IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL A. KAMBERGER, Appellant.	No. 39712-9-II UNPUBLISHED OPINION

Armstrong, P.J.—A jury found Michael Kamberger guilty of attempted second degree robbery and third degree theft. He appeals, arguing that he was denied his right to a speedy trial under RCW 9.98.010. He also raises other issues in a statement of additional grounds under RAP 10.10. Finding no errors, we affirm.[1]

On July 15, 2008, the Mason County prosecuting attorney charged Kamberger with two counts of attempted second degree robbery.[2] While on bail for those charges, Kamberger was arrested in Pierce County and charged with theft. He pleaded guilty to the Pierce County charges and on October 8, 2008, was sent to the Department of Corrections (DOC).

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

[2] In light of the issues raised, we need not review the substantive facts.

On October 16, 2008, Kamberger sent a "Notice of Place of Imprisonment and Request for Final Disposition of Untried Indictment, Information or Complaint" under RCW 9.98.010 (detainer request) to the Mason County prosecuting attorney, seeking to have the attempted robbery charges in Mason County resolved. The DOC did not send Kamberger to Mason County until January 26, 2009.

Kamberger moved to dismiss the Mason County charges, arguing that his right to be tried within 120 days following his detainer request, as contained in RCW 9.98.010, had been violated. The State opposed the motion, noting that while the detainer request had been sent to the Mason County prosecuting attorney, it had not been sent to the Mason County superior court as well, and that under RCW 9.98.010, a detainer request must be sent to both the prosecutor and the superior court. The trial court agreed with the State and denied Kamberger's motion. The State later amended its information to charge Kamberger with one count of attempted second degree robbery and one count of third degree theft. A jury found Kamberger guilty of those charges.

Kamberger renews his argument that because more than 120 days elapsed between the day he sent his detainer request, October 16, 2008, and the day he was brought to trial, July 21, 2009, he was denied his right to a speedy trial under RCW 9.98.010(1). That statute provides in pertinent part:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of this state, and whenever during the continuance of the term of imprisonment there is pending in this state any untried indictment, information, or complaint against the prisoner, he shall be brought to trial within one hundred twenty days after he shall have caused to be delivered to the prosecuting attorney and the superior court of the county in which the indictment, information, or complaint is pending written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint.

Kamberger argues that he substantially complied with RCW 9.98.010(1) by sending his detainer request to the Mason County prosecuting attorney and so his right to a trial within 120 days thereafter was denied. But RCW 9.98.010(1) requires that a prisoner shall send the detainer request to "the prosecuting attorney and the superior court of the county in which the . . . information . . . is pending." (Emphasis added.) And RCW 9.98.010(2) requires that the detainer request be sent "to the appropriate prosecuting attorney and superior court by certified mail, return receipt requested." While Kamberger sent his detainer request by certified mail, return receipt requested to the "Mason County Prosecutor's Office," he did not also send his detainer request to the Mason County superior court. Clerk's Papers at 201. In light of the statutory language requiring that detainer requests be sent to both the prosecuting attorney and the superior court, sending a detainer request to only the prosecuting attorney does not constitute substantial compliance with RCW 9.98.010(1). And because Kamberger did not comply with RCW 9.98.010(1), he did not have a right to be tried within 120 days of sending his detainer request to the Mason County prosecuting attorney. The trial court did not err in denying his motion to dismiss.

In his statement of additional grounds, in addition to reiterating his counsel's argument above, Kamberger argues that the State lost exculpatory video surveillance evidence, that his trial counsel was ineffective, that a witness lied about his having a gun, that witnesses gave different statements in their testimony than they had in the police reports, and that he was tazed unlawfully by the police. The last three grounds involve evidence outside the trial record and so cannot be raised in this appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). As to his

claim of the lost video surveillance evidence, he does not demonstrate how that evidence would have exculpated him.

As to his claim of ineffective assistance of counsel, he must show: (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness based on all the circumstances and (2) the deficient performance prejudiced him because, had the errors not occurred, the result probably would have been different. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wn.2d at 334-35 (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). He asserts that his counsel's performance was deficient in that his counsel: (1) did not request a lesser included instruction; (2) did not bring the motion to dismiss on speedy trial grounds that Kamberger had prepared; (3) brushed him off or shushed him during trial; (4) did not provide him with discovery; (5) did not seek to excuse a juror with whom Kamberger had had a negative experience; (6) did not arrange for an omnibus hearing; (7) did not cross-examine witnesses effectively; and (8) admitted to the jury that Kamberger had committed the third degree theft. He does not show that he would have been entitled to a lesser included instruction on either charge, so assertion (1) fails. Assertions (3) and (7) cannot be effectively reviewed because of their vagueness. He does not show any prejudice resulting from assertions (4) and (6), even if those failures to act were deficient performance. And assertions (2), (5) and (8) involve tactical decisions made by counsel, and as such, do not constitute ineffective performance of counsel. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Israel*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002). Kamberger does not demonstrate that he received 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.

Armstrong, J.

We concur:

Hunt, J.

Van Deren, J.