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

STATE OF WASHINGTON,
Respondent,

v.

JESSE COOK,
Petitioner.

COA NO. 58126-4-II

PETITION FOR REVIEW

A. IDENTITY OF MOVING PARTY

Petitioner Jesse Cook (hereinafter "Mr. Cook"), through his attorney, Shawn P. Hennessy, asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Cook requests review of the Court of Appeals May 14, 2024, ruling in *State v. Cook*, 2024 WL 2153509 (2024) affirming his convictions for unlawful possession of methamphetamine with intent

to distribute, unlawful possession of fentanyl with intent to distribute, and the two firearm sentencing enhancements. A copy of the decision is attached in the Appendix. Specifically, Mr. Cook specifically challenges the Court of Appeals decision pertaining to his claims of ineffective assistance of counsel and the sufficiency of the evidence regarding the firearm enhancements.

C. ISSUES PRESENTED FOR REVIEW

a. Mr. Cook received ineffective assistance of counsel during the plea-bargaining process because he proceeded to go to trial on the inaccurate information provided by his counsel that if was convicted, he would receive a lesser sentence then he did. Mr. Cook should be re-sentenced in accordance with the original sentence he received, or the one offered by the State during the plea-bargaining process

b. The affirmance of Mr. Cook's conviction by the Court of Appeals for the firearm enhancement was in conflict with decisions of the Supreme Court of Washington that hold that a firearm must be "easily accessible" and there must be a nexus between the accused, the weapon, and the crime.

D. STATEMENT OF THE CASE

Introduction

On February 7, 2023, City of Napavine Police arrested Mr. Cook with one count of Possession of a Stolen Firearm, one count of Possession of Methamphetamine with Intent to Deliver while armed with a firearm, and one count of Possession of Fentanyl with Intent to Deliver

while armed with a firearm. The state dismissed the stolen firearm charge during trial.

A jury convicted Mr. Cook of the possession of methamphetamine and fentanyl charges after trial. The court initially sentenced Mr. Cook to 48 months and one day of incarceration on both charges, with the firearm enhancement.

The matter returned to court for re-sentencing on July 18, 2023. The court re-sentenced Mr. Cook to 123 months of incarceration. Mr. Cook filed a timely notice of appeal.

Facts

Mr. Cook did not have any previous convictions, so he was deemed to have an offender score of zero. *C.P.2. p. 11* (*C.P. 2* contains the court documents for the July 19, 2023, re-sentencing). As a result, the court sentenced Mr. Cook to 12 months of incarceration on the drug charges. The court, counsel and the prosecutor all thought Mr. Cook was convicted of Level 2 drug charges. *R.P. 278-280*. Finding that the two counts involved same/similar conduct, the court merged them and sentenced Mr. Cook to concurrent sentences of 48 months and one day, which included the firearm enhancements. *Id*.

On July 18, 2023, the state brought the matter back for re-sentencing because the Department of Corrections (hereinafter "DOCS") advised the prosecutor that the initial 48-month sentence imposed by the court was wrong. *R.P. p.2.* (July 18, 2023, transcript done by Gloria Bell). The state first argued that Mr. Cook should have been sentenced on Level Three offenses instead of a Level Two offenses, because of the firearm enhancement. *R.P. p. 2.* The state also indicated that the court wrongly imposed the sentences on Mr. Cook to run concurrently, when according to "case law", the sentence should have been imposed consecutively. *Id*. As a result, Mr. Cook, with no criminal history in Washington, was now going to be sentenced to 123 months of incarceration. This was more than double his original sentence of 48 months. *Id*.

Counsel argued that the new sentence was unfair and had Mr. Cook known that he could face 123 months of incarceration, he would have taken the plea offered to him instead of going to trial. *R.P.2, p.10* Counsel stated

> I believe the State and DOC are correct on the 51 to 68. I don't like it, nor does my client. Because he went to trial thinking he was looking at a totally different type of range. So, it may have made a difference in his decision to go

forward.

R.P. 2, p. 10. Counsel also cited the dissent in "*State v. Mandinas"*, which was spelled phonetically and did not include the citation, arguing that the counts should be merged, and Mr. Cook should be sentenced concurrently on each charge. *R.P.2, pp.10-11*. The court adjourned re-sentencing for a day to review the law. *RP2. 15*.

On July 19, 2023, the court held the re-sentencing hearing. Throughout the proceedings, the court expressed remorse that it had to re-sentence Mr. Cook. On three occasions, the court stated that although it agreed with the interpretation of the sentencing statutes, it did not agree with the results. *R.P.3. pp. 5-6.* (July 19, 2023, transcript by Amy Brittingham). Also, the court opined

> that none of us really knew that this was the situation, and he was going to trial, based on something which was -- he was thinking he was gonna (sic) get a lot lesser of a sentence. It might be something you may want to look into. I just don't know that you would be able to do that now that it's at the Court of Appeals.

