

Supreme Court No. _____
(COA No. 48833-7-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEDRIC GREER,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Dedric Greer, petitioner here and appellant below, asks this Court to accept review the Court of Appeals decision terminating review, dated July 25, 2017, for which a motion to reconsider was denied on August 21, 2017, copies of which are attached as Appendix A and B. *See* RAP 13.3(a)(1); RAP 13.4(b).

B. ISSUES PRESENTED FOR REVIEW

1. A guilty plea is not knowing, intelligent, and voluntary when the accused person does not accurately understand the sentence he faces if convicted. The Court of Appeals agreed that Mr. Greer's guilty plea rested on a facially invalid comparability claim for an out-of-state conviction. But it refused to grant Mr. Greer the opportunity to withdraw his guilty plea despite this error, and instead ordered he be resentenced. When a person pleads guilty based on an incorrect understanding of his standard range that is plain on its face, is he entitled to the opportunity to withdraw his guilty plea as a matter of due process and under controlling case law from this Court?

2. Effective assistance of counsel is an essential component of the guilty plea process. Mr. Greer's attorney failed to provide effective assistance of counsel on several fronts: he stipulated to an offender

score that relied on a facially invalid comparability determination, he refused to assist Mr. Greer when Mr. Greer complained about being bullied into accepting the plea, he failed to advocated for Mr. Greer at sentencing and instead conceded that a sentence close to the high end of the standard range would be appropriate because Mr. Greer lacked any understanding of mercy. Is Mr. Greer entitled to withdraw his guilty plea based on ineffective assistance of counsel?

3. When confronted with a request to withdraw a guilty plea prior to sentencing based on a conflict with counsel, the court should appoint a new attorney based on the right to representation by conflict-free counsel at all stages of proceedings. Mr. Greer was abandoned by counsel before sentencing. Should this Court review whether an accused person is entitled to counsel when his appointed attorney declines to represent him during material stages of proceedings?

C. STATEMENT OF THE CASE

Dedric Greer entered into a written plea agreement to the charged offense of murder in the second degree. 1RP 11; CP 19. The plea agreement included his understanding that he faced a standard range of 154 to 254 months, and stated his expectation that he could ask

for the low end while the prosecution would ask for the high end. CP 19, 21.

The plea agreement included a sentencing stipulation to the existence of two prior convictions from Arkansas and stated their legal comparability to certain Washington offenses. CP 17. It said one Arkansas conviction occurred in 2005 and it was comparable to RCW 46.12.750. *Id.* But it did not mention that RCW 46.12.750 did not exist in 2005. *Id.*

The agreement further said the second Arkansas conviction from 2014 for “sex aslt 2” was comparable to RCW 9A.44.050(1)(b). CP 17. It did not mention that the Arkansas statute is facially broader than the elements of the purportedly comparable Washington offense or that a similar offense in Washington may not be a violent felony, so it would not be double counted in the offender score.

Before Mr. Greer was sentenced, defense counsel told the court Mr. Greer wanted to withdraw his plea. 2RP 3. Rather than explain the basis of Mr. Greer’s request, defense counsel told Mr. Greer he needed to address the court directly. *Id.* Mr. Greer told the judge he had a “conflict of interest” with his attorney, who had miscommunicated with him, failed to take actions he requested, and told him he was not

permitted to tell the court that he acted accidentally. 2RP 3-4; CP 28.

The court did not inquire into his statements that his attorney misadvised him and did not give him another attorney, denying the motion. 2RP 4.

During the sentencing proceeding, defense counsel did not ask for a sentence of “154 months confinement,” as the plea agreement provided for. CP 21. Instead, counsel told the court that Mr. Greer did not deserve the low end of the standard range, he did not know the meaning of mercy, and he had not showed his victim mercy. 2RP 8-9.

The court imposed the high end of the standard range, as calculated based on an offender score of three. 2RP 11; CP 35.

The Court of Appeals agreed the 2005 Arkansas conviction could not be counted in Mr. Greer’s offender score because the agreement of the parties was only that it was comparable to a statute that did not exist in Washington in 2005. Slip op. at 6-9. Because the stipulation of criminal history was facially invalid, the Court of Appeals ordered a new sentencing hearing. Slip op. at 9. But it refused to allow Mr. Greer to withdraw his plea based on the misunderstanding of his offender score at the time he pled guilty. Slip op. at 9-12; Order Denying Motion to Reconsider (attached as Appendix B).

