69802-8

69802-8

NO. 69802-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN JACKSON, JR.

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Hayden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. Appellant received ineffective assistance of counsel rendering his pleas involuntary.

2. The court erred in denying appellant's motion to withdraw his pleas based on a manifest injustice.

3. The court erred in entering findings of fact 5, 6 and 7 in its Findings and Conclusions of Law on Defendant's Motion to Withdraw Plea. CP 98-101.[1]

4. The combined sentence on count I, including the period of incarceration and term of community custody, exceeds the statutory maximum.

Issues Pertaining to Assignments of Error

1. Was appellant deprived of his right to effective assistance of counsel during plea negotiations, where self-defense was a viable defense and defense counsel failed to inform appellant prior to his guilty pleas that if he presented some evidence of self defense, the burden would then shift to the state to disprove the defense beyond a reasonable doubt?

2. Where appellant's standard range exceeded the statutory maximum for attempted first degree assault and the court

[1] The court's findings and conclusions are attached as an appendix.

therefore imposed the statutory maximum of 120 months, did the court err in failing to reduce the applicable 36-month term of community custody for that count, so that the combination of incarceration and community custody did not exceed the statutory maximum?

B. STATEMENT OF THE CASE[2]

On October 7, 2011, the King County Prosecutor charged appellant John Jackson, Jr., together with Vincent Pettie, with first degree assault for allegedly assaulting Anthony Narancic on October 4, 2011. CP 1; RCW 9A.36.011(1)(c).[3] According to the certification for determination of probable cause, the altercation arose out of a landlord-tenant dispute. CP 4. Narancic, who was Jackson's former landlord, was withholding Jackson's damage deposit for alleged damages done to the room Jackson rented. CP 4.

According to the certification, Jackson had made several threatening calls to Narancic before the altercation. CP 4. On October 4, Narancic was sitting in his office at the rental unit when

[2] This brief refers to the verbatim report of proceedings as follows: RP – jury trial and plea hearings held September 10-12, 2012; 1RP – motion to continue sentencing held October 5, 2012; and 2RP – motion to withdraw pleas and sentencing held December 12, 2012.

Jackson and Pettie reportedly barged in. The state alleged Jackson hit Narancic multiple times with a metal club that was inside a white sock. CP 4. The state further alleged that when Narancic tried to rise up from his chair, Pettie held him down while Jackson continued to hit Narancic. CP 4. The certification alleged that Jackson and Pettie ran out and thereafter drove off in green Cadillac. CP 4.

When Jackson was later apprehended, based on Narancic's description of him and the Cadillac, Jackson told police he went to see Narancic to get his deposit back. When Narancic refused, "they got into a tussle." CP 4. Jackson said, "It was a fair fight" and there was no pipe. CP 4.

When the case proceeded to jury trial nearly a year later, the state moved to amend the information to include the deadly weapon alternate means of committing first degree assault. RP 6. Defense counsel for both Jackson and Pettie objected. RP 9.

Daniel Felker, defense counsel for Jackson, explained that he would be prejudiced in the defense of Jackson's case. Although

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[3] Specifically, the state alleged Jackson and Pettie, while acting with intent to inflict great bodily harm, assaulted and inflicted great bodily harm upon Narancic. CP 1.

the defense theory of the case was self defense,[4] the alternate theory was that the state could not prove Jackson inflicted great bodily harm. RP 9. As part of the latter theory, the defense retained an expert who would testify Narancic's injuries were not that serious. RP 9-10.

Felker also explained that the amendment would put him in the position of having to investigate whether the weapon allegedly used was in fact a deadly weapon. RP 10. At the time of trial, defense counsel had conducted no investigation in that regard and had not even seen a color picture of the alleged weapon until that first day of trial. RP 13.

The alleged weapon, a hollow pipe with a sock covering it, was recovered several blocks from the rental unit on the side of the road by a woman picking her child up from school several hours after the incident. RP 12. The state had conducted no forensic examination of the item, and the defense did not agree it was "even the item that was used." RP 24.

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[4] In that vein, the defendant's trial memorandum reported: "Mr. Jackson indicates that he will testify that he was acting in self-defense." CP 20. The Omnibus Order also indicated Jackson's defense was denial/self defense. Supp. CP __ (sub. no. 47, Order on Omnibus Hearing, 8/17/12).