R.P. 3, p. 8. Nonetheless, the court opined "but, I have to follow the law. I believe that that's what the law is. I think it is very clear that that's what the law is. It's not really up to me to change that". *RP3. 6*.

Counsel again argued that the re-sentencing was patently unfair and that based on a dissent he read in "*State v. Mandanis"*, the two counts should merge, and Mr. Cook should be given concurrent sentences. The court then re-sentenced Mr. Cook to 123 months of incarceration. *Id*.

Appeal to Court of Appeals, Division Two

On appeal, Mr. Cook argued that counsel was ineffective for not arguing the court had discretion to impose an exceptional sentence for the firearm enhancements to run concurrently. Mr. Cook also argued that he suffered prejudice as a result of counsel's ineffectiveness. He received a new sentence that increased his time spent in prison to 123 months, seven years longer than his original sentence of 48 months. Had counsel known what Mr. Cook's true sentencing exposure would be prior to trial, Mr. Cook would avail himself of the plea offered by the State. Instead, Mr. Cook exercised his right to trial and ultimately received an excessive period of incarceration. Given the record, there can be no doubt that counsel's ineffectiveness greatly prejudiced Mr. Cook.

Mr. Cook also argued that the evidence was insufficient to support

the firearm sentencing enhancement because the firearm was not easily accessible because it was hidden in the center console, behind an ashtray that needed to be removed to gain access to it. The evidence also showed that the vehicle Mr. Cook drove was not his. Thus, he did not know the gun was hidden in the center console.

Opinion of Court of Appeals, Division II

Division II did not address Mr. Cook's argument that he was prejudiced due to counsel's ineffectiveness in advising him of the wrong sentencing exposure prior to deciding not to accept the State's plea offer and go to trial. *State v. Cook*, 2024 WL 2153509 at *6 (2024).

Also, the Court of Appeals wholly disregarded Mr. Cook's legal sufficiency of the firearm enhancement argument that he did not know the firearm was in the vehicle because the vehicle was not his. *Id. at *5*. Instead, the Court of Appeals held that

> the firearm was hidden from view, it was located in the center console immediately next to Cook while he was transporting the drugs. Nichols testified that the firearm was accessible by merely removing the ashtray and that the ashtray was easily removed. This evidence creates a reasonable inference that at the time Cook was transporting the drugs, the firearm was easily accessible and readily available to him.

Id.

The Court of Appeals affirmed Mr. Cook's conviction and upheld the sentence imposed on him.

E. WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review under RAP 13.4 § (b)(1), (2), (3) & (4) because the Court of Appeals decision in *State v. Cook*, 2024 WL 2153509 (2024) is (1) in conflict with a decision of the Supreme Court; (2) is in conflict with a published decision of the Court of Appeals; (3) a significant question of law under the Constitution of the State of Washington or of the United States is involved; and (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Cases Presented on Appeal

Mr. Cook presented the following authority in support of his argument to the Court of Appeals:

In the Matter of the Personal Restraint Petition of Brett, 142 Wn.2d 868, 16 P.3d 601 (2001)

In the Matter of the Personal Restrain Petition of Crace, 174 Wn.2d 835, 280 P.3d 1102 (2012)

In the Matter of the Personal Restraint Petition of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007)

In the Matter of the Personal Restraint Petition of Yung-Cheng Tsai, 1Wn.2d 91, 351 P.3d 138 (2015)

State v. Barnes, 153 Wn.2d 378, 103 P.3d 1219 (2005)

State v. Johnson, 94 Wn.App. 882, 974 P.2d 855 (1999)

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009)

State v. Leavitt, 111 Wn.2d 66, 758 P.2d 982 (1988)

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)

State v. McFarland, 189 Wn.2d 47, 399 P.3d 1106 (2017)

State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002)

State v. Melland, 9 Wn. App.2d 786, 452 P.3d 562 (2019)

State v. Robinson, 153 Wn.2d 689, 107 P.3d 90 (2005)

State v. Rupe, 108 Wn.2d 734, 743 P.2d 210 (1987)

State v. Schelin, 147 Wn.2d 562, 55 P.3d 632 (2002)

State v. Spruell, 57 Wn.App. 383, 788 P.2d 21 (1990)

State v. Valdobinos, 122 Wn.2d 270, 858 P.2d 199 (1993)

State v. Williams, 149 Wn.2d 143, , 65 P.3d 1214 (2003)

State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005)

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)
United States v. Landry, 257 F.2d 425, 431 (7th Cir. 1958)

Statutes
RCW 69.50.401(2)(a)

RCW 69.50.401(2)(b)

Table of Cases for Petition for Review

Cases

Statutes

F. ARGUMENTS

a. Mr. Cook received ineffective assistance of counsel during the plea-bargaining process because he proceeded to go to trial on the inaccurate information provided by his counsel that if was convicted, he would receive a lesser sentence then he did. Mr. Cook should be re-sentenced in accordance with the original sentence he received, or the one offered by the State during the plea-bargaining process

An appellate court can review a claim of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Therefore, 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. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defendants have a Sixth Amendment right to counsel, which extends to all phases of representation, including the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012); *State v. Langworthy*, 11 Wn.App.2d 1008, 2019 WL 5699111 (2019)[1]. The right to effective assistance of counsel is also guaranteed by Article I, section 22 of the Washington constitution. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). See also *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). During plea negotiations, defendants are "entitled to the effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).