D. ARGUMENT

1. Misinformation about the sentence a person faces undermines the guilty plea and is not remedied by simply ordering a new sentencing hearing.

Due process requires a guilty plea may be accepted only if the accused person understands the plea's consequences and enters the plea knowingly and voluntarily. *State v. A.N.J.*, 168 Wn.2d 91, 117, 225 P.3d 956 (2010); *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); U.S. Const. amend. 14; Const. art. I, §§ 3, 22.

“A guilty plea is not knowingly made when it is based on misinformation regarding sentencing consequences.” *In re Pers. Restraint of Quinn*, 154 Wn. App. 816, 835-36, 226 P.3d 208 (2010); *see also State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996) (“At all times, the defendant must understand the consequences of pleading guilty”); *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988), *overruled on other grounds State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011) (“A defendant must understand the sentencing consequences for a guilty plea to be valid”).

The court must ensure the accused person understands the plea's consequences. *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233

(2011); *Boykin*, 395 U.S. at 243-44 (court accepting a guilty plea must “canvas[] the matter with the accused to make sure he has a full understanding” of plea and “its consequence”). A person who pleads guilty “must understand” the direct and mandatory sentencing consequences “for a guilty plea to be valid.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

Defense counsel must accurately inform the accused of the sentencing consequences of the charges. *Padilla v. Kentucky*, 559 U.S. 356, 373, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). Counsel’s failure to research the operative sentencing laws and accurately explain the consequences of pleading guilty undermines the validity of a guilty plea. *Lafler v. Cooper*, 566 U.S. 156, 163, 132 S.Ct. 1376, 182 L. Ed. 2d 398 (2012).

In *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.3d 512 (1999), this Court ruled that an attorney’s failure to research the law and discover that the charged acts occurred before the statute’s enactment constituted ineffective assistance of counsel.

In *Walsh*, this Court ruled that a defendant must be allowed to withdraw her guilty plea when she pled guilty based on a misunderstanding of the standard range. 143 Wn.2d at 8. The Court

explained that when “a plea agreement is based on misinformation,” the defendant may elect to withdraw her guilty plea. *Id.* at 8-9, citing *Miller*, 110 Wn.2d at 531.

Mr. Greer pled guilty based on misinformation. He believed his 2005 Arkansas conviction was comparable to RCW 46.12.750. CP 17. But the law of comparability requires the out-of-state offense is comparable to a law that existed at the time of the prior offense and RCW 46.12.750 did not exist in 2005. RCW 9.94A.525(3); *see also In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Accordingly, he pled guilty based on a misunderstanding of the law governing comparability that was used to increase his offender score.

The Court of Appeals agreed this legal flaw occurred and it undermined the legality of Mr. Greer’s sentence but instead of giving him the opportunity to withdraw his plea, it order a new hearing at which the prosecution may prove the 2005 Arkansas offense is comparable to some other Washington offense.

This remedy is inadequate and contrary to established law. Even if the prosecution is somehow able to prove the 2005 Arkansas offense is comparable to another Washington offense, Mr. Greer pled guilty based on a different understanding of the sentencing consequences of

his prior convictions. His stipulation is no longer valid. His waiver of his right to trial was premised on particular sentencing consequences. A defendant “cannot waive the legal effect of his prior convictions” and “cannot agree to a sentence in excess of that statutorily authorized.” *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 876, 50 P.3d 618 (2002).

The remedy for a plea agreement based on misinformation about the sentence a person faces is to permit the defendant the opportunity to withdraw her plea. The Court of Appeals decision to allow the prosecution a new opportunity to find another offense that is comparable to the Arkansas conviction does not rectify the due process violation that occurs when a person pleads guilty based on an incorrect understanding of the comparability of a prior conviction.

2. When an attorney essentially abandons his client during material proceedings, he has not received effective assistance of counsel.

a. Mr. Greer had the right to effective representation of counsel at all critical stages of the proceedings.

The right to effective representation by counsel at all critical stages of a case includes plea and sentencing proceedings. *United States v. Cronin*, 466 U.S. 648, 653-54, 104 S.Ct. 2039, 80 L.Ed.2d 657

(1984); *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Padilla v. Kentucky*, 559 U.S. at 373; U.S. Const. amend. 6;¹ Const. art I, § 22.²

Effective assistance of competent counsel extends to “the negotiation of a plea bargain” and the decision of whether to plead guilty. *Padilla*, 559 U.S. at 364. An attorney’s failure to assist his client with understanding the important consequences of a guilty plea constitutes ineffective assistance of counsel. *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 105, 351 P.3d 138 (2015).

