IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARK BRANDON VENIS, Appellant.	No. 39172-4-II PUBLISHED OPINION

Worswick, J — Mark Brandon Venis appeals his convictions for second degree assault with a firearm enhancement, first degree unlawful possession of a firearm, fourth degree assault, and two counts of violation of a no-contact order, contending that his counsel was ineffective. Venis also argues that his firearm enhancement violates double jeopardy and that the court's no-contact order imposed at sentencing is improper. We affirm.

Facts

Venis and Monique Barnes dated from August to November 2008. The relationship ended when police arrested Venis for assaulting Barnes outside of her car at an intersection in Longview on November 1, 2008.

While Venis was in custody regarding the assault at the intersection, Barnes told the police there had been another incident a few days earlier. According to Barnes, around October 28, while she was driving with Venis in his Chevrolet Blazer, he became agitated and took a handgun out of a compartment on the vehicle's door. He put the barrel of the gun against her head and

told her he would "blow [her] f****ing head off" if she lied to him. 3A RP at 320. He had the gun against her head for about a minute. Barnes thought that he might indeed blow her head off. Venis then put the gun back in the door compartment. Barnes did not report the incident because she did not want anything bad to happen to her family.

While Venis was in custody, Barnes removed the gun from the truck and gave it to her mother for safekeeping.

The State charged Venis with second degree assault (count I), felony harassment (count II), and unlawful possession of a firearm in the first and second degree (counts III and IV). Both the assault charge and the harassment charge included firearm enhancements. The State also charged Venis with fourth degree assault for the November 1 incident in the intersection (count V), and with two misdemeanor counts of violation of a no-contact order for a letter and phone call by Venis to Barnes while a no-contact order was in place (counts VI and VII). The first and second degree unlawful possession of a firearm charges (counts III and IV) were for the same gun.

At the jury trial, the prosecutor offered to stipulate that Venis had a serious offense conviction and a felony conviction as required by the unlawful possession of a firearm statute, rather than provide evidence of Venis's lengthy criminal history. Defense counsel tried to get Venis to stipulate, but Venis would not agree to it. In lieu of the stipulation, the State called a fingerprint expert to testify that the fingerprints for 10 felony convictions were all Venis's fingerprints. Defense counsel did not cross examine the witness. Instead, defense counsel moved for a mistrial and objected to portions of the witness's testimony, resulting in some redactions of

the State's documentary evidence and limiting instructions telling the jury to consider Venis's prior convictions only to determine whether he had committed a serious offense or a felony as required for counts III and IV. All of Venis's juvenile adjudications of guilty and adult judgment and sentences were admitted as exhibits and given to the jury for deliberations.

The jury found Venis guilty as charged on all counts. By special verdicts, the jury also found that Venis acted with deliberate cruelty to Barnes in committing counts I and II, that Venis was armed with a firearm during the commission of counts I and II, and that Barnes and Venis were household members regarding counts I, II, V, VI, and VII.

At sentencing, the court concluded that the jury's deliberate cruelty finding, Venis's high offender score, and his unscored misdemeanors each established a separate basis for an exceptional sentence and each basis would, standing alone, support an exceptional sentence. The court found that the second degree assault (count I) and the felony harassment (count II) were the same criminal conduct. To avoid double jeopardy, the court vacated Venis's conviction for second degree possession of a firearm (count IV). The court ordered that the second degree assault (count I) and the first degree unlawful possession of a firearm (count III) be served consecutively as an exceptional sentence. Venis's total incarceration period is for 204 months. The court also imposed a no-contact order prohibiting Venis from contacting Barnes for ten years. Venis appeals.

Analysis

I. Ineffective Assistance of Counsel

Venis first argues that his trial counsel was ineffective for failing to stipulate to his criminal

history. We disagree.

Washington follows the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). In order to show that he received ineffective assistance of counsel, Venis must show (1) that defense counsel's conduct was deficient, and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Because both prongs must be met, a failure to show prejudice will end the inquiry. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986). We employ a strong presumption that defense counsel's conduct was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Accordingly, defense counsel's *legitimate* trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 336.

