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DEC 31, 2012

Court of Appeals  
Division III  
State of Washington

COURT OF APPEALS NO. 31143-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON

V.

JUSTIN HARDGROVE,

Appellant.

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

The Honorable David Frazier, Judge

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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant received ineffective assistance of counsel at sentencing.

Issue Pertaining to Assignment of Error

Whether appellant received ineffective assistance of counsel at sentencing where defense counsel requested an exceptional sentence below the standard range but failed to inform the court of relevant authority supporting it?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Trial Testimony

Following a jury trial in Whitman County Superior Court, appellant Justin Hardgrove was convicted of two counts of delivering methamphetamine. RP 246. He was set up by childhood friend Violet Smith, who worked for the Quad-Cities Drug Task Force for money. RP 42, 56-77, 111-113, 143. For her efforts as a criminal informant (CI) against Hardgrove, Smith earned \$220. RP 77. Hardgrove was sentenced to seven years in prison. RP 278.

Detective Bryson Aase started working with Smith in 2009. RP 42-43. He testified that CIs must sign an agreement with the

task force to refrain from criminal activity, including drug usage. RP 33, 35, 52-54, 80-81, 143. Despite this, other CIs frequently reported that she was using drugs. RP 44, 82-83, 86. Significantly, Smith was terminated previously from working as a CI in Walla Walla for using methamphetamine. RP 92, 110. While working with Aase, Smith was also implicated in a tire-slashing incident in Idaho. RP 80-81, 96. Nonetheless, Aase did not terminate Smith, as he reportedly had no corroboration. RP 33, 44-45, 97.

On October 17, 2011, Smith contacted Aase about Hardgrove. RP 46-47. She claimed Hardgrove had called to ask whether she wanted to buy some methamphetamine. RP 47-48, 117. Smith reportedly told Hardgrove no, but then immediately telephoned Aase. RP 47. Aase directed Smith to set up a buy. RP 48.

Smith met with Hardgrove the next day and drove him to Pullman, where the drugs were supposed to be located. RP 56. The mission to Pullman was unsuccessful, however, and Smith came back empty handed. RP 48, 55, 117-118.

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<sup>1</sup> "RP" refers to the jury trial and sentencing held on August 20, 2012, and September 14, 2012, respectively.

Smith claimed that Hardgrove texted her later that day to see if she still wanted to buy some methamphetamine. RP 56, 119. Smith met with members of the task force beforehand to receive \$170 in pre-recorded buy money (for two grams). RP 49, 74. Police patted her down for drugs and searched her car for three-to-four minutes. RP 79-80, 49, 199-200. Surveillance officers followed Smith to Hardgrove's house. RP 58, 121, 200.

Smith testified that Hardgrove met her outside in the driveway. Smith rolled her window down and gave Hardgrove the money. RP 120. Hardgrove put a baby seat and some other items in the back of Smith's car. RP 120. He reportedly told Smith the drugs were in the DVD case. RP 120. Smith drove back to meet the task force and gave Aase the DVD case. RP 62, 124. Inside, was a small bag of methamphetamine. RP 62, 75-76, 167.

Police made no effort to arrest Hardgrove, however. Instead, they attempted another buy using Smith in November, but she "just came up shorthanded." RP 91.

Smith contacted Aase again on January 3, 2012, claiming Hardgrove had called to see if she wanted more methamphetamine. RP 63, 127. Aase directed her to set up another buy. RP 63-64, 127.

Again, Smith met with the task force beforehand to receive \$100 in pre-recorded buy money (for a gram). RP 64, 68, 72. Aase patted her down and another officer performed a search of her car. RP 129, 64, 181.

Smith was supposed to meet Hardgrove at a nearby park, but picked him up as he was walking there. RP 66-69, 128-129. They drove in the direction of Hardgrove's grandfather's house and pulled into the driveway. RP 132-33. Hardgrove got out after giving Smith a small bag of methamphetamine. RP 132-33, 167. Smith drove back to meet the task force and gave it to them. RP 73, 75-76.

## 2. Sentencing

Because one of the buys counted as an "other current offense," it increased Hardgrove's offender score from an 8 to a 9. RP 255. The drug sentencing grid yields a standard range of 60-120 months for an offender score of six and over. RP 256, 276.

In support of an exceptional sentence below the standard range, defense counsel asserted a failed defense of entrapment. RP 257-58, 262. Because it did not rise to a complete defense, it was not asserted at trial. RP 262. In support of the mitigating circumstance, however, Hardgrove's girlfriend testified at

sentencing it was Smith who contacted Hardgrove to make the drug purchases. RP 260.

