IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY EUGENE VAUGHN, Appellant.	No. 42288-3-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Anthony Vaughn appeals the trial court's denial of his request to be sentenced under the drug offender sentencing alternative (DOSA), RCW 9.94A.660, arguing that the trial court failed to meaningfully consider his request before denying it. In a statement of additional grounds (SAG),[1] he argues he received ineffective assistance of counsel. We affirm.[2]

FACTS

Vaughn entered a plea of guilty to three counts of first degree identity theft and eighty-two counts of second degree identity theft. He signed a "Statement of Defendant on Plea of Guilty" which set out the standard ranges and maximum term of sentencing. He affirmed that

[1] RAP 10.10.

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

"[n]o person has made promises of any kind to cause me to enter this plea except as set forth in this statement." Clerk's Papers at 27. He was aware the State planned to recommend an exceptional sentence of a total of 15 years of confinement. The court accepted Vaughn's plea after determining that he had reviewed the plea form with his attorney, he was making the plea freely and voluntarily, and understood that the court was not bound by the recommendations.

At the sentencing hearing, Sergeant James Dunn and Detective Michael Hirte from the Thurston County Sheriff's Office testified about the investigation that led them to Vaughn. Dunn testified that in his twenty-five years in law enforcement, this was the first case where there were over one thousand potential victims. Several victims testified regarding the negative effects the identity theft had on their lives. Judith Lee Johnson testified that her car was broken into at the state parking garage and a list with the names of six hundred members from an association of which she was the treasurer was stolen. She stated she felt personally responsible for all of the members in the association affected, and sought counseling because of the theft. Kirk and Laurie Jarman testified that they have spent hundreds of hours attempting to undo the damage to their credit that Vaughn caused, including changing their childrens' social security numbers.

Vaughn presented the testimony of Dennis Neal, a chemical dependency professional and owner of Northwest Resources in support of his argument for a DOSA sentence. Neal testified that Vaughn appeared to be a good candidate for a DOSA sentence. Vaughn also testified that he was "one hundred percent clean and sober" and "no longer influenced or driven by the addiction [he was] under." Report of Proceedings (RP) (June 2, 2011) at 84.

The court stated there was "no more invasive type of crime [not involving physical harm] than identity theft" and the victims will feel the impact of the crime for "many, many, many years to come." RP (June 2, 2011) at 87, 88. The court then denied Vaughn's DOSA request and imposed an exceptional sentence totaling 15 years of confinement.

ANALYSIS

First, Vaughn argues that the trial court erred when it failed to meaningfully consider his request for a DOSA sentence. The sentencing court has discretion to impose a DOSA sentence if the defendant meets the DOSA eligibility requirements and if the court determines that the offender and the community will benefit from use of the sentencing alternative. RCW 9.94A.660(2). But even when a defendant is eligible for a DOSA sentence, the decision to impose it rests solely in the trial court's discretion. *State v. Conners*, 90 Wn. App. 48, 53, 950 P.2d 519, *review denied*, 136 Wn.2d 1004 (1998). Our review of the denial of a DOSA sentence is limited to claims that the trial court categorically refused to exercise its discretion to impose a DOSA, or relied on an impermissible basis for refusing to impose a DOSA, such as religion, race, or gender. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998).

After hearing from two detectives involved in the investigation, several victims, and Vaughn himself, the trial court meaningfully considered Vaughn's request for a DOSA sentence. The court "was heartened to hear" that Vaughn "appear[ed] to be very committed to changing his life and to getting the treatment that he needs for [his] addiction." RP (June 2, 2011) at 88. However, the court also stated that due to the sophistication of the identity thefts, the large

number of victims, and the fact that numerous identity thefts would go unpunished under the standard sentence, an exceptional sentence was justified. The trial court did not rely on an impermissible reason, such as race, gender, or religion, in denying the request. Accordingly, the trial court did not impermissibly deny Vaughn's DOSA request.

Second, in his SAG, Vaughn argues that he signed the guilty plea on the advice of his attorney in order to receive a DOSA sentence but that his attorney did not advise him that he could be given an exceptional sentence. A defendant asserting ineffective assistance of counsel must show that (1) defense counsel's performance was deficient under an objective reasonableness standard, and (2) that deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If the defendant's ineffective assistance of counsel claim rests on evidence or facts not in the existing trial record, filing a personal restraint petition is his appropriate course of action. *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011); *McFarland*, 127 Wn.2d at 335.

Vaughn's conversations with his attorney and any advice provided are not a part of the record. Without a record to review, we cannot address whether Vaughn received ineffective assistance of counsel.[3] *McFarland*, 127 Wn.2d at 335.

[3] The record reflects Vaughn's awareness that the State was requesting an exceptional sentence prior to entering his guilty plea. Vaughn further informed the trial court before it accepted his guilty plea that no one had made him any promises. These facts undermine Vaughn's claim that his counsel failed to advise him that he could receive an exceptional sentence.

We affirm Vaughn's sentence.

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.

QUINN-BRINTNALL, J.

We concur:

WORSWICK, A.C.J.

JOHANSON, J.