In order to prevail on an ineffective assistance of counsel claim, an appellant must demonstrate 1) deficient performance by counsel, and 2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In re: Pers. Restraint of Cross*,

[1] State v. Langworthy is an unpublished opinion. Pursuant to RAP 14.1(a), unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

180 Wn.2d 664, 693, 327 P.3d 660 (2014).The performance prong requires a defendant to show “that counsel's representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. Courts evaluate the reasonableness of a particular action by examining the circumstances at the time of the act. *In re: Pers. Restraint of Cross*, 180 Wn.2d at 694. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Strickland*, 466 U.S. at 689.

In order to establish prejudice as a result of the ineffective assistance of counsel under the second prong of the test, a defendant must “show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. In the context of pleas, a defendant must show the outcome of the plea process would have been different. *Lafler*, 566 U.S. at 163. The prejudice requirement focuses on whether counsel's ineffective advice affected the outcome's plea process. “Counsel's errors must be so serious as to deprive the

defendant of a fair trial, whose result is unreliable." *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011); quoting *Strickland*, 466 US at 687.

Ineffective Assistance

There is a presumption of counsel's effectiveness on appeal. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). However, that presumption is rebutted if there is no possible tactical explanation for the performance or actions of counsel. See, *In re: Pers. Restraint of Cross*, 180 Wn.2d at 695.

The record reflects that the State offered Mr. Cook the chance to plead guilty and receive a lesser sentence than if he was convicted after trial. The record is silent on what the offer was but is clear that an offer was made predicated on Mr. Cook being sentenced as a Level II Drug Offense. Based on counsel's advice, Mr. Cook chose to reject the plea offer and contest the charges at trial. Mr. Cook was found guilty and sentenced to a Level II Drug Offender II sentence, which included a 48-plus months of incarceration (including the firearm enhancement) and 12 months of the community custody *R.P. 281*. Nobody, including counsel, the court, or the prosecution, though the sentence was wrong.

In July 2023, DOCS informed the court that the sentence was wrong and that Mr. Cook should have been sentenced as a Level III Drug Offender. As a result, the court had no choice but to re-sentence Mr. Cook's and increase his sentence from 48 months incarceration to 123 months of incarceration. The court expressed regret and offered consolation for the 75 month increase in incarceration to Mr. Cook.

Throughout the re-sentencing proceedings, counsel indicated that he told Mr. Cook he would receive a lesser sentence if he went to trial and was convicted. Counsel informed the court that he was ineffective by indicating "I don't like it, nor does my client. Because he went to trial thinking he was looking at a totally different type of [sentencing] range. So, it may have made a difference in his decision to go forward". *R.P. 2, p. 10*. Counsel reiterated that "Mr. Cook decided to go to trial, based on a range that he thought of 48 to 56 months." .*R.P. 3, p. 4*. After imposing the new sentence on Mr. Cook, the court indicated

> that might be something you want to explore, Mr. Brown, given that none of us really knew that this was the situation and he was going to trial, based on something which was -- he was thinking he was gonna get a lot lesser of a sentence. It might be something you may want to look into. I just don't know that you would be able to do that, now that it's at the Court of Appeals.

Although no attorney wants to admit that they were ineffective in their representation of a client, sometimes even experienced and highly competent counsel can make mistakes that result in ineffective assistance. Mr. Cook's attorney was no different. Mr. Cook's attorney was clearly ineffective at the plea-bargaining stage of the prosecution and the result was a clear deprivation of his right to effective counsel. The performance of Mr. Cook's trial counsel failed to meet the objective standard of reasonableness. If he had been properly informed that his sentencing exposure was 123 months, Mr. Cook would not have risked going to trial and accepted the State's plea offer, which was undoubtedly lower. Although calculations regarding sentencing enhancements are often complex, an error of the magnitude suffered by Mr. Cook cannot be characterized as anything less than deficient performance and ineffective assistance of counsel.

The Court is being asked to consider a cut-and-dry case of ineffective assistance of counsel here. There is no hindsight that the court needs to engage in such as counsel's decision not to call a particular witness, or the failure to cross-examine on a specific issue. There is no possible tactical explanation for failing to calculate Mr.

Cook's standard range sentence properly and correctly during the plea-bargaining stage of the case. The presumption of counsel's effectiveness has been clearly rebutted on these facts.

