

No. 95374-1

NO. 74733-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR THOMAS,

Appellant.

FILED
Apr 07, 2017
Court of Appeals
Division I
State of Washington

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

The Honorable Jeffrey Ramsdell, Judge
The Honorable Hollis Hill, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

If defense counsel failed to preserve error by failing to object to empanelment of a jury on the precise grounds raised on appeal, did counsel provide ineffective assistance?

Issues Pertaining to Supplemental Assignment of Error

1. As a preliminary matter, may a claim that a trial court exceeded its sentencing authority be raised for the first time on appeal?

2. Defense counsel objected to the empanelment of a jury to retry the appellant solely on a firearm allegation, but he did so on double jeopardy grounds. Did counsel's failure to object on the grounds that the court lacked the authority to empanel the jury constitute ineffective assistance?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The State has argued in its response brief that this Court should not consider the appellant's argument on appeal—that the trial court lacked statutory authority to empanel a second jury to address the firearm enhancement, after the first jury was unable to unanimously agree—because any error was waived by trial counsel. Brief of Respondent (BOR) at 3-4. Out of an abundance of caution, Thomas is seeking this Court's permission to raise a supplemental claim of ineffective assistance for failing to raise this precise issue in the court below.

C. SUPPLEMENTAL ARGUMENT

1. CHALLENGES TO A TRIAL COURT'S SENTENCING AUTHORITY MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

Thomas may raise this issue, a challenge to the trial court's sentencing authority, for the first time on appeal.

Trial courts lack inherent authority to empanel sentencing juries. State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007). Moreover, “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). “[A] sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional.” In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)).

When a sentence has been imposed for which there is no authority in law, appellate courts have “the power and the duty” to correct the erroneous sentence upon its discovery. Petition of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980) The appropriate remedy is reversal of the erroneous, void portion of the sentence. State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980), overruled by statute on other grounds, State v. Barr, 99 Wn.2d 75, 658 P.2d 1247 (1983).

Based in part on the foregoing authority, this Court should address Thomas's argument that the trial court lacked the authority to empanel a jury solely to consider whether a firearm enhancement should be imposed. Because the trial court lacked the authority to empanel such a jury and therefore to impose the firearm sentence enhancement, the enhancement should be vacated. Carle, 93 Wn.2d at 33-34.

2. INEFFECTIVE ASSISTANCE OF COUNSEL ALSO REQUIRES VACATION OF THE FIREARM ENHANCEMENT.

Thomas believes his objection to the error in the court below was preserved by trial counsel's objection to empanelment of the jury.

Should this Court disagree, however, Thomas also asserts that trial counsel was ineffective for failing to object on the grounds he now asserts, that the trial court lacked authority to empanel the jury and impose the sentence enhancement.

a. Trial counsel did not waive the objection.

Putting aside, temporarily, the question of ineffective assistance, Thomas's trial counsel did not waive his objection to empanelment of the second jury. He objected, albeit on somewhat different grounds.

And while the State argues that defense counsel waived his objection, the two cases cited by the State are not on point. BOR at 4.

First, in State v. Nguyen, Nguyen argued that the trial court lacked authority to impose a firearm enhancement, because even though the legislature created a procedure for imposition of a deadly weapon enhancement in RCW 9.94A.602, it created no parallel procedure for the imposition of a firearm enhancement. 134 Wn. App. 863, 869, 142 P.3d 1117 (2006). In rejecting Nguyen's argument, this Court stated that even though there was no objection in the court below, it would nonetheless "exercise its discretion" to consider an argument that the trial court lacked authority to empanel a jury to consider a firearm enhancement. 134 Wn. App. at 870 n. 13.

Second, the State cites to State v. Toney, in which Division Two of this Court declined to address such an argument, noting that there was no objection in the court below. Toney, 149 Wn. App. 787, 798, 205 P.3d 944 (2009) ("Like the defendant in Nguyen, Toney failed to object to the special verdict forms regarding the firearm enhancements. We decline to address the issue.").

In those cases, there no objection at all to the procedure employed by the trial court in each case. But here, trial counsel strenuously objected to empanelment of a second jury to retry Thomas solely on the firearm enhancement. This objection put the trial court on notice that such a trial was not authorized. 8RP 29-43; CP 113 (Thomas's trial brief).

Moreover, the State itself cited to the cases now at issue in this appeal. For example, the State cited State v. Reyes-Brooks¹ and State v. Thomas² to argue that Thomas could be retried on the firearm enhancement alone. CP 199-200. Thus, the question of whether those cases provided the trial court authority to empanel the sentencing jury was before that court.

Because the trial court had an opportunity to correct the error in the court below, the issue was not waived. Cf. State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014) (recognizing that moving for a mistrial after a prosecutor's rebuttal argument preserves the issue of prosecutorial misconduct for appellate review). This Court should find the error was preserved for its review.

- b. In the alternative, defense counsel was ineffective for failing to alert the court that it lacked authority to empanel the freestanding firearm enhancement jury.

In the alternative, defense counsel was ineffective for failing to alert the trial court that it lacked the authority to empanel a jury to consider the firearm enhancement.

¹ 165 Wn. App. 193, 202-07, 267 P.3d 465 (2011), review granted, cause remanded, 175 Wn.2d 1020, 289 P.3d 625 (2012).

² 166 Wn.2d 380, 208 P.3d 1107 (2009).

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and, in Washington, under Article I, section 22. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Only legitimate trial strategy or tactics constitute reasonable performance. Kylo, 166 Wn.2d at 869.

Defense counsel was ineffective. First, defense counsel's performance fell below an objective standard of reasonableness. Counsel had a duty to be aware of the applicable law. Kylo, 166 Wn.2d at 862. Correspondingly, counsel had a duty to understand that Reyes-Brooks, 165 Wn. App. at 202-07 and other authority relied on by the State conflicted with Pillatos, 159 Wn.2d at 469-70 and the cases Pillatos relied on. See Brief of Appellant at 4-5.

Second, prejudice exists where there is a reasonable probability that the result would have been different but for counsel's performance.

Thomas, 109 Wn.2d at 226. Here, the questions of prejudice and the question of the trial court's authority to empanel the jury are one and the same. If the court lacked authority to empanel the jury, and therefore to impose the firearm enhancement, then Thomas was prejudiced by his attorney's failure to raise the issue in the court below, alerting the court.

In summary, Thomas has shown both deficient performance and prejudice. Reversal is required based on counsel's ineffective assistance.

D. CONCLUSION

For the reasons stated above and in Mr. Thomas's opening brief, this Court should order that the firearm enhancement be vacated.

DATED this 7TH day of April, 2017.

Respectfully submitted,

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