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Washington State
Court of Appeals
Division Two

February 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of: MICHAEL ERIC NELSON, Petitioner.	No. 49782-4-II consolidated with No. 49795-6-II UNPUBLISHED OPINION

MELNICK, J. — Michael Eric Nelson seeks relief from personal restraint imposed following his conviction for robbery in the first degree and unlawful possession of a firearm in the first degree. We conclude that Nelson's petition is not successive, Nelson received effective assistance of counsel, and the trial court did not err in calculating Nelson's offender score. We deny the petition.

FACTS

I. ROBBERY AND FIREARM

On October 1, 2011, Nelson and two other men, August Jerako Jackson and Theo Burke, offered to give Travis Calloway a ride from Tacoma to Lakewood. Calloway entered the car. Rather than going to Lakewood, the car pulled into an apartment complex. Nelson took out a gun, pointed it at Calloway, and demanded all of his property. The three men in the car took Calloway's wallet, jacket, hat, cell phone, and cash. Calloway then exited the car, ran, and called police.

On October 10, police searched Caitlyn Dripps's apartment where Nelson had stayed for at least two nights after the robbery. They found a .38 caliber black handgun that Calloway,

Jackson, and Burke identified as the gun Nelson had used during the robbery. Jackson testified that the gun used in the robbery was a chrome revolver. He also stated he was absolutely positive that the weapon retrieved from Dripps's residence was the one used in the robbery.

II. Pretrial Proceedings

The State charged Nelson with robbery in the first degree occurring on October 1, 2011, and unlawful possession of a firearm in the first degree occurring on October 10, 2011.

The court appointed a lawyer to represent Nelson at some point between his previous attorney's withdrawal on September 11, 2012 and a hearing on January 7, 2013. The lawyer did not visit Nelson at the Pierce County Jail at any time between his appointment and trial.

On February 12, the trial judge received a letter from Nelson stating that his lawyer had not contacted him in five and a half months, except in court, and that he had not gone over the case or any evidence with him. In the letter, Nelson requested the judge appoint a new lawyer for him.

On February 21, the day set for trial, the lawyer requested a recess until February 27 so he could show Nelson evidence and interview a State's witness. The trial court conducted preliminary trial matters and then recessed the case until the requested date for jury selection. The court warned the lawyer that the case might have to wait until February 28, depending on the court's schedule.

On February 28, the judge received another letter from Nelson alleging that his lawyer had not talked with him about the case, had not interviewed any witnesses, and had not shown Nelson any evidence. Nelson requested that the issue be addressed at the next court date.

On the day set for trial, the judge asked for clarification as to whether the charges stemmed from the same incident, given the inconsistent dates. The prosecutor assured the court that "the Unlawful Possession of a Firearm should be the date in which [Nelson] had the gun during the robbery." Report of Proceedings (Feb. 21, 2013) at 7. Nelson's lawyer stated that was his

understanding of the issue. The State filed an amended information with the date of both charges being October 1, 2011.

III. Trial

Trial began on February 28 and five days later the jury returned guilty verdicts on both counts. The jury also found beyond a reasonable doubt that Nelson had been armed with a firearm at the time of commission of the robbery.

IV. Sentence

The trial court sentenced Nelson to concurrent terms of 108 months for the robbery and 102 months for unlawful possession of a firearm and an additional 60 months for the firearm sentencing enhancement.

In calculating Nelson's offender score, the court considered seven prior criminal convictions, including two convictions each of unlawful possession of a controlled substance (UPCS) and conspiracy to unlawfully deliver a controlled substance (C/UDCS) from 2006.

At the sentencing hearing, Nelson did not raise any issue regarding the calculation of his offender score of eight points. Nelson and his lawyer both signed a statement of prior criminal history and offender score that scored one point for each of Nelson's 2005 and 2006 convictions. Nelson attached factual information on these crimes to his personal restraint petition (PRP).

