

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 39573-1-III

On review from the Superior Court of Okanogan County, no. 21-1-00074-24

STATE OF WASHINGTON, Respondent,

v.

BOBBIE BERNARD DICK, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Bobbie Dick pleaded guilty to violating a domestic violence restraining order, understanding that his attorney would request a family offender sentencing alternative (“FOSA”). A Department of Corrections assessment concluded that Mr. Dick was eligible but not suitable for the FOSA. Despite Mr. Dick’s lack of prior felony history, the victim’s content to the contact that violated the order, and indications of a mental health disorder that could include cognitive deficits, his attorney did not request any kind of mitigated sentence besides the FOSA. Under the record presented here, that failure was deficient performance that prejudiced Mr. Dick’s prospects at sentencing.

The trial court found Mr. Dick indigent at the time of his sentencing and imposed a \$500 crime victim penalty assessment under RCW 7.68.035 and a \$100 domestic violence assessment under RCW 10.99.080. Subsequently, the statute authorizing the crime victim penalty assessment was revised,

prohibiting its imposition on defendants who are indigent at the time of sentencing. Because the legislative revisions apply to Mr. Dick's case while it is pending on appeal, the crime victim assessment should be stricken from the judgment and sentence. Further, because the domestic violence assessment is discretionary, it may not be imposed on Mr. Dick due to his indigency and should also be stricken.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Trial counsel's performance was ineffective for failing to request a mitigated sentence when the record discloses the existence of mitigating circumstances.

ASSIGNMENT OF ERROR NO. 2: The \$500 crime victim penalty assessment should be stricken from the judgment and sentence due to Mr. Dick's indigency.

ASSIGNMENT OF ERROR NO. 2: The \$100 domestic violence assessment should be stricken from the judgment and sentence due to Mr. Dick's indigency.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether counsel's decision not to request a mitigated sentence was reasonable when facts in the record establish statutory mitigating factors and there was no agreement with the State to recommend a specific sentence that would be breached by requested a downward departure from the standard range.

ISSUE NO. 2: Whether there is a reasonable likelihood that a different sentence would have been imposed when the trial court expressed that it was imposing a standard range sentence "reluctantly."

ISSUE NO. 3: Whether revisions to RCW 7.68.035 made effective July 1, 2023 apply to Mr. Dick's case.

ISSUE NO. 4: Whether the domestic violence assessment is a discretionary legal financial obligation that may not be imposed under RCW 10.01.160(3) due to Mr. Dick's indigency.

IV. STATEMENT OF THE CASE

Bobbie Dick is an enrolled member of the Confederated Tribes of the Colville Reservation who was contacted by police while shopping in the electronics department at Walmart with his girlfriend. CP 15, 71. She told them that she had picked Mr. Dick up and brought him to Walmart, where they had been shopping together for about an hour. CP 15. Police were aware of an active domestic violence no contact order between them and the State charged Mr. Dick with a felony due to having two prior convictions for violating the no contact order. CP 11-12, 15.

Mr. Dick pleaded guilty to the charge without negotiating a recommendation from the State, stating that the defense intended to request a FOSA. CP 26, 28, RP 14, 26. He had one

prior adult felony conviction but his prior misdemeanor domestic violence convictions increased his offender score to 5, giving him a standard range sentence of 33-43 months in prison. CP 66, 83.

The Department of Corrections conducted a risk assessment and filed a report recommending against a FOSA despite Mr. Dick's eligibility. CP 65, 74. At sentencing, the State recommended against the FOSA, arguing that Mr. Dick had not taken responsibility for his actions, and instead recommended the low end of the standard range. RP 36-37. Defense counsel did not request a mitigated sentence or assert any grounds to impose a mitigated sentence, instead telling the court that its only choice was between a FOSA and a prison sentence. RP 39. Nevertheless, counsel noted that Mr. Dick appeared to have cognitive issues that were recognized in the risk assessment report. *Id.*; CP 72.