Prejudice

The facts of this case also satisfy the prejudice prong of the *Strickland* test. Trial counsel's deficient performance most certainly affected the outcome of the plea bargain process. Mr. Cook could not make a knowing, intelligent and voluntary decision to either plead guilty or go to trial when the information he was relying on was grossly inaccurate. Moreover, Mr. Cook was sentenced to 75 months more incarceration than what counsel told him he would receive.

In a recent case directly on point to this case from Division I, *Langworthy*, 11 Wn.App.2d 1008, the appellant was convicted of possession with the intent to deliver methamphetamine. On appeal, the appellant argued that his counsel incorrectly advised him of his sentencing exposure during plea negotiations. *Id*. As a result, the appellant contested his charges at trial but was convicted. *Id*. The trial court initially sentenced the appellant to 28 months of incarceration. However, after the court received notification that the appellant's

standard range was incorrectly calculated, the trial court resentenced him to 63 months. The appellant argued he was prejudiced because had he known that his sentencing exposure was much higher, he would have accepted a plea agreement. Citing this Court's decision in *Estes*, 188 Wn.2d at 458, Division One agreed with the appellant. Consequently, the Court of Appeals reversed the appellant's conviction and remanded for resentencing consistent with*. Cooper*, 566 U.S. at 170-172.

Both *Estes* and *Langworthy* are directly on point with this matter. Like the appellants in those cases, Mr. Cook rejected the State's plea offer on the faulty information from counsel that he would receive a lesser sentence were he to contest the charges at trial and lose. The prejudice to Mr. Cook is more extreme that the prejudice to the appellant in Langworthy in that he received 75 more months of incarceration that he was told he could receive.

Defense counsel's failure to research the effects of the firearm enhancement on Mr. Cook's potential sentencing exposure and communicate accurate information to him when discussing whether to proceed to trial or avail himself of the plea offer greatly prejudiced him. *State v. Estes*, 188 Wn.2d at 458, Counsel failed to read the sentencing

guidelines and accurately communicate the correct standard sentencing range to Mr. Cook during plea negotiations. Had counsel informed Mr. Cook of the proper information, there is a reasonable probability that Mr. Cook would have accepted the State's plea offer.

Remedy

As stated in *Lafler*, Sixth Amendment remedies should be "tailored to the injury suffered" and must "neutralize the taint" of a constitutional violation. *Lafler*, 566 US at 170; quoting *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). Justice Kennedy wrote that in some situations, "resentencing alone will not be a full redress for the constitutional injury." *Lafler*, 566 U.S. 171. That is the situation facing Mr. Cook. Because of the inflexibility of Washington's Sentencing Enhancement law, a judge's discretion is hamstrung at sentencing. Thus, the only proper remedy is for the prosecution to re-offer the original plea bargain. *Lafler*, 566 US 171.

A new trial alone will not provide an adequate remedy to Mr. Cook, because he would still be facing the same sentencing range were he convicted. The proper remedy here should rectify Mr. Cook's prejudice in receiving the 123-month sentence. Mr. Cook respectfully requests

that his conviction be reversed, and his case remanded for re-sentencing consistent with what his original sentence was, or the one that was offered by the State during the plea-bargaining process.

b. The affirmance of Mr. Cook's conviction by the Court of Appeals for the firearm enhancement was in conflict with decisions of the Supreme Court of Washington that hold that a firearm must be "easily accessible" and there must be a nexus between the accused, the weapon, and the crime

In criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). For purposes of sentence enhancements, the State must prove beyond a reasonable doubt that a defendant committed the offenses charged while armed with a firearm. *State v. Williams-Walker*, 167 Wn.2d 889, 898, 225 P.3d 913 (2010). This Court has found a person is "armed" for purposes of the sentence enhancement when the accused is within proximity of an easily and readily available firearm for offensive or defensive purposes and a nexus is established between the accused, the weapon, and the crime. *State v. O'Neal*, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007); *State v. Eckenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007); *State v.*

Sassen Van Elsloo, 191 Wn.2d 798, 425 P.3d 80 (2018).

During the trial, the State failed to prove that the handgun used for the enhancement that was found in the vehicle driven by Mr. Cook was both easily accessible and readily available to Mr. Cook. The State also failed to prove there was a nexus between the firearm and the two crimes charged by the State. The evidence showed that the Police found the firearm in the Acura driven by Mr. Cook after "pulling on stuff on the dash." *R.P. 133; C.P. 103*. The firearm was hidden in the center console, behind an ashtray. The ashtray had to be removed to gain access to the compartment that contained the gun. *Id.* Thus, the only way for Mr. Cook to retrieve the firearm was to pull the ashtray out of the dashboard, discard it, reach into the empty compartment where the ashtray was, and remove the firearm.