A. PRIOR OFFENSES[1]

i. 2005 Charges

In 2005, police planned a buy/bust operation. The target arrived at the arranged time and place in a vehicle driven by Nelson. The target tried to run from police, but they apprehended him and recovered a baggie containing 5.5 grams of cocaine and a sack containing 71.3 grams of marijuana in the area, as well as 14.8 more grams of marijuana in his coat pocket. While some officers pursued the fleeing target of the operation, others contacted Nelson who was driving the vehicle. Nelson had 15 MDMA[2] tablets in a Ziploc baggie that he identified as ecstasy. Nelson told police that another passenger in the vehicle had offered him money to drive.

The State charged Nelson with unlawful possession of a controlled substance, MDMA, and conspiracy to deliver a controlled substance, but did not identify the drug.

ii. 2006 Charges

In 2006, police arrested Nelson for violating a noise ordinance. When police searched his car incident to his arrest, they found three bags of marijuana, four rocks of cocaine, two cell phones, a scale with marijuana residue on it, a large sum of cash, and a plastic bag. Officers also found numerous pills.

The State charged Nelson with one count of unlawful possession of a controlled substance, cocaine, and conspiracy to deliver a controlled substance, MDMA.

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[1] Nelson attached factual information to his PRP regarding the following prior offenses. He did not introduce any of this information at his original sentencing.

[2] MDMA (methylenedioxymethamphetamine) is also known as "ecstasy."

iii. 2005/2006 Guilty Plea

On September 26, 2006, Nelson plead guilty as charged in the 2005 and 2006 informations. As part of his plea, he stipulated to a criminal history that included both his possession and conspiracy convictions separately, resulting in an offender score of four.

V. OTHER PROCEEDINGS

Nelson appealed his convictions and sentence and we affirmed. *State v. Nelson*, No. 44725-8-II (Wash. Ct. App. Jan. 27, 2015) (unpublished), http://www.courts.wa.gov/opinions/). Nelson argued that he had been deprived of his rights to a public trial and to represent himself, that he had received ineffective assistance of counsel, and that the trial court had incorrectly calculated his offender score for sentencing. *Nelson*, No. 44725-8-II, slip op. at 1. Due to an insufficient record, we did not address several of his ineffective assistance of counsel or erroneous offender score arguments. *Nelson*, No. 44725-8-II, slip op. at 5-6. We noted that a PRP would be the proper method for Nelson to obtain review. *Nelson*, 44725-8-II, slip op. at 6.

Before trial, Nelson filed a "Motion to Show Cause," alleging that the Pierce County Jail had mistreated him. He sought $330,000 in damages. The superior court transferred the motion to this court for consideration as a PRP. We remanded it with direction to treat it as a civil action for damages.

On November 21, 2016, Nelson filed a CrR 7.8 motion for resentencing with the superior court. The superior court transferred the motion to this court for consideration as a personal restraint petition. We accepted the transfer.

On December 22, Nelson filed a PRP with this court alleging that he received ineffective assistance of counsel in his trial. We consolidated the two petitions on February 1, 2017.

ANALYSIS

I. PRP STANDARD OF REVIEW

A petitioner may request relief through a PRP when he or she is under an unlawful restraint. RAP 16.4(a)-(c). "A personal restraint petitioner must prove either a (1) constitutional error that results in actual and substantial prejudice or (2) nonconstitutional error that 'constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.2d 884 (2010) (quoting *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004)). The petitioner must prove prejudice by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). In addition, "the petitioner must support the petition with facts or evidence and may not rely solely on conclusory allegations." *Monschke*, 160 Wn. App. at 488; RAP 16.7(a)(2)(i).

In evaluating PRPs, we can (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 176-77, 248 P.3d 576 (2011).

II. NELSON'S PRP IS NOT SUCCESSIVE

The State contends that we should not reach the merits of Nelson's PRP because he already filed a PRP that was decided in 2014 and Nelson has not shown why he did not raise these claims in that case.

