NO. 44329-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL S. BICKLE,

Appellant.

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

The Honorable Nelson Hunt, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the appearance of fairness doctrine by threatening the defendant with a longer sentence when he objected to the judge refusing to follow the agreed recommendation.

2. Mr. Bickle's plea was not knowing, voluntary and intelligent where his trial attorney informed him that notwithstanding the trial court's colloquy, the trial judge would follow the agreed recommendation.

3. The trial court abused its discretion by denying Mr. Bickle's motion to withdraw his appeal based on his attorney's misrepresentations.

4. Mr. Bickle was denied effective assistance of counsel by his attorney's misrepresentation that the trial judge would follow the agreed recommendation.

Issues Presented on Appeal

1. Did the trial court violate the appearance of fairness doctrine by threatening Mr. Bickle with a longer sentence?

2. Did the defendant make a knowing, voluntary and intelligent guilty plea where his attorney misstated that

the judge would follow the agreed sentencing recommendation?

3. Did the trial court abuse its discretionin denying the CrR motion to withdraw the guilty plea?

4. Was Mr. Bickle denied effective assistance of counsel by his attorney's misrepresentation that the judge would follow the agreed sentencing recommendation?

B. STATEMENT OF THE CASE

While serving time on an unrelated offense, Mr. Bickle pleaded guilty to multiple counts of theft in exchange for a recommended concurrent standard range sentence. CP 12-29; RP 3-8. The trial judge declined to follow the recommendation and imposed the sentence consecutive to the sentence Mr. Bickle was serving at the time of the sentencing. CP 30-40; RP 14. Mr. Bickle objected and the trial court made the following threat after Mr. Bickle stated, "I'll go to trial on this." RP 14.

> THE COURT: No, you're not, you already pled guilty.
>
> THE DEFENDANT: That's not right, I didn't do it.
>
> THE COURT: I don't care.

> THE COURT: Wait a minute, your time to speak is over, all right, you pled guilty. You understood at the time that I didn't have to accept this recommendation and I'm not accepting the recommendation. You're going to be doing this time consecutively. And I don't want to hear another word out of you. If you do, we will figure out a way to make it longer, do you understand that?

RP 14-15.

Mr. Bickle moved to withdraw his plea under CrR 7.8 CP 47-48. During the CrR 7.8 motion Mr. Bickle explained that he pleaded guilty because his attorney told him that even though the judge did not have to follow the agreed recommendation, the judge would do so. RP 9, 11 (November 21, 2012). Mr. Bickle explained to the judge that he did not say anything when the judge informed him that he did not have to follow the recommendation because his attorney told him that if he interrupted the judge during the colloquy or objected to anything in the plea agreement, then the judge would not follow the recommendation. RP 11 (November 21, 2012).

> THE COURT: Then why did you plead guilty?
> 14 That's the whole issue here. You had that. Why did you
> 15 plead guilty?
> 16 THE DEFENDANT: Because my attorney told me,
> 17 pretty much, they are going to find you guilty if you go to
> 18 trial.
> 19 THE COURT: Okay. And you elected to plead
> 20 guilty, you went through the form, you pled guilty, you

21 were sentenced, right? And now you are coming back and
22 saying, oh, but I had all these defenses.
23 THE DEFENDANT: And I told him, no, I would
24 like to pretty much proceed at trial. He goes no, Paul, if
25 you go to trial, you will be found guilty because of your
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1 criminal history. What I am going to do is I am going to
2 get it ran concurrent for you, but you are going to have to
3 sign this. And it will be in -- I'm lost of words. But he
4 says, if you sign guilty -- I mean, if you sign to all
5 counts and say you did this, I will get it ran concurrent.
6 And the prosecuting attorney -- I mean, the prosecuting
7 attorney is agreeable with this. I go, can't the judge
8 give me a consecutive sentence? He goes, no, once I sign
9 and agree and the prosecuting attorney signs and agree, the
10 judge cannot go -- give you a consecutive sentence.
11 THE COURT: Mr. Bickle, that's ridiculous. Not
12 only is it ridiculous, you signed a document that says, the
13 judge does not have to follow anyone's recommendation as
to sentence. You signed that document. And when I went
15 through that document with you, I asked you, as part of the
16 guilty plea procedure, you understand that I don't have to
17 follow the State's recommendation, I am free to give you
18 any sentence I feel is appropriate, up to the maximum
19 authorized by law regardless of what anyone else may
20 recommend. You answered, yes, I understand that.
21 So you cannot come now and say, oh, the paper I signed

RP 8-9 (November 21, 2012).

The trial judge essentially told Mr. Bickle that he was a liar. RP 12

THE COURT: More than what it was -- so he told
you to lie then? He told you to lie that when I said: Do
you understand that I have the -- I'm not bound by any
plea
agreement that you agreed to with the prosecutor, and
I
have the authority to sentence you to any legal
sentence

authorized by law? And you said, yes, I understand that,
and you still wanted to plead guilty, then you were lying to me; is that right?

RP 12.

