IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. J.D. JONES BARTON, Appellant.	No. 40507-5-II UNPUBLISHED OPINION

Hunt, J. — J.D. Jones Barton appeals his judgment and sentences for three guilty plea convictions: two counts of second degree assault and one count of unlawful possession of a firearm. He argues that his firearm sentence enhancements were not authorized by statute. The State concedes that Barton's sentences for second degree assault improperly exceed the applicable statutory maximum. In his pro se statement of additional grounds (SAG), he contends that the trial court should have allowed him to withdraw his guilty pleas because (1) the Certification of Probable Cause was deficient, (2) he did not receive a speedy trial, and (3) his appointed attorney, paid by the State, had a conflict of interest. We affirm his convictions, vacate his sentences, and remand for resentencing.

FACTS

On April 20, 2008, after a verbal dispute escalated into violence, J.D. Barton shot Juan

Lemus in the shoulder; he also shot Virith Chrun in the head. Barton pled guilty on October 31, 2008, to two counts of second degree assault while armed with a firearm and one count of first degree unlawful possession of a firearm. His standard range sentence for the second degree assaults while armed with a firearm, Counts I and II, was 63 to 84 months of confinement. The standard range sentence for first degree unlawful possession of a firearm, Count III, was 77 to 102 months of confinement. Barton stipulated to and the trial court imposed a total sentence of 180 months of confinement, which included exceptional concurrent terms of 108 months for the assaults and two consecutive 36-month firearm enhancements for counts I and II; the 102 months for count III ran concurrently with the assault terms.[1]

On December 9, 2008, Barton moved to withdraw his guilty pleas, asserting ineffective assistance of counsel and incompetence when he pled guilty. On April 2, 2009, the superior court orally denied his motion and directed the State to prepare a written order, which apparently the State did not prepare and the trial court never entered.

On September 18, 2009, Barton filed a motion to modify and to correct his judgment and sentences challenging his offender score, arguing that the current crimes were the "same criminal conduct." CP at 47. On January 8, 2010, the trial court denied the motion by written order, stating that Barton "has not made a substantial showing that he was entitled to the relief requested." CP at 64. Barton sought review of that order in the Supreme Court, which

[1] In its Findings of Fact and Conclusions of Law re Exceptional Sentence, the trial court erroneously states that it "is justified in entering an exceptional sentence of *12 months*, which is *below the standard range of* 108 MONTHS on counts I and II." CP at 21 (emphasis added). Because this statement directly contradicts the Judgment and Sentence and the very basis of this appeal, we consider it to be a typographical error.

transferred the case to us.[2]

ANALYSIS

I. Sentencing

Barton argues that the trial court could not add firearm enhancements to his exceptional sentence because those enhancements could be added to only a standard range sentence. We disagree with Barton on this point. But we accept the State's concession of sentencing error on other grounds.

A sentencing court adds a firearm enhancement to the "standard sentence range" for felony crimes if, as here, the offender was armed with a firearm and the offender is being sentenced for one of the crimes eligible for firearm enhancements. RCW 9.94A.533(3). "Standard sentence range" refers to the sentencing court's discretionary range in imposing a non-appealable sentence. RCW 9.94A.030(47). When an enhancement is added to the standard range, it creates a new standard range. *Gutierrez v. Dep't of Corr.*, 146 Wn. App. 151, 154-55, 188 P.3d 546 (2008). Contrary to Barton's contention, the trial court does not add a firearm enhancement to an exceptional sentence; rather, the trial court determines the propriety of an exceptional sentence on the basis of the firearm-enhanced standard range. *See State v. Silva-Baltazar,* 125 Wn.2d 472, 475, 886 P.2d 138 (1994) ("An enhancement increases the presumptive or standard sentence. An enhanced sentence is not an exceptional sentence, which allows the court to sentence outside the presumptive or standard sentencing range."); *see also Gutierrez*, 146 Wn. App. at 155 ("[T]he enhanced range is considered a standard range term[,]

[2] Our court commissioner considered this matter under RAP 18.14 and referred it to a panel of judges.

and a departure from that range is an exceptional sentence."). Thus, a sentence that is both enhanced and exceptional may be proper if it does not exceed the statutory maximum, above which the sentencing court lacks authority. RCW 9.94A.533(3)(g).

Here, however, as the State concedes, the exceptional 108-month sentences for the two assault counts, together with the 36-month mandatory firearm enhancements on each count, exceed the ten-year statutory maximum for each Class B felony offense. *See* RCW 9A.20.021(1)(b). Even though Barton stipulated to a 180-month exceptional sentence for each of the two assaults, "a defendant cannot agree to punishment in excess of that which the Legislature has established." *In re Pers. Restraint of Goodwin,* 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). On the contrary, if an enhanced standard sentence range exceeds the statutory maximum, the statutory maximum becomes the "presumptive sentence." RCW 9.94A.533(3)(g).

We further note, however, that although an offender cannot be sentenced in excess of the statutory maximum for any single offense, his total period of confinement can exceed the statutory maximum for the most serious offense when he has committed multiple offenses with firearm enhancements. *State v. Thomas*, 150 Wn.2d 666, 668, 80 P.3d 168 (2003). Thus, Barton's sentence should be 156 months (36 months for the first consecutive firearm enhancement, 36 months for the second consecutive firearm enhancement, and then 84 months for his concurrent base sentences for the two assaults).

