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NO. 93006-6

RECEIVED ELECTRONICALLY

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE MARCUM

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 46855-7-II
Clallam County Superior Court No. 12-1-00249-4

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Clallam County Deputy Prosecuting Attorney JESSE ESPINOZA.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court to deny review of the Court of Appeals decision affirming the conviction and sentence, No. 46855-7-II, entered Feb. 9, 2016, a copy of which is attached to the petition for review.

The Court of Appeals affirmed the convictions and held as follows:

There was a sufficient factual basis for the guilty plea.

The record supports the finding that Marcum's drug use contributed to his offenses and the community custody condition that Marcum obtain a chemical dependency evaluation and treatment.

The State's concession is accepted that the condition barring Marcum from using or possessing any drug without a prescription is overbroad.

The Court declined to review Marcum's claim regarding legal financial obligations as he failed to object at sentencing.

The charges of Child Rape and Child Molestation occurred on different dates and do not constitute double jeopardy.

Marcum failed to show that his attorney's pre-arraignment advice

entitles him to relief.

III. COUNTERSTATEMENT OF THE ISSUES

The question presented is whether this Court should decline to accept review because none of the criteria set forth in RAP 13.4 (b) are met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or the Court of Appeals; and
2. The petition fails to present a significant question of law under the Constitution of the State of Washington and of the United States; and
3. The petition fails to present any issue of substantial public interest that should be determined by this Court?

IV. STATEMENT OF THE CASE

On July 27, 2012, the State filed an information charging Marcum with the crimes of Count 1, Rape of a Child in the First Degree (as a incident that occurred at a time separate and distinct from that in Count 2); Count 2, Child Molestation in the First Degree; Count 3, Sexual Exploitation of a Minor; and Count 4, Possessing Depiction of Minor Engaged in Sexually Explicit Conduct in the First Degree. CP 100.

The State filed Detective Kori Malone's Certification of Probable Cause in support of the charges of the original information. (CP 104-

107). Det. Malone interviewed Mr. Marcum about property found in the woods associated with Mr. Marcum. CP 105. Det. Malone showed Mr. Marcum a photo of a flashdrive and digital camera. CP 105. Mr. Marcum admitted that the flash drive was his and that he had possessed it for several years. CP 105. He also stated that he kept trying to get rid of it and it kept reappearing with his belongings. CP 106. Mr. Marcum told Det. Malone that the photos on the flash drive show Mr. Marcum molesting a child and that the pictures were of his face with his mouth against the vagina of a child. CP 105.

Det. Malone states that she personally viewed the video and pictures on the flash drive she discussed with Mr. Marcum and confirmed what Mr. Marcum told her would be on the flash drive. CP 106.

Det. Malone provided descriptions of the contents of a video which formed the basis for the charge of Rape of a Child, photos which formed the basis for the charge of Child Molestation and Sexual Exploitation of a Minor, and more photos where Mr. Marcum was not identified which formed the basis for the charges of Possessing Depiction of Minor Engaged in Sexually Explicit Conduct. CP 106-07.

Det. Malone identified Mr. Marcum's face in the photographs which formed the basis for Child Molestation charges. CP 106. The videos show a tattoo identified as the same as Marcum's tattoo on his left

arm. CP 106. Det. Malone also states that the child or children in the video and photos were about 2 to 3 years old. CP 106–107. The video and photos were taken from same camera. CP 106.

Det. Malone described the video as showing Mr. Marcum licking the vagina and anus of a female of about 2 years of age. CP 106. Det. Malone also described two photos matching the description Mr. Marcum gave to Det. Malone showing Mr. Marcum licking the vagina and anus of a female child of approximately 2 to 3 years of age. CP 106.

According to a forensic exam, the video was likely created on Mar. 13, 2011 at about 4:11 p.m. and placed on the flash drive on Oct. 25, 2011. CP 106. The forensic exam showed that the date on the camera when the photos were created was Mar. 7, 2011 at about 8:56 p.m. CP 106. In the photo showing the Child Molestation, Mr. Marcum was wearing a different T-shirt than the one he was wearing in the video of the Rape of a Child. CP 106.

Det. Malone also described photographs on the flash drive showing an adult male having sexual contact and intercourse with a female child approximately 2 to 3 years old. CP 107. The background in the photos is the same as described in the still photo from the video where Mr. Marcum was identified by his tattoo. CP 106, 107.

On Oct. 19, 2012, the State filed an amended information which

clarified Counts 1–4 and added Counts 5–14, all of which were charges for Possessing Depiction of Minor Engaged in Sexually Explicit Conduct in the First Degree.

