

FILED
November 2, 2011
Court of Appeals
Division III
State of Washington

CASE NO. 298019-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

TIMOTHY TOMASZEWSKI, Appellant

Consolidated with CASE NO. 302385

PERSONAL RESTRAINT PETITION OF
TIMOTHY TOMASZEWSKI

FROM THE SUPERIOR COURT FOR BENTON COUNTY

NO. 10-1-00300-6

BRIEF OF RESPONDENT

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STATEMENT OF RELEVANT FACTS

On March 22, 2010, the State of Washington filed an Information charging the Defendant with Felony Driving Under the Influence, Driving While License Suspended or Revoked in the First Degree, Hit and Run Attended, and Ignition Interlock Violation. (CP 1-2). On May 13, 2010, the Defendant entered a Statement on Plea of Guilty. (CP 6-15). At the time of the plea, the court discussed with the defendant the rights he was giving up and the State's recommendation. (RP 5/13/10, 2-6). The Defendant was sentenced on May 27, 2010, to 33 months in custody. (CP 22).

The Defendant was incarcerated at the Benton County Jail from March 19, 2010, to June 2, 2010. (CP 71). Of the time the Defendant spent in custody, 40 days were applied to a Benton County District Court matter. (CP 71). The remaining time, 35 days, along with the good time of 17 days the Defendant earned, were applied to this matter. (CP 71).

The Defendant filed a motion to amend the Judgment and Sentence on January 26, 2011, requesting that the court amend the Judgment and Sentence to give him credit for the 40 days that was applied to a District Court Matter. (CP 32-37). The court denied the Defendant's Motion. (CP 72). The Defendant appealed this ruling, and filed a Personal Restraint Petition. (CP 103-05). The appeal and personal restraint petition were consolidated before the Court of Appeals.

ARGUMENT

1. THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Every defendant in a criminal matter is guaranteed effective assistance of counsel under the Sixth Amendment to the United States Constitution. In order to demonstrate that effective assistance was denied, a defendant must prove two prongs: 1) that trial counsel's performance was deficient and; 2) that the deficient performance prejudiced the defendant.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the case at bar, the defendant is unable to meet the burden of either prong, therefore the defendant was not denied effective assistance of counsel.

A. Defense counsel's performance was effective.

Courts engage in a strong presumption that representation is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), citing *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *Id.* at 336.

A defendant is entitled to credit for time served when incarcerated. However, "[t]he sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is

being sentenced." RCW 9.94A.505(6). The Defendant in this case served time not only on this case, but also on a District Court matter. (CP 71). He received credit for all time served on this case to which he was entitled.

The Defendant further alleges that the State breached the plea agreement. However, this is not the case. The State's recommendation was enunciated by the court, and the Defendant agreed that it was accurate. (RP 5/13/10, 6). At the time of the sentencing, the sentencing Judge stated that credit for time served would be determined by the Benton County jail. (RP 5/27/10, 6). Credit was appropriately calculated according to the Revised Code of Washington. Therefore, the Defendant's counsel was effective.

B. The Defendant was not prejudiced due to choices made by Trial Counsel.

The defendant must not only demonstrate that counsel's performance was deficient, but also that the defendant was prejudiced, such that the

outcome of the proceeding would have been different but for the deficient representation. *State v. McFarland*, 127 Wn.2d at 335, citing *State v. Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816 (1987). This is not possible in the case at bar because the outcome would not likely have been different had defense counsel taken any actions. Credit was applied on this case pursuant to RCW 9.94A.505(6). No actions on this case would have changed the outcome, therefore, the defendant was not prejudiced.

CONCLUSION

The Defendant was treated fairly. The State did not breach the plea agreement. The Defendant received effective assistance of counsel. Accordingly, the Defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 2nd day of
November 2011.

ANDY MILLER
Prosecutor

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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U.S. Regular Mail,
Postage Prepaid

Signed at Kennewick, Washington on November 2, 2011.

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