Further, Mr. Cook denied knowing that the firearm was in the Acura or that it was his. Given that two other People drove the Acura, Judy Lee and Robert Snow, Mr. Cook's denial was plausible. Notably the police did not conduct a fingerprint analysis or DNA analysis on the firearm. *R.P. 172*. The absence or the presence of Mr. Cook's fingerprints or DNA on the firearm was never confirmed, so there was

no evidence linking the weapon to him, other than he was in the vehicle where the owner hid it.

On appeal, the Court of Appeals concluded that the evidence was sufficient to prove the firearm enhancements. However, the "mere presence" of a gun at the crime scene, "mere close proximity of the gun to the defendant, or constructive possession alone is not enough to show the defendant is armed." *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). Presence of the firearm at the crime scene was all the State showed here. This was not a case where Mr. Cook could have easily reached down and grabbed the gun from the seat-well of the vehicle or from his clothing such as pocket or waistband. See *State v. Sabala*, 44 Wn. App. 444, 448, 723 P.2d 5 (1986) (driver was "armed" where the loaded handgun lay beneath the driver's seat with the grip easily accessible to the driver).

Citing *O'Neal,* 159 Wn.2d at 504-05, the Court of Appeals concluded there was a sufficient nexus because the State "need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible, so long as it was at the time of the crime." However, *O'Neil* was wholly distinguishable from

Mr. Cook's case. In *O'Neal*, this Court was presented with specific facts, including, defendant admissions, police monitoring equipment, and proximity of the co-defendants to an easily accessible and readily available gun in an unlocked gun safe and under a bed, which allowed the Court to infer the guns were present to protect contraband as part of a continuing crime.

The facts in *O'Neal* do not resemble the facts here. Mr. Cook was not arrested at the scene and would not have been able to access the firearm in the Acura, Regardless, it would have taken some effort for Mr. Cook to retrieve the firearm from behind the ashtray in the center console. Also, the evidence showed that Mr. Cook did not own the firearm. Mr. Cook was initially charged with possession of a stolen firearm that belonged to somebody else. However, the State dismissed that charge because the owner did not appear at trial. Lastly, Mr. Cook produced evidence that the Acura the firearm was found in was not owned by him. Mr. Cook borrowed the vehicle from the owner.

Because the Court of Appeals decision finding sufficient evidence to support the firearm enhancements is not supported by the record and conflicts with this Court's prior precedent, review is appropriate under

RAP 13.4(b)(1).

F. CONCLUSION

For the reasons stated herein and in the referenced opening brief on appeal, this Court should accept review under RAP 13.3(b)(1), (2), (3) and (4).

I, SHAWN P. HENNESSY certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 4,874 words, as calculated by the Microsoft Word "Word Count" function. The font size is Arial 14 pt.

DATED this 12th day of June 2024.

Respectfully submitted,

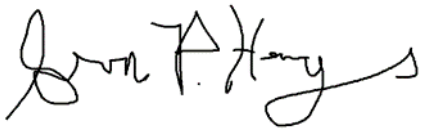
SHAWN P. HENNESSY
WSBA NO.: 50981
Attorney for Mr. Cook
Law Office of Lise Ellner

CERTIFICATION

I, Shawn P. Hennessy do hereby certify under penalty of perjury under the laws of the state of Washington, that on June 12, 2024, I mailed to the following electronically or via US Postal Service first class mail:

Lewis County Prosecuting Attorney:
appeals@lewiscountywa.gov and
sara.beigh@lewiscountywa.gov)

Jesse Cook: Washington Corrections Center, PO Box 900, Shelton, WA 98584



SHAWN P. HENNESSY
Law Office of Lise Ellner
Attorney for Mr. Cook

APPENDIX

2024 WL 2153509
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Jesse Michael **COOK**, Appellant.

No. 58126-4-II
|
May 14, 2024

Appeal from Lewis County Superior Court, Docket No: 23-1-00084-1, Honorable Joely A Ye, Judge.

Attorneys and Law Firms

Lise Ellner, Attorney at Law, P.O. Box 2711, Vashon, WA, 98070-2711, Shawn P. Hennessy, Attorney at Law, P.O. Box 11, Olalla, WA, 98359-0011, for Appellant.

Sara I. Beigh, Lewis County Prosecutors Office, 345 W Main St. Fl. 2, Chehalis, WA, 98532-4802, for Respondent.

UNPUBLISHED OPINION

Maxa, J.

***1** **Jesse** Michael **Cook** appeals his convictions of unlawful possession of methamphetamine with intent to distribute and unlawful possession of fentanyl with intent to distribute, the two firearm sentencing enhancements associated with those convictions, and his sentence. The drugs and the firearm were found during the search of a vehicle that **Cook** was driving but did not own.

We hold that (1) the evidence was sufficient to establish that **Cook** had constructive possession of the drugs, (2) the evidence was sufficient to establish that **Cook** was armed at the time of the offenses, (3) the trial court did not err in determining that it did not have the discretion to impose an exceptional sentence by running the firearm sentencing enhancements concurrently to each other and to the sentences for the substantive offenses, and (4) defense counsel did not provide ineffective assistance of counsel by failing to request an exceptional sentence on an impermissible basis. Accordingly, we affirm **Cook's** convictions, firearm sentencing enhancements, and sentence.

