IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 65562-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
RICARDO CALVIN PEREZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 12, 2011
	)	

Lau, J. — Ricardo Perez appeals the sentence imposed after he pleaded guilty to two counts of first degree robbery. Perez argues the trial court erred in denying his request for an exceptional sentence downward based on its belief that it lacked authority to order him into a community protection program (program) administered by the Department of Social and Health Services (DSHS). In the alternative, Perez argues his counsel provided ineffective assistance at sentencing in failing to correctly inform the trial court of its sentencing authority, failing to apply for the program, or failing to take other steps to put him in a position to allow the trial court to exercise its authority. Because the record shows the trial court properly exercised its discretion in denying the exceptional sentence and Perez failed to demonstrate defense counsel's deficient

performance or prejudice, we affirm.

FACTS

In May 2009, Ricardo Perez was charged with two counts of first degree robbery. In July 2009, the State amended the information, alleging certain aggravating factors—Perez committed the offenses shortly after being released from incarceration, he committed multiple current offenses, and his high offender score resulted in some offenses going unpunished. Perez pleaded guilty to all charges, including the aggravating factors. Based on those factors, the State requested an exceptional sentence upward of 183 months. Perez requested an exceptional sentence downward of 60 months based on the mitigating factor that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired. Perez relied on Dr. Robin Ladue's psychological evaluation.

Dr. Ladue evaluated Perez in December 2009 and diagnosed him with polysubstance abuse, depression, and posttraumatic stress disorder. Dr. Ladue concluded that Perez had cognitive defects and mental health problems; that Perez likely had organic brain damage due to prenatal alcohol exposure, head trauma, and chronic substance abuse; and that Perez's IQ (intelligence quotient) was below average—in the mildly retarded range. Dr. Ladue relied solely on the Wechsler Adult Intelligence Scale in making the IQ assessment, rather than the usual eight- to ten-hour "battery" of tests.

Dr. Ladue further concluded that Perez is "believed" to have fetal alcohol spectrum disorders (FASD). Dr. Ladue described characteristics of Perez that are

consistent with FASD but noted that the diagnosis would need to be confirmed by a dysmorphologist and recommended an FASD evaluation.

At the sentencing hearing, Dr. Ladue testified for the defense and noted that Perez might be able to obtain "24/7 supervision" through a DSHS program. Report of Proceedings (RP) (May 21, 2010) at 9. Perez's counsel then stated that she and Dr. Ladue had taken steps to obtain services from the program, but the record fails to indicate what those steps were. Neither Dr. Ladue nor Perez's counsel could guarantee that Perez would be able to enroll in the program.

The trial court imposed a high-end standard range sentence of 171 months. The trial court balanced Perez's mental health issues, the danger Perez posed to the public, and the availability of alternatives such as the program and declined to impose an exceptional sentence below the standard range. In weighing the issues, the court noted it had no authority to order Perez into DSHS's program, and Perez's counsel conceded this fact. The court ultimately concluded that public safety and practical considerations required that Perez's request for an exceptional sentence downward be denied.

ANALYSIS

Sentencing

Perez contends the trial court abused its discretion in denying his request for an exceptional sentence downward based on its belief that it did not have authority to order Perez into the program. The State counters that Perez cannot appeal his standard range sentence, that the trial court properly exercised its discretion in denying

Perez's request, and that the trial court properly concluded it had no authority to order Perez's placement in the program.

A standard range sentence is generally not appealable. However, a criminal defendant "may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the [Sentencing Reform Act of 1981, ch. 9.94A RCW] or constitutional requirements." State v. Osman, 157 Wn.2d 474, 481–82, 139 P.3d 334 (2006). "[W]here a defendant has requested an exceptional sentence below the standard range[,] review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. Garcia–Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

"A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range." Garcia–Martinez, 88 Wn. App. at 330. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if, for example, it takes the position that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex, or religion. Garcia–Martinez, 88 Wn. App. 330.