The court denied the state's motion to amend, reasoning it was questionable whether the pipe found on the side of the road was in fact used during the altercation, and whether it constituted a deadly weapon at all:

> [T]here might be lots of avenues off the top of my head that defense counsel could follow, to defend that this is not a deadly weapon, and/or that it was used in the attack.
>
> So, those are the kinds of things in my mind that go to factual prejudice as opposed to just arguing one prong to the jury or not; and, indeed, that might require some additional pretrial discovery, not necessarily discovery of the State, but discovery of this item to make a coherent argument as to whether in fact this is a deadly weapon.
>
> . . .
>
> At the last minute, I don't think anybody can tell me what it is, how much it weighs, what its main use is. So, I am going to, in the exercise of discretion, I am going to deny the motion to amend.

RP 24-25.

On the third day of trial, September 12, 2012, the state and defense counsel for Jackson indicated they had reached a resolution of the case. Jackson agreed to plead guilty to amended charges of attempted first degree assault and felony harassment. CP 26-40; RP 131.

Pursuant to the agreement, Jackson also agreed to an exceptional sentence in the form of consecutive sentences.[5] CP 26-40; RP 132. Because Jackson's standard range for attempted first degree assault exceeded the statutory maximum, the parties agreed to recommend the statutory maximum – 120 months – for the offense. RP 133. The parties agreed to recommend the high end of the range – 60 months – for the felony assault, for a total of 180 months. RP 133-135. The parties also agreed the attempted first degree assault required a 36-month community custody term. RP 134.

Before sentencing, on September 24, 2012, Jackson filed a pro se motion to withdraw his pleas, alleging ineffective assistance of counsel. CP 41-44. At the hearing initially set for sentencing, on October 5, 2012, defense counsel Felker asked to withdraw as Jackson's attorney and to set over sentencing so that Jackson could retain counsel to argue his motion to withdraw. 1RP 5-6.

The court was hesitant to set the matter over, noting it had not heard the reason for defense counsel's ineffectiveness. 1RP 8.

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[5] See e.g. In re Personal Restraint of Breedlove, 138 Wash.2d 298, 300, 979 P.2d 417 (1999) (agreement of the parties may constitute a substantial and compelling reason to depart from the standard range).

In response to the court's questions, Jackson asserted Felker never asked for his side of the story and visited him in jail only to discuss a number of continuances that were sought in advance of trial. 1RP 8-9. Jackson stated Felker never talked to him about the case. 1RP 10. The court indicated it would set the matter over and appoint substitute counsel but that it also wanted the plea colloquy transcribed and a declaration from Felker as to what he and Jackson discussed. 1RP 20, 23.

In his subsequently filed declaration, Felker reported the following relevant facts:

> 10. That in an initial meeting at the King County Jail Mr. Jackson described his participation in the incident, indicating that he acted in self defense.
>
> 11. That we discussed his participation in the incident on several occasions.
>
> . . .
>
> 14. That the defendant and I met in the King County jail on at least thirteen separate occasions.
>
> 15. That the duration of those visits was for a few minutes to an hour.
>
> 16. That during those visits we discussed Mr. Jackson's case: specifically the testimony of Mr. Narancic, the victim, and the other witnesses and the ongoing investigation for which I had authorizations for two separate investigators, his right to testify and his story. . . .
>
> 17. That during those visits, I may have referenced prosecutor's burden of proof. I did not discuss with Mr. Jackson the shifting burden of proof from the defense to the State when self defense is raised.

. . .

19. Very little time was spent discussing his options vis-à-vis a plea deal since the defendant had always said he wanted to go to trial and the State had never, until trial, made an offer other than to plead guilty. Once in trial the State, perhaps because they received an adverse ruling, made an offer of 180 months. This was conveyed to the defendant as soon as it was made. On the final day of trial the defendant, upon entering the courtroom, said he wanted the deal. Counsel proceeded to the sixth floor, where Mr. Worley's [the prosecutor's] supervisor modified the offer to something less palatable to Mr. Jackson. I conferred with Mr. Jackson and he declined this new offer. Upon returning to the prosecutor's office, Ms. Worley agreed to the initial offer of 180 months.

