IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONALD LEO BARNELL, Appellant.	No. 38819-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Donald Barnell appeals the sentence imposed following his conviction for failure to register as a sex offender. He contends that he received ineffective assistance of counsel at sentencing. Concluding that he fails to demonstrate ineffective assistance, we affirm.[1]

Barnell is subject to sex offender registration requirements. On April 16, 2008, Barnell was registered as residing at 395 Hall Road in Toutle. On that date, a sheriff's deputy visited that residence and learned that Barnell no longer lived there. On April 21, 2008, Barnell came to the sheriff's office to register a new address. He was arrested for failing to register a new

[1] A commissioner of this court initially considered Barnell's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

address within 72 hours or to register as a transient within 48 hours of April 16, 2008. After a bench trial, the court found Barnell guilty. The State informed the trial court that Barnell's standard sentencing range was 33 to 43 months. The trial court commented on the length of the standard range and set over sentencing to allow Barnell's counsel to investigate an exceptional sentence downward.

During the first sentencing hearing, Barnell's counsel argued:

> I think 36 months or 33 months is clearly excessive for this kind of situation.
>
> I don't have a specific mitigating factor but I would note, Your Honor, that I did bring a copy of Section 525 of the [Sentencing Reform Act of 1981, ch. 9.94A RCW (SRA)]. Under 525, Your Honor, I believe you could treat the two underlying convictions, the child molestations from 1991, as one offense in which his [offender] score would be five instead of eight. And, his range for a five would be 14 to 18 instead of 33 to [43].

Report of Proceedings (RP) at 103-04.

The court continued the sentencing hearing to allow the parties to brief the question of treating the 1991 convictions as part of the same criminal conduct. At the continued sentencing hearing, Barnell's counsel argued for treating the 1991 convictions as part of the same criminal conduct. He also argued:

> [O]ur request would be that Your Honor consider an exceptional sentence downwards just because the presumptive sentence in this case, I think, is not consistent with the purposes of the SRA. We are asking for a lot of time for what boils down to an administrative violation.

RP at 108.

The trial court ruled that it could not treat the 1991 convictions as part of the same criminal conduct. It then rejected Barnell's request for an exceptional sentence downward and sentenced Barnell to 33 months, the low end of the standard range.

Barnell argues that he received ineffective assistance of counsel because his trial counsel did not "aggressively" seek an exceptional sentence downward. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that, but for that deficient performance, the result of his trial probably would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Barnell's appellate counsel argues that "[t]he trial court was clearly amenable to [an argument in support of an exceptional sentence downward], had a thoughtful, thorough one been presented." Br. of Appellant at 6. But other than arguing that the standard sentencing range was clearly too excessive in light of the de minimus nature of Barnell's crime, an argument that Barnell's trial counsel did make, Barnell's appellate counsel fails to identify any other argument that Barnell's trial counsel could have made. None of the mitigating factors set out in RCW 9.94A.535(1) apply to Barnell. And dissatisfaction with the standard sentencing range is not a ground for an exceptional sentence downward. *State v. Pascal*, 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987).

The standard sentence range is a legislative judgment of how best to accommodate the need to protect the public, the need for rehabilitation, and the need to make frugal use of State resources. *Pascal*, 108 Wn.2d at 137. Our courts have consistently held that "'fixing penalties for criminal offenses is a legislative, and not a judicial, function.'" *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999) (quoting *State v. Manussier*, 129 Wn.2d 652, 667, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201 (1997)); *see also State v. Le Pitre*, 54 Wash. 166, 169, 103 P. 27 (1909) (the determination of penalties for crimes is a legislative function). Barnell's trial counsel's performance did not fall below an objective standard of reasonableness. Therefore,

Barnell fails to demonstrate ineffective assistance of counsel.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, P.J.

BRIDGEWATER, J.