IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KEVIN R. BOWEN, Appellant.	No. 40020-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Kevin R. Bowen pleaded guilty to bail jumping at a change of plea hearing held on the afternoon of the same day he was sentenced on previous convictions for possession of methamphetamine and first degree unlawful firearm possession. The trial court ordered Bowen to serve the bail jumping sentence consecutively to his possession sentence. Bowen appeals his bail jumping sentence, arguing that the trial court erred by failing to presume the sentences would run concurrently and by imposing an exceptional sentence without prior notice, or, alternatively, that he was denied effective assistance of counsel at his change of plea hearing. Finding no error, we affirm.

FACTS

A jury found Bowen guilty of possession of methamphetamine[1] and first degree unlawful firearm possession.[2] On September 26, 2008, Bowen failed to appear in court for his scheduled

[1] RCW 69.50.4013.

[2] RCW 9.41.040(1)(a).

sentencing on those convictions. Bowen was subsequently arrested. The State charged Bowen with bail jumping for missing the September 26 hearing.

The trial court held a sentencing hearing for Bowen's methamphetamine and firearm convictions on the morning of March 23, 2009. At this hearing, Bowen sought to plead guilty to the bail jumping charge. The trial judge (who was sitting pro tem, having retired from the bench) declined to hear Bowen's motion for a change of plea on the bail jumping charge. That afternoon, a second trial judge accepted Bowen's guilty plea on the bail jumping charge. The second judge set Bowen's bail jumping sentencing for April 13. Bowen's counsel did not object.

Bowen's sentencing hearing for bail jumping did not take place until November 16, in part because Bowen's counsel insisted that the State produce certified copies of the judgment and sentence for each of Bowen's 27 prior crimes. At this hearing, the State recommended that Bowen's sentence run consecutive to his sentence for methamphetamine and firearm possession. Bowen argued that he was entitled to have the sentences run concurrently because he pleaded guilty to bail jumping and requested sentencing on the same day that he was sentenced for his possession convictions.[3] The State argued that Bowen was not entitled to a concurrent sentence because not all of Bowen's crimes had been sentenced on the same day.

The trial court found that the presumption of concurrent sentences did not apply and ordered that Bowen serve his sentences consecutively. The trial court also found that, although there was a basis for an exceptional sentence due to Bowen's extensive criminal history, it would not impose an exceptional sentence. The trial court imposed a sentence of 60 months, the high

[3] The record does not reflect that Bowen requested sentencing on the same day as his plea, but rather reflects that Bowen's counsel did not object to setting the sentencing hearing for several weeks later.

end of the standard range. Bowen timely appeals.

DISCUSSION

Consecutive Sentences

Bowen challenges the trial court's authority to impose his bail jumping sentence consecutive to his controlled substance and firearm possession sentences. He argues that unless the trial court imposed an exceptional sentence, his bail jumping conviction is an "other current offense" under RCW 9.94A.525(1) and that the presumption of concurrent sentences under the Sentencing Reform Act of 1981[4] (SRA) required that the trial court impose concurrent sentences on the methamphetamine, firearm, and bail jumping charges. The State counters that RCW 9.94A.589(3) governs Bowen's bail jumping sentence and, under these circumstances, gives the sentencing judge discretion to order that Bowen serve his bail jumping sentence consecutive to the sentences imposed on the methamphetamine and unlawful possession of a firearm convictions.[5] We agree with the State.

Bowen's sentence on the methamphetamine and firearm possession convictions is not before us in this appeal. Bowen asks us to review only the sentence the trial court imposed on Bowen's bail jumping conviction on November 16, 2009. The meaning and application of a statute are questions of law we review de novo. *State v. Pineda-Guzman*, 103 Wn. App. 759,

[4] Ch. 9.94A RCW.

[5] In *State v. Bowen*, 157 Wn. App. 821, 239 P.3d 1114 (2010), we reversed Bowen's methamphetamine possession and firearm convictions and remanded for a new trial. But because the question of whether Bowen's sentences must be concurrent affects the start date for his bail jumping sentence, the issue is not moot. *Cf. State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (a case is moot when a court can no longer provide effective relief (quoting *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995))).

762, 14 P.3d 190 (2000) (citing *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000)), *review denied*, 143 Wn.2d 1021 (2001). We start with the plain language of the statute. *Pineda-Guzman*, 103 Wn. App. at 762-63 (citing *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995)).

RCW 9.94A.589(3) provides,

> Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

In *State v. Jones*, 137 Wn. App. 119, 151 P.3d 1056 (2007), we held that when a defendant is not under sentence of a felony at the time he commits the crime for which he is sentenced, the sentencing court may exercise its discretion and require that the sentence imposed on that crime be served after completing any sentences previously imposed. 137 Wn. App. at 125 (quoting *State v. Klump*, 80 Wn. App. 391, 396, 909 P.2d 317 (1996)); *see also* RCW 9.94A.589(3). Such a decision lies within the sentencing court's legitimate discretion and is not an exceptional sentence subject to either *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), or *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), jury trial protections. RCW 9.94A.589(3).