20. I read the plea form to Mr. Jackson. Based upon my understanding of Mr. Jackson's familiarity with the criminal justice system and his responses to my reading of the plea form to him, I thought that he was making an informed decision to plead guilty.

21. Mr. Jackson did request that I obtain a recording of a 911 call he made prior to the incident which would have shown that he called to report that Mr. Narancic was acting unlawfully. I did not request that tape in a timely fashion and it was recycled.

CP 47-50 (emphasis added).

In the subsequent motion to withdraw filed by newly appointed Daniel Norman, defense counsel asserted Jackson should be allowed to withdraw his pleas on grounds Felker never discussed the legalities of self defense with Jackson, specifically that if Jackson offered some evidence of the defense, the burden

would then shift to the state to disprove the defense beyond a reasonable doubt. CP 51-64 (citing State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983); State v. Montoya, 109 Wn.2d 270, 744 P.2d 340 (1987); and State v. Haydel, 122 Wn. App. 365, 95 P.3d 760 (2004)).

Without such information, a defendant might believe it is their burden to prove self-defense beyond a reasonable doubt and decide to accept a plea bargain based upon this faulty belief. CP 55. Indeed, that is essentially what happened to Jackson, as he averred in his declaration.[6] As a result of defense counsel's failure to provide this crucial information, Jackson's plea was not knowing, voluntary and intelligent. CP 55.

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[6] Counsel also attached Jackson's declaration in which he stated:

> 4. Although I was aware of the term self defense, I did not know what that meant legally. Mr. Felker and I never discussed self defense. He did not tell me what we would have to prove or what the state would have to prove at trial if I testified that I was defending myself.
> 5. At no point did Mr. Felker tell me anything about the state's burden if I testified that I acted to defend myself. The first time that I heard about this was through my present attorney.
> 6. At the time I pled guilty I was not aware of the state's legal burdens at trial if I testified that I acted to defend myself. If he had told me about the laws of self defense, and the state's burdens, I would have not pled guilty but would have continued the trial and testified.
> 7. If this case had continued through trial, I was intending to testify that I acted in self-defense.

CP 63-64.

As part of its response, the state obtained a supplemental declaration from Felker asserting the following facts:

> 2. I reviewed the entire discovery, visited the scene of the crime and interviewed many of the State's witnesses. I had two different investigators assigned, who worked many hours on the case. I was familiar with the facts of the case and the evidence that the State would likely present. Approximately a month before trial, after I had interviewed the victim and the State's witnesses and conducted an independent investigation and evaluation of the case, Mr. Jackson asked me for my opinion on the strength of his possible defense. Based upon everything I knew, including what Mr. Jackson discussed with me, I told him that he had "a really tough case," as I did not think Mr. Jackson could avoid conviction by raising self-defense. I believed that the State could prove that Mr. Jackson had not acted in self-defense. I advised Mr. Jackson that if the prosecutor was willing to make a reasonable plea offer that he should consider it.
>
> 3. On the third day of trial, when Mr. Jackson announced to me and the State that he wanted to plead guilty to an offer of 180 months, which had been discussed with Ms. Worley the previous day. The parties then engaged in formal plea negotiations for the first time. Based on my evaluation of the strength of the State's case, taking into consideration Mr. Jackson's proffered defense of self-defense and my knowledge of his intended testimony, I believe that Mr. Jackson's plea was in his best interests and would save him many years in prison.

CP 90-91.

In response, the state argued Felker had no obligation to advise Jackson about the state's burden of proof regarding self defense on grounds "[t]here is no actual evidence that the defendant had a viable claim of self-defense." CP 87. Alternately, the state claimed Jackson could not show prejudice, i.e. that he would not have pled guilty had Felker discussed with him more thoroughly the law on self-defense. CP 87.

At the hearing on the motion held December 12, 2012, the court inquired how much of a role credibility played in its determination of whether Jackson should be allowed to withdraw his plea. 2RP 19-21. The court noted that in his declaration, Jackson stated "Mr. Felker and I never discussed self-defense, period." 2RP 19. Defense counsel clarified Jackson meant "[t]he specifics" and that Jackson did not know what it meant *legally*. 2RP 19-21.

Regardless, it was undisputed Felker did not advise Jackson that if he presented some evidence of self defense, the burden would shift to the state to disprove the defense beyond a reasonable doubt. 2RP 21. Accordingly, there was no credibility contest on that issue. 2RP 23.

The court denied the motion, reasoning Felker did not perform deficiently:

> Now, whether he [Felker] called the issue of self-defense a shifting burden of proof and who has to prove it or who doesn't have to prove it, I think a layperson wouldn't know one way or another. But it is my finding that Mr. Felker told him if you assert self-defense, the State's going to be able to disprove that. That's what he said in his declaration. The State is going to disprove it.
>
> It was my belief and I think he conveyed that to him; you're going to lose. Now, whether he said you may think you got the burden of proof but it shifts over to the State or shifts back and all that. My finding is he told him you got a self-defense case and the State is going to disprove that. That is my finding is what he told him.
>
> Frankly, I – whether the State would or would not have disproved it would have been left for the jury, that's true. Whether that was sound advice under the circumstances, this court finds indeed it was sound advice. Based on what I knew about this case, I think it would have been very easy for the State to disprove self-defense.

2RP 29-30.[7] Nonetheless, the court noted that it probably would have given self defense instructions had Jackson testified Narancic made the first move. 2RP 33.

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[7] In its written findings and conclusions, the court entered the following findings:

> 2. The court finds the statements contained in the October 31, 2012 and December 7, 2012 declarations of trial counsel, Daniel Felker, credible.
> 3. The court does not find credible the statements of the defendant on October 5, 2012, in court and does not find credible the statements contained in the declaration of the

Sentencing was held immediately following the court's ruling on the motion to withdraw. 2RP 35. Pursuant to the parties' plea agreement, the court imposed the agreed recommendation for 120 months on count I, attempted first degree assault, and 60 months on felony harassment, to run consecutively. 2RP 39. On the assault charge, the court also imposed 36 months of community custody. 2RP 39. Jackson timely filed a notice of appeal. CP 105-106.

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defendant regarding his meetings and discussions with Mr. Felker.

4. The court finds that the State would have presented evidence showing that he defendant (and his co-defendant) showed up at the victim's work with a weapon in hand; that the defendant attacked and repeatedly assaulted the victim with the weapon; that the defendant had made prior threats against the victim; that the defendant had offered money to another tenant if that tenant would let the defendant know when the victim arrived at work; and that as the defendant was leaving, he threatened to kill the victim, yelling, "I'm a gangster, I'll kill you."
5. The defendant has never identified any evidence that he acted in self-defense. Attorney Felker credibly represented that the defendant could not have successfully claimed that he acted in self-defense.
6. There was substantial evidence that the defendant did not act in self-defense and was the first aggressor.
7. The court finds that Mr. Felker discussed self-defense with the defendant, discussed the defendant's potential testimony with the defendant, and conveyed to the defendant that while he could assert self-defense, the State would easily disprove that assertion. While Mr. Felker may not have used the exact verbiage of a "shifting burden of proof," Mr. Felker did convey to the defendant that he would not be successful in escaping conviction by claiming self-defense. The defendant has not established this advice was unreasonable.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING JACKSON'S MOTION TO WITHDRAW HIS GUILTY PLEAS.

This Court should allow Jackson to withdraw his pleas to correct a manifest injustice. Jackson's pleas were involuntary and the product of ineffective assistance of counsel.

A plea may be withdrawn under CrR 4.2(f) "whenever it appears that the withdrawal is necessary to correct a manifest injustice." "Manifest injustice" means "injustice that is obvious, directly observable, overt, not obscure." State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991); State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Nonexclusive indicia of a manifest injustice include: non ratification of a plea by the defendant or his representative; involuntariness of the plea; failure by the prosecutor to keep the plea agreement; and denial of effective assistance of counsel. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996); Saas, 118 Wn.2d at 42. A trial court must examine the "totality of circumstances" when deciding whether a manifest injustice exists. State v. Stough, 96 Wn. App. 480, 485, 980 P.2d 298, review denied, 139 Wn.2d 1011 (1999).

CP 99-100.

The test for ineffective assistance of counsel is (1) whether counsel's performance fell below an objective standard of reasonableness and (2) whether there is a reasonable probability the result would have been different absent the errors. Strickland v. Washington, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2952 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The Strickland test also applies to ineffective assistance of counsel claims related to the plea process. State v. McCollum, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997); State v. Stowe, 71 Wn. App. 182, 186, 858 P.2d 267 (1993).

