SUPREME COURT NO. 1032340
COA NO. 86176-0-I

IN THE SUPREME COURT OF THE STATE WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

QUINCY HAWKINS,

Appellant.

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

The Honorable Timothy Ashcroft, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Quincy Hawkins asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of State v. Quincy Hawkins, COA No. 86176-0-I, filed on May 6, 2024, and the Order Denying Motion for Reconsideration, filed on June 6, 2024, attached as appendices A and B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the court's failure to recognize its discretion to consider appellant's rehabilitation at resentencing constituted an abuse of discretion?

2. Whether this Court should accept review because Division One's decision in this Hawkins' case conflicts with Division Three's decision in State v. Dunbar, 27 Wn. App. 2d 238, 532 P.3d 652 (2023)? RAP 13.4(b)(2).

3. Whether petitioner received ineffective assistance of counsel at resentencing because his attorney wrongly acquiesced rehabilitation was not something the court could consider?

4. Whether this Court should accept review of this significant question of law under the state and federal constitutions? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Following a jury trial in 2008, petitioner Quincy Hawkins was convicted of: second degree murder for the shooting death of Dowell Thorn; second degree assault for a gunshot wound to Michael Chelly's leg; and first degree unlawful possession of a firearm (VUFA). CP 3-4. Counts 1 and 2 carried firearm enhancements. CP 8.

The state alleged Hawkins shot both men during an altercation at Hawkins' ex-girlfriend's house on September 29, 2007. CP 3-4. There was evidence Thorn was the one who brought the gun. CP 37, 92. Hawkins

asserted the gun went off accidentally during a struggle for it. CP 38. Hawkins was 22 at the time of the charged crimes. CP 1-2.

At sentencing, the court calculated Hawkins' offender score as "6" for counts 1 and 2 and a "5" for count 3. CP 8. The offender score calculation included ½ point for a juvenile unlawful possession of a controlled substance offense (simple possession). CP 8.

The offender score yielded the following ranges: (1) 195-295 months + 60 months for the enhancement; (2) 33-43 months + 36 months for the enhancement; and (3) 41-54 months. CP 8. The court imposed the high end of the range for all counts to run concurrently but with the enhancements to run consecutively to the base sentence and to each other for a total of 391 months (295 + 60 + 36 = 391). CP 11-12.

On April 19, 2021, Hawkins filed a pro se motion to correct his judgment and sentence following State v.

Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). CP 52-53. As indicated above, a juvenile simple possession conviction was used to calculate his offender score. CP 52.

Defense counsel was appointed and subsequently filed a motion for resentencing. CP 55-77. Counsel recalculated Hawkins' offender score as a "5" for counts 1 and 2 and a "4" for count 3, yielding ranges of: (1) 175-275 months + 60 months for the enhancement; (2) 22-29 months + 36 months for the enhancement; and 36-48 months. CP 57.

In advance of resentencing, Hawkins' attorney filed a memorandum outlining Hawkins' difficult childhood leading up to the offenses. CP 79-81. The memo also outlined Hawkins' significant rehabilitation during the 15+ years he had since served in prison. CP 79-152; Brief of Appellant (BOA) at 7-9.

Defense Counsel sought a full resentencing[1] at which the court should consider the mitigating qualities of youth. CP 85-93 (citing inter alia Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015)). The defense sought an exceptional mitigated sentence of 235 months total for the now nearly 38-year-old Hawkins. CP 93.

In a written response, the state argued "[p]ost-conviction rehabilitation may not be used as the basis for an exceptional mitigated sentence." CP 275. Rather, "[0]nly evidence relevant to the crime or the defendant's criminal history may be used to justify a departure from the standard range." CP 276. The state argued the

[1] CP 84 (citing inter alia State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009); State v. Toney, 149 Wn. App. 787, 205 P.3d 944 (2009) (trial court has discretion to conduct a full, adversarial resentencing proceeding, giving both sides the opportunity to be heard)).

potential for rehabilitation is only relevant when the court is sentencing a minor. CP 279.

At the hearing, defense counsel conceded that post-conviction rehabilitation is not a basis for an exceptional sentence. RP 20. However, defense counsel argued rehabilitation was relevant to the court's consideration of youthfulness. RP 20. The prosecutor and court disagreed rehabilitation was a factor under O'Dell. RP 22. Defense counsel acquiesced. RP 22.