FACTS

Background

On February 7, 2023, Napavine police officer Taylor Nichols stopped the vehicle that **Cook** was driving after observing that the vehicle's taillights were not illuminated. **Cook** was the sole occupant of the vehicle.

Cook told Nichols that he had borrowed the vehicle from a friend. After Nichols learned that **Cook's** driver's license had been suspended, Nichols cited **Cook** for driving on a suspended license. Nichols advised **Cook** that he either could have a licensed driver retrieve the vehicle or leave on foot. **Cook** took some items from the vehicle and walked away.

After **Cook** left, Nichols contacted a K9 unit. The drug dog unit alerted to the vehicle's driver's and passenger's doors. The K9 officer also observed drug paraphernalia in plain view in the back seat of the vehicle. Nichols obtained a search warrant for the vehicle.

During the vehicle search, Nichols removed the ashtray from the vehicle's center console and found a loaded .40 caliber handgun inside the dashboard. Nichols later testified that the ashtray was easily removed from the dashboard.

In the back of the vehicle's trunk behind a subwoofer, Nichols found two small scales, one of which had methamphetamine residue on it; 21.05 grams of methamphetamine; 50 to 100 fentanyl pills weighing 10.01 grams; heroin; and some packaging materials.

Later that evening, Nichols contacted **Cook** and informed him that he was being charged with unlawful possession of a controlled substance with intent to deliver and unlawful possession of a firearm. **Cook** did not deny any of the allegations. He only expressed concern about what class felony each of the charges would be. **Cook** also thanked Nichols for "messing up his life." Rep. of Proc. (RP) at 159.

Cook was arrested at his home in Tacoma the next day. At **Cook's** home, officers discovered a box of .40 caliber ammunition**.**

While booking Cook into the Lewis County jail, Nichols told Cook that he had almost not investigated the vehicle further because he thought that Cook had walked away with any potential evidence. When Nichols told Cook that he had not intended to stop Cook from walking away, Cook responded, "Wish I would have f***ing known that." RP at 164. After Cook repeated this statement a second time, Nichols told Cook that he was confused about what Cook meant. Cook explained that if he had known Nichols would not have stopped him then they would not have been at the jail. Nichols believed that Cook was suggesting that he would have taken evidence from the car if he had known he would not have been prevented from leaving.

***2** The State charged Cook with unlawful possession of a controlled substance (methamphetamine) with intent to deliver and unlawful possession of a controlled substance (fentanyl) with intent to deliver.[1] The State also alleged that Cook had committed these offenses while armed with a firearm.

Trial

At trial, the State's witnesses testified as described above. Cook was the only defense witness.

Cook testified that he had borrowed the vehicle from a friend so he could visit his children in Oregon. He stated that he and his father picked up the car from his friend's boyfriend in the Tacoma area and that Cook drove the vehicle to Oregon. Nichols stopped him on his way home from Oregon the next evening.

Cook testified that he was unaware that the firearm or the drugs were in the vehicle. He admitted to having opened the passenger side door. Cook also denied having any firearms in his home.

The jury found Cook guilty of unlawful possession of methamphetamine with intent to deliver and unlawful possession of fentanyl with intent to deliver. The jury also found that Cook was armed with a firearm when he committed each of these offenses.

Sentencing

At the April 2023 sentencing hearing, the parties and the trial court assumed that each drug offense was a level 2 drug offense and that the standard sentencing range for each offense was 12 months plus one day to 20 months. Because the court found that the two offenses constituted same criminal conduct, the offender score for each offense was 0 points.

The trial court stated that because of Cook's low offender score, it was imposing low-end sentences of 12 months plus one day plus 36-months for the firearm sentencing enhancement. The court ran the two sentences, including the firearm enhancements, concurrently for a total sentence of 48 months plus one day.

Resentencing

The Department of Corrections (DOC) subsequently notified the parties that the April 2023 sentence was incorrect. After the parties reviewed the sentence, they determined that the DOC was correct, and the trial court held a resentencing hearing.

The State advised the trial court that the original sentence was incorrect because the parties and the court had erroneously concluded that each drug offense was a level 2 offense. But under RCW 9.94A.518,[2] the firearm enhancements raised the offenses to level 3 offenses.

The State further stated that as level 3 offenses, the standard range for each offense was 51 to 68 months rather than 12 months plus one day to 20 months. The State also asserted that although the two counts were determined to be same criminal conduct by agreement of the parties, case law required that the two sentencing enhancements be served consecutively.

Based on this new information, the State requested a sentence of 51 months on each count to run concurrently and two 36 month firearm sentencing enhancements to run consecutively to each other and to the 51 month sentence. The resulting total term of confinement would be 123 months.

