

63046-6

63046-6

NO. 63046-6-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

QUENTIN CAMPBELL,

Appellant.

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~~FILED~~  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

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

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APPELLANT'S REPLY BRIEF

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

1. Mr. Campbell was denied his right to effective assistance of counsel where his attorney failed to object to the incorrect calculation of his offender score at sentencing, and even affirmatively acknowledged the incorrect calculation in defense counsel's presentence report.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

1. Counsel provides ineffective assistance when he or she unreasonably acts and causes a defendant to serve additional unwarranted time in custody. In the case at bar, Mr. Campbell's trial attorney failed to object to the flawed offender score, and adopted it in her presentence report, which she filed with the trial court, resulting in an erroneous sentence. Did Mr. Campbell receive ineffective assistance of counsel where his attorney unreasonably waived this issue and caused Mr. Campbell to serve additional unnecessary time incarcerated?

C. ARGUMENT.

1. WHERE DEFENSE COUNSEL FAILED TO OBJECT TO THE INCORRECT CALCULATION OF MR. CAMPBELL'S OFFENDER SCORE, MR. CAMPBELL WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

- a. Mr. Campbell has a constitutional right to the effective assistance of counsel. A person accused of a crime has a constitutional right to the effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6;<sup>1</sup> Wash. Const. art. 1, section 22. The right to effective assistance embraces not only trial proceedings, but also includes the right to assistance of counsel at sentencing. State v. Thiefault, 160 Wn.2d 409, 583, 158 P.3d 580 (2007) (finding attorney ineffective for failing to object to comparability of out-of-state prior conviction).

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<sup>1</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

To prevail in a claim of ineffective assistance of counsel, a defendant must show, “First, [that] counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,” quoting Strickland, 466 U.S. at 688).

While an attorney’s decisions are treated with deference, his or her actions must be reasonable based on all circumstances. Wiggins, 539 U.S. at 521; State v. Tilton, 149 Wn.2d 775, 72 P.2d 735 (2003). To assess prejudice, the defense must demonstrate grounds to conclude a reasonable probability exists of a different outcome, but need not show the attorney’s conduct altered the result of the case. Tilton, 149 Wn.2d at 784.

b. Defense counsel's failure to object to the incorrect calculation of the offender score, and to make the same criminal conduct argument, was unreasonable. It is presumptively deficient for an attorney to take actions that result in a client serving additional unnecessary time in prison. Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001).

Here, defense counsel filed a presentence report in which she affirmatively acknowledged that Mr. Campbell's offender score was a two. Supp. CP \_\_\_\_ (Sub. No. 82). As the State points out, at no time did defense counsel argue that the two counts of second degree assault constituted the same criminal conduct, as Mr. Campbell has argued in his Opening Brief. Resp. Brief at 18-19. Had defense counsel successfully argued that the assaultive behavior was one continuous event – involving the same time, place victim, and intent – the resulting sentence would have been reduced.

Since there can be no reasonable strategic explanation for defense counsel's failure to object to the miscalculation of Mr. Campbell's offender score, defense counsel's representation was ineffective. See, e.g., McFarland, 127 Wn.2d at 335-36.

c. Any increased incarceration resulting from an attorney's deficient performance establishes prejudice. An attorney's deficient performance is presumed prejudicial when it results in any amount of increased incarceration. Glover, 531 U.S. at 204. In Glover, the government argued that counsel's failure to pursue a sentencing argument that could have resulted in a decrease of six to 21 months of incarceration was insufficiently prejudicial to a defendant. Id. at 202. The United States Supreme Court rejected that contention, and by the time the case reached the Supreme Court, even the prosecution had abandoned this argument. Id.

The Glover Court ruled, "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." Id. at 203.

Additionally, a defendant claiming ineffective assistance of counsel is not required to prove that the attorney's error changed the outcome of the case, but only that there is a reasonable probability that the result would have been different had the attorney

not performed deficiently. Nix v. Whiteside, 475 U.S. 157, 175, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986); see e.g., House v. Bell, 457 U.S. 518, 126 S.Ct. 2064, 2086, 165 L.Ed.2d 1 (2006) (“conclusive exoneration” not required for ineffective assistance of counsel claim based on new evidence).

Here, had defense counsel properly pursued Mr. Campbell’s argument regarding same criminal conduct at sentencing, he would have been saved several months of incarceration. Because defense counsel failed to effectively represent Mr. Campbell at sentencing, counsel’s negligent performance caused Mr. Campbell prejudice.

