No. 39603-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH SULLIVAN, III,

Appellant.

FILED
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STATE OF WASHINGTON
BY DEPUTY

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

The Honorable Christine Pomeroy, Judge
Cause No. 08-1-01591-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the stipulated evidence was sufficient to sustain Mr. Sullivan's conviction for possession of marijuana with intent to deliver in light of the holding of In re Barr.

2. Whether Sullivan received ineffective assistance of counsel at sentencing when his attorney failed to argue Counts I and II encompassed the same criminal conduct.

B. STATEMENT OF THE CASE.

1. The State accepts the defendant's statement of the case with the following corrections, clarifications, and additions:

On April 21, 2009, Mr. Sullivan pleaded guilty to one count of unlawful possession of a controlled substance with intent to deliver—marijuana (Count II). [4/21/09 RP 3]. The following colloquy occurred between the court, the defendant, and defense counsel (Mr. Kauffman):

> The Court: "You're pleading to Count II, which is possession of marijuana with intent to deliver it. Do you understand that?"
>
> Sullivan: "Yes."
>
> The Court: "Do you understand by pleading guilty you give up all your rights including the right to appeal?"
>
> Sullivan: "Yes."
>
> The Court: "Do you understand that the maximum penalty is five years and a $10,000 fine, the standard range is six to 18 months. [sic]"

Sullivan: "Yes, Your Honor."

The Court: "Twelve months, they're asking for 12 months with work release, okay, credit for time served, standard fees and costs, drug penalty, 12 months probation in which you will have to have no law violations, and the criminal history is of two assault seconds; is that correct?"

Sullivan: "Yes."

The Court: "And felony harassment."

Sullivan: "Yes."

The Court: "And the unlawful possession of a firearm; is that correct?"

Sullivan: "Yes."

The Court: "Instead of making a statement, you believe the Court can review the probable cause statement. Will you stipulate to that?"

Sullivan: "Yes, Your Honor."

The Court: "There is nothing in this probably cause statement about marijuana."

. . .

Kauffman: . . . "I believe the point at which we were was that this Court was going to find a factual basis based on the representation."

The Court: "And that's what I did. I looked at the probable cause and it has nothing about marijuana. So that's where we were, it has only methamphetamine."

[4/21/09 RP 6-7]. After the State described to the court its finding of "175 grams of dried marijuana in several packages . . . as well as several smoking devices with [marijuana] residue" in the home where Sullivan was arrested, the court addressed Sullivan again and said, "Does he stipulate to those facts, that he had marijuana that was over – well, with the intent to deliver?" [4/21/09 RP 7]. To this defense counsel replied, "Your Honor, were this case the [sic] go to trial, that is a rendition of the facts that the State would put before the jury and be likely to prove beyond a reasonable doubt." [4/21/09 RP 8]. The following exchange then took place:

> The Court: "I accept it. There is a factual basis based on what I know from you. I'll accept it."
>
> . . .
>
> The Court: "You know, the marijuana was in other people's bedroom, but you're going to accept it In Re: Barr type situation?"
>
> Kauffman: "Yes."
>
> The Court: "I accept on it [sic] those grounds. . . ."

[4/21/09 RP 8].

At that time the defendant then signed a Memorandum of Agreement stipulating to the "accuracy and sufficiency of the law enforcement/investigating agency reports as they relate to the

allegations/charges as listed" previously in the memorandum. [CP 17]. The charges listed in the memorandum included unlawful possession of a controlled substance with intent to deliver-methamphetamine and unlawful possession of a controlled substance with intent to deliver (no drug listed). [CP 15]. It further noted that "bail jumping [(Count III)] [would] be added." [CP 15]. The agreement then went on to state that if the defendant fully complied with the terms of the agreement, then the State would:

> i) Allow the defendant to plead guilty to Count II Unlawful Possession of a Controlled Substance with Intent to Deliver-Marijuana. The State [would] dismiss Count I and agree not to file the pending Bail Jumping matters.
> ii) The State [would] recommend a sentence of 12 months in the Thurston County Jail. The State [would] also recommend this time may be served on the work release. Standard fines and assessments and 12 months of community custody with drug conditions will also be recommended to the Court.