With rehabilitation off the table, counsel nevertheless asked for an exceptional sentence based on youth and a finding the victim was a provoker or willing participant of the incident. RP 20; RCW 9.94A.535(1)(a).

The prosecutor argued Hawkins had not shown either of these bases for an exceptional sentence. RP 26-28. The state asked for the high end for all sentences for a total of 371 months. RP 25.

The defense sought a total sentence of 235 months, consisting of a base sentence of 139 months plus 96 months for the enhancements. If granted, this would amount to a 46-month departure from the bottom of the standard range (175-275 months) or approximately 4 years.

The court indicated it considered all the parties' submissions but did not see a basis to depart from the standard range:

> When I reviewed this case and -- again, what I don't see a lot of direct evidence of is -- while Mr. Hawkins had a difficult upbringing, I didn't see a lot of direct evidence of the impact on this particular event. And I say that because I am declining to give a below standard-range sentence. I don't think under the facts of this case, after considering all of the submissions that have been given, that that's appropriate. However, that does not mean that the Court does not consider some of the mitigating factors of youth as to where within the standard range to fall.

RP 56.

Whereas the prior trial judge sentenced Hawkins to the high end, the judge at resentencing determined to impose a more median sentence. RP 56-57. For the most serious count, the court imposed a base sentence of 240 months. Thus, with the enhancements, the total sentence is 336 months. RP 57.

On appeal, Hawkins argued the lower court erred because it failed to recognize its discretion to consider rehabilitation at resentencing. BOA at 17-26; State v. Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007); Dunbar, 27 Wn. App. 2d at 247-49. The Court of Appeals disagreed, concluding the court had considered rehabilitation. Appendix A at 2-4. This conclusion was based on a few scant remarks, including defense counsel's proffer that "rehabilitation is something that's still germane for this Court to Consider," and the court's remark it had "reviewed everything that's been supplied to me." Appendix A at 3.

Hawkins filed a motion for reconsideration arguing the parties' and court's comments regarding rehabilitation must be viewed in context. Motion for Reconsideration (MR). At the time of Hawkins' resentencing, several courts had held rehabilitation was not relevant to sentencing under the SRA, including this Court. MR at 3; State v. Barnes, 117 Wn.2d 701, 709-10, 818 P.2d 1088 (1991) (rehabilitation not relevant in sentencing non-sex offenders); State v. Law, 154 Wn.2d 85, 97, 110 P.3d 717 (2005) (SRA focused solely with circumstances of the offense and the defendant's culpability); State v. Ramos, 189 Wn. App. 431, 357 P.3d 680 (2015), aff'd but criticized, 187 Wash. 2d 420, 447-448, 387 P.3d 650 (2017), as amended (Feb. 22, 2017) (individual factors are not part of sentencing for adult offenders, but when considering juvenile offenders, the court may consider rehabilitation).

Hawkins was resentenced on March 10, 2023. Dunbar did not come out until July 18, 2013. Due to the authorities cited in the motion for reconsideration, Dunbar appeared to break new ground in holding that rehabilitation is a bona fide sentencing consideration for all offenders undergoing resentencing. Dunbar, 27 Wn. App. 2d at 250. Contrary to the appellate court, Hawkins' resentencing court did not have the benefit of Dunbar's novel approach and did not perceive rehabilitation as a legitimate consideration.

Division One denied the motion for reconsideration. Appendix B.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE DIVISION ONE'S DECISION IN HAWKINS' CASE CONFLICTS WITH DIVISION THREE'S IN STATE v. DUNBAR.

Contrary to the Court of Appeals decision in Hawkins' case, the lower court did not understand its

discretion to consider Hawkins' rehabilitation at the time of resentencing. The court's comments at resentencing make clear it considered only "the mitigating factors of youth as to where within the standard range to fall." The appellate court's stamp of approval on the lower court's failure to consider Hawkin's rehabilitation conflicts with Division Three's decision in State v. Dunbar, 27 Wn. App. 2d 238 (2023). This Court should accept review. RAP 13.4(b)(2).

The court abused its discretion in disregarding Hawkins' rehabilitation at resentencing. Contrary to the court's understanding, rehabilitation is a factor the court may consider when determining the appropriate length of the sentence. A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of its sentencing options. Mulholland, 161 Wn.2d at 333.