The trial court rejected the FOSA request on the grounds that Mr. Dick did not “show an inner desire” to change and had challenges with compliance. RP 44. It imposed the 33-month prison sentence recommended by the State, indicating that it did so “reluctantly.” RP 46.

At sentencing, the trial court found that Mr. Dick was indigent. CP 94; RP 46. It imposed a \$500 crime victim penalty assessment pursuant to RCW 7.68.035 and a \$100 DV assessment pursuant to RCW 10.99.080. CP 119-20. Mr. Dick timely appealed and was again found indigent for that purpose. CP 122, 128.

Subsequently, the Washington Legislature introduced and passed H.B. 1169, amending several statutes that govern legal financial obligations in criminal cases. The bill came into effect on July 1, 2023. Laws of Wash. c. 449 (68th Leg. 2023).

V. ARGUMENT

Mr. Dick's attorney failed to provide the vigorous advocacy required by the Sixth Amendment and article I, § 22 of the Washington Constitution by failing to request a mitigated sentence in spite of grounds present in the record that would support it and the lack of any agreed recommendation from the State that the request would violate. Because the trial court's reluctance to impose a 33-month standard range sentence indicates that the trial court likely would have been receptive to a request for mitigation, the failure was prejudicial to Mr. Dick and the case should be remanded for resentencing. If this court does not agree that resentencing is required, it must strike \$600 in legal financial obligations from the judgment and sentence that are not legally authorized.

A. Defense counsel's assistance was ineffective by failing to request a mitigated sentence on the grounds of the victim's willing participation in the DVRO violation and the defendant's impaired capacity to appreciate the

wrongfulness of his conduct or conform to the requirements of the law.

The right to counsel under the federal and Washington State constitutions is the right to counsel's effective assistance. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To show that the assistance provided fell short of constitutional standards, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Grier*, 171 Wn.2d at 32-33.

Although there is a strong presumption of effective assistance, this presumption can be overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Grier*, 171 Wn.2d at 33. And not all defense strategies are immune from attack – the question is not whether counsel's choices were strategic, but whether they were reasonable. *Id.* at 33-34.

In the present case, no reasonable strategic reason justifies the failure to request a mitigated sentence when grounds to request mitigation are apparent in the record. Sentencing courts must presumptively impose a sentence within the standard range. *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014). However, the court has discretion to impose a sentence below the standard range if substantial and compelling reasons support it, and the statute lays out a non-exclusive list of mitigating factors a court can rely on. RCW 9.94A.535.

Applicable here are two mitigating factors:

- To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident, RCW 9.94A.535(1)(a);
- The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired, RCW 9.94A.535(1)(e).

As to the first, the victim told police that she picked up Mr. Dick at Safeway and drove him to Walmart, where they shopped together for about an hour. CP 15. Video surveillance footage confirmed her account. CP 15-16. The victim did not complain about the contact; it was an off-duty police officer who knew there was a restraining order between them who saw them at Walmart and reported it. CP 15. Consequently, the circumstances of the violation are significantly less egregious than cases involving unwanted contact.

As to the second factor, the risk assessment report identifies multiple prior mental health diagnoses related to conduct and adjustment disorders. CP 72. Indeed, Mr. Dick apparently met the standards for the Social Security Administration to determine that he is disabled, although he was not entitled to any additional benefits. CP 111. And at sentencing, trial counsel advised that “there may be some indications of some cognitive issues that – that exist also that we’ve seen and seem to be implied somewhere in the report.”

RP 39. These facts indicate that Mr. Dick likely has psychological or developmental deficits that affect his decisions and may render him less culpable than other offenders.

Despite this record, counsel did not request a mitigated sentence and even told the court that its only choice was between a FOSA, which was opposed by the Department of Corrections and the State, and a standard range prison sentence. RP 39-41. This is not reasonable because it is not correct; the court could have imposed a mitigated sentence on the record before it. Nor is there a reasonable strategic reason not to ask for a mitigated sentence; there was no agreed recommendation based on the plea agreement, so the defense was free to request any sentence authorized by law. CP 28; RP 14.