[CP 18]. If, however, the defendant failed to fully perform all obligations under the contract, "the State [would] not dismiss or amend any charges and [would] ask the court to immediately conduct a stipulated bench trial where the judge will read the law enforcement/investigating agency's reports to determine the . . . defendant's guilt or innocence." [CP 18].

Additionally, under the agreement the defendant

> . . . stipulate[d] that the Court may determine the question of my guilt on the charge(s)/enhancement(s) that are or may be filed against me in this matter, based solely upon the law enforcement/investigating agency's reports on which the prosecution was based. I further stipulate that the facts contained within the investigation reports are sufficient for a trier of fact to find me guilty of the charge(s) that are and may be filed against me in this matter.

[CP 18]. And also that, "[he understood] that, by this process, [he was] irrevocably giving up" numerous Constitutional rights, including "the right to appeal a determination of guilty after the trial." [CP 19]. Sullivan then signed the agreement, as did his defense counsel, after stating the following: "I have reviewed this entire agreement and thoroughly discussed it with my client, Joseph Leslie Sullivan, III. I believe that he/she has knowingly, voluntarily, and intelligently entered into this agreement." [CP 19].

After failing to comply with all the requirements of the agreement, Sullivan again came before the court for a stipulated facts bench trial on July 15, 2009. [7/15/09 RP 3]. At that time, his guilty plea was withdrawn in accordance with the memorandum of agreement and all of the amended charges were reinstated. After reviewing the reports and the agreement, the court stated:

> Okay. I do see that there is a factual basis beyond a reasonable doubt of the unlawful possession of controlled substance, methamphetamine, with the intent to deliver and the unlawful possession of controlled substance, marijuana, with the intent to deliver, all arising out of his home on August 29th, 2008.

[RP 7/15/09 6]. The court found the same in regards to the charge of bail jumping and sentenced Sullivan with an offender score of six. [RP 7/15/09 6-7].

C. ARGUMENT

1. The State submits Sullivan knowingly, voluntarily, and intelligently entered into the Memorandum of Agreement and stipulated to the accuracy and sufficiency of the evidence to prove Count II beyond a reasonable doubt, but concedes that In re Barr likely does not apply.

Washington's Constitution assures defendants "the right to appeal in all cases." Const. art. I, § 22. A defendant may only waive his right to appeal if he does so knowingly, voluntarily, and intelligently. State v. Neff, 163 Wn.2d 453, 459, 181 P.3d 819 (2008). When the defendant signs a waiver and states on the record he understands the rights he is waiving, it "creates a strong presumption that the [waiver] is voluntary." Id. quoting State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998) (alteration in original).

There is a strong preference for "enforcing the terms of plea agreements which are voluntarily and intelligently made." In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). "[A] plea can be voluntary and intelligent absent a factual basis for the actual charges, so long as the plea is based on informed review of all the alternatives and the defendant understands the nature of the consequences of the plea." State v. Zhao, 157 Wn.2d 188, 193 n. 3, 137 P.3d 835 (2006) (citing In re Pers. Restraint of Barr, 102 Wn.2d 265, 268, 684 P.2d 712 (1984)). Plea agreements "are regarded and interpreted as contracts and both parties are bound by the terms of a valid plea agreement." In re Breedlove, 138 Wn.2d at 309 (citing State v. Talley, 134 Wn.2d 176, 182, 949 P.2d 358 (1998)); State v. Wakefield, 130 Wn.2d 464, 480, 925 P.2d 183 (1996) (Sanders, J., concurring in part, dissenting in part).