Division One's decision conflicts with Division Three's in Dunbar. In 2017, Daniel Dunbar was convicted of

possessing a stolen motor vehicle and witness tampering. His prior criminal history totaled 41 prior offenses, including two convictions for possessing a controlled substance. The court calculated Dunbar's offender score as 26 for the possession of a stolen motor vehicle charge and 12 for the witness tampering charge. The court sentenced Dungar to 60 months for the offenses, to run consecutively to sentences imposed in 2016. Dunbar, 27 Wn. App. 2d at 240.

Following the Supreme Court's decision in Blake, 197 Wn.2d 170, Dunbar sought resentencing because his offender score included two prior convictions for unlawful possession of a controlled substance. Id.

At resentencing, Dunbar sought a low-end standard range sentence. He submitted evidence of rehabilitation since his original sentencing by underlining his participation in a substance abuse and addiction treatment program. Dunbar highlighted his completion of

an advanced degree in Heating, Ventilation, and Air Conditioning and the promise of two job offers in that field should the court grant work release. Id. at 240-41.

Before announcing the sentence, the court noted it could not consider Dunbar's rehabilitation since his incarceration:

> Mr. Dunbar has provided this Court with information about what he has done since being incarcerated, and the problem is, is that it is basically a look back, and by that, I have regular resentencings that I do where the state's position is, is that the Court cannot take that into consideration and shouldn't take that into consideration.

Dunbar, at 242.

The resentencing judge also remarked on what the 2017 court imposed (the high end consecutive to the 2016 charges) and noted the standard range remained the same and encapsulated extensive criminal history, even without the simple possession charges. While the court "appreciated what it is [Dunbar had] been doing to

better [himself]," the court announced it was going to impose the same sentence as the first judge. Id.

On appeal, Division Three held the resentencing court committed reversible error in refusing to entertain Dunbar's request for a lower sentence based on his purported rehabilitation. Id. at 243. At the outset, the court held all resentencings should be conducted de novo, unless the reviewing court restricts resentencing to narrow issues. Dunbar, at 244; United States v. Kinder, 980 F.2d 961 (5th Cir. 1992).

Turning to the question of rehabilitation as a sentencing consideration, the court noted the United States Supreme Court and well as legislative intent in Washington favored its consideration:

> Although the United States Supreme Court has not held that resentencing is de novo in total, the court held that, when a reviewing court reverses and remands for resentencing, the district court may consider evidence of rehabilitation since the earlier sentencing. Pepper v. United States, 562

> U.S. 476, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011). The Supreme Court noted the policy behind sentencing of treating each offender as a unique individual, whose human failings and improvements sometimes mitigate and sometimes magnify the crime and punishment to ensue.
>
> This Washington court also wishes to promote rehabilitation by rewarding it on resentencing. Evidence of rehabilitation relates to the legislature's explicit provision that a sentence should "[o]ffer the offender an opportunity to improve himself or herself." RCW 9.94A.010(5).

Dunbar, at 247.

The Dunbar court found further support in the fact that rehabilitation was a factor for consideration when sentencing under the Miller-fix statute:

> In State v. Delbosque, 195 Wn.2d 106, 456 P.3d 806 (2020), the Washington Supreme Court held that resentencing courts must consider the measure of rehabilitation that has occurred since a youth was originally sentenced to life without parole when resentencing pursuant to Washington's Miller-fix statute. Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). State v. Delbosque concerns other

> circumstances, but still evidences a policy of rewarding rehabilitation.

Id.

In its briefing to the court against rehabilitation as a consideration, the state cited RCW 9.94A.340, which provides:

> The sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant.

Id.

But the Dunbar court refused to construe this ambiguous provision in the far-reaching manner advocated-for by the state:

> The State argues that rehabilitation does not relate to Daniel Dunbar's crime or prior record. The Washington Supreme Court, in State v. Law, 154 Wash.2d 85, 92-104, 110 P.3d 717 (2005), cited RCW 9.94A.340 to partly justify a prohibition on consideration of personal factors to depart from a standard range sentence. The dissent in Law wrote that the statute should be read more narrowly to relate to *discrimination* based on race, sex,

> economic status, education, or family history. State v. Law, 154 Wash.2d 85, 109-18, 110 P.3d 717 (2005) (Sanders, J., dissenting). Our review of other caselaw interpreting RCW 9.94A.340 reveals no rhyme or reason for applying RCW 9.94A.340 beyond Law's holding. We decline to extend the ambiguous statute to prohibit consideration of rehabilitation on resentencing.

