. Knotek, 136 Wn.App. 412, 425 (2006).

Which in Guzman's situation, his convictions were class B-

felonies with the maximum of 120 months if imposed as exceptional sentence. Otherwise, his top sentencing range would be 33-43 months instead it is 141-months clearly to excessive.

Therefore, the proper course would be to remand for a new sentencing hearing.

When a sentence has been imposed for which there is no authority in law, "A Court has the authority to correct an erroneous sentence". In re Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997)(citing State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996).

DUE TO COUNSEL'S PERFORMANCE OF INEFFECTIVENESS MR. GUZMAN WAS DEPRIVED OF HIS SIXTH AMENDMENT OF THE CONSTITUTION.

The right to assistance of counsel is contained in the Sixth Amendment to the United States Constitution and Article I, §22 of the Washington State Constitution.

The United States Supreme Court has stated that the substance of this guaranty is that Courts must make "effective" Appointment of counsel. Powell v. Alabama, 287 U.S. 45, 77 L.ED. 158, 53 S.ct. 55, 84 A.L.R. 527 (1932).

Under the "effective representation" standard, a defendant is entitled to reasonably competent assistance of counsel. State v. White, 5 Wn.App. 283, 286-87, rev'd on other grounds, 81 Wn.2d 223.

What is reasonably competent assistance of counsel will, of

course, have to be developed on a case by case basis. State v. Piche, 71 Wn.2d 583, 591, 430 P.2d 522 (1967).

This presumption can be overcome by showing , among other other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial. State v. White, supra; see U.S. v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968).

Although unable to ascertain whether counsel's lack of preparation prejudiced defendant by depriving him of evidence that would have been helpful to his case, it still considered whether defendant was prejudiced because counsel's lack of preparation caused him to overlook obvious legal issues and arguments for trial. see Moore v. U.S., 432 F.2d 735 (3rd Cir. 1970).

The failure of counsel to adequately acquaint himself with the facts of the case by interviewing witnesses, failure to subpoena them and failure to inform the Court of the substance of their testimony, before and during the trial, were omisions which no reasonably competent counsel would have committed.

Counsel was ineffective in Mr. Guzman's case because Mr. Guzman insisted to his counsel to call certain witnesses, to investigate and prepare for trial to have them be cross-examined.

ADDITIONAL GROUNDS III

MR JEFFERSON'S LACK OF INTEREST TO REPRESENT CLIENT

The state charged Mr. Guzman with Second Degree Assalt due to Mr. Raymond Reyes Senior's injuries. The injuries could have been rebutted during trial, had counsel called the four witnesses willing to testify on behalf of Mr. Guzman.

Prior to the trial, Mr. Guzman informed his Counsel Larry Jefferson that he had four witnesses, including their addresses: (1) Paul Dawn (2) Debra Dawn (3) Karoline Sanchez and (4) Viola "Araceli" Olivares. In that instant Guzman called one of the witnesses Ms. Karoline Sanchez through his cell-phone and passed the phone to Mr. Jefferson. They spoke about the incident and asked questions and she seemed to answer them. She informed him that she would testify on behalf of Mr. Guzman.

The day after this conversation took place, Mr. Guzman visited Mr. Jefferson's office to speak to his counsel about the case to see whether he has investigated the witnesses? Whether he was prepared for the trial? The court appointed cousel Mr. Jefferson became irritated, argumentative and hostile towards Mr. Guzman and stated to him "I don't use witnesse in my cases".

Once out of Mr. Jefferson's office, Mr. Guzman contacted Ms. Sanchez to help him write a letter of complaint to Mr. Jefferson's supervisor about Mr. Jefferson's lack of interest in his case, his conduct and performance.

After the complaint was filed to his supervisor, Mr. Jefferson contacted Mr. Guzman to come back to his office.

At the office they briefed about the case, and again Mr. Jefferson informed Guzman that he was not going to use the testimonies of the four witnesses for his case. "He then stated: "The only reason I'm doing your case is because the BAR will be on my ass, but Guzman you are going to lose and I'm going to sit with you and watch you go down".

The four witnesses provided to Mr. Jefferson by Mr. Guzman would have helped in his defense. All four witnesses were present during the incident in which Mr. Raymond Reyes Senior's injuries came about. The testimony of the 4 witnesses clearly Mr. Reyes testimony of what actually occurred and that he slipped on his own, and Mr. Guzman did not inflict or cause the fracture to Mr. Reyes Sr. ribbs on which the charge of Second Degree Assault is based on.

Mr. Guzman should be remanded for a new trial or have the charges dismissed.

DATED 9/10/08

PROCE