However, when the plea agreement involves the defendant pleading to "an amended charge for which there is no factual basis, the validity of the plea turns on both the trial judge's and the defendant's understanding of the infirmity in the amended charges." Zhao, 157 Wn.2d at 199. Thus, a defendant may "plead guilty to amended charges for which there is no factual basis, . . . *only* if the

record establishes the defendant did so knowingly and voluntarily and that there at least exists a factual basis for the original charge, thereby establishing a factual basis for the plea as a whole." Id. at 200 (emphasis in original). There is no requirement, though, that the defendant's voluntariness can only be established by a specific exchange on the record with the court. Id.

Unlike a stipulation to facts, because "a stipulation to the sufficiency of the evidence is a legal conclusion, a court is not bound by it." State v. Drum, 168 Wn.2d 23, 31 (2010); State v. Knapstad, 107 Wn.2d 346, 351-52, 729 P.2d 48 (1986). There is a strong deferential standard when reviewing a bench trial, State v. Devries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003), but "when the record contains only documents, [an appellate court] review[s] without deference to the trial court." Neff, 163 Wn.2d at 461. Thus, this court's review of the evidence is likely not deferential to the trial court and it may independently consider the evidence to which Sullivan stipulated regarding the charge of unlawful possession of a controlled substance with intent to deliver (marijuana) (Count II).

Based on the above case law, while the State submits Sullivan stipulated to the facts and sufficiency of it to prove Count II beyond a reasonable doubt, and further that he waived his rights

knowingly, intelligently, and voluntarily, it is unlikely to the State the trial court's acceptance of his plea based on In re Barr was appropriate. First, Sullivan stipulated and waived his rights knowingly, voluntarily, and intelligently. Both the court and defense counsel discussed the terms of the agreement with him, the rights Sullivan was expressly waiving via the agreement, what Sullivan was stipulating to, the factual infirmity of Count II, and the nature and consequences of the plea. Additionally, he did not object to the findings of fact and conclusions of law when presented.

Moreover, Sullivan's written statement and acknowledgement that he read and understood the plea agreement and that its contents were true, created a prima facie verification of the plea's voluntariness. State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982) (citing In re Personal Restraint of Keene, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); In re Personal Restraint of Teems, 28 Wn. App. 631, 626 P.2d 13 (1981); State v. Ridgley, 28 Wn. App. 351, 623 P.2d 717 (1981)). "When [a] judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable." Perez, 33 Wn. App. at 262.

Although Sullivan's plea was knowing and voluntary, the second prong of Zhao is likely not met. Ordinarily, issues raised for the first time on appeal are not reviewable unless they are of a constitutional magnitude rising to the level of manifest error. RAP 2.5(a)(3). Although CrR 4.2(d) requires a trial court to confirm there is a factual basis for a plea, the requirement is not a constitutional one. In re Personal Restraint of Hews, 108 Wn.2d 579, 591-92, 741 P.2d 983 (1987). Thus, if a defendant fails to challenge the factual basis of a plea, and he does not otherwise assert his plea to the charge is not voluntary, knowing, and intelligent, then he fails to preserve the issue for review. This tenet is not likely to apply in the instant case, however, since both the trial court and defense counsel discussed the factual infirmity of Count II, but mistakenly seemed to believe the holding of In re Barr was controlling. The State concedes Sullivan's argument on this issue is correct. There does not appear to be a factual basis to support the original charge of unlawful possession of a controlled substance with intent to deliver—marijuana.

As previously noted, under Zhao and In re Barr, a defendant may plead to a legal fiction for amended charges where there is a factual basis for the original charge. In re Barr, 102 Wn.2d at 270;

Zhao, 157 Wn.2d at 199-200. Count II was one of the original charges as well as included in each amended information. The main difference between the original information and the amended information was the addition of the bail jumping charge in the third amended information. The State finds it likely that upon this court's own review of the introduced evidence, it is probable it will find Sullivan's presence in the home, without more, is not enough to demonstrate constructive possession of the marijuana noted in the law enforcement/agency reports to which he stipulated. It does not appear, viewing the evidence in the light most favorable to the State (even with all reasonable inferences), that a reasonable trier of fact could find the State proved Count II beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). Moreover, while a defendant can stipulate to the accuracy of facts, as noted above, he cannot stipulate to the sufficiency of the evidence where there is no factual basis for the original charge.