A defense attorney’s obligation to explain the consequences of a guilty plea is separate from a court’s role in ascertaining the voluntariness of a plea. *State v. Sandoval*, 171 Wn.2d 163, 173, 249 P.3d 1015 (2011). Even if the court explains sentencing consequences to a defendant, defense counsel’s advice may undermine or negate that information. *Id.*

b. Defense counsel abandoned Mr. Greer by undermining his request to withdraw his guilty plea.

¹ The Sixth Amendment provides:
In all criminal prosecutions, the accused shall enjoy the right to ...have the Assistance of Counsel for his defense.

² Article I, section 22 provides, in pertinent part:
In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.”

When a defendant asks to withdraw his guilty plea before sentencing, the hearing is a critical stage at which he has the right to assistance of counsel. *State v. Davis*, 125 Wn.App. 59, 63-64, 104 P.3d 11 (2004) (“A defendant is entitled to counsel at all critical stages of a criminal prosecution, which includes a motion under CrR 4.2(f) to withdraw a guilty plea.”). CrR 4.2(f) provides that a presentence motion to withdraw a guilty plea is a critical stage of a criminal proceeding for which a defendant has a constitutional right to be represented by counsel. *State v. Chavez*, 162 Wn.App. 431, 439, 257 P.3d 1114 (2011).

The Kentucky Supreme Court addressed a similar situation in *Commonwealth v. Tigue*, 459 S.W.3d 372, 382 (KY 2015), where a represented criminal defendant asked to withdraw his guilty plea at a sentencing hearing. His appointed attorney was physically present but did not advocate for the defendant’s motion to withdraw his plea. *Id.* at 385. The Kentucky Court ruled that the defendant was “in effect, completely denied counsel during his efforts to withdraw his plea despite [assigned counsel]’s nominal presence at the sentencing hearing.” *Id.* at 386.

Mr. Greer asked to withdraw his plea before he was sentenced. 2RP 3. He explained to the court he had “a conflict of interest” with his assigned attorney. 2RP 3. “A conflict of interest may amount to ineffective assistance of counsel where it adversely affects a client’s interests.” *Chavez*, 162 Wn.App. at 438; *Tigue*, 459 S.W.3d at 387 (“actual conflict of interest” arises when defendant claims attorney refused to prepare defense to encourage defendant to plead guilty).

When confronted with a reason to believe a conflict exists requiring appointment of a new attorney, the trial court should question the attorney or defendant “privately and in depth” to ascertain the nature of the problem between the lawyer and client. *United States v. Nguyen*, 262 F.3d 998, 1002-03 (9th Cir. 2002).

The court did not ask about the conflict of interest or appoint a different attorney.

Mr. Greer explained there was “miscommunication” and his lawyer had not done things he had asked in the course of the proceedings. 2RP 3. He was upset that his lawyer “wanted me to agree to this crime. And I just can’t get up and agree to it, man.” 2RP 4. He said his lawyer had told him he could not tell the court what happened or say it was an accident, even though accidentally causing the injury

would be a defense to the charged offense of intentional assault with the reckless infliction of bodily harm. 2RP 4; *see State v. Hendrickson*, 81 Wn.App. 397, 399, 914 P.2d 1194 (1996).

Rather than confer confidentially with Mr. Greer or his lawyer, or appoint new counsel, the judge told him, “Guilty is guilty” and noted he already entered his guilty plea. 2RP 4. The court categorically refused to consider any legal basis to withdraw the guilty plea “unless something exceptional happens at the sentencing.” 2RP 5.

The court did not inquire further into Mr. Greer’s assertion of a conflict of interest, the work Mr. Greer had asked his attorney to do that his lawyer failed to do, or the apparently incorrect legal advice the attorney gave about an available defense.

Mr. Greer was entitled to effective representation at this stage of the proceedings, but Mr. Greer’s assigned attorney refused to assist him. He told Mr. Greer to address the court directly, and said he did not know the basis for Mr. Greer’s motion. 2RP 3. Mr. Greer had no assistance of counsel when he told the court that his attorney misadvised and refused to adequately communicate about the guilty plea, which denied him his right to counsel.

c. *Defense counsel undermined the plea agreement by encouraging a high end sentence despite promising to recommend a low end sentence when inducing the plea.*

An accused person waives bedrock constitutional rights by pleading guilty. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *State v. MacDonald*, 183 Wn.2d 1, 8-9, 346 P.3d 748 (2015); U.S. Const. amend. 14; Const. art. I, § 3. A decision to plead guilty must be based on an understanding of the charge, “alternative courses of action,” and the sentencing consequences. *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 597, 741 P.2d 983 (1987).