In the plea bargaining context, ineffective assistance of counsel means that counsel failed to actually and substantially assist the client in deciding whether to plead guilty, and but for counsel's failure, the client would not have pleaded guilty. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); State v. McCollum, 88 Wn. App. at 982; State v. Holley, 75 Wn. App. 191, 197, 876 P.2d 973 (1994); State v. Garcia, 57 Wn. App. 927, 932-33, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990). The Rules of Professional Conduct require that, "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered . . . ." RPC 1.2(a).

Before pleading guilty, a defendant should be made aware of possible defenses, at least where the defendant makes known facts that might form the basis of such defenses. United States v. Frye, 738 F.2d 196, 199 (7th Cir. 1984). When there are facts that might support the basis of a self defense claim, the defendant should be made aware of the state's burden to disprove the offense beyond a reasonable doubt, once the defendant has offered some evidence to support the defense. See State v. Haydel, 122 Wn. App. 365, 95 P.3d 760 (2004).

In order to properly raise the issue of self-defense, there need only be some evidence admitted in the case from whatever source which tends to prove an assault was done in self-defense. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). Once the issue of self defense is properly raised, the absence of self defense becomes another element of the offense which the state must prove beyond a reasonable doubt. McCullum, 98 Wn.2d at 493-94. Defense counsel's failure to advise his client as to the state's burden to disprove self defense – where self defense is a viable defense – prior to his client pleading guilty constitutes deficient performance. See State v. Montoya, 109 Wn.2d 270, 744 P.2d 340 (1987); Haydel, 122 Wn. App. 365 (2004).

In Montoya, Mendoza Montoya filed a personal restraint petition challenging the validity of his guilty plea to first degree manslaughter on grounds he was not informed of the burden of proof on the issue of self defense prior to his guilty plea. Montoya, 109 Wn.2d at 279. Montoya was charged with second degree murder while armed with a deadly weapon for stabbing Jose Angiano in the chest, causing his death. Montoya, 109 Wn.2d at 271. Subsequently, a plea bargain was negotiated and Montoya agreed to plead to a reduced charge of first degree manslaughter with no deadly weapon allegation. Montoya, at 272.

At the plea hearing, Montoya entered a Newton[8] plea, stating that he did not remember the events but believed there was a strong possibility the state would be able to convict him of murder and therefore wished to take advantage of the state's plea offer. Montoya, 109 Wn.2d at 272-74. Montoya had been drinking the night of the altercation and also lost a lot of blood due to an injury he received that evening. Montoya, 109 Wn.2d at 273-74.

To establish a factual basis for the plea, the state presented the court with an oral summary of the state's evidence. It tended to show that Angiano was stabbed while trying to break up a knife

[8] State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976).

fight between Montoya and another individual, Johnny Hernandez. Montoya, 109 Wn.2d at 275-277. There were three witnesses who would have testified that moments before Montoya stabbed Angiano, Angiano raised his arms and said, "I have no knife." Montoya, 109 Wn.2d at 276.

Two years after Montoya entered his plea, he filed a personal restraint petition in the Court of Appeals. Montoya, 109 Wn.2d at 272, 277. The Court of Appeals granted Montoya's petition, in part because he had not been informed of the burden of proof on self-defense. Montoya, 109 Wn.2d at 277. The Supreme Court reversed.

In disposing of Montoya's claim that he was not adequately apprised of the nature of the charge because he was never informed of the burden of proof on the issue of self defense, the Court noted self defense becomes an issue only if the defendant raises the defense and presents some credible evidence to support it. Montoya, 109 Wn.2d at 279.

In support of his claim that self defense was an issue, Montoya had pointed to evidence in the police reports detailing the prior dispute between Montoya and Hernandez, the fact that Angiano was with Hernandez at the bar that evening, and the fact

that Angiano approached Montoya just before Montoya stabbed him. Montoya, 109 Wn.2d at 279. The Court was not persuaded, however, as Montoya himself did not remember what happened that night:

> None of these assertions, however, are adequate to support a plausible claim of self defense. There is no evidence that Angiano, who was unarmed at the time of the stabbing, engaged in any threatening behavior which would make a credible self-defense claim available to Montoya. *See* RCW 9A.16.050. Montoya's bare assertion that he was defending himself is unpersuasive given that he was unable to remember exactly what happened.