Since Count II was part of the original charge, and the original charges (plus bail jumping) encompassed the entirety of Sullivan's charges and convictions in this case, the legal fiction scenario which Zhao and In re Barr address likely does not exist here. If this court finds this is the case, then it should dismiss Count

II and remand Sullivan for resentencing appropriate with his remaining convictions for which the evidence was sufficient and which Sullivan does not challenge.

2. The State concedes a court could likely conclude defense counsel was ineffective for failing to raise the issue of same criminal conduct at sentencing following the stipulated facts bench trial.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State *v.* Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71

Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *see* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an

insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first]." Strickland, 466 U.S. at 697.

When calculating an offender score, RCW 9.94A.589(1)(a) says all "current and prior convictions [should be treated] as if they were prior convictions for the purpose of the offender score," but recognizes the exception 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). The "same criminal conduct" "means two or more crimes that require the same criminal intent, involve the same victim, and are committed at the same time and place." All of these elements must exist in order for a court to make a finding of same criminal conduct. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

Generally, a defendant does not waive a miscalculated offender score. In re Personal Restraint of Goodwin, 146 Wn.2d

861, 874, 50 P.3d 618 (2002). However, where "the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion[,]" a waiver may occur. Id.; State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000) (holding the defendant waived review of the same criminal conduct issue by agreeing to the standard range calculation and failing to raise it at sentencing).

Generally, making a showing of ineffective assistance based on a lack of a same criminal conduct analysis is extremely difficult. This is because same criminal conduct is an issue involving questions of both fact and law and when the issue is not raised, there is no record as to the underlying facts of the offenses challenged as same criminal conduct for an appellate court to review. Nitsch, 100 Wn. App. at 520-21. Thus, demonstrating prejudice will be, at a minimum, extremely difficult, if not altogether impossible.

The State concedes the two drug offenses at issue here, occurred at the same time and place and against the same victim (the general public). Also, it does not appear the intent differs from one offense to the other. The State further agrees that defense

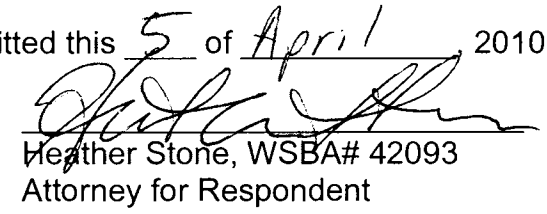
counsel's failure to argue same criminal conduct for unlawful possession of a controlled substance with intent to deliver—methamphetamines (Count I) and unlawful possession of a controlled substance with intent to deliver—marijuana (Count II), could potentially survive a deficient performance and actual prejudice review. It appears to the State likely a court would deem it objectively unreasonable defense counsel would not argue same criminal conduct where it is not factually inconsistent with the facts stipulated to at the bench trial. Nitsch, 100 Wn. App. 512 at 523. The State is unable to determine a tactical reason for not doing so.

If this court finds Lander's defense counsel was ineffective for not arguing Counts I and II constituted the same criminal conduct, then it should remand for resentencing based on an appropriate offender score which does not count the charges separately. RCW 9.94A.589(1)(a).

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm this conviction.

Respectfully submitted this 5 of April, 2010.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

☒ US Mail Postage Prepaid

☐ ABC/Legal Messenger

☐ Hand delivered by to Supreme Court

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STATE OF WASHINGTON
BY DEPUTY

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

Dated this 5th day of April, 2010, at Olympia, Washington.

Chong McAfee