The attorneys may not contravene “any of the defendant’s reasonable expectations that arise from the agreement.” *State v. McRae*, 96 Wn.App. 298, 305, 979 P.2d 911 (1999). For example, a prosecutor may not explicitly or by conduct show an intent to circumvent the terms of a plea agreement. *State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). Likewise, an attorney may not induce a person to plead guilty, or reject a guilty plea offer, based on inaccurate information. *Lafler*, 132 S.Ct. at 1408. Defense “counsel must communicate actual offers, discuss tentative plea negotiations, and discuss the strengths and weaknesses of the defendant’s case so that the defendant knows what to

expect and can make an informed decision on whether to plead guilty.”

State v. Edwards, 171 Wn.App. 379, 394, 294 P.3d 708 (2012).

Mr. Greer waived his right to trial and agreed to plead guilty based on an agreement that he would be able to ask the court to impose the low end of the standard range, which was 154 months, while the prosecution would ask for the high end of the standard range, 254 months. CP 21. When entering his guilty plea, the court made sure that Mr. Greer had closely reviewed “every line” of the statement on plea of guilty. 1RP 6. The plea agreement explicitly included Mr. Greer’s understanding that his attorney may ask the court to impose a sentence of “154 months confinement – low end of the standard range.” CP 21.

But rather than fulfill Mr. Greer’s anticipated sentencing recommendation that his attorney would ask for the low end of the standard range, defense counsel told the court, “this is not a low end case,” it “calls out for a sentence higher than the low end,” and Mr. Greer did not deserve a low end sentence. 2RP 8, 9.

Defense counsel emphasized, “This case was a tragedy. It . . . calls out for a sentence higher than the low end. And I understand that, Your Honor.” 2RP 8. Defense counsel reminded the court that Mr. Greer “should have shown his victim [mercy] and did not.” 2RP 9.

Defense counsel did not ask for a sentence at or close to the low end, or even the middle of the range. Defense counsel started from the State's high end request and asked for something slightly lower. 2RP 9. Instead of proposing 154 months or a low end term, counsel asked the court to "show him some mercy, some mercy that he should have shown his victim and did not." 2RP 9.

Not only did defense counsel fail to advocate for the low end sentence that was the premise of the plea bargain, he gave the court reasons to impose a high end sentence and encouraged such a sentence by arguing that Mr. Greer had yet to learn the meaning of mercy or compassion. This sentencing argument undermined Mr. Greer's expectations when he plead guilty, leaving him without the meaningful request for leniency that he anticipated when he waived his right to trial and agreed to plead guilty, and further demonstrating how defense counsel essentially abandoned advocating for his client during the sentencing proceeding, despite falsely assuring Mr. Greer he would make a request for a low end sentence when he entered his guilty plea. This misadvice about critical consequences of the plea constitutes ineffective assistance of counsel. *See Padilla*, 559 U.S. at 368-69.

An attorney's representation is unreasonable and deficient when it falls below prevailing professional norms. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). Professional norms include sentencing advocacy. *Criminal Justice Standards, Defense Function, Standard 4–8.1 Sentencing*, American Bar Association (3d ed.1993) (ABA standards direct counsel to file presentence report or “submit to the court and the prosecutor all favorable information relevant to sentencing”). The National Legal Aid and Defender Association (NLADA) standards for attorney performance state that defense counsel at sentencing “should be prepared” to “advocate fully for the requested sentence and to protect the client’s interest.” NLADA Performance Guidelines for Criminal Defense Representation, 8.7 (1985).³

Defense counsel did not meaningfully advocate for his client at sentencing, as promised in the plea agreement, demonstrating counsel’s deficient performance.

³ Available at:
http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#eiughtone.

d. Defense counsel unreasonably stipulated to a higher offender score than legally permissible.

Defense counsel's obligation to understand the law and accurately explain it to both his client and the court extends to the sentencing consequences of a conviction. *See State v. McGill*, 112 Wn.App. 95, 101-02, 47 P.3d 173 (2002) (finding ineffective assistance of counsel for failing to ask for exceptional sentence downward based on multiple offense policy); *see also State v. Saunders*, 120 Wn.App. 800, 824-25, 86 P.3d 232 (2004) (ineffective assistance of counsel for failing to ask court to treat offenses as same criminal conduct).

