

No. 41556-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE THE PERSONAL RESTRAINT PETITION OF:

DANIEL MARSHALL AGUIRRE

THURSTON COUNTY SUPERIOR COURT

The Honorable Gary Tabor, Judge
Cause No. 06-1-01702-5

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES RAISED IN PETITIONER'S SUPPLEMENTAL BRIEFING

1. Whether the reference hearing court incorrectly characterized the sentencing range for second degree rape.

2. Whether the reference hearing court properly excluded the testimony of the petitioner's legal expert.

3. Whether there was sufficient evidence presented at the reference hearing to support the court's conclusion that the defense trial counsel adequately conveyed the significance of the State's plea offer.

B. STATEMENT OF THE CASE

Aguirre was tried in Thurston County Superior Court on one count of second degree rape and two counts of second degree assault, one of which carried a deadly weapon enhancement. The jury acquitted on one of the second degree assault charges but convicted him of the rape and one of the second degree assaults, and found that he was armed at the time with a deadly weapon. Aguirre appealed, and the Court of Appeals affirmed in an unpublished opinion. 2008 Wash. App. LEXIS 2202. He successfully sought review in the Supreme Court, and his convictions were again affirmed. State v. Aguirre, 168 Wn.2d 350, 229 P.3d 669 (2010). The underlying facts of the case are found in those opinions.

Aguirre then brought this personal restraint petition, arguing, among other things, that his trial counsel had never conveyed to him a plea offer made by the State nor explained to him the consequences of taking the offer as opposed to being convicted as charged. This court ordered a reference hearing on that question, which was held on July 18 and 21, 2011.

This court then granted Aguirre's motion for supplemental briefing. Because of space constraints, the State will address the evidence produced at the reference hearing in the argument portion of this response.

C. ARGUMENT

1. The reference hearing court did not err in its conclusion that the sentence for second degree rape is not a mandatory sentence of life in prison.

Aguirre correctly cites to In re Pers. Restraint of Brett, 142 Wn.2d 868, 873-74, 16 P.3d 601 (2001), and In re Pers. Restraint of Bradford, 140 Wn. App. 124, 129, 165 P.3d 31 (2007), for the standard of review following a reference hearing. Conclusions of law and mixed questions of law and fact are reviewed de novo. Findings of fact are reviewed for substantial evidence to support them. Bradford, 140 Wn. App. at 129. The court in this case only entered one conclusion of law—that Aguirre failed to prove by a

preponderance of the evidence that his trial attorney had failed to convey or adequately explain the State's plea offer. While Aguirre couches the court's statements about the "determinate-plus" sentence as conclusions of law, they were not. They were merely an aside and nothing in his oral ruling indicated that his understanding of the sentencing law played a significant role in his legal conclusion. [RP 263] In any event, the court was correct.

Aguirre referred to his "mandatory life sentence" so many times during the hearing and in his briefing that it is nearly impossible to count them. It appears he is attempting to make his sentence sound so draconian that it is virtually equivalent to life in prison without the possibility of parole, thus somehow increasing the trial attorney's obligation to convey and explain a plea offer. It really makes no difference. An attorney has the obligation to convey and explain *any* plea offer made by the State. State v. James, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). However, the court did not mischaracterize a sentence pursuant to RCW 9.94A.507.¹ The procedure for nonpersistent offender sentencing was explained by the Supreme Court as follows:

¹ In 2006, this statute was codified as RCW 9.94A.712. It was recodified by LAWS OF 2008, chap. 231, sec. 33, effective August 1, 2009. The language remained the same.

RCW 9.94A.712, which governs the sentencing of certain nonpersistent offenders, mandates that offenders receive an indeterminate sentence comprised of a minimum and maximum term. RCW 9.94A.712(3)(a). Before the expiration of an offender's minimum term, the Department of Corrections conducts an end of sentence review by evaluating the offender based on "methodologies . . . recognized by experts in the prediction of sexual dangerousness." RCW 9.95.420(1)(a).² The Board then conducts a hearing to determine whether the offender poses a risk of engaging in sex offenses if released to community custody. RCW 9.95.420(3). Under RCW 9.95.420(3)(a) and (b), the Board 'shall order the offender released' under appropriate conditions "unless the [B]oard determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the offender will commit sex offenses if released." (Emphasis added.) If the Board does not order the offender released, it must establish a new minimum term for the offender, which may not exceed two years and must fall within the maximum term. *Id.*

In re Pers. Restraint of McCarthy, 161 Wn.2d 234, 239-40, 164 P.3d 1283 (2007) (emphasis in original). The court found that the statute creates a presumption in favor of release, limits the Board's discretion, and thus creates only a limited liberty interest. Id. at 241. Offenders are entitled to due process protections regarding the hearings, but those protections do not include the right to counsel. Id. at 245.

² This section is still codified with the same number.

Therefore, the hearing judge was correct. The minimum term in Aguirre's judgment and sentence is the time he will serve, unless the Board concludes it would be dangerous to release him. That finding is largely up to him. If he is not a danger to reoffend, he will be released. Even if he is not released, his term is extended by a maximum of two years at a time, and the only way he will serve a life sentence is if the Board concludes he is dangerous for the rest of his life, a decision made every two years at the outside. It is correct that he will be under the supervision of the Department of Corrections for life, but he has argued, both in the hearing and in briefing before this court, such as to give the impression that he was sentenced to life in prison without the possibility of parole. His sentence simply is not as dire as he portrays it, and the Supreme Court did not find it sufficiently serious to conclude that offenders are entitled to counsel at the review hearings. The hearing judge's misunderstanding of the availability of legal counsel at the review hearings is hardly indicative of confusion about the sentencing law itself. He explained the law essentially as the Supreme Court did in McCarthy. [RP 254]

Aguirre further argues that because the judge misunderstood the sentencing law, he did not take as seriously trial counsel's

obligation to convey and explain the offer. Appellant's Supplemental Brief at 12-13. He does not identify any statements made by the court which support that argument.

The court considered the following: (1) Aguirre did not want to take any offer that cost him his military career, which ruled out domestic violence or felony convictions; (2) he understood that if convicted as charged he would be forced out of the military; [RP 257] while Aguirre testified he had trouble coping at times, those times occurred during the evening and he was lucid during the day; [RP 258] because of the inconsistencies in the jail logs, the court did not place much weight on that evidence; [RP 259] Steele requested an offer and there was no reason suggested that he would fail to convey it; [RP 260] Aguirre said that up until late December he would not accept any plea that cost him his military career; there is no date on the letter Aguirre wrote and the court could not determine the date it was written; the letter indicated Aguirre would accept an offer that Steele thought was in his best interests; [RP 261] and up through sentencing Aguirre hoped there was some way to save his military career. [RP 262]. The court found that the State's offer had been explained more than adequately and the judge had no doubt that Steele had explained

to Aguirre exactly what was in the offer. [RP 262] The plea offer contained all of the consequences. [RP 263] “[M]y finding, . . . is that an offer was conveyed, and . . . I’m going to find that the offer was adequately explained as to the difference between the plea-offer sentence and the potential sentence if Mr. Aguirre were convicted at a trial . . .” [RP 265]

The court’s interpretation of the sentencing statute was correct. There is nothing in the record to lead to the conclusion that because the court disagreed with Aguirre’s characterization of his sentence that it minimized the burden of explaining the plea and its consequences to Aguirre.

2. The court did not abuse its discretion in excluding the testimony of Aguirre’s legal expert.

There is no dispute that an attorney has the duty of communicating offers and discussing the consequences with the defendant. James, 48 Wn. App. at 362. Expert testimony is admissible if it will assist the trier of fact to understand the evidence or determine a fact in issue. ER 702. The court’s ruling regarding the admissibility of expert testimony is reviewed for abuse of discretion. State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007).

