

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 29801-9-III
)	Consolidated with
Respondent,)	No. 30238-5-III
)	
v.)	
)	
TIMOTHY TOMASZEWSKI,)	
)	
Appellant.)	
)	UNPUBLISHED OPINION
In re the Personal Restraint Petition of:)	
)	
TIMOTHY TOMASZEWSKI,)	
)	
Petitioner.)	
)	

Brown, J. • Timothy Tomaszewski pleaded guilty to felony driving under the influence, first degree driving while license suspended, hit and run, and ignition interlock violation. The State recommended, and the court imposed, a standard-range sentence. Pro se, Mr. Tomaszewski appeals, contending his due process rights were violated because the State did not recommend credit for time served on another offense. In his consolidated personal restraint petition (PRP), Mr.

¹ Mr. Tomaszewski filed a motion on the merits following the filing of the

Tomaszewski contends he was denied effective assistance of counsel.¹ Finding no error, we affirm.

FACTS

After being involved in a motor vehicle accident and leaving the scene, Mr. Tomaszewski was charged with felony driving under the influence, first degree driving while license suspended or revoked, hit and run (attended vehicle), and ignition interlock violation. Mr. Tomaszewski pleaded guilty. In exchange, the State agreed to recommend 33 months incarceration; the low end of a standard range sentence. At the plea hearing, the court discussed with Mr. Tomaszewski the rights he was giving up and the State's recommendation. He informed the court he understood his rights. The court sentenced Mr. Tomaszewski to 33 months.

Mr. Tomaszewski was incarcerated at the Benton County Jail from March 19, 2010, to June 2, 2010. 40 days of this time was for a Benton County District Court matter. The remaining time, 35 days, along with the good time of 17.5 days that Mr. Tomaszewski earned were applied to this matter.

State's response brief. Since his appeal and PRP were already set on the March docket, the motion was referred to the panel. A motion on the merits to reverse may be granted, "if the appeal or any part thereof is determined to be clearly with merit." In making this determination, the court will look to, "all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and clearly not supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly an abuse of discretion." *Id.* Because Mr. Tomaszewski's issues are not clearly controlled by settled law and not clearly supported by the evidence in his favor, his motion is denied.

Mr. Tomaszewski, pro se, filed a CrR 7.8(b)(3) motion to amend the judgment and sentence on January 26, 2011, requesting the court give him credit for the 40 days that was applied to the district court matter. The court denied his request. Mr. Tomaszewski appealed this ruling and filed a PRP. This court consolidated the two matters.

ANALYSIS

A. Credit for Time Served

The issue is whether Mr. Tomaszewski's due process rights were violated at sentencing. He contends the State orally agreed to recommend he receive credit for time served on a district court matter separate from the charges in this appeal.

Mr. Tomaszewski brought his motion below as a motion to amend the judgment and sentence under CrR 7.8(b). We review a trial court's decision on a CrR 7.8(b) motion for relief from judgment for abuse of discretion. *State v. Smith*, 159 Wn. App. 694, 699, 247 P.3d 775 (2011). Generally, a defendant may not appeal a standard range sentence. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993); RCW 9.94A.585. Exceptions to this rule exist, however, for challenges to the court's sentencing procedures and violations of due process. See *State v. Goldberg*, 123 Wn. App. 848, 852, 99 P.3d 924 (2004) (standard range sentence may be appealed where constitutional violation is alleged). A prosecutor's breach of a plea agreement at sentencing violates due process. *State v. Sanchez*, 146 Wn.2d

339, 346, 46 P.3d 774 (2002). A plea agreement is a contract, *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003), and a prosecutor must act in good faith when carrying out its terms. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997).

Offenders are entitled to receive credit for all pretrial detention served. *State v. Speaks*, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992). “Failure to allow such credit violates due process, denies equal protection, and offends the prohibition against multiple punishments.” *In re Pers. Restraint of Costello*, 131 Wn. App. 828, 832, 129 P.3d 827 (2006). In *Costello*, the court stated former RCW 9.94A.120(17) (now renumbered as RCW 9.94A.505(6)) “simply represents the codification of the constitutional requirement that an offender is entitled to credit for time served prior to sentencing.” *Costello*, 131 Wn. App. at 833 (quoting *State v. Williams*, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990)). But credit is not allowed for time served on other charges. *In re Pers. Restraint of Phelan*, 97 Wn.2d 590, 597, 647 P.2d 1026 (1982).

Here, any promise for credit for time served on another crime would be unenforceable. Accordingly, Mr. Tomaszewski cannot establish prejudice by any alleged oral promise. See *State v. Cantrell*, 111 Wn.2d 385, 388-89, 758 P.2d 1 (1988) (proof of prejudice is necessary element of due process claim). Therefore, Mr. Tomaszewski’s due process violation claim fails.

B. Assistance of Counsel

The issue is whether Mr. Tomaszewski should be granted relief from restraint

because he was denied effective assistance of counsel. He contends his counsel was ineffective for failing to secure credit for time served on the district court offense.

Both federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove deficient performance, the defendant must show that counsel's performance fell "below an objective standard of reasonableness." *Id.* at 688. "There is a strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* at 863. To satisfy the prejudice prong, the defendant must show that the outcome of the proceedings would have differed but for counsel's deficient performance. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). "The proper standard for attorney performance is that of reasonably effective assistance." *Strickland*, 466 U.S. at 687.

A petitioner may request relief through a PRP when under unlawful restraint. RAP 16.4(a)-(c). The petitioner must prove either a (1) constitutional error resulting in actual and substantial prejudice or (2) nonconstitutional error "constitut[ing] a fundamental defect which inherently results in a complete miscarriage of justice." *In*

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re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)). The petitioner must prove the error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

When a PRP is based on ineffective assistance of counsel, a personal restraint petitioner need not “satisfy a heightened prejudice requirement under actual and substantial prejudice that exceeds the showing of prejudice necessary to successfully establish the *Strickland* prejudice prong.” *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 491, 251 P.3d 884 (2010) (quoting *In re Pers. Restraint of Crace*, 157 Wn. App. 81, 112-14, 236 P.3d 914 (2010), *review granted*, 171 Wn.2d 1035, 257 P.3d 1260 (2011)).

For the reasons discussed in Mr. Tomaszewski’s direct appeal, he cannot establish prejudice. Under both RCW 9.94A.505(6) and *Phelan*, 97 Wn.2d at 597, credit is not allowed for time served on other charges. Accordingly, any attempt by defense counsel to secure credit for time served on the district court offense would have been futile. Without prejudice, Mr. Tomaszewski cannot show he was denied effective assistance of counsel.

Affirmed. PRP denied.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW

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2.06.040.

Brown, J.

WE CONCUR:

Korsmo, A.C.J.

Sweeney, J.