Cook agreed that the proper sentencing range was 51 to 68 months, but he argued that he should receive only one firearm enhancement because the two offenses were same course of conduct and only one firearm was involved. The State responded that if the trial court ran the firearm enhancements concurrently, it would require an exceptional sentence downward.

***3** The trial court imposed a new sentence of 51 months on each count and two 36 month firearm sentencing

enhancements. The court ran the two 51 month sentences concurrently and the two 36 month firearm enhancements consecutive to the sentences for the substantive offenses and to each other, for a total sentence of 123 months.

Cook appeals his convictions, the firearm sentencing enhancements, and his sentence.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Cook argues that the State failed to present evidence sufficient to prove that (1) he possessed the methamphetamine and fentanyl found in the vehicle, or (2) he was armed with the firearm during the commission of the crimes. We disagree.

1. Legal Principles

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). In a sufficiency of the evidence claim, the defendant admits the truth of the evidence, and we view the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the State. *Id.* at 265-66. Credibility determinations are made by the trier of fact and are not subject to review. *Id.* at 266. And circumstantial and direct evidence are equally reliable. *Id.*

2. Possession of Controlled Substances

Cook argues that the evidence was insufficient to establish that he possessed the methamphetamine and fentanyl. We disagree.

a. Legal Principles

To prove unlawful possession of a controlled substance with intent to deliver, the State had to prove, among other elements, that Cook possessed the drugs in question. RCW 69.50.401(1). When possession is an element of the charged offense, possession can be established if the State proves that the defendant had either actual possession or constructive possession of the item. *State v. Listoe*, 15 Wn. App. 2d 308, 326, 475 P.3d 534 (2020). Actual possession, which requires physical custody of the item, is not alleged here.

Constructive possession occurs when a person has dominion and control over an item. *Id.* To determine whether sufficient evidence proves that a defendant had dominion and control over an item, we examine the totality of the circumstances and a variety of factors. *Id.* Aspects of dominion and control include (1) whether the defendant could immediately convert the item to his or her actual possession, (2) the defendant's physical proximity to the item, and (3) whether the defendant had dominion and control over the premises where the item was located. *Id.* at 326-27. A vehicle is considered a "premises." *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

But mere proximity to an item is not enough to establish constructive possession. *Listoe*, 15 Wn. App. 2d at 327. Similarly, the defendant's knowledge of the item's presence on a premises alone is insufficient to show constructive possession. *Id.*

Consistent with these rules, the trial court gave the following jury instruction:

> Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.
>
> ***4** ....
>
> In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

Clerk's Papers (CP) at 63.

b. Analysis

Cook was the sole occupant and driver of the vehicle in which the drugs were found. The jury was instructed that one factor that they could consider in determining dominion and control over the drugs was "whether the defendant had dominion and control over the premises where the substance was located." CP at 63. This means that a jury could infer constructive possession of items on the premises from the defendant's dominion and control over the premises. *See* *State* *v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007). Therefore, this factor supported a finding that Cook had dominion and control over the drugs.

In addition, other evidence demonstrated that Cook had control over the drugs. The drug dog alerted to the driver's door and passenger's door of the vehicle, and Cook touched both of these locations. Taking this evidence in the light most favorable to the State, this evidence supports the conclusion that Cook had had physical control of drugs at the time he was in contact with the vehicle. Cook also did not appear surprised when he initially was informed that he was going to be charged, suggesting that he was aware of what was in the vehicle. And Cook later made statements to Nichols to the effect that if he had realized Nichols would have let him leave the scene, Nichols would not be in jail. This statement suggests that Cook knew what was in the vehicle and could have easily accessed the drugs to remove them before he left.

Considering this evidence in the light most favorable to the State, we hold that the evidence was sufficient to establish that although the drugs were in the trunk, Cook had dominion and control over the drugs.

3. Armed with a Firearm

Cook argues that the State failed to provide sufficient evidence to establish that he was armed with a firearm during the commission of the offenses. We disagree.

a. Legal Principles

For purposes of firearm sentencing enhancements, to establish that the defendant was armed "the State must prove (1) that a firearm was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime." *State* *v. Sassen Van Elsloo*, 191 Wn.2d 798, 826, 425 P.3d 807 (2018). Mere "presence, close proximity, or constructive possession of a weapon at the scene of a crime is, by itself, insufficient to show that the defendant was armed for the purpose of a firearm enhancement." *Id.* at 825.