Accordingly, we accept the State's concession of error and remand for resentencing.[3]

[3] We note that although Barton apparently challenges the sentences for only the assault counts, the State has recommended remand for resentencing generally, which we interpret to mean resentencing on all three counts including count III.

II. Statement of Additional Grounds

In his Statement of Additional Grounds (SAG),[4] Barton challenges the trial court's denial of his motion to withdraw his guilty pleas. He contends that (1) the State's Certification of Probable Cause is invalid; (2) he did not receive a speedy trial; and (3) his trial attorney had a conflict of interest because he was paid by the State. These claims would ordinarily be barred as untimely in the appellate court. *See* RCW 10.73.090 (requiring that a collateral attack on a judgment be brought within one year of the entry of the judgment). But Barton did timely seek to withdraw his pleas in superior court, which denied the motion orally and directed the State to provide a written order. Technically, Barton could not appeal the trial court's denial of his motion to withdraw his guilty pleas until the trial court entered a written order of denial, RAP 2.2(a), which never happened. Rather than remand for entry of such order at this juncture, we choose to address the issues that Barton raises in this appeal. *See In re Pers. Restraint of Hoisington,* 99 Wn. App. 423, 430-32, 993 P.2d 296 (2000).

A criminal defendant may withdraw his guilty plea whenever it appears necessary to correct a manifest injustice. *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974) (quoting CrR 4.2(f)). Four indicia of manifest injustice are (1) denial of effective counsel, (2) a plea not ratified by the defendant or other authorized person, (3) involuntariness of the defendant in making the plea, and (4) a plea agreement not kept by the prosecution. *Taylor*, 83 Wn.2d at 597. When the facts do not fall within one of the four listed categories, "there must at least be some showing that a manifest ([i]. e. , obvious, directly observable, overt or not obscure) injustice will

[4] RAP 10.10(a).

occur if the defendant is not permitted to withdraw his plea." *Taylor*, 83 Wn.2d at 598.

A. Certification of Probable Cause

A court may determine probable cause based on an affidavit, sworn testimony, or a document as provided by RCW 9A.72.085. CrR 2.2. Thus, a matter that requires support by a sworn written statement may, with like force and effect, be supported by an unsworn written statement that recites that it is certified by the person to be true under penalty of perjury, is subscribed by the person, states the date and place of its execution, and states that it is so certified or declared under the laws of the state of Washington. RCW 9A.72.085. The probable cause certification here met these requirements of RCW 9A.72.085. Accordingly, Barton's first SAG argument fails.

B. Speedy Trial

A defendant who pleads guilty waives numerous rights, including the right to challenge his conviction based on a denial of speedy trial rights. *State v. Phelps*, 113 Wn. App. 347, 352, 57 P.3d 624 (2002). Barton pleaded guilty knowing the circumstances of his case, including knowing that he had a right to a speedy trial. He demonstrates no reason not to hold him to his bargain. Accordingly, this argument also fails.

C. Conflict of Interest

Barton contends that the operation of the public defender's office violates his constitutional right to counsel because the attorneys it employs receive compensation from the State, thus creating a conflict of interest. Unless a defendant can show that counsel actively represented conflicting interests, he cannot establish a constitutional predicate for a claim of ineffective assistance. *Mickens v. Taylor*, 535 U.S. 162, 165-66, 122 S. Ct. 1237, 152 L. Ed. 2d

291 (2002). The mere fact that a public defender or appointed counsel receives pay from the State does not create a conflict of interest or render the defendant's counsel ineffective. *See Tamez v. Director, TDCJ-CID*, 550 F. Supp. 2d 639, 643 (E.D. Tex. 2008), *aff'd sub nom. Tamez v. Thaler*, 344 Fed. App'x 897 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1523 (2010) (arguments that "public defenders have a conflict of interest because they are paid by the State—have been rejected by the courts").[5] Barton has not shown, and the record does not reflect, that his counsel actively represented conflicted interests or that a conflict produced a negative impact of constitutional dimension on his (Barton's) access to the courts. Again, Barton's argument fails.

Holding that Barton has presented nothing that warrants withdrawal of his pleas, we affirm his convictions. We vacate his sentences and remand to the trial court for resentencing consistent with this opinion.

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.

Hunt, J.

[5] *See also Walters v. Kautzky*, 680 N.W.2d 1, 7-8 (Iowa 2004) (to prevail on a claim that a conflict of interest arose from their reliance of lawyers paid by the State, plaintiffs had to "establish that the alleged conflict produced a negative impact of constitutional dimension upon their access to the courts"); *State v. Ferguson*, 254 Kan. 62, 864 P.2d 693, 696-97, 702-03 (Kan. 1993) (affirming the trial court's decision not to appoint substitute counsel despite defendant's protest that her counsel, a public defender, was an employee of the state and, thus, had a conflict of interest); *State v. Speed*, 265 Kan. 26, 961 P.2d 13, 27 (Kan. 1998) (rejecting defendant's argument that his public defender lawyers had a conflict of interest because "any appointed counsel suffers from the same problems [of receiving pay from the State,] and . . . this fact does not deny the defendant a fair trial)" (citing *Ferguson*, 254 Kan. at 66-67)).

We concur:

Van Deren, J.

Worswick, ACJ.