Montoya, 109 Wn.2d at 280 (emphasis added).

Under these circumstances, the Court concluded:

> In sum, we conclude that there is no potential evidence that would support a claim of self-defense in this case. The trial court certainly had no obligation to inform Montoya of the burden of proof on a purely hypothetical claim.

Montoya, 109 Wn.2d at 280. From the Court's conclusion, it is logical to infer that had Montoya's self defense claim been *more than purely hypothetical*, the court would have had an obligation to inform him about the burden of proof.

Similarly, at issue in Haydel was whether the failure to advise Haydel of the state's burden to disprove self defense rendered his plea to assault involuntary. Haydel, 122 Wn. App. at

369. Haydel was charged with first degree assault with a deadly weapon for stabbing John Puletasi. Haydel, 122 Wn. App. at 368. According to the state's evidence, Puletasi heard loud music coming from a car below his apartment building, found Haydel inside and asked him to turn it down. Haydel refused, got out of his car and grabbed Puletasi. The two men exchanged blows and Puletasi thereafter realized Haydel stabbed him multiple times. Haydel, 122 Wn.2d at 368.

At Haydel's omnibus hearing, the court entered an order stating that self-defense was the general nature of Haydel's defense. The record did not indicate the evidentiary basis for this allegation. Haydel, 122 Wn.2d at 368. Haydel subsequently entered an Alford[9] plea to an amended charge of attempted first degree assault with no deadly weapon allegation. Id.

Haydel thereafter moved to withdraw his plea, alleging ineffective assistance of counsel. Following an evidentiary hearing, the court found Haydel's counsel was not ineffective. However, the court sua sponte decided Haydel's plea was not "knowing" as a matter of law because neither the Statement of Defendant on Plea of Guilty nor colloquy before the judge taking the plea addressed

[9] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

self defense. The trial judge further held that "self defense is an element of assault that must be disproved beyond a reasonable doubt by the State." Haydel, 122 Wn. App. at 369.

On the state's motion for discretionary review, this Court reversed. In reversing, this Court noted there is no obligation to advise a defendant of defenses for which there is no evidentiary support. Haydel, 122 Wn. App. at 370-71. In Haydel's case, there was no evidence of self defense at the time the plea was taken. This Court held: "The statement in the omnibus order regarding the general nature of the Haydel's defense is not evidence." Haydel, 122 Wn. App. at 371. The state therefore had no obligation to advise Haydel "of its burden of proof on his purely hypothetical claim at the time of the taking of the plea." Haydel, 122 Wn. App. at 371.

And regardless, the state obtained a declaration from defense counsel indicating Haydel's attorney "read and reviewed the jury instructions on self-defense that included the State's burden with Haydel[.]" Id. at 372. As a result, "Haydel's rights were fully protected in this case." Id.

The opposite is true here. Unlike the circumstances in Montoya and Haydel, there was evidence of a plausible self

defense claim at the time of Jackson's plea. As indicated in the certification for determination of probable cause, Jackson asserted self defense at the time of arrest. He told the officer "they got into a tussle," that "it was a fair fight," and no pipe was involved. CP 4. Jackson indicated before trial in his trial memorandum he intended to testify he acted in keeping with this claim of self defense. Defense counsel reiterated during pretrial proceedings the defense was self defense.

And significantly, the court did not allow the state to amend the assault charge to include the deadly weapon alternative means, in part, because it was disputed whether the pipe found several hours later along the side of the road was in fact used during the altercation. The court found Jackson should at least be afforded the opportunity to pursue that line of defense. Thus, the facts here – unlike those in Montoya and Haydel – do not definitively show the use of a weapon against an unarmed individual. Not only did Jackson claim self defense at his first opportunity, but the defense also disputed the use of a weapon. Therefore, Jackson had a plausible self defense claim at the time the plea was taken.

Although not adduced until after the plea was taken, it should also be noted defense counsel stated in his second

declaration that Jackson had wanted him to obtain a 911 recording that would have shown Narancic was acting illegally. Unfortunately, Felker did not request the tape in time and it was recycled. Nonetheless, this fact also lends credibility to Jackson's self defense claim.