Under the Sentencing Reform Act, an out-of-state conviction may be included in the offender score only if the prior offense is comparable to a Washington offense. RCW 9.94A.525(3); *see also Lavery*, 154 Wn.2d at 258 (conviction for foreign crime that is broader than analogous Washington statute may not be counted as a "strike" for purposes of sentencing).

As the Court of Appeals agreed, at least one of the two Arkansas convictions was used to increase Mr. Greer's offender score based on a facially invalid stipulation to comparability. Slip op. at 8-9.

This error demonstrates the ineffective assistance Mr. Greer received. He should be given conflict-free counsel and allowed the opportunity to withdraw his plea, before a new sentencing hearing occurs. This Court should grant review to address the conflicts between the Court of Appeals decision and established case law and constitutional guarantees.

F. CONCLUSION

Based on the foregoing, Petitioner Dedric Greer respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 19th day of September 2017.

Respectfully submitted,



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APPENDIX A

July 25, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DEDRIC LAMAR GREER,

Appellant.

No. 48833-7-II

UNPUBLISHED OPINION

MAXA, A.C.J. – Detric Greer appeals his conviction and sentence for second degree murder. Greer pleaded guilty and stipulated that he had two prior Arkansas convictions that were comparable to Washington offenses. The trial court imposed the maximum standard range sentence.

We hold that (1) the trial court did not err by not appointing substitute counsel at the sentencing hearing, (2) the trial court erred in calculating Greer’s offender score based on a stipulation that a 2005 Arkansas conviction was comparable to a Washington offense based on a non-existent Washington statute, and (3) Greer has not established ineffective assistance of counsel.

Accordingly, we affirm Greer’s conviction, but we reverse his sentence and remand for resentencing.

FACTS

On July 22, 2015, the State charged Greer with second degree murder for the death of a 15-month-old child, SMJ, with the aggravating factors that Greer abused his position of trust and that the victim was particularly vulnerable.

According to the statement of probable cause, Greer and SMJ's mother brought SMJ to the hospital on the morning of July 18. SMJ was already dead and rigor mortis had set in, indicating that SMJ had been dead for some time before his arrival at the hospital. An autopsy on SMJ showed that he died from blunt force injury to the abdomen. The medical examiner also noted that SMJ had multiple scars of varying age and injuries that appeared to have been inflicted around the time of death. The examiner believed that SMJ had suffered repeated abdominal trauma for weeks.

Guilty Plea

On January 22, 2016, the State amended the charge to second degree murder without the two aggravating factors in exchange for a guilty plea. Greer signed a written plea statement in which he pleaded guilty to second degree murder. In the plea statement, Greer admitted assaulting SMJ and causing his death.

Greer also signed a stipulation regarding his prior criminal record and offender score. The stipulation listed two prior convictions from Arkansas. The first was listed as "Fel Theft By Rec" with the notation "[=RCW 46.12.750]" underneath and the point score listed as one. Clerk's Papers (CP) at 17. The second was listed as "Sex Aslt 2" with the notation "[=RCW 9A.44.050(1)(b)]" underneath and the point score listed as 2. CP at 17. The stipulation also stated that the defendant "asks this court to sentence according to the stipulated offender score

set forth above” and that “[i]f sentenced within the standard range, the defendant further waives any right to appeal . . . based upon the above stated criminal history and/or offender score calculation.” CP at 17.

Consistent with the stipulation, the guilty plea statement showed that Greer’s offender score was 3 and calculated his standard range sentence at 154 to 254 months. The plea statement also included a statement that the prosecutor would recommend a 254 month sentence, but that Greer may argue for 154 months confinement, the low end of the standard range.

The trial court went through the guilty plea with Greer to confirm that he understood the plea and the rights he was giving up. The court accepted Greer’s guilty plea, finding that the plea was voluntary and made with a full understanding of the rights he was giving up.

Motion to Withdraw Guilty Plea

At the beginning of the sentencing hearing, defense counsel told the trial court that Greer wanted to withdraw his guilty plea. Defense counsel stated, “I will turn it over to Mr. Greer. I’m not precisely sure what the basis is for that motion.” Report of Proceedings (RP) (Mar. 31, 2016) at 3.

Greer told the court that he wanted to withdraw his guilty plea because he felt it was the result of a miscommunication between defense counsel and himself. He stated that he felt there was a conflict of interest. Greer said he originally told defense counsel that he wanted to argue that SMJ’s death was an accident, but that defense counsel said Greer could not do that. He also stated that he thought he was entering an *Alford*¹ plea, not a straight guilty plea.