Dunbar, at 248.

The court therefore remanded for a new de novo resentencing, at which the court should consider new evidence and arguments of the parties, including Dunbar's rehabilitation. Id. at 248-49.

Just as in Dunbar's case, the resentencing court in Hawkins' case failed to exercise discretion to consider Hawkins' significant rehabilitation since the time of the charged crimes. Division One's stamp of approval of this failure conflicts with Division Three's decision in Dunbar. Review is appropriate. RAP 13.4(b)(2).

2. THIS COURT SHOULD ACCEPT REVIEW BECAUSE HAWKINS' CASE INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Contrary to the appellate court's decision, the resentencing court did not consider rehabilitation in determining Hawkins' sentence. That is because counsel wrongly acquiesced it was not a factor for the court to consider. Whether counsel proffered it was still "germane," counsel never tied it to any legal authority. And in fact, dropped the issue of rehabilitation. This was ineffective assistance.

Both the United States and Washington Constitutions guarantee a criminal defendant the right to effective assistance of counsel. State v. Lopez, 190 Wash.2d 104, 115, 410 P.3d 1117 (2018); see also U.S. CONST. amend. VI; WASH. CONST. art. I, § 22.

"To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense

counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Defense counsel's failure to discover relevant case law is generally considered deficient. See State v. Kyllo, 166 Wash.2d 856, 868, 215 P.3d 177 (2009) (counsel failed to discover relevant case law before proposing jury instructions); State v. Clark, 17 Wash. App. 2d 794, 799, 487 P.3d 549 (2021), review denied, 198 Wash.2d 1033, 501 P.3d 132 (2022). While the Dunbar decision was decided after the resentencing hearing, the authorities

relied upon by the court in that case were not new. Defense counsel's failure to cite to the Supreme Court's decision in Pepper, RCW 9.94A.010(5) and Delbosque, all of which favor consideration of rehabilitation, constituted deficient performance. There was no tactical reason for counsel not to proffer these authorities as counsel clearly wanted the court to consider Hawkins' rehabilitation when resentencing him.

Counsel's deficient performance prejudiced Hawkins. There is reasonable probability the court would have imposed a lower sentence had it known it could consider Hawkins' rehabilitation. It is clear the court did not feel compelled to impose the same sentence as the trial court judge. Moreover, it is clear the court found some mitigation in Hawkins' youthfulness at the time of the offenses. Had the court known it could also consider Hawkins' rehabilitation since, it is likely the court would have imposed an even lower sentence.

This Court should accept review of this significant question of law under the state and federal constitutions. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(2), (b)(3).

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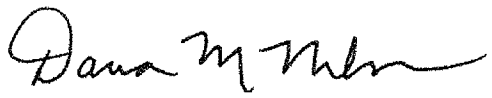
Dated this 8th day of July, 2024.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX A

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. QUINCY VALENTINO HAWKINS, Appellant.	No. 86176-0-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Hawkins appeals from his resentencing conducted pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), which struck down Washington's statute prohibiting simple drug possession. He argues that we should remand for another resentencing because (a) the resentencing court mistakenly believed it could not take his post-conviction rehabilitation into account in determining his new sentence and (b) his attorney provided ineffective assistance at and before the resentencing hearing. Hawkins also contends that the trial court erred by imposing discretionary legal financial obligations (LFOs) as part of his sentence. We remand for the trial court to determine whether to impose restitution interest under RCW 10.82.090(2) and expressly strike from Hawkins' judgment and sentence several LFOs (as detailed below) that may not be imposed on indigent defendants. In all other respects, we affirm.

I

Following a jury trial in 2008, Hawkins was convicted of second degree murder, second degree assault, and first degree unlawful possession of a firearm. The sentencing court imposed a sentence on the high end of the standard range, totaling 391 months. Because Hawkins' offender score included an offense for possession of a controlled substance, Hawkins filed a motion under CrR 7.8(b) to correct his judgment and sentence following our Supreme Court's decision in *Blake*.

Hawkins' resentencing memorandum included evidence of his post-conviction rehabilitation. Hawkins also argued that the court should impose an exceptional sentence below the standard range based on his youthfulness at the time he committed the crimes at issue. Lastly, Hawkins requested a mitigated sentence under RCW 9.94A.535(1)(a) based on his assertion that the "victim was an initiator, willing participant, aggressor, or provoker of the incident."