With respect to prejudice, a defendant must show that there is a reasonable likelihood that the outcome of the proceedings would have been different but for the deficient performance. *Grier*, 171 Wn.2d at 34. Here, the record

indicates that the trial court imposed the standard range sentence “reluctantly.” RP 46. Indeed, the trial court’s comments reflect an understanding that penalties should gradually escalate, which calls into question the appropriateness of a multi-year prison sentence for a non-violent second felony. RP 44. These comments indicate a reasonable probability that if defense counsel had requested a mitigated sentence or identified the mitigating factors that applied, the trial court would have imposed it. *Cf. State v. Hernandez-Hernandez*, 104 Wn. App. 263, 15 P.3d 719, *review denied*, 143 Wn.2d 1024 (2001) (prejudice was “slight” where argument encompassed some mitigating factors to support defense request for standard range sentence).

Under these facts, defense counsel’s failure to request a mitigated sentence under RCW 9.94A.535(1)(a) or (e) is unreasonably deficient and prejudiced Mr. Dick’s case because it is reasonably likely the trial court would have imposed a sentence below the standard range minimum. Accordingly, the

sentence should be vacated and the case remanded for resentencing.

B. The \$500 crime victim assessment and the \$100 Domestic Violence assessment must be stricken from the judgment and sentence due to Mr. Dick's indigency.

Two legal financial obligations totaling \$600 cannot be imposed due to Mr. Dick's indigency. The \$500 crime victim assessment has been modified by subsequent legislative changes that apply to his judgment and sentence on appeal. The \$100 Domestic Violence assessment is a discretionary legal financial obligation, which may not be imposed under RCW 10.01.160(3). Both should be stricken from the judgment and sentence.

Effective July 1, 2023, a new subdivision was added to RCW 7.68.035, the crime victim penalty assessment statute, prohibiting the court from imposing the penalty if it finds the defendant indigent at sentencing. Laws of Wash. c. 449 § 1;

RCW 7.68.035(4). Mr. Dick was found to be indigent at the time of sentencing. CP 94. Consequently, if the statutory amendment applies to his case, then the crime victim assessment is unauthorized and should be stricken.

The Supreme Court has held that the precipitating event for application of a prospective statute concerning attorney fees and costs is the termination of the case. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). Because a case is not terminated until it is final on appeal, the statute applies prospectively to cases that are pending on appeal at the time the statute was enacted. *Id.* The Court of Appeals has specifically concluded that the amendments at issue in this case apply to cases pending on appeal following the reasoning of *Ramirez*. *State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023).

Thus, under *Ramirez* and *Ellis*, the revisions to the crime victim penalty statute apply to Mr. Dick's case on appeal. Under the revisions, the crime victim assessment may not be

imposed due to his indigency. Accordingly, the assessment should be stricken from the judgment and sentence.

The \$100 domestic violence assessment established under RCW 10.99.080 is a discretionary obligation because the court “may” impose it and is encouraged to solicit information concerning the defendant’s ability to pay it. Although RCW 10.01.160(3) addresses “costs,” the Supreme Court has interpreted the statute broadly to apply to discretionary legal financial obligations generally. *See State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015).

After *Blazina*, the legislature revised RCW 10.01.160(3), which now prohibits the imposition of costs on indigent defendants. Under *Blazina*’s precedent, this prohibition applies generally to discretionary legal financial obligations such as the domestic violence assessment. Consequently, Mr. Dick’s indigency precludes it from being imposed and it should be stricken from the judgment and sentence.

VI. CONCLUSION

For the foregoing reasons, Mr. Dick respectfully requests that the court VACATE his sentence and REMAND the case for resentencing; or, alternatively, STRIKE the \$500 crime victim assessment and the \$100 domestic violence assessment from his judgment and sentence.

RESPECTFULLY SUBMITTED this 8 day of
December, 2023.

This document contains 2,266 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by placing a copy in the U.S. mail, with first-class postage thereon prepaid, addressed to the following:

Okanogan County Prosecuting Attorney
234 Fourth Avenue North 3rd Floor
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 8 day of December, 2023 in
Kennewick, Washington.



Andrea Burkhart