Predisposition aside, defense counsel argued Hardgrove was induced or prompted by Smith and the drug task force to commit the deliveries:

When the state participates, state encourages, state gives the opportunity – you know, he had the disposition, the jury found, but the state gave the opportunity. Seems like it would be the just thing to err on the lower side instead of the higher side.

RP 263. Defense counsel cited no case law to support this theory, however.

The disagreed with defense counsel's theory, concluding: "this is not an entrapment case." RP 277. The court perceived Hardgrove's offender score as somewhat of an aggravating circumstance, which favored a higher end sentence. RP 277. Nonetheless, the court also perceived mitigating circumstances in that the deliveries were of small amounts initiated by the police. RP 277. The court therefore split the difference and imposed 90 months. RP 278.

C. ARGUMENT

HARDGROVE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Although defense counsel requested an exceptional sentence downward, counsel failed to cite relevant authority that would have supported it. Even in the absence of such authority, the court saw the circumstances of the offenses somewhat mitigated. Had the court known of existing case law supporting the grant of an exceptional sentence below the standard range in similar circumstances – where the police through multiple controlled buys increased a defendant’s offender score – the court may have exercised its discretion differently. This potentiality is further supported by the fact the court considered Hardgrove’s offender score – which was increased by the multiple controlled buys here – as an aggravating circumstance.

The state and federal constitutions guarantee criminal defendants reasonably effective representation by counsel at all critical stages of a case. U.S. Const. amend. 6; Wash. Const. art. 1 § 22; Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Sentencing is a critical stage of a criminal

case. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997).

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must show that: 1) counsel's performance was deficient "and not a matter of trial strategy or tactics;" and 2) the deficient performance prejudiced the defendant's case. State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003) (citing State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) and Strickland, 466 U.S. at 687-89). A tactical decision at trial will be found deficient if it is not reasonable. Hendrickson, 129 Wn.2d at 77-78; Roe v. Flores-Ortega, 528 U.S. 470, 481, 145 L. Ed. 2d 985, 120 S. Ct. 1029 (2000).

Failure to request an exceptional sentence may constitute deficient and prejudicial representation. In State v. McGill, 112 Wn. App. 95, 98, 47 P.3d 173 (2002), the defendant was sentenced to a prison term within the standard sentence range for convictions on two cocaine delivery and one possession with intent to deliver counts.<sup>2</sup> The drug purchases happened within a seven-day period and each involved a small amount of cocaine. Each delivery from McGill to a CI occurred at the same location. Id.

Each purchase was controlled by the investigating officers, who used the same CI. Based upon the purchases, officers obtained a search warrant and served it on McGill eight days after the first purchase. They seized two small bindles of cocaine from McGill. Id.

After McGill was convicted, his counsel failed to request an exceptional sentence below the standard range. Id. On appeal, McGill argued that failure to request the exceptional sentence was ineffective assistance, relying on State v. Sanchez, 69 Wn. App. 255, 256-57, 848 P.2d 208, rev. denied, 122 Wn.2d 1007 (1993), and State v. Hortman, 76 Wn. App. 454, 886 P.2d 234 (1994), rev. denied, 126 Wn.2d 1025 (1995). The court agreed, holding that failure to inform a sentencing court of the proper scope of its discretion when sentencing a defendant was ineffective and prejudicial. McGill, 112 Wn. App. at 101-02. The McGill court noted that a sentencing court's discretion includes circumstances in which operation of the multiple offense policy of the SRA yields a sentence that is clearly excessive. Id., at 99-100 (citing RCW

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<sup>2</sup> The jury could not agree on whether McGill had committed the charged third delivery offense.

9.94A.535(1)(g)).<sup>3</sup> In such circumstances, a court may impose an exceptional sentence. Id.; Sanchez, 69 Wn. App. at 260-61.

The Sanchez court analyzed whether Sanchez' presumptive sentence was clearly excessive under the purposes of the SRA. Sanchez, 69 Wn. App. at 260. With no controlling precedent, the court analogized to cases where an exceptional sentence above the standard sentence range is permissible, as in State v. Batista, 116 Wn.2d 777, 808 P.2d 1141 (1991):

In Batista, the court identified two factual bases, either of which may support reliance on [former] RCW 9.94A.390(2)(f): (1) "egregious effects" of defendant's multiple offenses and (2) the level of defendant's culpability resulting from the multiple offenses.

Sanchez, 69 Wn. App. at 260-61. The court held that if:

a sentence under [former] RCW 9.94A.390(2)(g) is justified by effects that are egregious, it follows that a sentence under [former] RCW 9.94A.390(1)(g) is justified by effects that are nonexistent, trivial or trifling.

69 Wn. App. at 261 (emphasis added).

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<sup>3</sup> Under RCW 9.94A.535(1)(g), the court may impose an exceptional sentence below the standard range if it finds by a preponderance of the evidence that:

The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

In order to assess whether a presumptive sentence under the multiple offense policy of the SRA is clearly excessive, a court must examine:

the difference between (a) the effects of the first buy alone and (b) the cumulative effects of all three buys. It is this difference, if any, that the multiple offense policy is designed to take into account. If it can be shown that this difference is nonexistent, trivial or trifling, the multiple offense policy should not operate; rather, the sentencing judge should be permitted to give an exceptional sentence downward . . .

Id. This test applies regardless of the nature of the convictions before the sentencing court. See, e.g., McGill, supra, 112 Wn. App. at 98 (two cocaine deliveries and one possession with intent to deliver cocaine); State v Calvert, 79 Wn. App. 569, 582-83, 903 P.2d 1003 (1995) (multiple check forgeries).

This analysis furthers the policies underlying the SRA:

none of the purposes of the SRA are served by the multiple offense policy . . . if qualitative differences between the first criminal act and subsequent acts must be ignored.

State v. Fitch, 78 Wn. App. 546, 553, 897 P.2d 424 (1995) (citing Hortman, 76 Wn. App. at 464). Furthermore, imposition of:

"a penalty which is within the standard range but unduly harsh, considering the circumstances of a case, does not '[p]romote respect for the law by

providing punishment which is just.' RCW 9.94A.010(2)."

Fitch, 78 Wn. App. at 553 (quoting State v. Nelson, 108 Wn.2d 491, 502, 740 P.2d 835 (1987)). When analyzing the difference between the acts underlying each conviction, the sentencing court must determine whether there were "minimal cumulative effects of the crimes" -- that in essence, "the whole should not be greater than the sum of its parts" when assessing whether a standard range sentence was excessive. Calvert, 79 Wn. App. at 583; also see Hortman, supra, 76 Wn. App. at 464 (inquiry turns on whether the subsequent criminal acts are de minimis).

In the context of a multiple-charge drug prosecution, when police learn of a defendant's predisposition to sell drugs, they have control over how many controlled buys would be solicited from criminal defendants before calling a halt to the undercover investigation and initiating charges. Hortman, 76 Wn. App. at 461-62. Thus, if subsequent criminal acts "had no apparent purpose than to increase the [defendant's] presumptive sentence," an exceptional sentence below the standard range is warranted. Sanchez, 69 Wn. App. at 261. McGill, Sanchez and Hortman are directly applicable to this case.

Each purchase here was controlled by the investigating officers who used the same CI. Each delivery took place in the same general area within a fairly short time period. Each delivery involved a small amount of drugs. Moreover, there appeared to be no apparent purpose for instituting multiple controlled buys other than to increase Hardgrove's presumptive sentence. As in Sanchez, the difference in effect between the first controlled buy and second were non-existent, trivial and trifling. Operation of the multiple offense police therefore resulted in a sentence that was clearly excessive.

Although the sentencing range would have been the same without the second count, the court viewed the additional point in Hardgrove's offender score as an aggravating circumstance. Had the court known the officers' instigation of multiple controlled buys to increase a defendant's offender score is – pursuant to well established case law – in reality a circumstance meriting leniency, it likely would have exercised its discretion differently.

There can be no legitimate tactical reason for defense counsel's failure to cite to Sanchez and Hortman. Defense counsel was seeking an exceptional sentence but failed to cite to the relevant authorities that would have supported it. Counsel

performed deficiently. Because there is a reasonable possibility the court would have exercised its discretion differently had it known of the relevant authority supporting an exceptional sentence, Hardgrove was prejudiced by defense counsel's deficient performance. Hardgrove received ineffective assistance of counsel. This Court should remand for a new sentencing hearing.

D. CONCLUSION

Because Hardgrove received ineffective assistance of counsel at sentencing, this Court should remand for a new sentencing hearing to allow the court to consider whether an exceptional sentence is appropriate in light of the relevant authorities cited above.

Dated this 31<sup>st</sup> day of December, 2012

Respectfully submitted

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State V. Justin Hardgrove

No. 31143-1-III

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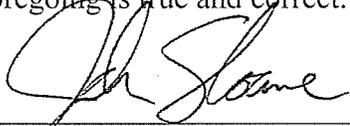
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