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

The trial court stated that whether Greer entered an *Alford* plea or a straight guilty plea made no difference for sentencing purposes. The court also noted that it had gone over the plea with Greer and told him about all the rights Greer was giving up by entering the plea. The court found there was no legal basis for Greer to withdraw his guilty plea and denied Greer's motion to withdraw the plea.

Sentencing

During sentencing, the prosecutor recommended a 254-month sentence based in part on the victim's young age. Defense counsel did not request a specific sentence. He acknowledged that the case was "rife with all of the emotional upheaval that calls out for a sentence higher than the low end," but he emphasized that Greer had expressed regret and had taken responsibility for his actions. RP (Mar. 31, 2016) at 8. Defense counsel stated that Greer was "truly sorry for what it is that he has done" and noted that Greer signed off on restitution. RP (Mar. 31, 2016) at 8. Defense counsel also stated that although Greer initially tried to withdraw his guilty plea, Greer "has since thought better of his decision today to try to withdraw his plea" and has taken responsibility. RP (Mar. 31, 2016) at 8-9.

Finally, defense counsel asked the trial court to show Greer compassion and mercy: "[I]t's not a low end case, Your Honor. But I'm going to ask that you not high end Mr. Greer and that you show him some mercy, some mercy that he should have shown his victim and did not." RP (Mar. 31, 2016) at 9.

The trial court sentenced Greer to 254 months, stating that he could not in good conscience show mercy and leniency because of the "brutality of the crime itself" and "the callous neglect after the fact." RP (Mar. 31, 2016) at 11.

Greer appeals his conviction and sentence.

ANALYSIS

A. FAILURE TO APPOINT NEW DEFENSE COUNSEL

Greer argues that the trial court violated his right to counsel by failing to appoint new defense counsel to help Greer make his motion to withdraw his guilty plea, based on Greer's statement that there was a miscommunication and conflict of interest with his defense counsel.² We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution provide a criminal defendant with the right to counsel at all critical stages of criminal prosecution. *State v. Heddrick*, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009). A critical stage is one in which a defendant's rights, defenses, or privileges may be lost, claimed, or waived or the outcome of the case is substantially affected. *Id.* at 910. A motion to withdraw a guilty plea that comes before the court enters judgment and sentence is considered a critical stage. *State v. Harell*, 80 Wn. App. 802, 803-04, 911 P.2d 1034 (1996).

But a defendant does not have an absolute right to choose his counsel. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). To justify replacing appointed defense counsel, the defendant must show good cause. *Id.* Good cause includes a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the defendant and defense counsel. *Id.* But the defendant's general dissatisfaction with or loss of trust or confidence in defense counsel is not sufficient cause to appoint new counsel. *Id.* The

² Greer also seems to argue that his right to counsel was denied because defense counsel refused to assist Greer in moving to withdraw his guilty plea. Greer makes the same argument in his ineffective assistance of counsel claim, and the argument will be addressed in that context below.

relationship between the defendant and counsel must be so diminished as to prevent presentation of an adequate defense. *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997).

Here, Greer never requested substitute counsel. He did state that he believed his counsel had a conflict of interest and that there had been miscommunication between counsel and himself, but that was in the context of Greer's motion to withdraw his guilty plea. And Greer never explained why his counsel had a conflict of interest. Greer's statements did not indicate that he wanted new counsel, nor did his statements indicate that he was unable to work with defense counsel to receive an adequate defense.

Accordingly, we hold that the trial court did not violate Greer's right to counsel by not appointing new defense counsel at the sentencing hearing.

B. SENTENCE BASED ON STIPULATED OFFENDER SCORE

Greer argues that the trial court lacked authority to impose Greer's sentence because it was based on an incorrect offender score. Greer argues that his stipulation that his 2005 Arkansas conviction was comparable to RCW 46.12.750 was invalid because that statute was not in existence in 2005. The State argues that Greer waived any challenge to his offender score by stipulating that the Arkansas conviction was comparable to a Washington offense, and that listing RCW 46.12.750 instead of the statute that was in effect in 2005 was merely a scrivener's error. We agree with Greer.