The trial court scheduled a resentencing hearing and, at the conclusion of the hearing, declined to impose an exceptional sentence below the standard range. Instead, after considering all of the evidence presented and excising the prior convictions subject to *Blake*, the court imposed a sentence in the middle of the standard range, totaling 336 months. Hawkins appeals.

II

A. Resentencing Error

Hawkins argues that the resentencing court abused its discretion because it sentenced him under the "mistaken belief it could not take his rehabilitation into account in determining the sentence." We disagree.

Hawkins' argument misconstrues controlling precedent. In *State v. Ramos*, 187 Wn.2d 420, 449, 387 P.3d 650 (2017), our Supreme Court held that trial courts are *not required* to consider evidence of post-conviction rehabilitation "as a basis for an exceptional sentence downward." Instead, where evidence of post-conviction rehabilitation exists, such evidence is relevant, if at all, to the trial court's decision regarding the length of a sentence within the standard range. *See State v. Dunbar*, 27 Wn. App. 2d 238, 241, 532 P.3d 652 (2023) (acknowledging that Dunbar may seek a sentence at the low end of the standard range based on evidence of post-conviction rehabilitation).

The trial court here appropriately considered evidence of Hawkins' post-conviction rehabilitation in determining Hawkins' sentence within the standard range. At the outset of its ruling, the court stated, "I . . . hope that everyone sees that I have reviewed *everything* that's been supplied to me." (Emphasis added.) When it explained its ruling, the court again confirmed that it had reviewed all of the submitted evidence:

> When I reviewed this case and -- again, what I don't see a lot of direct evidence of is -- while Mr. Hawkins had a difficult upbringing, I didn't see a lot of direct evidence of the impact on this particular event. And I say that because I am declining to give a below standard-range sentence.
>
> I don't think under the facts of this case, after considering *all of the submissions* that have been given, that that's appropriate. However, that does not mean that the Court does not consider some of the mitigating factors of youth as to where within the standard range to fall.
>
> The prior [sentencing] court judge, back when this trial happened, gave Mr. Hawkins a high end of the standard-range sentence on all counts and, for me -- again, *taking into account the evidence that's been presented*, I don't think a high end of the standard range is appropriate either.

(Emphasis added.) As can be seen, the court did not state or even suggest that it had restricted its review of the evidence; instead, it considered everything that the parties had submitted, as required by precedent. *See Dunbar*, 27 Wn. App. 2d at 241 ("unless the reviewing court restricts resentencing to narrow issues, any resentencing should be de novo").

The record is equally clear that the trial court's reference to "everything that's been supplied to me" included evidence regarding Hawkins' post-conviction rehabilitation. Hawkins' resentencing memorandum expressly addressed and attached evidence of post-conviction rehabilitation. Additionally, to support Hawkins' request for a sentence at or below the low end of the standard range, Hawkins' family members provided statements describing his post-conviction rehabilitation. For example, Hawkins' sister stated:

> He has taken the necessary steps to better himself. In doing so, he has completed courses of substance abuse and domestic violence; he has also furthered his education so he can be an addition to society in a productive manner. He has made the necessary changes within to be a better mentor and example for our youth.

Hawkins' fiancé similarly stated:

> He wrote a course called "Am I My Worst Enemy" that I helped him copyright. He also started a nonprofit organization called Locate the Nation to focus on adolescence within the community in which he grew up . . . to let them know that they are not forgotten and give the support and knowledge that inspires to never give into false realities of the street or peer pressure from other's choices.

Thus, in determining Hawkins' sentence within the standard range, the record shows that the trial court considered everything that the parties had submitted, which includes evidence of post-conviction rehabilitation, and exercised its

discretion accordingly. Whereas the sentencing court imposed a sentence on the high end of the standard range in 2008, the resentencing court imposed a sentence in the middle of the standard range in 2023.

On this record, Hawkins' reliance on *Dunbar* is misplaced. The defendant there sought relief under *Blake* to correct his offender score because it included two convictions for possession of a controlled substance. *Dunbar*, Wn. App. 2d at 239-40. At resentencing, similar to Hawkins here, Dunbar submitted evidence of post-conviction rehabilitation. *Id.* at 241. The resentencing court responded to that evidence as follows:

> Mr. Dunbar has provided the Court with information about what he has done since being incarcerated, and the problem is . . . that it is basically a look back, and by that, I have regular resentencings that I do where the state's position is . . . that *the Court cannot take that into consideration and shouldn't take that into consideration.*

Id. at 242 (emphasis added). The court then imposed the same high-end sentence that the original sentencing court imposed. *Id.* at 242.

