

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 42596-3-II

Respondent,

v.

MARSELE KENITH HENDERSON,

UNPUBLISHED OPINION

Appellant.

Penoyar, J. — Marsele Henderson appeals the sentences imposed following his convictions for first degree robbery, attempted first degree robbery, and two counts of second degree unlawful possession of a firearm, arguing that he received ineffective assistance of counsel.

We affirm.¹

On June 9, 2011, a jury found Henderson guilty of first degree robbery while armed with a firearm (count I) and attempted first degree robbery while armed with a firearm (count II). On June 20, 2011, the trial court found Henderson guilty of two counts of second degree unlawful possession of a firearm (counts V-VI). At that time, charges of residential burglary, first degree murder and second degree unlawful possession of a firearm were pending against Henderson. The court asked Henderson’s counsel, who was representing him in all his cases, whether he wanted to defer the sentencing on counts I, II, V and VI until after those charges were resolved. Henderson’s counsel said that deferring the sentencing was appropriate.

Henderson pleaded guilty to residential burglary and was found guilty of first degree murder and a third count of second degree unlawful possession of a firearm. He was sentenced

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

on counts I, II, V and VI on August 19, 2011. The burglary, murder, and unlawful possession of a firearm convictions were counted in his offender score as other current convictions, resulting in offender scores of 9 for the robbery and attempted robbery and 7 for the unlawful possession of firearm convictions, resulting in the following standard sentence ranges:

Count No.	Offender Score	Seriousness Level	Standard Range	Enhancements	Total Standard Range
I	9	IX	129-171	60	189-231
II	9	IX	96.75-120	36	120
V	7	III	33-43		33-43
VI	7	III	33-43		33-43

The court sentenced Henderson to 231 months (171 months plus 60 months' enhancement) on count I and to 120 months (84 months plus 36 months' enhancement) on count II, consecutive to each other, for a total of 351 months.² The court then sentenced Henderson to 704 months for the murder conviction, to 57 months on the burglary conviction, and to 43 months on the unlawful possession of a firearm conviction, concurrent with each other.

Henderson argues that he received ineffective assistance of counsel when his counsel elected to defer sentencing until after the burglary, murder, and third unlawful possession of a firearm cases were resolved. To establish ineffective assistance of counsel, he must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that as a result of that deficient performance, the result of his case probably would have been different.

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

² The transcript of the sentencing hearing indicates that the court sentenced Henderson to 33 months on count V and 43 months on count VI, concurrent with each other and to counts I and II, but Henderson's judgment and sentence does not include those sentences.

Henderson notes that had he been sentenced on counts I, II, V and VI in June 2011, before he had been found guilty of murder and burglary and the third count of unlawful possession of a firearm, those convictions would not have been included in his offender score. His offender scores would have decreased, resulting in the following standard sentence ranges:

Count No.	Offender Score	Seriousness Level	Standard Range	Enhancements	Total Standard Range
I	5	IX	57-75	60	117-135
II	5	IX	42.75-56.25	36	78.75-92.25
V	4	III	12+-16		12+-16
VI	4	III	12+-16		12+16

Thus, Henderson contends that had he been sentenced earlier, he would have received at most 135 months on count I and 92.25 months on count II, to be served consecutively, for a total of 227.25 months. And so he contends he was prejudiced by his counsel's agreement to defer sentencing.

But, as the State points out, deferring Henderson's sentencing on counts I, II, V and VI resulted in shorter total term of confinement. Had he been sentenced before the murder, burglary and third unlawful possession of a firearm convictions been entered, RCW 9.94A.589(2)(a) would have required the trial court to make the sentences on those later convictions *consecutive* to the sentences on counts I, II, V and VI. But by being sentenced on all the convictions at the same time, RCW 9.94A.589(1)(a) required the trial court to make the sentences on the later convictions *concurrent* with the sentences on counts I, II, V and VI.³ So, even with the lower offender scores, Henderson would have received a longer total term of confinement had he not deferred

³ The court could have made the sentences consecutive only upon a finding of an aggravating circumstance, which was not present here. RCW 9.94A.589(1)(a).

sentencing:

○ Sentenced together: 704 months for the murder, concurrent with the 351 months for counts I, II, V and VI, for a total of 704 months.

○ Sentenced separately: 704 months for the murder, consecutive to the 227.25 months for counts I, II, V and VI, for a total of 931.25 months.

Thus, Henderson's counsel did not perform deficiently in deferring the sentencing on counts I, II, V and VI. Henderson does not establish ineffective assistance of counsel. We affirm his sentences.

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.

Penoyar, J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.