RCW 10.73.140 states:

> If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows a good cause why the petitioner did not raise the new grounds in the previous petition.

When the court dismisses a PRP on procedural grounds and does not consider it on its merits, however, a subsequent PRP "is not barred as a successive petition." *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 263, 36 P.3d 1005 (2001).

Nelson's previous PRP was titled a "Motion to Show Cause." The trial court treated it as a CrR 7.8 motion for relief from judgment and transferred it to this court for consideration as a PRP. We remanded it to be treated as a civil action and "'a demand for monetary damages is not actionable by personal restraint petition.'" Br. of Resp't, App. D (quoting *In re Pers. Restraint of Williams*, 171 Wn.2d 253, 256, 250 P.3d 112 (2011)).

Accordingly, Nelson's PRP is not successive.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient, and (2) that the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. Representation is deficient if, after considering all the circumstances, the performance falls below an objective

standard of reasonableness. *Grier*, 171 Wn.2d at 33. Prejudice exists if there is a reasonable probability that, except for counsel's errors, the results of the proceeding would have been different. *Grier*, 171 Wn.2d at 34. The prejudice that a petitioner must show in a PRP that alleges ineffective assistance of counsel is the same as if it was raised in a direct appeal. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 845, 280 P.3d 1102 (2012). If either prong is not satisfied, the defendant's claim fails. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

An appellant faces a strong presumption that counsel's representation was effective. *Grier*, 171 Wn.2d at 33. Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). There is "no claim for ineffective assistance of counsel when the challenged action goes to a legitimate trial strategy or tactic." *State v. Kolesnik*, 146 Wn. App. 790, 801, 192 P.3d 937 (2008).

"Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). The defense counsel's strategic decisions must be reasonable. *Grier*, 171 Wn.2d at 34. The standard for proving prejudice is the same on collateral attack as on direct appeal. *Crace*, 174 Wn.2d at 846-47.

B. MOTION TO SEVER

Nelson alleges that his lawyer's failure to move for severance of his unlawful possession of a firearm count from his robbery count was deficient performance. He argues that a motion to sever the two counts would have been granted. We disagree.

Nelson must show prejudice "first by showing that a severance motion would likely have been granted. And second, he must show that, had a severance been granted, there is a reasonable probability that the jury would not have found him guilty." *Sutherby*, 165 Wn.2d at 884.

CrR 4.3 allows for joinder of two or more offenses in one charging document when the offenses "[a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.3(a)(2). Severance of joined offenses "may be ordered on a party's motion where 'the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.'" *State v. Bluford*, 188 Wn.2d 298, 306, 393 P.3d 1219 (2017) (quoting CrR 4.4(b)). A party "must generally move for severance pretrial and renew a denied pretrial motion for severance 'before or at the close of all the evidence" or waive his or her severance arguments. *Bluford*, 188 Wn.2d at 306 (quoting CrR 4.4(a)).

Sutherby discussed four factors to determine whether a court would have granted a severance motion: "'(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.'" 165 Wn.2d at 884-85 (quoting *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)).

In *Sutherby*, the defendant had been charged with rape and child molestation, and ten counts of possession of child pornography stemming from images found on his computer. 165 Wn.2d at 875-76. The court held that a severance motion likely would have been granted because the State's evidence on the child pornography was stronger than its evidence of the rape, the defenses were different for the rape and the possession cases, the State argued that the pornography showed "motive" for the rape, and the evidence of each crime would likely have been excluded from trial on the other. *Sutherby*, 165 Wn.2d at 885-86.

In this case, the majority of the evidence presented by the State supported conviction on both counts against Nelson. Three witnesses testified at trial that Nelson both had a gun and used it to rob Calloway. Nelson argues that he "was *not* charged with unlawful possession due to the use of the gun in the robbery. He was charged with unlawful possession of what appears to be a separate weapon." Reply Br. of Appellant at 9. However, the charging instrument alleges that Nelson had a firearm on the same day of the robbery: October 1, 2011, an allegation that is supported by the testimony of every witness, including Nelson.