THE COURT: Well, somebody is lying here

because you signed the document saying you understand that.You answered my direct question on that saying, yes, I understand that. I asked you if there were any promises that were made to you that I hadn't covered. You said, no. Then I asked you, do you want to plead guilty to these charges, specifically which charges, and you said, yes, and pled guilty. So where in there is it that Mr. Underwood, apparently, told you that, well, I couldn't do any of those things, and I did them, and you just said, okay, I will do it.

RP 13.

The trial court denied the motion to withdraw the plea. CP 420; RP 18 (November 21, 2012). This timely appeal follows. CP 421-422.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED THE APEARANCE OF FAIRNESS DOCTRINE BY THREATENING THE DEFENDANT.

"Criminal defendants have a due process right to a fair trial by an impartial judge. Wash. Const. art. I, § 22; U.S. Const. amends. VI, XIV. Impartial means the absence of actual or apparent bias." *In re PRP of Swenson,* 158 Wn. App. 812, 244 P.3d 959 (2010), *citing, State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). Under the

appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties obtained a fair, impartial, and neutral hearing. *State v. Gamble,* 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (citing *State v. Bilal,* 77 Wn.App. 720, 722, 893 P.2d 674 (1995) " 'The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.' " *State v. Post,* 118 Wash.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) (quoting *State v. Madry,* 8 Wn.App. 61, 70, 504 P.2d 1156 (1972)).

An individual need only demonstrate evidence of a judge's potential bias for an appearance of fairness claim to succeed. *Gamble,* 168 Wn.2d at 187–88, 225 P.3d 973; *State v. Dominguez,* 81 Wash.App. 325, 329, 914 P.2d 141 (1996). The Code of Judicial Conduct (CJC) and due process require judges to disqualify themselves in a proceeding in which their impartiality "might reasonably be questioned." *State v. Chamberlin,* 161 Wn..2d 30, 37, 162 P.3d 389 (2007) (quoting former CJC Canon 3(D)(1) (2007)). The test for determining whether the judge's impartiality might reasonably be questioned is an objective one. *State v. Leon,* 133 Wn.App. 810, 812, 138 P.3d 159 (2006), *review denied,* 159 Wn.2d 1022, 157 P.3d

404 (2007).

Under CJC Canon 3(D)(1), "[j]udges **should** disqualify themselves in a proceeding in which their impartiality might reasonably be questioned." (emphasis added). Under case law, a judge **must** disqualify him or herself where impartiality might reasonably be questioned. *Chamberlin*, 161 Wn.2d at 37, *citing, Dominguez*, 81 Wn. App. at 328.

The federal due process clause also requires mandatory recusal when the "probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), quoting, *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

To determine if a judge is impartial, the defendant must provide evidence of bias which the reviewing Court considers from an objective perspective to determine "whether a reasonably prudent and disinterested observer would conclude" that the defendant "obtained a fair, impartial, and neutral" hearing. *Dominguez*, 81 Wn. App. at 330; *See also*, Post**,** 118 Wn.2d at 619; *Leon,* 133 Wn. App. at 812.

Here the trial judge threatened Mr. Bickle with a longer sentence when Mr. Bickle asked to go to trial after the judge refused to follow the agreed recommended sentence. The trial court was rude, inappropriate and bullying. During the plea hearing, the trial court did not permit Mr. Bickel to explain that his trial attorney informed him that the judge would follow the recommendation and that Mr. Bickle should not question the judge or say anything during the plea hearing. RP 14. During the CrR 7.8 hearing where Mr. Bickle, pro se requested to withdraw his plea, the trial court called him a liar when Mr. Bickle explained that he was told by his attorney that the judge would follow the agreed recommendation. RP 2, 18 (November 21, 2012)

The trial court's comments and threats to Mr. Bickle constitute some evidence in which the trial judge's impartiality "might reasonably be questioned." *Chamberlin,* 161 W..2d at 37. Accordingly, Mr. Bickle's conviction must be reversed and the case remanded for a new trial in front of a different judge.

2. THE TRIALCOURT ABUSED ITS DISCRETION IN DENYING MR. BICKLE'S CrR 7.8 MOTION TO WITHDRAW HIS GUILTY PLEA THAT WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT.

Under CrR 7. 8(b), a defendant may withdraw a guilty plea based

on proof of

> (1) [m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void; or
>
> (5) Any other reason justifying relief from the operation of the judgment.

This Court reviews a trial court's denial of a CrR 7. 8(b)(1) motion to withdraw a guilty plea for an abuse of discretion. In re *PRP of Cadwaller,* 155 Wn.2d 867, 879-80, 123 P.3d 456 (2009); *State v. Crawford,* 164 Wn.App. 617, 621, 267 P.3d 365 (2011). Mr. Bickle argues that the trial court abused its discretion in denying his motion to withdraw his guilty plea under CrR 7.8.1 and .5. Specifically, Mr. Bickle was incorrectly informed by his attorney that regardless of the judge's advisement that he did not have to follow the agreed recommendation, the judge in fact would follow the recommendation.