Aguirre offered the declaration and testimony of Brad Meryhew, an attorney who graduated from law school in 1994. Ex. 13 at 2. That puts his years of legal experience at 17, as opposed to the 30 years the hearing judge had behind him. [RP 60] Further, the hearing judge correctly noted that Meryhew's declaration went to the issue of ineffective assistance of counsel, a decision that the judge was not making. The court was only to decide the factual issue of whether or not the plea offer had been conveyed and explained. Id. The court did not mention, but it could not have escaped his notice, that Meryhew's declaration specified that his opinion was based upon the assumption that Aguirre's declaration was true and that the jail records were true and correct. Ex. 13 at 5. If those things were true, a first-year law student could have ascertained that Steele did not convey or explain the plea offer. The court found that those assumptions of Meryhew were not accurate and therefore his opinion was of no value to the court. Nor, as argued above, did the court misunderstand the sentencing consequences of Aguirre's convictions.

The hearing judge did not abuse his discretion in refusing to admit the proffered evidence of Brad Meryhew.

3. The evidence presented at the reference hearing supported the court's conclusion that Aguirre failed to carry his burden of proving, by a preponderance of the evidence, that Steele had not conveyed the State's offer nor adequately explained it to him.

A personal restraint petition is a civil matter. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 409, 972 P.2d 1250 (1999). The petitioner bears the burden, in a reference hearing, of proving his claims by a preponderance of the evidence. Id. at 410. "In reviewing findings of fact entered by the trial court, an appellate court's role is limited to whether substantial evidence exists to support its findings." Id., citing to Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). The "substantial evidence" standard applies in review of reference hearing factual findings. Id. Substantial evidence has been defined as a "sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." In re Pers. Restraint of Davis, 152 Wn.2d 647, 679, 101 P.3d 1 (2004) (citing to State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). The petitioner's burden is a heavy one.

[The petitioner] has a heavy burden to persuade us the trial court's assessment of the conflicting evidence it heard during the reference hearing was erroneous. The trial court had the opportunity to evaluate the witnesses' demeanor and judge their credibility. *State*

v. Cord, 103 Wn.2d 361, 366, 693 P.2d 81 (1985). Thus, in *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we said, “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” . . . Conflicting evidence may still be substantial, so long as some reasonable interpretation of it supports the challenged findings. . . . That there may be other reasonable interpretations of the evidence does not justify appellate court reversal of a trial court’s credibility determinations.

Gentry, 137 Wn.2d at 410-11 (some internal cites omitted).

A party challenging the court’s findings of fact must prove that they are not supported by substantial evidence in the record.

Davis, 152 Wn.2d at 680.

The tenor of Aguirre’s argument is more consistent with a theory that the State had the burden of proof. It did not. He argues in many respects for an interpretation of the evidence different from that of the court, but that does not go to an insufficiency of the evidence.

Aguirre maintains that if Steele advised him about the standard range for his offenses, he gave incorrect advice. Petitioner’s Supplemental Brief at 16-17.³ That is not the case. RCW 9.94A.507(2)(c)(i) provides that the minimum term must be within the standard range for the offense unless the offender is

³ In his footnote 16 Aguirre cites to *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010), giving the impression that the italicized language is from that case. It is not. The portion enclosed in quotation marks is.

eligible for an exceptional sentence under RCW 9.94A.535. While he is subject to the supervision of the Department of Corrections for life, he is still sentenced to a standard range sentence. If the statutory factors are present, an exceptional sentence is possible, meaning a minimum sentence outside the standard range for that offense.

Aguirre claims Steele testified he did not advise him of the pros and cons of the offer. Steele did testify that it was not his practice to put that analysis in writing, [RP 157], but he also testified that he explained the differences in sentencing between the offer and as charged, [RP 119], that he would have educated himself about the standard ranges, but at the time of the hearing he could not recall the specifics, [RP 122], he discussed with Aguirre the consequences of the State's offer, [RP158], he believed Aguirre was aware of what he was risking, [RP 163], he believes he followed his standard practice of explaining the consequences of being convicted as charged, [RP 172], he would have discussed indeterminate sentencing, [RP 173], he explained the amount of time Aguirre faced if convicted, and believes he explained the lifetime supervision consequences, although at the time of the hearing he had no specific recollection, [RP 174], he would have

explained the sentence he faced if he took the deal, [RP 175], he always explains indeterminate sentencing to his clients, [RP 177], he would have discussed the fact that a sex offender who did not admit the offense would be more likely to be held past the minimum sentence, [RP 178-79], and he remembered a conversation about the offer and that Aguirre was not interested in taking it. [RP 187]