In short, the circumstances here are unlike those in Montoya, where the only evidence of self defense was Montoya's bare assertion, which carried no weight in light of the fact he also admitted he could not remember what happened that night. The circumstances here are also unlike those in Haydel, where the only "evidence" of self defense was the allegation of self defense as the nature of Haydel's defense in the Omnibus Order.

Rather, these are circumstances where self defense was a viable defense. Indeed, the court itself appeared to recognize as much when it opined it likely would have given self defense instructions, had Jackson testified as anticipated. Under these circumstances, defense counsel – in order to effectively assist Jackson during the plea bargaining process – had an obligation to inform him of the state's burden to disprove self defense once he raised some evidence of the defense.

It was undisputed below defense counsel did not do so. Defense counsel admitted in his declarations he did not discuss the state's shifting burden of proof. In fact, the court made an express finding to this effect.

Accordingly, as defense counsel argued below, the other allegations, about which the court found Jackson not credible, are nothing more than a red herring. The fact of the matter is, defense counsel did not inform his client adequately on the legalities of his viable self defense claim.

Whether defense counsel discussed self defense in general and informed Jackson of counsel's belief he would lose is of no moment. Under Montoya and Haydel, Jackson should have been informed of the state's burden to disprove self defense beyond a reasonable doubt. Counsel's failure to do so constituted deficient performance.

The next question is prejudice. Generally, as explained above, in the context of ineffective assistance, the defendant must show that but for defense counsel's failing, he would not have entered the plea. In Jackson's declaration attached to the motion to withdraw, Jackson indicated that had he known of the state's burden to disprove self defense, once he offered some evidence of

the defense, he would have continued with the trial, rather than enter a plea. Importantly, while the court found incredible the statements contained in Jackson's declaration regarding his meetings and discussions with Felker, the court did not find this statement incredible. CP 99, finding of fact 3. Accordingly, Jackson has made a sufficient showing of prejudice to justify the withdrawal of his pleas.

More recently, the Supreme Court has held that a juvenile defendant should be allowed to withdraw his plea based on an ineffective assistance claim, where counsel misinformed him about a consequence of the plea. State v. A.N.J., 168 Wn.2d 91, 118, 225 P.3d 956 (2010). There, the Court held: "we have no difficulty concluding A.N.J. was misinformed as to the consequences of his plea. He is entitled to withdraw it." A.N.J., 168 Wn.2d at 117. It does not appear the Court examined prejudice in terms of whether A.N.J. would have entered the plea but for the misinformation. Id.

While Jackson was not "misinformed" per se, he was not fully advised about a viable defense. Under the Court's more recent reasoning in A.N.J., he should be allowed to withdraw his pleas as they were not "knowing." See also Montoya, 109 Wn.2d at 277 (A constitutionally invalid guilty plea gives rise to actual

prejudice) (citing In re Hews, 99 Wn.2d 80, 87-88, 660 P.2d 263 (1983) (Hews I). Because Jackson was deprived of his right to effective assistance of counsel during the plea bargaining process, this Court should allow him to withdraw his pleas.

2. WHERE THE COURT IMPOSED THE MAXIMUM TERM OF INCARCERATION, IT ERRED IN IMPOSING A COMMUNITY CUSTODY TERM.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Statutory construction is a question of law and is reviewed de novo. In re Pers. Restraint of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

Under RCW 9.94A.701(1)(b), the court is directed to impose a community custody term of three years for a serious violent offense. Attempted first degree assault is a serious violent offense. RCW 9.94A.030(45)(v), (ix). However, because Jackson was already sentenced to the statutory maximum on that offense, the court was without authority to impose community custody.

Under earlier statutes, the Department of Corrections was allowed to recalculate community custody terms to ensure the combination of confinement and community custody did not exceed the statutory maximum. See State v. Franklin, 172 Wn.2d 831,

837, 263 P.3d 585 (2011). But the legislature amended the pertinent statute in 2009, and in 2012, the Supreme Court held that sentencing courts must reduce the community custody term to ensure the combination does not exceed the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012) (citing RCW 9.94A.701(9)). Because the sentencing court did not do so here, this Court should remand for resentencing. Boyd, 174 Wn.2d at 473; State v. Land, 172 Wn. App. 593, 295 P. 3d 782, 786-87 (2013).