Nelson points out that the information only alleged the offenses occurred on the same day after the State amended its information on the day of trial. He argues that defense counsel could not have known the State was planning to amend from the original charged date of October 10, 2011, and thus that this original date should be used in considering whether his counsel's conduct was deficient. The "general rule is that an amended information supersedes the original." *State v. Oestreich*, 83 Wn. App. 648, 651, 922 P.2d 1369 (1996). If the charged date of Nelson's possession of a firearm had been the date police took the gun from Dripps's residence, the State still could have presented identical evidence about Nelson's connection to that gun: the evidence of the robbery. However, we look at the actual date charged and tried.

"The likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on each charge." *State v. Russell*, 125 Wn.2d at 64. Here, Nelson took the position that he had taken a gun from Calloway but that a different gun with no connection to Nelson had been found at Dripps's apartment nine days later. Defense counsel argued in closing that, because they were different guns, and only the gun found at Dripps's residence was tested, the State had presented no evidence that the gun from the robbery was operable. As in *Russell*, Nelson's defense would "not have worked well" even if the charges had

been severed because the same witnesses still would have testified that the gun found at Dripps's residence was the same gun Nelson used to rob Calloway and all the same evidence would have discredited the argument. 125 Wn.2d at 65.

As to the third factor, the jury instructions explicitly stated that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count." Clerk's Papers (CP) (No. 44725-8-II) at 267.

The final factor "is whether evidence of each count would be cross admissible under ER 404(b) if severance were granted." *Russell*, 125 Wn.2d at 66. To find the evidence of the other crime admissible, the court "must determine that the evidence is relevant to identity and that any prejudicial effect is outweighed by the probative value. It must then properly limit the purpose for which the jury may consider the evidence." *Russell*, 125 Wn.2d at 66. In this case, both criminal charges stem from an identical set of facts: that Nelson robbed Calloway on October 1, 2011, with a firearm.

Nelson's defense counsel was not deficient for failing to move to sever the charges because such a motion would have been denied.

C. CONTROL OF OWN DEFENSE

Nelson alleges that his defense counsel was ineffective because he failed to allow Nelson to "control his defense." PRP2 at 11. We disagree.

"Implicit in the Sixth Amendment is the criminal defendant's right to control his defense." *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013). The "defendant's right to control his defense is necessary 'to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy.'" *Lynch*, 178 Wn.2d at 492 (quoting *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013)).

Nelson does not cite to any cases, and we could find none, that have interpreted this right as one that could be violated by a defense attorney who failed to visit a defendant in jail or discuss evidence against him. While "'the client decides the goals of litigation,'" it is the attorney who "'determines the means.'" *In re Det. of Hatfield*, 191 Wn. App. 378, 398, 362 P.3d 997 (2015) (quoting *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (2006)). "[T]he choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." *Hatfield*, 191 Wn. App. at 398 (quoting *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)).

Nelson has not alleged any facts supporting his claim that his defense counsel denied him his right to control his defense.

D. Additional Ineffective Assistance Arguments

Nelson contends that his lawyer did not visit him in jail to discuss trial strategy and did not show Nelson videos of evidence against him.[3] He also claims his lawyer failed to properly investigate his case, provided incompetent representation, failed to consult with Nelson, failed to object to the amendment of the information on the day of trial, failed to object to a police officer's identification of the gun, failed to object to a witness being referred to by his "gang name," failed to prepare Nelson for his own testimony, and failed to understand sentencing law.[4] We disagree.

[3] Nelson raised the issue of ineffective assistance of counsel for his attorney's failure to contact him in his SAG on direct appeal, but we dismissed the claim because it relied on facts outside the record. *Nelson*, No. 44725-8-II, slip op. at 5. We therefore consider it on the merits.