2. WHERE MR. CAMPBELL WAS PUNISHED TWICE BASED ON A SINGLE UNIT OF PROSECUTION, HIS PROTECTION AGAINST DOUBLE JEOPARDY WAS VIOLATED.

a. The assaultive behavior constituted a continuing course of conduct. As the State notes in its brief, Mr. Campbell argues that one assault occurred against Ms. Campbell, and that this assault took place in the midst of a continuing course of conduct. Resp. Brief at 12. Although the State merely argues that the Court should review the facts “in a commonsense manner,” the record indicates that the course of conduct analysis is correct. Id.

The entire assault took place in approximately 30 to 60 minutes, and neither party ever left the bedroom. 1/21/09 RP 43-54; 93-97. Despite the State's argument, it is clear that there was no pause in the events while Mr. Campbell retrieved the handgun from the closet following the choking incident. Resp. Brief at 12. Had there been such a pause, it seems clear that the complainant would have taken the opportunity to leave the bedroom with her children.

The approach taken by the State in breaking this event into separate assault charges would allow an accused to be charged for each individual shove, tap, or punch as a distinct assault, creating an absurd result. This is exactly what the Supreme Court anticipated when holding that "the Legislature clearly has not defined 'assault' as occurring upon any physical act." State v. Tili, 139 Wn.2d 107, 116-17, 985 P.2d 365 (1999).

b. It was error not to merge the two assault convictions against Mr. Campbell, as they constituted a single unit of prosecution. Because Mr. Campbell's two convictions for assault in the second degree involving the same victim and same proceeding constitute a single unit of prosecution, these convictions violated his right to be free from double jeopardy. One of the

convictions must be vacated and the case remanded for a new sentencing hearing. State v. Leyda, 157 Wn.2d 335, 351, 138 P.3d 610 (2006).

3. WHERE MR. CAMPBELL WAS IMPROPERLY SENTENCED FOR TWO OFFENSES WHICH CONSTITUTE THE SAME CRIMINAL CONDUCT, THE CASE MUST BE REMANDED FOR RESENTENCING

a. A stipulation to a legal conclusion, such as Mr. Campbell's offender score, is not binding on this Court. "A stipulation as to an issue of law is not binding on this court; it is the province of this court to decide the issues of law." State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995); Rusan's, Inc. v. State, 78 Wn.2d 601, 606, 478 P.2d 724 (1970) ("Courts of law are not bound by parties' stipulations of law"); see also In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 875, 123 P.3d 456 (2005) (holding that the defendant could not stipulate to a persistent offender life sentence, which is a legal conclusion, if no facts established the appropriateness of that sentence); Barnett v. Hicks, 119 Wn.2n 151, 161, 829 P.2d 1087 (1992) (holding that parties cannot stipulate to jurisdiction or limit a court's review).

Thus, defense counsel's acquiescence to Mr. Campbell's offender score in the presentence report and at oral argument is not

binding on this court. A trial court's determination of what constitutes the same criminal conduct for sentencing purposes must be reversed on appeal where the court has abused its discretion or misapplied the law, as it did here. Tili, 139 Wn.2d at 122.

b. The two assault in the second degree offenses constituted the same criminal conduct and should have counted as the same offense in Mr. Campbell's offender score. This Court must review the sentencing court's calculation of an offender score de novo, and reverse only for abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

The State relied upon no case law in its argument at sentencing, merely asking the court to sentence Mr. Campbell consecutively for each of the second degree assault convictions based merely upon its oral argument that there were "two different intents and two different time periods in the grand scheme." 2/13/09 RP 6. Nowhere in the record is this contention supported by fact or law. For the reasons previously argued above and in Mr. Campbell's Opening Brief, the record reveals that the events on the morning of May 21, 2008 constituted the same criminal conduct and should have counted as the same offense in Mr. Campbell's offender score.

c. Mr. Campbell's case must be remanded for sentencing within the correct standard range. Because the trial court improperly calculated Mr. Campbell's offender score, the case must be remanded for sentencing. Tili, 139 Wn.2d at 128; State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999).

F. CONCLUSION.

For the foregoing reasons, Mr. Campbell respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 21<sup>st</sup> day of January, 2010.

Respectfully submitted,



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