Dunbar appealed, and this court remanded for a new resentencing. The court noted that issuing "the same sentence does not necessarily correlate with the second court considering itself precluded from exercising discretion." *Id.* at 243. It nevertheless remanded for a new resentencing because "the resentencing court's comments could be taken as adopting the sentencing court's judgment without reviewing the relevant facts and considerations anew." *Id.* at 243. And in doing so, we instructed the trial court to "consider new evidence and arguments of the parties, including evidence of Daniel Dunbar's rehabilitation." *Id.* at 250. But while our holding in *Dunbar* strongly supports Hawkins' argument that the resentencing court here may consider evidence of post-conviction rehabilitation,

the record shows that the court did so—resulting in a shorter sentence at the middle rather than the high end of the standard range. Consequently, *Dunbar* is distinguishable and does not require remand for another resentencing.

In short, because the record shows that the resentencing court appropriately considered Hawkins' evidence of post-conviction rehabilitation in determining the length of his sentence within the standard range, there was no abuse of discretion.

B. Ineffective Assistance of Counsel

Hawkins next argues that he is entitled to resentencing because his lawyer provided ineffective assistance. We disagree.

"Both the United States and Washington Constitutions guarantee a criminal defendant the right to effective assistance of counsel." *State v. Vazquez*, 198 Wn.2d 239, 247, 494 P.3d 424 (2021). "To demonstrate ineffective assistance of counsel, a defendant must make two showings." *Id.* at 247. First, the defendant must show that "defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances." *Id.* at 247-48. And second, the defendant must show that "defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 248. "Failure to establish either prong of the test is fatal to an ineffective assistance claim." *State v. Arumugam*, ___ Wn. App. 2d ___, 545 P.3d 363, 374 (2024).

First, Hawkins argues that his lawyer provided ineffective assistance by allegedly "conceding rehabilitation was not a legitimate factor for consideration" in

resentencing. This argument fails because defense counsel made no such concession. At the resentencing hearing, the prosecutor asked "whether or not the Court is going to consider post-conviction rehabilitation" because "that does change some of the nature of the State's argument." Defense counsel responded that while post-conviction rehabilitation is not the basis for Hawkins' request for "an exceptional sentence based on youthfulness," one of Hawkins' arguments for a lesser sentence (but not his only argument), "we think that the post-conviction rehabilitation is something that's still germane for the Court to consider." Contrary to Hawkins' argument, his lawyer clearly stated that evidence of post-conviction rehabilitation was and remained relevant in resentencing.

Nor did Hawkins' lawyer retreat from that view, as Hawkins also claims. Hawkins points to the following colloquy:

> [MS. NORTH (prosecutor)]: Just to make it clear, the State is not only just asking that post-conviction rehabilitation doesn't come in but it's not germane to the O'Dell[1] analysis that occurs.
>
> This is a youthful offender case where we're looking at -- for looking at the defendant's ability to be rehabilitated.
>
> The State doesn't believe that's part of the SRA analysis of youthful mitigation; it's more of whether or not the instant crime reflected youthful characteristics enough to mitigate -- to impose a mitigated sentence.
>
> THE COURT: And perhaps we're splitting hairs. I'm not sure that I heard Mr. Downs necessarily disagreeing with that --
>
> MS. NORTH: Yeah.
>
> THE COURT: It's not a *Houston-Sconiers*[2] situation, so we don't have that aspect of it, and, again, just for the parties'

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[1] *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).
[2] *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017)

> awareness, I guess, not only did I go back and read *O'Dell*, I've tried to look up basically almost every case that's cited to *O'Dell*, since there are several. Some are published; some are unpublished, a lot of unpublished cases, a lot of Division II unpublished cases that basically, as I read them, all state that, under *O'Dell*, the court can consider youthfulness; it's not required to consider youthfulness. I don't think any of those talked about rehabilitation issues.
>
> So I'll ask you, Mr. Downs, is that your understanding of what *O'Dell* and its progeny stand for?
>
> MR. DOWNS [Defense attorney]: Yes, that's correct.