***5** But the defendant is not required " 'to be armed at the moment of arrest to be armed for purposes of the firearms enhancement,' and the State 'need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible, so long as it was at the time of the crime.' " *Id.* at 826-27 (quoting *State* *v. O'Neal*, 159 Wn.2d 500, 504-05, 150 P.3d 1121 (2007)). In addition, to establish that there was a nexus among the defendant, the weapon, and the crime, we "look[ ] at the nature of the crime, the type of weapon, and the circumstances under which it was found." *Sassen Van Elsloo*, 191 Wn.2d at 827.

b. Analysis

Cook argues that the State failed to prove a nexus between the firearm and himself or the firearm and the crimes. He contends that the State failed to establish a nexus between himself and the firearm because he testified that (1) he did not own the vehicle and others drove the vehicle, (2) he did not know that the firearm was in the vehicle because it was hidden and not in plain view, and (3) the firearm was not his and he was unaware that it was in the vehicle. He also notes that there was no fingerprint or DNA evidence linking the firearm to him.

However, although the firearm was hidden from view, it was located in the center console immediately next to Cook while he was transporting the drugs. Nichols testified that the firearm was accessible by merely removing the ashtray and that the ashtray was easily removed. This evidence creates a reasonable inference that at the time Cook was transporting the drugs, the firearm was easily accessible and readily available to him. In addition, there was evidence that the ammunition found in Cook's home was the same caliber as the firearm found in the vehicle. This evidence creates a reasonable inference that the firearm belonged to Cook and therefore that he knew that the firearm was in the vehicle. Taken in the light most favorable to the State, the evidence

provided the required nexus between Cook, the firearm, and the offenses.

Considering this evidence in the light most favorable to the State, we hold that the evidence was sufficient to establish that Cook was armed with a firearm at the time of his offenses.

B. SENTENCING ISSUES

1. Consecutive Sentences for Firearm Enhancements

Cook argues that the trial court abused its discretion at sentencing because the court failed to understand that it had the discretion to impose a 36 month exceptional sentence by running the firearm sentencing enhancements concurrently to each other and to the sentences on the substantive offenses instead of consecutively. We disagree.

RCW 9.94A.533(3)(e) states, "Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." In *State v. Brown*, the Supreme Court held that based on the language of RCW 9.94A.533(3)(e), sentencing courts do not have discretion to impose an exceptional sentence with regard to deadly weapon enhancements. 139 Wn.2d 20, 29, 983 P.2d 608 (1999). In *State v. Kelly*, this court held that RCW 9.94A.533(3)(e) and *Brown* preclude a trial court from imposing an exceptional sentence by ordering the firearm sentencing enhancements to run concurrently with one another. 25 Wn. App. 2d 879, 887-89, 526 P.3d 39 (2023), *review granted*, 2 Wn.3d 1001 (2023). Several cases in other divisions of this court also have followed the holding in *Brown*. *E.g.*, *State v. Wright*, 19 Wn. App. 2d 37, 52, 493 P.3d 1220 (2021), *review denied*, 199 Wn.2d 1001 (2022).

***6** Cook relies on *In re Personal Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), and *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017). In *Mulholland*, the Supreme Court held that trial courts have discretion to impose concurrent sentences for multiple serious violent offenses based on its interpretation of RCW 9.94A.589(1) and RCW 9.94A.535. 161 Wn.2d at 327-31. But the court did not address RCW 9.94A.533(3)(e) or firearm enhancements. In *McFarland*, the Supreme Court held that a trial court has discretion to impose concurrent sentences for multiple firearm-related convictions. 189 Wn.2d at 53-55. But this case involves firearm enhancements, not firearm-related convictions.

We conclude that the trial court did not have the discretion to impose concurrent sentences for Cook's firearm enhancements.

2. Ineffective Assistance of Counsel

Cook argues that he received ineffective assistance of counsel because defense counsel failed to argue that under *Mulholland* and *McFarland* the trial court could impose an exceptional sentence downward by running the firearm sentencing enhancements concurrent to each other and to the sentences for the substantive offenses. We disagree.

To prevail on an ineffective assistance of counsel claim Cook must show both that (1) defense counsel's representation was deficient and (2) the deficient representation was prejudicial. *State v. Vazquez*, 198 Wn.2d 239, 247-48, 494 P.3d 424 (2021). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.*

As discussed above, the trial court did not have the discretion to impose an exceptional sentence by running the firearm enhancements concurrently to each other or to the sentences for the substantive offenses. Defense counsel did not provide deficient representation by failing to argue that the court could impose an exceptional sentence on a legally impermissible basis.

Accordingly, Cook's ineffective assistance of counsel claim fails.

CONCLUSION

We affirm Cook's convictions, firearm sentencing enhancements, and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

VELJACIC, A.C.J.

GLASGOW, J.

All Citations

Not Reported in Pac. Rptr., 2024 WL 2153509

Footnotes

1 The **State** also charged **Cook** with possession of a stolen firearm, but that charge was dismissed.

2 The legislature amended this statute in 2023. LAWS Of 2023, ch. 66 § 2. Because this amendment did not change the relevant portion of the statute, we cite to the current version.

LAW OFFICER OF LISE ELLNER, PLLC

June 12, 2024 - 8:31 AM

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Address:
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