Venis argues that there was no reasonable tactical advantage to refusing the State's invitation to stipulate to his history of felony convictions, thereby keeping the fact of his extensive criminal history from the jury. But the decision not to stipulate was not defense counsel's strategic decision. The record shows that defense counsel tried to get Venis to stipulate, but Venis refused to do so. Counsel could not force Venis to stipulate. "An attorney is impliedly authorized to stipulate to, and waive, procedural matters in order to facilitate a hearing or trial; but, in his capacity as an attorney, he is without authority to waive any substantial right of his client *unless specifically authorized to do so*." *State v. Ford*, 125 Wn.2d 919, 922, 891 P.2d 712 (1975) (quoting *In re Adoption of Coggins*, 13 Wn. App. 736, 739, 537 P.2d 287 (1995)

(emphasis in original). Because the State had charged Venis with first and second degree unlawful possession of a firearm, the State was obliged to prove that Venis had a requisite serious offense conviction and a general felony conviction. RCW 9.41.040(1)(a), (2)(a). Defense counsel had no authority to waive Venis's right to require the State to prove all of the essential elements of the charged offenses.

Moreover, defense counsel worked vigorously to exclude as much of the information regarding Venis's prior convictions as possible within the limitations placed on him by Venis's refusal to stipulate. Defense counsel's objections resulted in redactions of the State's documentary evidence submitted on the issue of Venis's prior convictions as well as limiting instructions on the use of that evidence.

"[T]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (quoting *Strickland*, 466 U.S. at 688). In other words, "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. Here defense counsel worked reasonably and diligently within the limitations placed upon him. Under these circumstances Venis's claim of ineffective assistance fails.

II. Double Jeopardy

Venis next contends that his conviction for second degree assault with a firearm enhancement violates double jeopardy. We disagree.

Venis was convicted of second degree assault and the jury made a separate finding that he

was armed with a firearm at the time of the assault. He argues that imposition of a sentence enhancement based on the firearm possession, where such firearm possession is also an element of his second degree assault conviction, punishes him twice for the same conduct in violation of the double jeopardy provisions of the state and federal constitutions. He further contends that this court should reevaluate the issue of whether application of the firearm sentence enhancement statute (RCW 9.94A.533)(3) in this context violates double jeopardy in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which postdates the statute's enactment.

Citing *State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), and *State v. Kelley*, 146 Wn. App. 370, 189 P.3d 853 (2008), Venis acknowledges that Divisions I and II of this court have previously rejected the double jeopardy arguments that he now makes, but he resubmits these challenges noting that our Supreme Court granted review in *Kelley*. *See State v. Kelley*, 165 Wn.2d 1027, 203 P.3d 379 (2009) (granting review). Subsequent to the filing of the appellate briefs, however, our Supreme Court affirmed our decision in *Kelley*, holding that "imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm." *State v. Kelley*, 168 Wn.2d 72, 84, 226 P.3d 773 (2010). The *Kelley* court held that the decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and its progeny[1] do not alter this analysis. 168 Wn.2d at 84. The court recently reiterated this holding in *State v. Aguirre*, 168 Wn.2d 350, 366-67, 229 P.3d

[1]*Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Sattazahn v. Pennsylvania*, 537 U.S. 101,, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003); *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

669 (2010). The matter is settled, and Venis's double jeopardy challenge fails.

III. No Contact Order

Finally, Venis asks this court to remand for clarification of the no contact order imposed at his sentencing. We decline to do so.

At sentencing the trial court imposed an order prohibiting Venis from contacting Barnes for ten years. Venis argues that the trial court failed to specify which counts the ten year no-contact order pertains to, and that clarification is necessary.

Trial courts may impose crime-related prohibitions, including no-contact orders, for a term of the maximum sentence for a crime. *State v. Armendariz*, 160 Wn.2d 106, 120, 156 P.3d 201 (2007). Generally, we review a trial court's crime-related prohibitions for abuse of discretion. *Armendariz*, 160 Wn.2d at 110. Here, the trial court had the authority to impose a ten-year no contact order pursuant to Venis's convictions for second degree assault and the first degree unlawful possession of a firearm, each of which is a class B felony with a ten-year statutory maximum. *See* RCW 9A.36.021(1)(c), (2)(a); RCW 9.41.040(1); RCW 9A.20.021(b). Venis has not successfully challenged those convictions. Under these circumstances, any error in failing to specifically relate the order to one of Venis's convictions is harmless.

We affirm.

Worswick, A.C.J.

We concur:

Armstrong, J.

Dwyer, J.