The trial court then responded, "All right. So with that, Mr. North, you may proceed."

The foregoing exchange does not support Hawkins' argument that his lawyer wrongly conceded that rehabilitation could not properly be considered in resentencing. The cases cited by the trial court—*O'Dell* and *Houston-Sconiers*—address consideration of youthfulness as a mitigating factor in sentencing. *State v. Houston-Sconiers*, 188 Wn.2d 1, 23-24, 391 P.3d 359 (2015); *O'Dell*, 183 Wn.2d at 688-89. Thus, when the statements of Hawkins' attorney are properly considered in context, the record shows that counsel merely conceded that evidence of post-conviction rehabilitation was not germane to Hawkins' *separate and additional* argument that the court should impose an exceptional sentence below the standard range based on Hawkins' youthfulness at the time he committed the crimes at issue. Because Hawkins' lawyer did not concede that rehabilitation "was not a legitimate factor for consideration" in resentencing, as Hawkins claims, we reject this argument.

Second, while Hawkins recognizes that *Dunbar* (discussed above) was decided *after* the resentencing hearing, he argues that the authorities discussed in

Dunbar "were not new" and that his lawyer provided ineffective assistance by failing to cite those authorities, "all of which favor consideration of rehabilitation." Our Supreme Court has held that "[w]here an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient." *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015). But here, Hawkins does not, and cannot, establish that the result of the proceeding would have been different if his attorney had cited these additional authorities because, as noted previously, the record shows that the trial court considered Hawkins' evidence of post-conviction rehabilitation as *Dunbar* and the authorities cited therein require. Accordingly, Hawkins' ineffective assistance of counsel argument necessarily fails based on the absence of prejudice (the second prong of the ineffective assistance of counsel test).

C. Imposition of Legal Financial Obligations

At the conclusion of the resentencing hearing, the trial court decided to waive all discretionary LFOs. Hawkins argues that the judgment and sentence is not definite and certain as to which LFOs are discretionary and which are not, as required by controlling precedent. *See, e.g., Grant v. Smith*, 24 Wn.2d 839, 840, 167 P.2d 123 (1946) ("It is the rule in this state that a sentence for violation of law must be definite and certain."). As a result, Hawkins asks this court to remand for the trial court to amend the judgment and sentence. The State concedes this point and states, "On remand, the superior court should expressly waive the attorney fees, criminal filing fees, extradition costs, supervision fees, collection costs, appellate costs, and nonrestitution interest." We accept the State's concession

and remand to the trial court to amend the judgment and sentence accordingly.

Hawkins also requests that we remand to the trial court to strike both the $500 Victim Penalty Assessment (VPA) and the $100 DNA collection fee imposed at resentencing. Consistent with Hawkins' argument, RCW 7.68.035 and RCW 43.43.7541 allow a court, upon motion by the defendant, to waive "any VPA" and "any fee for the collection of the offender's DNA imposed prior to July 1, 2023." The State concedes this point as well. Here too, we accept the State's concession and remand for the trial court to strike the DNA collection fee and VPA.

Finally, Hawkins ask us to remand for the trial court to consider waiving interest on restitution. Consistent with Hawkins' argument, a recent amendment to RCW 10.82.090 provides that the superior court "may elect not to impose interest on any restitution the court orders" and that this determination shall be based on factors such as whether the defendant is indigent. LAWS OF 2022, ch. 260, § 12. This new law applies here because this case is on direct appeal. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). The State does not object to remand for the trial court to consider waiving interest on restitution pursuant to RCW 10.82.090. We accept that concession as well, and remand to the trial court to address whether to waive restitution interest pursuant to the new statute.

III

We remand to the trial court to determine whether to impose restitution interest after consideration of the relevant factors under RCW 10.82.090(2) and expressly strike from Hawkins' judgment and sentence the VPA, DNA collection

fee, attorney fees, criminal filing fee, extradition costs, appellate costs, supervision fees, collection costs, and nonrestitution interest. In all other respects, we affirm.

Feldman, J.

WE CONCUR:

Chung, J.

Brown, J

APPENDIX B

FILED
6/6/2024
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. QUINCY VALENTINO HAWKINS, Appellant.	No. 86176-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Quincy Hawkins, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Feldman, J.
Judge

NIELSEN KOCH & GRANNIS P.L.L.C.

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