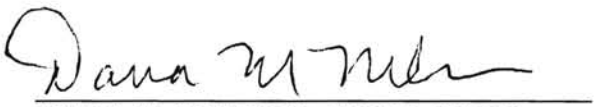
D. CONCLUSION

Because Jackson was deprived of his right to effective assistance of counsel, he should be permitted to withdraw his pleas. Alternately, this Court should remand for resentencing because the court imposed a sentence that exceeds the statutory maximum for count I.

Dated this 27th day of September, 2013

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
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Attorneys for Appellant

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOHN JACKSON, JR., Defendant.	No. 11-C-07884-8 SEA FINDINGS AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION TO WITHDRAW PLEA

A hearing on the defendant's motion to withdraw his guilty plea was held on December 12, 2012, before the Honorable Judge Michael Hayden. After considering the declarations and briefing submitted by the parties and hearing argument, the court makes the following findings:

1. This Court presided over the trial and plea in this matter and observed the defendant, co-defendant and trial counsel on September 10-12, 2012. During that time, the court heard pre-trial motions, jury selection, trial testimony of three law enforcement witnesses and conducted the plea colloquy. This court also heard from the defendant on October 5, 2012, wherein the defendant declared to this Court that Mr. Felker had never met with

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him to talk about the facts of the case or the discovery in the case, and that Mr. Felker only met with him to sign continuance orders and never discussed anything else with him. In addition to the declarations and briefing submitted by the parties, the court incorporates by reference the record of proceedings from the above prior hearings.

2. The court finds the statements contained in the October 31, 2012 and December 7, 2012 declarations of trial counsel, Daniel Felker, credible.

3. The court does not find credible the statements of the defendant on October 5, 2012, in court and does not find credible the statements contained in the declaration of the defendant regarding his meetings and discussions with Mr. Felker.

4. The court finds that the State would have presented evidence showing that the defendant (and his co-defendant) showed up at the victim's work with a weapon in hand; that the defendant attacked and repeatedly assaulted the victim with the weapon; that the defendant had made prior threats against the victim; that the defendant had offered money to another tenant if that tenant would let the defendant know when the victim arrived at work; and that as the defendant was leaving, he threatened to kill the victim, yelling, "I'm a gangster, I'll kill you."

5. The defendant has never identified any evidence that he acted in self-defense. Attorney Felker credibly represented that the defendant could not have successfully claimed that he acted in self-defense.

6. There was substantial evidence that the defendant did not act in self-defense and was the first aggressor.

7. The court finds that Mr. Felker discussed self-defense with the defendant, discussed the defendant's potential testimony with the defendant, and conveyed to the defendant that

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while he could assert self-defense, the State would easily disprove that assertion. While Mr. Felker may not have used the exact verbage of a "shifting burden of proof," Mr. Felker did convey to the defendant that he would not be successful in escaping conviction by claiming self-defense. The defendant has not established that this advice was unreasonable.

Based on the above findings, and after considering the declarations and briefing submitted by the parties and hearing argument, the court makes the following conclusions of law:

1. This court concludes that Mr. Felker's advice to the defendant to accept the plea offer from the State was objectively reasonable and Mr. Felker was not deficient in his representation of the defendant.
2. This court concludes that the defendant has failed to credibly prove that he was prejudiced by any alleged deficient performance.
3. The defendant's plea was knowingly, intelligently and voluntarily entered. The defendant knowingly waived his constitutional trial rights, contained in paragraph 5 of the Statement of Defendant on Plea of Guilty. The defendant's plea was constitutionally valid.
4. The court further concludes that a manifest injustice has not been committed and the defendant's motion to withdraw his plea is denied.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Daniel T. Satterberg, Prosecuting Attorney
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Signed this 13 day of December, 2012.

JUDGE

Presented by:

Deputy Prosecuting Attorney #32800

Approved as to form by:

Attorney for Defendant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69802-8-I
	)	
JOHN JACKSON,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF SEPTEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] JOHN JACKSON
DOC NO. 979212
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF SEPTEMBER 2013.

x Patrick Mayovsky