

NO. 72313-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY STANDLEY,

Appellant.

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Richard T. Okrent, Judge

BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Appellant received ineffective assistance of counsel at sentencing.

Issue Pertaining to Assignment of Error

Where defense counsel moved for an exceptional sentence below the standard range, but failed to cite the relevant authorities indicating the court had discretion to do so, and where the court erroneously believed appellant's transportation difficulties and efforts to comply did not constitute mitigating factors the court could consider in sentencing appellant for failing to register, did appellant receive ineffective assistance of counsel at sentencing?

B. STATEMENT OF THE CASE¹

On March 21, 2014, the Snohomish County prosecutor charged appellant Zachary Standley with failing to register under RCW 9A.44.130. CP 107. Standley has a juvenile adjudication from 2000 that requires him to register. CP 103. The state alleged that Standley, having previously registered as not having a fixed residence, knowingly failed to register the week of February 18,

¹ This brief refers to the transcripts as follows: "1RP" – 7/18/14; and "2RP" – 7/28/14 and 8/11/14.

2014, through February 27, 2014. CP 84-84; RCW 9A.44.130(5)(b).

According to the affidavit of probable cause, Standley turned in his registration forms on January 7 and 29, 2014, and on February 11, 2014. CP 103.

On February 27, 2014, a police officer responded to the area of 88th St. N.E. and State Avenue in Marysville to investigate a complaint about panhandlers, one of who was Standley. CP 104. The officer ran Standley's name and learned of his registration requirements. CP 104. Standley told the officer he had not registered for the past two weeks because he had no money. CP 104.

Defense counsel filed a motion to dismiss on grounds the sheriff's office does not provide registrants with proof of registration upon turning in his or her weekly form. As a result, it is not possible to prove one's compliance once one is accused of failing to register. CP 85-100. Counsel argued the practice constituted government mismanagement and a denial of due process. CP 85-100.

Following a hearing, the court denied the motion to dismiss. 1RP 13. CP 82. Standley thereafter stipulated to a bench trial on agreed documentary evidence and was convicted as charged. CP 22-81; 2RP 7.

The defense moved for an exceptional sentence below the standard range. CP 16-21. In its sentencing memorandum, defense counsel noted Standley “was registered between 97th, 104th, and 155th and State Ave, Marysville, WA.” CP 17. He registered as homeless on December 31, 2013, January 9, 2014, January 27, 2014, and February 11, 2014. CP 17. On February 11, 2014, Standley submitted two registration forms, attempting to make up for the week he could not afford to get to the sheriff’s office. CP 17. On February 27, he was arrested for failing to register at 88th and State Avenue in Marysville. CP 17. “State Avenue” was the same street Standley previously registered. CP 19.

Defense counsel argued the circumstances showed “a willingness to comply” and constituted a mitigating factor:

More importantly, the sheriff’s office knew where he was. Mr. Standley had been registering on the same street “in the bushes” for weeks. He was arrested on that same street. The point of the registration requirement is to notify law enforcement

of Mr. Standley's whereabouts, and in this case law enforcement did know where Mr. Standley was. In fact, one week that Mr. Standley could not afford to register, he registered two times the next week to try and meet his requirements. This action shows a willingness to comply. A prison-based range in this case does not "promote respect for the law by providing punishment which is just."

CP 19.

As an aside, defense counsel informed the court Standley would be living with his uncle at a fixed residence upon his release and would no longer have to register weekly as homeless:

And Mr. Standley now has a fixed address which I think is the most important factor. He will no longer have to register as homeless when he is released, so it will take away those needs for transportation and resources, potentially bus money, to try to get to the sheriff's office every single week to maintain that schedule, which is hard for people who don't have a way to keep track of their sense of time.

2RP 11; see also CP 20.

When given the opportunity to address the court, Standley indicated that "even though I did have those costs, I see now that I still made a mistake." 2RP 12. He saw his new living arrangement as a "new chance." 2RP 12.

When the court interrupted to ask whether Standley could have walked from Marysville to the Everett sheriff's office, Standley responded it was "quite far" and that he had been trying to

scrounge bus money. But in hindsight, Standley recognized he should have made the journey. 2RP 13.

The court noted it did not have “complete discretion to just give out exceptional sentences.” 2RP 14. The court cautioned Standley: “It’s not enough that you’re trying or every once in a while you go in and register. You have to be in full compliance.” 2RP 16. Nonetheless, the court did not necessarily see the standard range sentencing scheme as entirely fair:

All right. I am not finding grounds for an exceptional sentence down. I’m giving this lecture to you, Mr. Standley, because I don’t want to have to give you, in a few years, 60 months in prison for failing to register for one week, which could happen. I’ve seen it happen. This new system, I don’t have complete agreement with what the legislature has done. It seems like the guy who’s out of compliance for two years is treated the same as the guy who’s out of compliance for two days. So, that’s the problem with it. Sometimes these standard ranges aren’t really very fair.

2RP 16.

The court sentenced Standley to the low end of the range, 12 months plus one day, and twelve months of community custody. CP 2-15. This appeal follows. CP 1.

C. ARGUMENT

STANDLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

The trial court has authority to depart downward from the standard sentence range based on the mitigating factor that the accused was trying to comply with registration requirements but had transportation and financial issues hindering his or her efforts. State v. Garcia, 162 Wn. App. 678, 256 P.3d 379 (2011), review denied, 173 Wn.2d 1008 (2008). Defense counsel moved for an exceptional sentence in part based on Standley's efforts to comply with registration requirements and transportation issues hindering those efforts. However, counsel failed to cite any relevant authority informing the court that these circumstances constituted a valid basis to depart from the standard range. This failure constituted ineffective assistance of counsel.

The Sixth Amendment of the United States Constitution guarantees defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel is constitutionally guaranteed at all critical stages of a criminal proceeding, including sentencing. Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19

L.Ed.2d 336 (1967); State v. Rupe, 108 Wash.2d 734, 741, 743 P.2d 210 (1987) (“Sentencing is a critical stage of the proceedings, at which a defendant is constitutionally entitled to be represented by counsel.”).

To demonstrate ineffective assistance of counsel, an appellant must show that the attorney's performance was deficient and that the deficiency was prejudicial. State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). Deficient performance is that which falls below an objective standard of reasonableness. In re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). The reasonableness of counsel's conduct is judged “on the facts of the particular case, viewed as of the time of counsel's conduct.” Strickland, 466 U.S. at 690. Prejudice occurs if, but for the deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

Under RCW 9.94A.535(1), the court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. While not listed as statutorily enumerated factors in RCW 9.94A.535(1)(a), Division Three of this Court has upheld the

lower court's imposition of an exceptional sentence in a failure-to-register case, based on the accused's transportation issues and efforts to comply with registration requirements. Garcia, 162 Wn. App. at 686.

Noel Garcia was convicted in 2005 of an offense requiring him to register with the Yakima County sheriff's office (YCSO) and report once a week. Garcia had to travel to Yakima to fulfill his reporting duties because a fire had destroyed the sheriff's office closest to Garcia's place of residence in Sunnyside. Garcia, 162 Wn. App. at 681.

On July 7, 2009, Garcia was required to report to the YCSO to fulfill his reporting duties. He intended to check in there and then turn himself in to the department of corrections (DOC) for an outstanding warrant. Garcia arranged for his friend to drive him from Sunnyside to Yakima. Although the friend was supposed to pick Garcia up from work at 4:00 p.m., she did not arrive until 4:50 p.m. Garcia, 162 Wn. App. at 682.