This constitutes both a mistake and a violation of Mr. Bickle's right to the effective assistance of counsel, which is a reason to justify relief from the plea. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S,Ct, 1709, 23 L.Ed.2d 274 (1969); CrR 4.2; CrR 7.8.

Mr. Bickle explained that he would not have pleaded guilty if he had understood that the trial court might not follow the recommended sentence. RP 8-9

CrR 4.2 provides in relevant part:

> **(d) Voluntariness.** The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Id.

CrR 7. 8(5) applies in extraordinary circumstances not addressed by any of the four preceding subsections of the rule, however the voluntariness section of CrR 4.2 applies to all pleas. *Boykin,* 395 U.S. at 243; *State v. Dennis,* 67 Wn.App. 863, 865, 840 P.2d 909 (1992). Extraordinary circumstances are those that relate to irregularities which are extraneous to the court's action or go to the

question of the regularity of the proceeding. *State v. Aguirre,* 73 Wn. App 682, 688, 871 P.2d 616, *review denied,* 124 Wn.2d 1028 (1994).

Under RCW 9.94.A.431(2) the sentencing judge is not bound by any recommendations contained in an allowed plea agreement. *State v. Henderson,* 99 Wn.App. 369, 376, 993 P.2d 928 (2000). However when trial counsel affirmatively misrepresents an immediate consequence of a plea, the plea is invalid because the defendant is denied effective assistance of counsel: an extraordinary circumstance under CrR 7.8. *State v. Ross,* 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

In order to comply with due process requirements, a defendant must make his guilty plea intelligently, voluntarily, and with knowledge that certain rights will be waived. *Boykin*, 395 U.S. at 243. During plea bargaining, counsel's duty is to assist the defendant 'actually and substantially' in determining whether to plead guilty by equipping the client with the tools needed to make a knowing, voluntary, and intelligent decision. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984), (quotation omitted); *State v. Holley,* 75 Wn.App. 191, 197, 876 P .2d 973 (1994). Ineffective assistance of counsel can constitute a manifest injustice that will support a motion to withdraw a guilty plea.

State v. Stowe, 71 Wn.App. 182, 186, 858 P.2d 267 (1993).

Thus, a plea is not knowing, voluntary or intelligent unless the attorney correctly advised the defendant its direct sentencing consequences. *Ross,* 129 Wn.2d at 284; (that defendant must serve 12-month community placement following prison sentence constitutes a direct consequence of a guilty plea and failure to so inform defendant renders a guilty plea invalid); *Wood v. Morris*, 87 Wn.2d 501, 513, 554 P.2d 1032 (1976) (a mandatory minimum term which must be imposed due to a guilty plea to an information which includes a separate firearm allegation, is a direct consequence which arises on entry of the plea); *State v. Kissee,* 88 Wn.App. 817, 821, 947 P.2d 262 (1997). *Wood,* 87 Wn.2d at 510. Trial counsel's affirmative misrepresentation rendered Mr. Bickle's plea involuntary.

3. MR. BICKLE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS PLEA HEARING .

Effective assistance of counsel is guaranteed by both the Sixth Amendment of the U.S. Constitution and article I, section 22 of the Washington Constitution. *State v. Hendrickson,* 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To establish ineffective assistance of counsel, the defendant must show not only that his attorney's performance

was deficient, but also that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An attorney's performance is deficient if it falls below the objective standard of reasonableness based on consideration of all circumstances. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Ineffective assistance of counsel occurs during a plea hearing when a trial counsel affirmatively misrepresents a sentencing consequence. *State v. Stowe,* 71 Wn.App. 182, 186, 858 P.2d 267 (1993). In *Stowe*, trial counsel affirmatively misrepresented that a conviction would not negatively impact the defendants military career prospects. The Court held that this affirmative misrepresentation of a sentencing consequence required reversal. *Stowe,* 71 Wn.App. at 186.

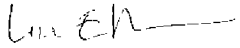
Here, Mr. Bickle explained to the trial court that his attorney misrepresented that although the judge would state that he need not follow the sentence recommendation, the judge would in fact do so. This was a misrepresentation of a direct sentencing consequence which constitutes ineffective assistance of counsel and requires remand for withdrawal of the plea. *Stowe, supra, Osborne, supra.*

D. CONCLUSION

Mr. Bickle was denied effective assistance of counsel by his trial attorney's misrepresentation that the trial judge would follow the sentencing recommendation - a direct consequences of the plea. On this basis, Mr. Bickle respectfully requests this Court reverse the conviction and remand for withdrawal of the plea. Mr. Bickle also request reversal and remand based on the trial court's violation of the appearance of fairness doctrine.

DATED this 14th day of June 2013

Respectfully submitted,



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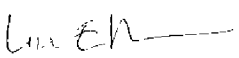
I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County prosecuting attorney's office Appeals Department appeals@lewiscountywa.gov and Paul S. Bickle DOC 297977 Washington Corrections Center P. O. Box 900 Shelton, WA 98584 a true copy of the document to which this certificate is affixed, on June 13, 2013. Service was made by depositing in the mails of the United States of America, properly stamped and addressed to Mr. Bickle and electronically to the prosecutor.



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