Aguirre makes much, as he did at the reference hearing, about the jail logs which indicated that Steele spent only a few moments with Aguirre during the time period the offer was open. The court did not give much weight to those logs, citing to their inconsistency. The evidence supported the court's skepticism about their accuracy. Lt. Klein from the jail testified that the times entered into the logs came from individual wristwatches or clocks around the jail, which were not synchronized. [RP 99-11, 103]. She acknowledged that visits are probably not always logged as they should be, [RP 103-04], there was an entry on November 20 showing that Aguirre was sent to visiting but there was no corresponding entry in the visiting log, as there should have been, [RP 105-06], and she has known it to happen that not all attorney visits get logged. [RP 109-10] The judge determines the weight

and sufficiency of the evidence. In re Pers. Restraint of Merrit, 69 Wn. App. 419, 424, 848 P.2d 1332 (1993).

Aguirre again claims that Steele did not tell him he faced a “real sentence of life in prison.” Petitioner’s Supplemental Brief at 19. Steele’s testimony summarized above shows that he did discuss indeterminate sentencing with Aguirre. The fact remains that he is not facing a “real sentence of life in prison.”

The evidence before the court was that Steele remembered having discussions about the plea offer and the relative consequences with Aguirre. Aguirre retained Steele some time before the offer was made in mid-November of 2006. [RP 113] Steele charged a flat fee in criminal cases up through the entry of the omnibus order and didn’t keep records of the time spent with the client for that period. He acknowledged that he is sometimes lax about recording his time even when charging by the hour. [RP 114-15] He would have had sufficient time to explain the consequences of Aguirre’s charges before the State ever made its offer, and thus would not have been starting from scratch when the offer was made.

The State only made one offer to Aguirre. [RP 205] Aguirre testified that there was talk of an offer of 48 to 58 months. [RP 86]

Rose Aguirre remembered a discussion about an offer after Christmas with a recommendation of 40 or 50 months. [RP 39-40] Since there was only one offer made, the Aguirres must have been talking about that one, even if they had the particulars wrong, which supports Steele's testimony that he discussed the plea offer with Aguirre.

Steele asked the State to make its best offer. [RP 208] Steele testified that he always asks the prosecutor for an offer. [RP 117] Steele testified that after the State made its written offer, the prosecutor "pestered" him during the pendency of the offer. [RP 121] The prosecutor confirmed that they discussed the case a great deal and had a number of conversations during the time the offer was open, between November 17 and November 30. [RP 207-08] There was never an offer made that would have put the sentence in the 40 to 50 month range. [RP 213-14] Steele told the prosecutor that Aguirre would not accept the offer because it would cost him his military career, and that Aguirre maintained his innocence. [RP 209] The State argued, and the court gave credence to that argument, [RP 260], that it made no sense for Steele to request an offer, discuss it with the prosecutor, tell the prosecutor that Aguirre rejected it, but never tell Aguirre about it.

The court considered Aguirre's claims of Post Traumatic Stress Disorder and concluded there was no basis to believe it, or his other health issues, affected his ability to comprehend or communicate. [RP 258] Aguirre said that he took medication at night which made him feel sluggish, but that he was coherent during the day. [RP 82] He always met with Steele in the daytime. [RP 93] Nothing in the medical evidence indicated that Aguirre was unable to comprehend, reason, or communicate.

Aguirre argues that Steele's memory was unreliable. Petitioner's Supplemental Brief at 19. However, Aguirre had no specific recollections of meetings between November 17 and November 30. [RP 74]

The court based its conclusions on a number of factors, set forth at RP 257-267. Those factors are all supported by the record. The hearing judge could observe the witnesses and make credibility determinations that are not reviewable. He found Steele more credible than Aguirre. Aguirre has the burden of proving by a preponderance of the evidence that the offer was never conveyed or explained, and he failed to carry that burden.

D. CONCLUSION

The State respectfully asks this court to affirm the findings of fact and conclusion of law entered by the hearing judge, find that Aguirre has failed to prove by a preponderance of the evidence his claim that George Steele failed to convey or explain the plea offer, and affirm Aguirre's convictions and sentence.

Respectfully submitted this 15th of February, 2012.



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