About a year later, on Oct. 17, 2013, Mr. Marcum entered a plea of guilty to Counts 1–10. CP 53, RP 9–10. Counts 11–14 were dismissed per the plea agreement. CP11. Prior to taking the plea of guilty, the trial court specifically discussed the charges of the amended information with Mr. Marcum. RP 8–10.

The court also inquired of Mr. Marcum if he had any questions about the statement of defendant on plea of guilty. RP 6. Mr. Marcum indicated that he did not and that he reviewed it with his attorney. RP 6. Mr. Marcum indicated that he understood the rights he was giving up (RP 7), that he understood his standard sentence range and offender score (RP 7), the state's sentencing recommendation including the dismissal of Counts 11–14 of the amended information (RP 8), and that the judge is not bound by the recommendation (RP 8).

Mr. Marcum pleaded guilty one-by-one to Counts 1–3 and then guilty to Counts 4–10. RP 9–10. Mr. Marcum indicated that no threats were made to get him to plead guilty and the court found that Mr. Marcum entered his plea of guilty in a knowing, voluntary, and intelligent manner. RP 10.

Mr. Marcum's statement in the Statement of Defendant on Plea of Guilty states, "I have reviewed the evidence in this case with my attorney and discussed it fully with him. I believe there is a substantial likelihood of my being convicted should this matter go to trial and I am entering this plea to take advantage of the State's plea offer." RP 60. Then there is an unchecked box in the same section and the statement continues, "Instead of making a statement, I agree that the court may review the police reports and/or statement of probable cause supplied by the prosecution to establish a factual basis for the plea." RP 60.

The court mentioned that the plea was essentially an Alford type plea and that "the Court has read the probable cause statement and does find that it establishes a factual basis for [the] plea." RP 10. The defendant had no objection to the trial court's finding of a factual basis for the plea based upon the statement of probable cause.

Prior to sentencing, Marcum moved to withdraw his plea of guilty based on the claim of ineffective assistance of counsel. CP 34, 43. The Court denied the motion (CP 25) and the matter proceeded to sentencing.

On Oct.29, 2014, at sentencing, the trial court stated that it had read the file thoroughly and the Presentence Investigation Report (PSI) (CP 76-92) a number of times. RP 69. The sentencing court adapted the recommendations from the PSI and imposed a sentence of 300 months.

RP 70.

Marcum appealed the denial of the motion to withdraw the appeal on the basis that the plea was not voluntary on the claim that there was no factual basis for the plea of guilty. The Court of Appeals affirmed the conviction finding that there was a factual basis for the plea. Marcum now Petitions the Court to review the Court of Appeals decision.

V. ARGUMENT

A. THE PETITIONER HAS NOT ESTABLISHED ANY OF THE CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW SET FORTH IN RAP 13.4 (b).

RAP 13.4 (b) sets forth the considerations governing this Court's acceptance of review:

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Marcum provides no authority showing that the Court of Appeals decision was in conflict with a decision of the Supreme Court or another

division of the Court of Appeals. Marcum's Petition for Review does not present a question of law under the Washington State or United States Constitutions. Finally, Marcum provides no argument that his petition involves an issue of substantial public interest based on his insufficiency of the evidence argument fails because there was sufficient evidence to support a finding of guilty.

This Court should decline to accept review because Marcum has failed to establish any of the above criteria.

**B. THE PETITIONERS'S CLAIMS OF
INEFFECTIVE ASSISTANCE WERE NOT
RAISED ON APPEAL AND ARE NOT
SUPPORTED BY THE RECORD.**

The ineffective assistance claims Marcum raised in his Petition for Review were not raised on appeal. "An issue not raised or briefed in the Court of Appeals will not be considered by this court." *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993) (citing *State v. Laviollette*, 118 Wn.2d 670, 679, 826 P.2d 684 (1992)).

Additionally, Marcum's claims of ineffective assistance are based upon matters outside the record.

Courts engage in a strong presumption counsel's representation was effective. *State v. Brett*, 126 Wash.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wash.2d at 226, 743 P.2d 816.

Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record.

State v. Crane, 116 Wash.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); *State v. Blight*, 89 Wash.2d 38, 45–46, 569 P.2d 1129 (1977). *Accord State v. Stockton*, 97 Wash.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the brief but not included in the record cannot be considered on appeal).

The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995).

In his Petition for Review, Marcum raises the following claims of ineffective assistance:

Defense counsel was informed that Marcum was high on medication when the detective was taking his confession.

Defense counsel was informed that Marcum was suffering from diminished capacity at the time of the crime.

Defense counsel did not investigate Marcum's case beyond reading the investigative reports in discovery and did not interview any witnesses.

Defense counsel did not obtain medical records.

Marcum entered a plea of guilty although defense counsel did not advise him of the Indeterminate Sentence Review Board and their role.