Here, when Bowen failed to appear for sentencing on September 26, 2008, he committed the crime of bail jumping after he was convicted of but before he was sentenced on the possession charges. Thus, he was not under sentence of a felony at the time he committed bail jumping and the trial court had discretion under RCW 9.94A.589(3) to impose consecutive sentences without

triggering the statutory exceptional sentence provisions of RCW 9.94A.589(1). Accordingly, we hold that the sentencing court did not err in requiring that Bowen serve his sentences consecutively.

Exceptional Sentence

Bowen next argues that he received an improper exceptional sentence. Specifically, Bowen argues that the SRA required the State to give notice before it sought an exceptional sentence and the State's failure to provide such notice violated his due process rights. Bowen bases his argument on RCW 9.94A.535(2)(c)[6] which provides that a trial court may impose an exceptional sentence without a finding of fact by a jury when "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."

In *Jones*, we held that the availability of facts supporting an exceptional sentence does not automatically render consecutive sentences exceptional. 137 Wn. App. at 125-26. There, Jones argued that his sentence was an exceptional sentence based on the fact that concurrent sentences would be "too lenient," which is a basis for an exceptional sentence under RCW 9.94A.535. *Jones*, 137 Wn. App. at 123. We rejected Jones's argument, finding that he was properly given a nonexceptional consecutive sentence under RCW 9.94A.589(3). *Jones*, 137 Wn. App. at 125-26. The imposed consecutive sentences were not exceptional merely because an exceptional sentence would have been available.

[6] We note that Bowen's claim fails even if we agreed with his argument that he was entitled to a presumption of concurrent sentences. Bowen's criminal history included 27 prior convictions. Under RCW 9.94A.535, the sentencing court had authority to impose an exceptional sentence under that statute's "free crimes" provision. *State v. McNeal*, 156 Wn. App. 340, 355, 231 P.3d 1266, *review denied*, 169 Wn.2d 1030 (2010); *see also* RCW 9.94A.535(2)(c), .525(22).

Bowen makes a nearly identical argument here, arguing that, because he could have been given an exceptional sentence under RCW 9.94A.535(2)(c), his consecutive sentences were exceptional. But the trial court here expressly declined to impose an exceptional sentence. Under *Jones*, the availability of an exceptional sentence does not remove a trial court's discretion to impose consecutive sentences under RCW 9.94A.589(3) and Bowen's argument fails.[7]

Ineffective Assistance of Counsel

Last, Bowen argues in the alternative that his trial counsel was ineffective for failing to ensure that the trial court sentenced him on all three convictions in a single proceeding on March 23, 2009. We disagree.

To establish ineffective assistance of counsel, Bowen must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice would occur here if, but for his counsel's deficient performance, there is a reasonable probability that his sentence would have differed. *McFarland*, 127 Wn.2d at 335 (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Thomas*, 109 Wn.2d at 226 (emphasis omitted) (quoting *Strickland*, 466 U.S.

[7] Bowen also argues that his consecutive sentence was not imposed under RCW 9.94A.589(3) because the State conceded at sentencing that if Bowen had been sentenced for bail jumping on March 23, the State *might have* entertained concurrent sentences. The fact that the State might have entertained requesting a concurrent sentence does not impact the trial court's discretion to impose consecutive sentences under RCW 9.94A.589(3) in this case.

at 694).

On the morning of March 23, Bowen attempted to change his plea on his bail jumping charge to guilty at the sentencing hearing for his possession charge convictions. Bowen's counsel stated that "the intent all along was to plead Mr. Bowen to [the bailing jumping charge] prior to his being sentenced [on his possession convictions] so that he can be pled and sentenced on both charges on the same day before Your Honor." Report of Proceedings at 2. But Judge James B. Sawyer II was not presiding over an arraignment or motion docket; he was conducting a sentencing hearing on a jury trial for which he was the trial judge. Judge Sawyer declined to hear Bowen's motion for change of plea and sentenced Bowen on his possession convictions.

Later on the same day, Judge Amber L. Finlay heard Bowen's motion for change of plea and accepted Bowen's guilty plea to the bail jumping charge. She then scheduled a sentencing hearing for April 13. Bowen's trial counsel neither requested that Judge Finlay immediately sentence Bowen on the bail jumping charge nor objected to scheduling the sentencing hearing for three weeks later. Even if counsel had requested immediate sentencing before Judge Finlay on March 23, Bowen does not cite to any legal authority granting him the right to immediate sentencing following the trial court's acceptance of his guilty plea. It is not unreasonable at a change-of-plea hearing for counsel to decline to make a request for which there is no supporting legal authority. *See State v. Townsend*, 152 Wn.2d 838, 843-44, 16 P.3d 145 (2001) (citing *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086, *cert. denied*, 605 U.S. 958 (1992)). Moreover, because the trial court had discretion to refuse counsel's request, if made, Bowen has not met his burden to show prejudice because he cannot show a reasonable probability that the trial court would have either sentenced him for bail jumping on March 23 or, given the nature of the charge

and Bowen's high offender score, imposed concurrent sentences if it had agreed to sentence him that day. Because Bowen cannot demonstrate deficient performance or prejudice, he has not shown ineffective assistance of counsel and his claim fails.

Accordingly, because the trial court did not err in requiring that Bowen serve his bail jumping conviction after completing his sentences for the convictions on which he jumped bail, we affirm.

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.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

WORSWICK, A.C.J.