Garcia contacted the YCSO official and informed her he would be unable to check in at the YCSO and would instead turn himself in to DOC. The official informed Garcia that his incarceration would be considered a valid reason for failing to report,

and he would not be in violation of his reporting duties if he turned himself in on the warrant. Garcia, 162 Wn. App. at 682.

Unfortunately for Garcia, upon arriving at the Yakima County jail at 5:30 p.m., jail officials told him it was too late to turn himself in that day. And regardless, they could not admit Garcia, unless an officer brought him in. Garcia, 162 Wn. App. at 682.

The standard range in Garcia's case was 33 to 43 months. The trial court justified imposing an exceptional sentence of 364 days, based upon Garcia's transportation difficulties and attempts to comply with his reporting requirements, as evidenced through his telephone calls to the YCSO and reporting to the Yakima County jail, and his obligation to register with two different government agencies located 40 miles apart. Garcia, at 682.

The state appealed, but this Court affirmed the sentence:

The mitigating factors used by the trial court to impose Mr. Garcia's exceptional sentence are elements related to the crime because they relate to Mr. Garcia's ability to perform his obligated reporting duties. The trial court held that Mr. Garcia's transportation difficulties and efforts to comply with registration through contacting the YCSO and attempting to obtain admittance to the Yakima County Jail were factors that justified his exceptional sentence. Neither of these factors relates to Mr. Garcia's personal conditions, such as his family situation or drug dependencies. Instead, they are specifically focused on the elements of the crime

under RCW 9A.44.130; namely, Mr. Garcia's ability to report to the YCSO and Yakima County Jail. Accordingly, they are legitimate factors to support the exceptional sentence.

Garcia, 162 Wn. App. at 686.

Defense counsel's failure to inform the trial court of its sentencing authority may constitute ineffective assistance of counsel. State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002); see also State v. McKinnon, 110 Wn. App. 1, 38 P.3d 1015 (2002) (counsel's failure to call trial court's attention to recent decisions which held that the former sex offender registration statute under which defendant was prosecuted was unconstitutionally vague as applied to a homeless sex offender was ineffective assistance of counsel).

In McGill, defense counsel failed to apprise the court of its authority to depart from the standard range on grounds the multiple offense policy of the Sentencing Reform Act resulted in an excessive sentence. McGill, 112 Wn. App. at 97.

Although there was case law supporting a downward departure in McGill's case, his attorney did not move for an exceptional sentence or cite the relevant authorities that would have supported it. McGill, 112 Wn. App. at 101-102. Division One

of this Court held defense counsel performed deficiently: “A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise.” McGill, at 102. Because the appellate court could not say the trial court would have imposed the same sentence had it known an exceptional sentence was an option, reversal was required. McGill, 112 Wn. App. at 100-101; see also State v. Miller, 181 Wn. App. 201, 324 P.3d 791 (2014) (remand for resentencing required where it was not clear court would have imposed same sentence had it known of its discretion).

Reversal is likewise required here. As in McGill, defense counsel failed to cite to the relevant authorities to inform the court of the parameters of its decision-making authority. Under Garcia, the court could have imposed an exceptional sentence based on Standley’s efforts to comply and transportation issues. Due to counsel’s failure, however, the court was unaware of its discretion to impose an exceptional sentence in Standley’s case. As in McGill, it is not possible to say whether the trial court would have imposed the same sentence had it known an exceptional sentence was an option. This is evidenced by the court’s comments it did not

have discretion to depart from the standard range, that substantial compliance was insufficient, and its opinion that the standard range set by the legislature was not necessarily fair. Because Standley was prejudiced by his attorney's failure to advise the court of its discretion, remand for resentencing is required.

D. CONCLUSION

This Court should remand for resentencing because Standley received ineffective assistance of counsel at sentencing.

Dated this 8th day of December, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 72313-8-1
)	
ZACHARY STANDLEY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR EMAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] ZACHARY STANDLEY
DOC NO. 362470
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF DECEMBER 2014.

x *Patrick Mayovsky*