1. Legal Principles

A defendant cannot agree to punishment in excess of that established by the legislature. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). Therefore, in

general a defendant's stipulation to a miscalculated offender score does not waive a challenge to the miscalculated score. *Id.*

But the court in *Goodwin* recognized limitations to the general rule that "a defendant cannot waive a challenge to a miscalculated offender score." *Id.* at 874. The court stated that "[w]hile waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *Id.*

In *State v. Hickman*, the court considered how the waiver doctrine described in *Goodwin* would apply to a defendant's stipulation that an out-of-state conviction was comparable to a Washington offense. 116 Wn. App. 902, 906-907, 68 P.3d 1156 (2003). Out-of-state convictions can be included in a defendant's offender score only if they are comparable to a Washington offense. *State v. Arndt*, 179 Wn. App. 373, 378, 320 P.3d 104 (2014). Whether an out-of-state conviction is comparable to a Washington offense generally involves a factual determination. *Id.* Therefore, in *Hickman* the court stated that "[b]ecause the doctrine of waiver applies where the alleged error involves a factual dispute, a defendant who stipulates that his out-of-state conviction is equivalent to a Washington offense has waived a later challenge to the use of that conviction in calculating his offender score." 116 Wn. App. at 907.

However, the court in *Hickman* did not address the situation where a defendant stipulates that an out-of-state conviction is comparable to a nonexistent Washington statute.

2. Analysis

The offender score stipulation stated that Greer's 2005 Arkansas conviction was comparable to RCW 46.12.750. However, RCW 46.12.750 did not exist in 2005.

At the time of Greer's 2005 Arkansas conviction, the Washington offense similar to the stipulated Arkansas offense³ was described by former RCW 46.12.210 (2003), titled "Penalty for false statements or illegal transfers." Former RCW 46.12.210 was recodified in 2010 – five years after Greer's conviction – as RCW 46.12.750. LAWS OF 2010, ch. 161, § 1214. The elements of the two statutes are substantially similar, except RCW 46.12.750 includes additional means of violating the statute by forgery that were not included in former RCW 46.12.210.

When determining comparability, the court must compare the out-of-state offense to the elements of a Washington criminal statute that was in effect when the out-of-state crime was committed. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The 2005 Arkansas conviction as a matter of law could not be comparable to an offense described by a nonexistent statute. Therefore, the trial court committed a legal error in calculating Greer's offender score based on his invalid stipulation on the 2005 Arkansas conviction and Greer could not waive that legal error. *Goodwin*, 146 Wn.2d at 874.

The State argues that the stipulation merely contained a scrivener's error. Instead of identifying former RCW 46.12.210 as the applicable Washington statute, the drafter mistakenly wrote RCW 46.12.750. But there is no indication in the record that either party intended to refer to former RCW 46.12.210 instead of RCW 46.12.750. *See State v. Moten*, 95 Wn. App. 927, 929 & n.1, 976 P.2d 1286 (1999) (finding an "obvious scrivener's error" where the wrong statute was listed on the judgment and sentence form, but the record indicated and the defendant

³ Although the stipulation did not identify the applicable statute, presumably the Arkansas offense was felony theft by receiving stolen property under former Ark. Code Ann. § 5-36-106 (2003).

acknowledged that the correct statute was used for sentencing). Therefore, the reference to RCW 46.12.750 was a substantive error rather than a scrivener's error.

We hold that the trial court erred as a matter of law in including Greer's 2005 Arkansas conviction in his offender score.

3. Remedy

Greer requests that we remand for a new sentencing hearing. We grant that relief.

At resentencing, Greer's stipulation regarding his 2005 Arkansas conviction will have no effect. However, if the parties do not enter into another stipulation, the State will be able to submit additional evidence that the 2005 Arkansas conviction is legally or factually comparable to a Washington conviction. RCW 9.94A.530(2).

In addition, depending on the outcome of the new sentencing hearing, Greer's offender score could be lower than the parties believed at the time of his guilty plea. Therefore, if the trial court determines on remand that the 2005 Arkansas conviction was not comparable to a Washington offense, Greer will be free to file a motion to withdraw his guilty plea on the basis that his plea was not knowing and intelligent.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Greer argues that he received ineffective assistance of counsel for several reasons. We either reject or decline to consider Greer's ineffective assistance of counsel claims.

1. Legal Principles

We review claims of ineffective assistance of counsel *de novo*. *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the

deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation is deficient if after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 33. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have been different. *Id.* at 34.

We presume that counsel's assistance was effective unless the defendant shows in the record the absence of legitimate or tactical reasons supporting counsel's conduct. *Id.* at 33-34.

2. Failure to Argue the Motion to Withdraw Guilty Plea

Greer argues that his counsel was deficient for not assisting him with his motion to withdraw his guilty plea. We disagree.