Defense counsel did not advise Marcum that he could possibly spend the rest of his life incarcerated or could be on probation the rest of his life.

Marcum states that he moved to withdraw his plea of guilty before sentencing and that he proved ineffective assistance of counsel but does not cite to anywhere in the record where the trial court made a finding that his counsel was ineffective.

The claims listed above are matters outside the record and were not raised on appeal. Furthermore, these claims do not support the criteria for review under RAP 13.4 (b). Therefore, the Court should deny the petition to review these claims.

C. THE COURT SHOULD DECLINE TO REVIEW PETITIONER'S DOUBLE JEOPARDY CLAIM BECAUSE IT IS BASED UPON MATTERS OUTSIDE THE RECORD.

On direct appeal, Marcum claimed in his Statement of Additional Grounds that the crimes of Child Rape and Child Molestation constituted one criminal act with one victim.

There is nothing in the record to support Marcum's claim that the two crimes occurred not just on the same date but at the same time, and therefore this claim may not be reviewed. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Furthermore, Marcum's double jeopardy claim is based upon matters that are not in the record and Marcum may not supplement the record to pursue this claim. "A double jeopardy challenge does not permit

a defendant to supplement the record.” *In re Francis*, 170 Wn.2d 517, 530, 242 P.3d 866, 873 (2010) (citing *State v. Knight*, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008) (citing *United States v. Broce*, 488 U.S. 563, 575–76, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) (defendants were precluded from expanding the record to demonstrate their two convictions for conspiracy stemmed from a single conspiracy))).

The record shows the crimes of Rape of a Child and Child Molestation occurred at different times and were not the same criminal act. Furthermore, Marcum’s argument that the crimes occurred on the same day or time or the State got the dates wrong is not supported by the record and does not establish double jeopardy. Finally, Marcum does not establish the criteria under RAP 13.4 (b) as to his double jeopardy claim.

Therefore, the Court should deny Marcum’s Petition to Review his double jeopardy claim.

D. THE COURT SHOULD DECLINE TO REVIEW THE PETITIONER’S DUE PROCESS CLAIM BECAUSE IT WAS NOT RAISED ON APPEAL.

Marcum argues in his petition that the trial court violated his right to due process by imposing an enhanced sentence. Marcum claims that he remained silent at sentencing and instead of the 240 months agreed upon, the trial court imposed 300 months. Br. of Petitioner at 9.

Marcum did not argue on appeal that the trial court violated his right to due process by enhancing his sentence and does not explain how 300 months equates to an enhanced sentence when the standard sentence range was 240 to 318 months. CP 53; RP 5, 7. Marcum acknowledged at sentencing that the trial court need not follow the sentencing recommendations of counsel. CP 27, 57; RP 8.

The Court need not consider this claim as it is not supported by any authority and the claim is not well taken on its face and has no obvious merit. *See Grant Cnty. v. Bohne*, 89 Wn.2d 953, 958, 577 P.2d 138 (1978) (citing *In re Cassel*, 63 Wn.2d 751, 388 P.2d 952 (1964)); *Whatcom Cnty. v. Kane*, 31 Wn. App. 250, 252, 640 P.2d 1075 (1981) (citing *Griffin v. Department of Social & Health Servs.*, 91 Wn.2d 616, 590 P.2d 816 (1979)).

Therefore, the Court should decline to review this claim.

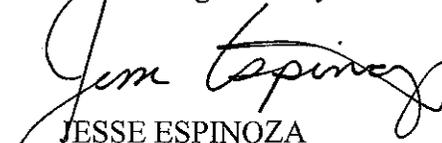
VI. CONCLUSION

Marcum presents no authority which conflicts with a decision by the Washington State Supreme Court or Court of Appeals. Marcum's Petition does not present a significant question of law under the Washington State or U.S. Constitutions. Marcum's petition also fails to present any issue of substantial public interest. Therefore, Marcum has not established any of the criteria set forth under RAP 13.4 (b).

For the foregoing reasons, the State respectfully requests that the Court deny Marcum's Petition for Review.

DATED May 11, 2016.

Respectfully submitted,
MARK B. NICHOLS
Prosecuting Attorney

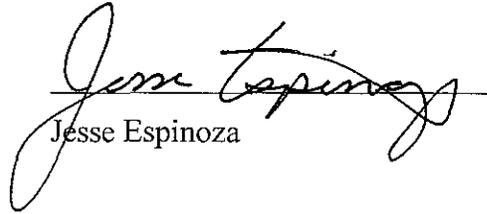


JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Dwayne Marcum at Coyote Ridge Correction Center, Connell, WA 99326 on 5/11/2016.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza