No. 98878-1

The Supreme COURT
OF THE STATE OF WASHINGTON

State of Washington, Respondent,
v.

Juan Ortiz, Petitioner,

MOTION FOR DISCRETIONARY REVIEW

Treated as a Petition for Review,
see Clerk's letter dated 10/20/20

Juan Ortiz
[Name of petitioner]

CBCC
1830 Eagle crest way
Clallam bay, WA
98326
[Address]

A. Identity of Petitioner

Juan ortiz [Name] asks this court to accept review of the decision designated in Part B of this motion.

B. Decision

[Statement of the decision or parts of decision petitioner wants reviewed, the court entering or filing the decision, the date entered or filed, and the date and a description of any order granting or denying motions made after the decision such as a motion for reconsideration.]

A motion For Reconsideration was file on June 15, 2020, and the court of Appeals Division one file a motion for denying for Reconsideration on 7/27/20.

A copy of the decision [and trial court memorandum opinion] is in the Appendix.

C. Issues Presented for Review

[Define the issues which the court is asked to decide if review is granted.]

The Sentencing court erred by allowing the plea agreement to limit its discretion to consider an exceptional sentence down, or to consider the mitigating factors at sentencing. State v. Barber, 170 Wn. 2d 854, 870, 248 P. 3d 494 (2011). A plea agreement cannot bind a court to impose a sentence that is contrary to law". In re det. of Brooks, 183 Wn. App. 319, 324, 333 P. 3d 494 (2014). The Sentencing court also erred and did not consider the mitigating factors at sentencing. A defendant may Appeal such a Sentence, if the trail court refused to exercise its discretion. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P. 2d 1104 (1997). The letter of Declaration by Isai Alvarez should also be review, the court of Appeals also misapplied what the letter Applied. It clearly states the conversations being said by Isai Alvarez, father Pablo ortiz had with counsel nowhere on the letter does it show my family understood the consequences of me entering the guilty plea, and it clearly shows the rules of proffesional misconduct 8.4(a) being Applied when counsel stated that my family should talk me out of wanting to withdraw the guilty plea.

D. Statement of the Case

[The statement should be brief and contain only material relevant to the motion.]

The Sentencing Courts did not consider the mitigating factors and conclude that a mid-range sentence was appropriate. But the Sentencing Courts error and misunderstood and misapplied the Scope of its discretion. Gilbert, 193 Wn. 2d at 177 ("Because the Judge presiding over Gilbert's resentencing believed he did not have discretion to consider anything other than an adjustment to the aggravated murder sentence, he did not consider whether the mitigating factors of Gilberts youth might warrent an exceptional sentence. We hold this to be error.

E. Argument Why Review Should Be Accepted

[The argument should be short and concise and supported by authority.]

Their is nothing to suggest on record that the trail court exercise its discretion to consider the mitigating factors, or the mandatory duty it had to consider an exceptional Sentense down. If the trail court had not misunderstood the Scope of its discretion and properly considered the options available to it, and had consider the mitigating factors of the defendant, the outcome could have been much differnt. this court should reverse the sentence and finding of guilty and allow me to withdraw the invalid plea, or as in Gilbert, this court should at the very least remand to give the trail court the opportunity to exercise its full discretion.

F. Conclusion

[State the relief sought if review is granted.]

The court should vacate the invalid guilty plea and remand for a trail. Or, at the very least, the court should remand for resentencing in which the trail court can exercise the full scope of its proper discretion under the Eighth Amendment and Houston-Sconiers.

DATED this 10 day of 18, 2020.

Respectfully submitted,

Petitioner

APPENDIX

FILED
7/27/2020
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. JUAN ORTIZ, Appellant.	No. 81363-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Juan Ortiz, filed a motion for reconsideration of the opinion that was filed on June 15, 2020. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Andrus, A.C.J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JUAN ORTIZ, Appellant.	)	No. 81363-3-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — After pleading guilty to first degree murder and second degree assault, Juan Ortiz challenges the validity of his plea agreement, contends his guilty plea was involuntary, and argues the trial court abused its discretion in refusing to continue his sentencing hearing to give him time to move to withdraw the plea. In a consolidated personal restraint petition, Ortiz contends he received ineffective assistance of counsel.

We conclude Ortiz's plea agreement did not restrict the trial court's discretion to consider his youth as required by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). We further conclude that Ortiz understood he was forgoing the right to request an exceptional sentence, that the court did not abuse its discretion in refusing to grant a fifth continuance of the sentencing hearing, and that Ortiz has not demonstrated ineffective assistance of counsel. We therefore affirm Ortiz's conviction and sentence and deny his personal restraint petition.

FACTS

In 2010, the State charged Ortiz with first degree murder, first degree assault, and first degree unlawful possession of a firearm. CP 1-2. The State alleged that Dean Salavea was at Juan Zuniga's residence with Zuniga when Ortiz and Naitaalii Toleafoa[1] arrived. Within seconds of their arrival, four to five gun shots rang out. A witness saw Ortiz leave Zuniga's home through the front door, carrying a handgun. Ortiz was 17 years old.

Police responded to the home on May 12, 2010, and found Zuniga dead. He had several gunshot wounds, including what appeared to be an execution-style wound to the back of the head.[2] Salavea had tried to run, but he succumbed to at least one gunshot wound to the back, which ultimately rendered him paraplegic.

Ortiz fled to Mexico. Over six years later, on August 30, 2016, Ortiz was arrested in Mexico. He was extradited to Pierce County and arraigned on April 5, 2017.

On February 13, 2018, Ortiz entered an Alford[3] plea to first degree murder, with a firearm sentencing enhancement, and second degree assault. The plea included a provision relating to the parties' sentencing recommendations: "State

[1] In late 2013, Toleafoa was extradited from Mexico, and on June 17, 2014, he pleaded guilty to one count of first degree murder with a firearm sentence enhancement.

[2] The State contended Zuniga's execution was premeditated. He was the leader of the Eastside Lokotes Surenos gang and was, at the time of his murder, in disfavor with other members of the gang, including Ortiz. The State alleged that senior gang members decided to execute Zuniga, choosing Ortiz and Toleafoa to carry out the order, and that Salavea had the misfortune of being in the wrong place at the wrong time.

[3] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "In an Alford plea, the accused technically does not acknowledge guilt but concedes there is sufficient evidence to support a conviction." In re Pers. Restraint of Cross, 178 Wn.2d 519, 521, 309 P.3d 1186 (2013). Washington adopted the Alford holding in State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976).

will recommend high end sentence and defense will recommend low end sentence."

The court reviewed the probable cause declaration and Ortiz's plea statement and found the facts alleged, if proven, would support the charges. After conducting an in-depth colloquy with Ortiz regarding the terms of the plea agreement, the court accepted the guilty plea, finding it was voluntary and made with an understanding of its direct and collateral consequences. The court scheduled Ortiz's sentencing hearing for February 23, 2018.

Defense counsel subsequently requested, and the court granted, four continuances of the sentencing date, to allow further professional evaluation of Ortiz's intellectual capacity. On June 12, 2018, Ortiz—apparently, without consulting with his counsel—noted a motion to withdraw his guilty plea. The court set a hearing on the motion for June 18, 2018, a week before the June 25, 2018 sentencing date. Before the June 18 hearing, Ortiz requested to strike the hearing. No pleadings related to the motion were ever filed.

At the outset of the June 25 sentencing hearing, Ortiz informed his counsel that he again wanted to withdraw his guilty plea. Counsel asked the court to continue the sentencing hearing yet again so he could consult with Ortiz on the request. Counsel indicated some of the reports on Ortiz's intellectual capacity could have spurred Ortiz's desire to withdraw his plea, but without revealing attorney client privileged communications, he could not discuss the matter further at that time. The court asked counsel if the report implicated a lack of intellectual capacity, which could render Ortiz's guilty plea invalid. Counsel assured the court

that was not the case, stating he would have brought a formal motion if that was a concern. The court denied the continuance, and Ortiz's sentencing hearing proceeded.

At sentencing, the State recommended a high-end sentence based on Ortiz's criminal history and the underlying seriousness of the crimes. As allowed by the plea agreement, defense counsel argued the Houston-Sconiers factors justified a sentence at the low end of the sentencing range. In support of that recommendation, counsel presented evidence of Ortiz's troubled youth, including intellectual disabilities impairing his development and bullying leading to his protection by gang members, one of whom was his older brother.

The court sentenced Ortiz to the mid-range standard sentence for the first degree murder charge—320 months. With the 60-month firearm enhancement, Ortiz was sentenced to 380 months total confinement,[4] with a mandatory minimum of 20 years confinement and 36 months of community custody.

Ortiz appeals the denial of his request to continue the sentencing hearing, and in a separate personal restraint petition, claims he received ineffective assistance of counsel.

ANALYSIS

Ortiz argues the trial court abused its discretion by denying his request to continue the sentencing hearing, erred in allowing the plea agreement to limit its sentencing discretion under Houston-Sconiers, and erred in finding the plea

[4] Ortiz's sentence included 17 months on the second degree assault charge, to be served concurrently with the first degree murder sentence and firearm enhancement.

agreement to be knowing and voluntary. In his personal restraint petition, Ortiz argues counsel provided ineffective assistance on multiple grounds. We address each argument in turn.

Motion to Continue Sentencing Hearing

Ortiz argues the trial court abused its discretion by denying his motion to continue sentencing so he could file a motion to withdraw his guilty plea. We review a trial court's decision to deny a motion to continue under an abuse of discretion standard. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The record does not show the court abused its discretion here.

Courts are statutorily required to hold sentencing hearings within 40 court days of a defendant's conviction, unless good cause is shown to extend the time period for conducting the hearing. RCW 9.94A.500(1); CrR 7.1(a)(1). Here, the trial court had already continued Ortiz's sentencing hearing four times. And at the time defense counsel sought a fifth continuance—with no promise that Ortiz would file a motion to withdraw his guilty plea, given the previously stricken hearing—Ortiz was 4 months post-conviction, well beyond the statutory 40 court days.

Additionally, pre-judgment, courts must allow defendants to withdraw guilty pleas whenever it appears the withdrawal is necessary to correct a "manifest injustice." CrR 4.2(f). "A manifest injustice exists where (1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) counsel was ineffective; or (4) the plea agreement was not kept." State v. DeClue, 157 Wn. App. 787, 792, 239 P.3d 377 (2010). "The injustice must be 'obvious, directly observable, overt, [and] not obscure.'" Id. (alteration in original) (quoting State v.

Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). "The defendant's burden when seeking to withdraw a plea is demanding because ample safeguards exist to protect the defendant's rights before the trial court accepts the plea." Id.

In this case, counsel provided no reason to believe a manifest injustice might exist, even telling the court he did not think anything in the professional evaluations rendered Ortiz's plea involuntary or unknowing. Thus, it was not unreasonable for the court to consider Ortiz's second, last minute request to withdraw his guilty plea as "a manipulation, frankly, of the sentencing procedure." The trial court did not abuse its discretion by denying Ortiz's motion to continue the sentencing hearing.[5]

Validity of Plea Agreement

Next, Ortiz argues his plea agreement is invalid under Houston-Sconiers because it limited the trial court's sentencing discretion and did not allow the court to consider Ortiz's youth at the time the crimes were committed. We reject this argument because the plea agreement did not limit the trial court's sentencing discretion. Furthermore, the record demonstrates the trial court exercised its discretion and considered Ortiz's youth when deciding the appropriate sentence.

In Houston-Sconiers, minor defendants were sentenced to over 30 years without the possibility of parole. 188 Wn.2d at 13. The trial court concluded it could not sentence the defendants to less than 30 years because of the firearm

[5] Under CrR 7.8, a defendant may move to vacate a guilty plea even after he is sentenced. Thus, the trial court's refusal to continue the sentencing hearing did not prevent Ortiz from filing a motion to vacate.

enhancement requirements in the Sentencing Reform Act[6] (SRA). Id. at 13, 20-21. But our Supreme Court disagreed, holding that

> sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant . . . . To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.

Id. at 21. The court went on to explain:

> [I]n exercising full discretion in juvenile sentencing, the court must consider mitigating circumstances related to the defendant's youth—including age and its "hallmark features," such as the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences." It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and "the way familial and peer pressures may have affected him [or her]." And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.

Id. at 23 (second alteration in original) (citations omitted) (quoting Miller v. Alabama, 567 U.S. 460, 477, 132 S. Ct. 2455, 2468, 183 L. Ed. 2d 407 (2012)).

In this case, the State and defense counsel represented to the court in their sentencing memoranda that they had agreed Ortiz would not seek an exceptional downward departure from the guidelines based on any of the factors set out in Houston-Sconiers. The State represented:

> The State and defense negotiated the present plea resolution that allows the State to argue for high end and [Ortiz] to argue for low end of the standard range. The court should understand, however, the so-called Houston-Sconiers factors (related to [Ortiz's] youth) have been specifically considered by the State and defense in negotiating the case and the defense has agreed not to use these

[6] Chapter 9.94A RCW.

> factors as a basis for recommending an exceptional sentence downward.

Defense counsel confirmed this agreement:

> The State . . . correctly noted in its Sentencing Memorandum that the parties have considered [Ortiz's] "youth" in negotiating this case and the [d]efense has specifically agreed to not use the Houston-Sconiers factors as a basis for recommending an exceptional sentence below the standard range.

Ortiz contends this agreement violates Houston-Sconiers because it restricted the trial court's discretion to impose an exceptional sentence based on Ortiz's youth. We disagree. It is well established that a defendant may waive the ability to request an exceptional sentence as a part of a plea agreement. "Agreements to forgo seeking an exceptional sentence, to decline prosecuting all offenses, to pay restitution on uncharged crimes, and to waive the right to appeal are all permissible components of valid plea agreements." State v. Lee, 132 Wn.2d 498, 506, 939 P.2d 1223 (1997). That is all that Ortiz did here.

Indeed, Ortiz's plea statement itself clearly indicated that while the parties were going to make their own sentencing recommendations, "[t]he judge does not have to follow anyone's recommendation as to sentence." Consistent with statutory requirements, the trial court informed Ortiz it was not required to follow either parties' sentencing recommendations and it would do what it thought the law required. See RCW 9.94A.431(2) ("The sentencing judge is not bound by any recommendations contained in an allowed plea agreement and the defendant shall be so informed at the time of plea."). Counsel stated he had explained, and Ortiz represented he understood, the judge did not have to follow anyone's recommendation as to the sentence.

And the record demonstrates the trial court did not believe its discretion had been limited in any way by the plea agreement. At the sentencing hearing, defense counsel argued Ortiz's age, background, developmental difficulties, bullying, and the need to seek protection from gang members as a result of the bullying, were all mitigating factors justifying a low-end standard range sentence. Counsel discussed how Ortiz's cognitive and intellectual difficulties and small stature led him to seek the protection of the gang with which his older brother was affiliated. He explained that English was Ortiz's mother's second language so when many of Ortiz's problems began to present themselves in middle school, she was unable to fully comprehend the ramifications. Counsel represented that Ortiz lived in high-risk environments, causing him to constantly seek interaction with protectors who ultimately exploit him. Finally, counsel acknowledged that Ortiz had a "jaded view of the world. He has some misguided loyalties that prevent going forward in this case to his benefit."

In delivering the sentence, the trial court recognized that "youthful offenders are susceptible to peer pressure," that "[t]hey act with impulsivity," and that "they act in a manner that doesn't reflect their understanding of the long-range consequences of their behavior." The court reasoned, however, that this crime was a premeditated execution. It found the killing had not occurred in the context of Ortiz being picked on or bullied. The court also pointed out that Ortiz successfully eluded authorities in Mexico for six years. And while it was not unsympathetic to Ortiz's cognitive challenges, "those challenges don't morph a murderer into a victim." Although it could "appreciate that [those challenges] may

render that particular individual susceptible to . . . [a] lack of foresight and [an] inability to resist peer pressures," the court did not think the circumstances of this case warranted a sentence at the low end of the standard range.

The record demonstrates the court considered all the mitigating circumstances related to Ortiz's youth—immaturity, impetuosity, failure to appreciate risks and consequences, environmental and familial circumstances, the extent of his participation in the crime, the effect of familial peer pressures, and factors suggesting Ortiz might be successfully rehabilitated. The plea agreement did not limit the trial court's discretion, and the trial court exercised its full discretion, even if it did not sentence Ortiz—a minor at the time of the charged crimes—to an exceptional sentence below the standard range. We therefore reject Ortiz's argument that the trial court's discretion was improperly limited by the plea agreement.

Voluntariness of Plea Agreement

Ortiz next contends his plea was involuntary because the trial court did not ensure he understood he was waiving his "rights" to an exceptional sentence under Houston-Sconiers. CrR 4.2(d) requires a trial court to determine if a guilty plea is made "voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." Due process requires a defendant's guilty plea to be knowing, intelligent, and voluntary. State v. Codiga, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). "There is a strong public

interest in the enforcement of plea agreements when they are voluntarily and intelligently made." Codiga, 162 Wn.2d at 922; see also In re Det. of Scott, 150 Wn. App. 414, 426, 208 P.3d 1211 (2009).

The question here is not whether Ortiz understood he was waiving his right to an exceptional sentence. No such right exists. The question is whether Ortiz understood he was waiving the right to request an exceptional sentence. The record demonstrates he did.

At the plea hearing, defense counsel drew the court's attention to the fact that the alleged crime occurred in 2010, when Ortiz was under 18 years of age. Counsel indicated, "We went over the four instances where the [c]ourt could go above or below the standard range sentence." Paragraph 6(k) of Ortiz's plea statement identified one of the four instances to include "if the judge finds mitigating circumstances supporting an exceptional sentence." Ortiz initialed this paragraph, indicating he understood it. Counsel also stated on the record, "No one in this case will be asking for an above or below the standard range sentence." This agreement was documented in Paragraph 6(j) of the plea statement, also initialed by Ortiz. In addition, Ortiz signed the plea statement, representing that "[m]y lawyer has explained to me, and we have fully discussed, all of the above paragraphs . . . . I understand them all." "A defendant's signature on a plea statement is strong evidence of a plea's voluntariness." Scott, 150 Wn. App. at 427.

The court engaged Ortiz in an extensive colloquy to ensure Ortiz understood the terms of the plea and its consequences. Although the court did not

explicitly reference Houston-Sconiers, it asked Ortiz if he understood the provisions of his plea statement which, by implication, included the sentencing recommendation and exceptional sentence provisions. Ortiz told the court his counsel had gone over the plea statement with him "paragraph by paragraph" and "line by line."[7] "When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable." Branch, 129 Wn.2d at 642 n.2 (internal quotation marks omitted) (quoting State v. Perez, 33 Wn. App. 258, 262, 654 P.2d 708 (1982)); see also Scott, 150 Wn. App. at 427.

The record demonstrates that Ortiz understood the judge could impose an exceptional sentence based on the presence of mitigating circumstances and that he understood he had agreed not to ask for such a sentence. We are not aware of any case requiring a court to ask a defendant if he understands that his age is a mitigating circumstance that might justify an exceptional sentence before the court can accept a defendant's agreement to forgo asking for an exceptional sentence. We therefore deny Ortiz's claim on appeal that the trial court erred in finding the plea to be knowing and voluntary.

Ineffective Assistance of Counsel

To obtain judicial relief through a personal restraint petition, an inmate must show by a preponderance of the evidence that he is being unlawfully restrained under RAP 16.4. See In re Pers. Restraint of Yates, 177 Wn.2d 1, 16-17, 296 P.3d

[7] Paragraph 6(e)(i) also notified Ortiz that because he was under the age of 18 at the time of the crime, if sentenced to more than 20 years of confinement, he could be able to petition the Indeterminate Sentence Review Board for early release after serving 20 years. Defense counsel stated he had explained this provision to Ortiz as well.

872 (2013). There is no dispute that Ortiz is being restrained by the Department of Corrections. The only issue is whether that restraint is unlawful. RAP 16.4(c)(2) makes a restraint unlawful if a conviction was obtained "in violation of the Constitution of the United States or the Constitution or laws of the State of Washington." Thus, Ortiz must show by a preponderance of the evidence that any alleged constitutional error actually prejudiced him. Yates, 177 Wn.2d 1 at 17.

A petitioner must support his unlawful restraint claim with factual evidence, rather than conclusory allegations. In re Pers. Restraint of Gronquist, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999). As an evidentiary prerequisite, the petitioner must demonstrate he has competent, admissible evidence to establish facts that entitle him to relief. In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Once the petitioner makes this threshold factual showing, the court then examines the State's response, which must answer the allegations and identify any material disputed questions of fact. Id.; RAP 16.9. To define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence. Rice, 118 Wn.2d at 886. If the parties' evidence establishes the existence of material disputed issues of fact, then we may direct the superior court to hold a reference hearing to resolve these factual disputes. Id. at 886-87.

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel, including during the plea process. In re Pers. Restraint of Riley, 122 Wn.2d 772, 779-80, 863 P.2d 554 (1993); see also State v. Sandoval,

171 Wn.2d 163, 169, 249 P.3d 1015 (2011). "Counsel's faulty advice can render the defendant's guilty plea involuntary or unintelligent." Sandoval, 171 Wn.2d at 169. To establish the plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the familiar Strickland[8] two-prong test. Id.; see also Hill v. Lockhart, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Ortiz must prove objectively unreasonable performance (the performance prong) and actual prejudice (the prejudice prong). Riley, 122 Wn.2d at 780. "The court may begin its review of the defendant's claim with an examination of either prong. If the prejudice prong is not proved by the defendant, then the court need not proceed to an examination of the performance prong." Id.

To satisfy the performance prong in the guilty plea context, Ortiz must show that counsel failed to substantially assist him in deciding whether to plead guilty. In re Pers. Restraint of Cross, 180 Wn.2d 664, 705, 327 P.3d 660 (2014), abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018); see also Hill, 474 U.S. at 59. The failure to advise a defendant of available options and possible consequences during plea negotiations constitutes ineffective assistance of counsel. State v. Cox, 109 Wn. App. 937, 940, 38 P.3d 371 (2002) (quoting In re Pers. Restraint of McCready, 100 Wn. App. 259, 263-64, 996 P.2d 658 (2000)). To satisfy the prejudice prong, a defendant challenging a guilty plea "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Riley, 122 Wn.2d at 780-81.

[8] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Ortiz submitted his declaration and a declaration from his nephew, Isai Alvarez, stating that defense counsel failed to inform Ortiz that by pleading guilty, he "waived [his] right to use Houston-Sconiers," told Ortiz he would receive a low-end sentence because of his age and mental status, refused to help Ortiz file a motion to withdraw his guilty plea, failed to provide Ortiz with discovery when requested, and pressured Ortiz into accepting the plea offered by the State. We conclude Ortiz has not shown by a preponderance of the evidence that counsel's performance was objectively unreasonable.

As to the allegation that he was not informed he was waiving any right to seek an exceptional sentence under Houston-Sconiers, we conclude Ortiz has not proved this accusation by a preponderance of evidence. The record demonstrates Ortiz was aware he had agreed to seek a low-end sentence rather than push for an exceptional sentence based on any mitigating circumstances. And in his declaration and the testimony of Alvarez, it is clear both understood Ortiz's age and his cognitive limitations were mitigating circumstances. Ortiz told the court that his counsel had gone over the entire plea statement with him and that he understood every paragraph and every line. We therefore reject his Houston-Sconiers claim under the performance prong.

We similarly conclude Ortiz has not demonstrated deficient performance in the advice counsel gave on the likelihood he would be sentenced at the low end of the standard range. At the plea hearing, Ortiz was present when counsel explicitly stated that the charge carried a mandatory minimum sentence of 20 years, that Ortiz's standard range based on his criminal history was 271 months to

361 months,[9] that he and Ortiz would be requesting a sentence at the low end of this range, that the State would request a sentence at the high end of the range, that the court could accept or reject either party's recommendation, and that Ortiz had the legal option of seeking early release from the Indeterminate Sentence Review Board after serving 20 years of any sentence. The declaration testimony from Ortiz and Alvarez supports a conclusion that counsel advised Ortiz there was a strong possibility counsel could convince the court to accept his recommendation for a low-end sentence because of Ortiz's age and background, but there is no evidence before us that counsel ever "promised" he could guarantee the court would do so. In fact, at his plea hearing, Ortiz represented to the court that no one made him any promises to convince him to plead guilty. And the court, before accepting Ortiz's guilty plea, made it absolutely clear that it would ultimately decide the most appropriate sentence, regardless what defense counsel or the State recommended. The record does not support Ortiz's claim that counsel's performance regarding sentencing advice was deficient.

Nor does the record support Ortiz's allegations that trial counsel refused to assist Ortiz in filing a motion to withdraw his guilty plea. At the sentencing hearing, defense counsel specifically stated:

> Mr. Ortiz is bringing his own motion to withdraw the guilty plea. He informed me this morning that he would like to withdraw his plea. I am not sure, because I have not sat down and consulted with him, the basis for that withdrawal.
>
> I can let the [c]ourt know that approximately ten days ago, Mr. Ortiz wanted to withdraw his plea and then changed his mind. A hearing was set, and that was struck at his request.

[9] This range does not include the 60 months for the firearm sentence enhancement.

> Given that he told me a few minutes before the [c]ourt took the bench that he would like to withdraw his plea, I'm certainly not aware of the basis for his withdrawal. On his behalf, I'd ask the [c]ourt to set this matter over to allow him to inform me or file his own motion if that's what he wants to do.

When the trial court suggested that Ortiz was manipulating the sentencing process, defense counsel explained that "as part of the plea agreement, . . . the [d]efense was not afforded the opportunity to argue age as a factor under Houston-Sconiers," so counsel had asked that Ortiz be evaluated for his intellectual capacity. The first evaluation indicated Ortiz had a "significantly low intelligence level." Counsel was uncomfortable with the results and asked that Ortiz be reexamined. After he received the results from the second evaluation, Ortiz expressed a desire to withdraw his plea based on reasons other than any alleged diminished intellectual capacity. Counsel stated that Ortiz had a basis for his motion, but counsel could not disclose it to the court without Ortiz's permission: "So Mr. Ortiz this morning informs me that he would like to go forward on those – on other issues not specifically related to his intelligence level." The trial court rejected Ortiz's request to continue the sentencing hearing for the fifth time, despite counsel's advocacy.

This record demonstrates defense counsel did not refuse to assist Ortiz in bringing a motion to withdraw his plea. Counsel in fact scheduled a hearing on the motion and only struck it because Ortiz changed his mind. And when Ortiz changed his mind again, counsel attempted to obtain a continuance of the sentencing hearing so he could consult with Ortiz about bringing the motion.

Furthermore, Ortiz has not explained what basis he now has for withdrawing his guilty plea, other than the Houston-Sconiers claims we have rejected. "[A] trial

court is not required to waste valuable court time on frivolous or unjustified CrR 4.2 motions." State v. Davis, 125 Wn. App. 59, 68, 104 P.3d 11 (2004). Without demonstrating a manifest injustice requiring the withdrawal of his guilty plea under CrR 4.2(f), Ortiz has not met the threshold to prove by a preponderance of evidence that his counsel was deficient in failing to file such a motion.

As to the remaining allegations, the evidence does not meet the threshold to create an issue of fact on the prejudice prong. We have no evidence that the discovery materials Ortiz claimed he did not receive would have materially changed the outcome of a trial such that he would have insisted on going to trial rather than pleading guilty. And Ortiz stated at his plea hearing that no one threatened, manipulated, coerced, or induced him to plead guilty and that it was his choice to enter the Alford plea of his own free will.

Because Ortiz fails to make a threshold showing of deficient performance that actually prejudiced him, we conclude Ortiz's ineffective assistance of counsel claim fails and deny his personal restraint petition.

Affirmed.

Andrus, A.C.J.

WE CONCUR:

Mann, C.J.

Leach, J.

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FAOZ

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