[4] In Nelson's pro se PRP, he argues his trial attorney deprived him of his right to control his defense. However, after being appointed counsel, he filed a reply brief making other specific allegations of ineffective assistance. We need not consider arguments raised for the first time in a reply brief. *In re Pers. Restraint of Rhem*, 188 Wn.2d 321, 327, 394 P.3d 367 (2017). However, because Nelson was not represented by counsel until after he filed his PRP, we consider his ineffective assistance arguments.

Nelson has not asserted that any of his trial lawyer's allegedly deficient conduct prejudiced the result of his case. "We do not consider conclusory arguments unsupported by citation to authority." *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012). "[P]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Mason*, 170 Wn. App. at 384 (quoting *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012)). We do not consider Nelson's argument because he has not argued how the allegedly deficient conduct prejudiced his case.

IV. Irreconcilable Conflict

Nelson argues that his relationship with his trial counsel broke down, causing "irreconcilable differences result[ing] in the complete denial of counsel." Reply Br. of Petitioner at 13-14. However, irreconcilable differences is a basis for requesting appointment of new counsel, not the basis for an ineffective assistance of counsel claim. There is no claim in the PRP that the trial court erred in denying a request for new counsel. Therefore, his argument fails.

V. Offender Score

Nelson contends that his 2005 convictions for possession of a controlled substance (UPCS) and conspiracy to unlawfully deliver a controlled substance (C/UDCS) constitute the same criminal conduct and must be treated as one offense in calculation of his offender score. He argues the same is true of his 2006 convictions for the same two crimes.

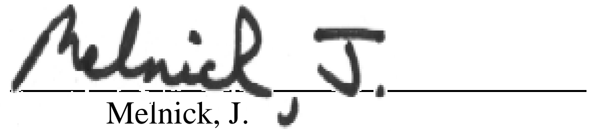
A defendant may raise a legal error with his or her sentence for the first time on appeal. *State v. Johnson*, 180 Wn. App. 92, 99, 320 P.3d 197 (2014). However, a defendant waives the right to challenge the State's depiction of his criminal history on appeal if the defense "not only fails to specifically object but agrees" with that depiction. *State v. Bergstrom*, 162 Wn.2d 87, 94, 169 P.3d 816 (2007), *superseded by statute on other grounds*. "Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion," and is not a purely legal error. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000).

In this case, the State submitted a "Statement of Prior Record and Offender Score" that calculated each conviction as a separate point towards Nelson's offender score. CP (No. 44725-8-II) at 296-97. The statement declared that "[t]he State submits that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct." CP (44725-8-II) at 297. Both Nelson and his attorney signed this form on April 5, 2013, the date Nelson was sentenced.

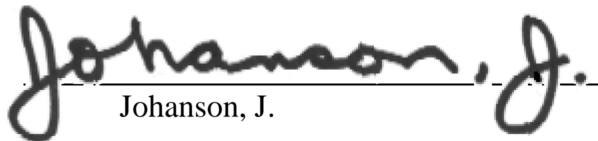
In *In re Personal Restraint of Goodwin*, the Supreme Court held that "in general a defendant cannot waive a challenge to a miscalculated offender score." 146 Wn.2d 861, 874, 50 P.3d 618 (2002). However, waiver can occur where a defendant's challenge to his offender score calculation on appeal "involves both factual determinations and the exercise of discretion." *Nitsch*, 100 Wn. App. at 523. Here, the stipulation involved a factual matter, and therefore Nelson waived this argument by stipulating to his offender score before the trial court.

We deny Nelson's petition.

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.


Melnick, J.

We concur: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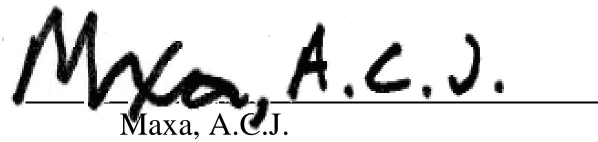
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