Greer claims that defense counsel abandoned him when he attempted to withdraw his plea. But the record does not support this claim. Defense counsel raised the motion with the trial court, but then told the court that Greer would speak about the precise reasons why he wanted to withdraw his plea because defense counsel was unaware of them himself. There is no indication that Greer objected to the manner in which defense counsel proceeded or that his defense counsel refused to assist with the motion.

Accordingly, we hold that under the facts here, counsel was not deficient regarding Greer's motion to withdraw his guilty plea.

3. Stipulation to Comparability of 2014 Arkansas Conviction

Greer argues that he received ineffective assistance of counsel when defense counsel allowed him to stipulate that his 2014 Arkansas conviction was comparable to an offense under

RCW 9A.44.050(1)(b). We hold that the record is insufficient to resolve this argument and therefore decline to address it.⁴

Out-of-state convictions can be included in a defendant's offender score only if they are either legally or factually comparable to a Washington offense. *State v. Arndt*, 179 Wn. App. at 378-79. Offenses are legally comparable if the elements of the out-of-state offense are the same or narrower than the Washington statute. *State v. Olsen*, 180 Wn.2d 468, 472-73, 325 P.3d 187 (2014). Offenses are factually comparable when defendant's actual conduct underlying the out-of-state offense would have violated the Washington statute. *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

Greer claims that counsel was deficient for allowing him to stipulate to comparability because the applicable Arkansas statute was much broader than the Washington statute and therefore could not be legally comparable.⁵ However, an offense that is not legally comparable can still be factually comparable. *Arndt*, 179 Wn. App. at 379. The record contains no information about the facts of Greer's offense, and therefore it is insufficient to determine whether the 2014 Arkansas conviction is factually comparable to an offense under RCW 9A.44.050(1)(b). In the absence of such information, we cannot determine whether defense counsel's performance was deficient.

⁴ Greer makes the same argument regarding his stipulation that his 2005 Arkansas conviction was comparable to a Washington offense. Because we are reversing Greer's sentence based on that invalid stipulation, we need not address this issue.

⁵ The stipulation does not state the applicable Arkansas statute, but Greer assumes based on the description "sex aslt 2," that the applicable Arkansas statute is Ark. Code Ann. § 5-14-125.

For the same reasons, Greer cannot show prejudice even if defense counsel was deficient. Greer would have to establish that if he had not stipulated that the 2014 conviction was comparable to a Washington offense, the State would have been unable to prove factual comparability. The record is insufficient to determine whether or not the 2014 Arkansas conviction was factually comparable to an offense under RCW 9A.44.050(1)(b).⁶

Because the record is insufficient to determine if defense counsel was deficient for allowing Greer to stipulate to the comparability of the 2014 Arkansas conviction, we decline to consider Greer's ineffective assistance of counsel claim based on that conviction. The appropriate means for asserting this claim is through a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

4. Failure to Ask for Low End Sentence

Greer argues that his defense counsel was deficient by not asking the trial court for a sentence on the low end of the standard range as stated in the plea agreement. Because we remand for resentencing, we need not address this issue.

D. APPELLATE COSTS

Greer asks that we not impose costs if the State prevails. We decline to address this issue. A commissioner of this court will determine whether to award appellate costs under RAP 14.2 if the State decides to file a cost bill and if Greer objects to that cost bill.

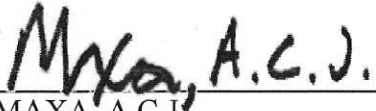
CONCLUSION

We affirm Greer's conviction, but we reverse his sentence and remand for resentencing.

⁶ Greer relies on *Thiefault*, to argue that an absence of facts in the record requires this court to find that there was a reasonable probability of prejudice. 160 Wn.2d at 417. But that case is distinguishable and does not apply here.

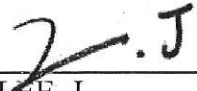
No. 48833-7-II

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.



MAXA, A.C.J.

We concur:



LEE, J.



SUTTON, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DEDRIC LAMAR GREER,

Appellant.

No. 48833-7-II

ORDER DENYING MOTION FOR
RECONSIDERATION

Appellant moves for reconsideration of the court's July 25, 2017 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Sutton

FOR THE COURT:

Maxa, A.C.J.
ACTING CHIEF JUDGE

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DIVISION II
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STATE OF WASHINGTON
BY *CDL*
DEPUTY

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 48833-7-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

respondent Chelsey Miller, DPA
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 19, 2017

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Appellate Court Case Title: State of Washington, Respondent v. Dedric Lamar Greer, Appellant
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