In State v. Cole, 117 Wn. App. 870, 880, 73 P.3d 411 (2003), the defendant unsuccessfully requested a sentence below the standard range and then challenged the court's refusal to impose an exceptional sentence on appeal. We held that the

defendant could not appeal from a standard range sentence where the trial court considered the defendant's request for the application of a mitigating factor, heard extensive argument on the subject, and then exercised its discretion by denying the request. Cole, 117 Wn. App. at 881. Similarly, in Garcia–Martinez, which involved an equal protection challenge to a standard range sentence, we held that a trial court that has considered the facts and concluded no basis exists for an exceptional sentence has exercised its discretion and the defendant may not appeal that ruling. So long as the trial court has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable, and imposed a standard range sentence, it has not violated the defendant's right to equal protection. Garcia–Martinez, 88 Wn. App. at 330.

Our review of the record shows that the trial court properly exercised its sentencing discretion. The court weighed the evidence of Perez's mental impairment, the danger he posed to the community, and the availability of alternatives such as the program. The court also imposed affirmative treatment conditions and 18 months' community custody, showing that it understood its authority and properly exercised its discretion in Perez's case. The court also properly concluded that it lacked authority to order Perez into a program. To qualify for such a program, a defendant must submit an application and DSHS must determine eligibility. RCW 71A.16.020(1), .030(4), .040(1). The record fails to establish that either of those conditions occurred. Having no guarantee that Perez would voluntarily enter such a program if so ordered and having no authority to compel DSHS to accept Perez, the court properly exercised its

discretion to deny Perez's request for an exceptional sentence downward based on concerns for public safety and prevention of recidivism.

Ineffective Assistance of Counsel

Perez argues that his counsel was ineffective for failing to apprise the trial court of its sentencing authority or to ensure the trial court could exercise its authority in his favor. The State counters that the record shows no deficient performance and no prejudice because Perez failed to show his eligibility for program placement with around-the-clock supervision that the trial court found was necessary to grant an exceptional sentence.

A criminal defendant has a Sixth Amendment right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686,104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 335. If a defendant fails to satisfy either prong (deficient performance and prejudice), the court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). There is a strong presumption of effective assistance, and the defendant bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no

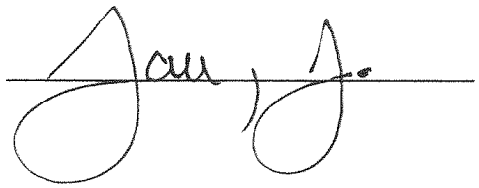
actual prejudice is shown and the error is not manifest." McFarland, 127 Wn.2d at 333.

To show that he was actually prejudiced by his counsel's failure to apprise the trial court of its sentencing authority or failure to ensure the trial court could exercise its discretion in his favor, Perez must show the trial court would likely have granted his request for an exceptional sentence. The record fails to establish Perez's eligibility for program services. The record establishes Perez may have been be eligible, but it does not indicate whether he would have been actually accepted into the program and subjected to the conditions the trial court found necessary to protect the public. Perez's counsel "looked into applying" for the program. RP (May 21, 2010) at 10. But the record fails to indicate what other steps counsel took, what counsel learned while investigating this alternative, or whether Perez was eligible. If Perez "wishes a reviewing court to consider matters outside the record, a personal restraint petition is the appropriate vehicle for bringing those matters before the court." McFarland, 127 Wn.2d at 338. Here, Perez made no showing that the sentencing would have been different but for counsel's deficient performance. As discussed above, the trial court exercised discretion and its main concern was public safety. Regardless of counsel's performance, the record fails to indicate that Perez would have obtained the placement the court felt necessary to protect the public, and thus, Perez fails to show a reasonable likelihood that the court would have granted his request for an exceptional sentence.

CONCLUSION

The trial court properly exercised its discretion in denying Perez's request for an

exceptional sentence downward. The record also fails to support Perez's claim of ineffective assistance of counsel. We affirm Perez's judgment and sentence.



WE CONCUR: