

NO. 35041-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

LUIS RUEDA-NACASPACA

Appellant.

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

The Honorable James J. Stonier, Judge

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BRIEF OF APPELLANT

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DIVISION TWO  
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A. ASSIGNMENT OF ERROR

Defense counsel's failure to ensure that appellant understood the sentencing consequences of proceeding under the plea agreement denied appellant effective representation.

Issue pertaining to assignment of error

Where trial counsel failed to ensure that appellant understood that, under the terms of the plea agreement, he could not ask for a lesser term of confinement and that he could not appeal the length of a standard range sentence, did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On March 15, 2005, the Cowlitz County Prosecuting Attorney charged appellant Luis Rueda-Nacaspaca with six counts of Violation of the Uniform Controlled Substances Act. CP 1-3; RCW 69.50.401(1). Rueda-Nacaspaca pled guilty to three counts, and the state dismissed the remaining charges. CP 4-6, 7-13. Under the terms of the plea agreement, the state recommended high end standard range sentences of 60 months with nine to 12 months of community custody, and the court imposed the recommended sentence. CP 9, 18.

This Court subsequently granted Rueda-Nacaspaca's personal restraint petition, holding that he was erroneously sentenced beyond the statutory maximum of 60 months for his class C felonies and remanding for resentencing. CP 23-24. On June 8, 2006, following a resentencing hearing, the Honorable James J. Stonier entered an order modifying Rueda-Nacaspaca's sentence, deleting the term of community custody. CP 25-26. Rueda-Nacaspaca filed this timely appeal. CP 29.

## 2. Substantive Facts

Rueda-Nacaspaca was appointed counsel to represent him on remand. 1RP<sup>1</sup> 4. At the resentencing hearing, counsel informed the court that the state had proposed striking the community custody from Rueda-Nacaspaca's sentence, leaving the 60-month term of confinement, and that the defense had agreed to the state's proposal. 3RP 3-4. When the court asked Rueda-Nacaspaca if he wanted to make a statement about his sentence, however, Rueda-Nacaspaca asked the court if it would consider imposing an exceptional sentence downward.<sup>2</sup> 3RP 5.

Defense counsel then informed the court that she had discussed the exceptional sentence and DOSA issues with Rueda-Nacaspaca and explained to him that if he asked for either of those, he would breach the

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<sup>1</sup> The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—6 /1/06; 2RP—6/2/06; 3RP—6/8/06.

<sup>2</sup> Rueda-Nacaspaca addressed the court through an interpreter. 3RP 4-8.

plea agreement. She believed he understood he could either exercise that option or accept the state's proposal, and she understood he wanted to accept the state's proposal. Because of Rueda-Nacaspaca's statements, she asked the court to inquire of Rueda-Nacaspaca what choice he would like to make. 3RP 5-6.

The court then stated that Rueda-Nacaspaca had entered a Statement on Plea of Guilty agreeing to a sentence of 60 months in prison and asked Rueda-Nacaspaca if he was seeking to withdraw his guilty plea. 3RP 6. Rueda-Nacaspaca responded that he just wanted everyone to be sure they were doing the right thing, so that there would be no error and he would not have to return. 3RP 6. He said he did not wish to withdraw his guilty plea because he is guilty, but he wanted to know if he would still have the right to appeal. 3RP 6-7.

The court then stated that since this would be a standard range sentence, he would not have the right to appellate counsel and a direct appeal. Counsel interjected that it was her position that she would file a notice of appeal any time a client requested, and let the courts resolve whether there was an appealable issue. 3RP 7-8. The court then told Rueda-Nacaspaca he could file a notice of appeal, and Rueda-Nacaspaca said he understood. 3RP 8.

C. ARGUMENT

COUNSEL'S FAILURE TO ENSURE RUEDA-NACASPACA WAS AWARE OF THE CONSEQUENCES OF PROCEEDING UNDER THE PLEA AGREEMENT DENIED RUEDA-NACASPACA EFFECTIVE REPRESENTATION.

The state and federal constitutions guarantee criminal defendants reasonably effective representation by counsel. U.S. Const., amend. VI; Const., art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 6674, 104 S. Ct. 2052 (1984). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland, 466 U.S. at 685. Deficient performance by counsel which prejudices the defense fails to secure this crucial right. Strickland, 466 U.S. at 687.

The first prong of the Strickland test for ineffective assistance of counsel requires a showing that defense counsel's performance "fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The defendant must overcome the presumption that there might be a sound trial strategy for counsel's actions. Strickland, 466 U.S. at 689.

As the parties and court below recognized, because Rueda-Nacaspaca had been misinformed as to a direct consequence of his guilty plea, his plea was involuntary, and he had the option of either withdrawing his plea or specifically enforcing the plea agreement. See State v. Mendoza, 157 Wn.2d 582, 590-91, 141 P.3d 49 (2006). An attorney advising a defendant with regard to a plea agreement has the duty to ensure that the defendant understands the available options and possible consequences. Hawkman v. Parratt, 661 F.2d 1161, 1170 (8<sup>th</sup> Cir. 1981).

Here, defense counsel failed to ensure that Rueda-Nacaspaca understood that choosing to proceed under the plea agreement would preclude him from seeking a lesser term of confinement, either at resentencing or on appeal. Rueda-Nacaspaca's lack of understanding was clearly demonstrated at the resentencing hearing, first when he asked the court to consider an exceptional sentence downward, and again when he asked whether he could appeal the agreed-upon standard range sentence. When the court responded that he did not have the right to a direct appeal of a standard range sentence, counsel correctly pointed out that even a standard range sentence might involve legal errors or an abuse of discretion which could be appealed. She failed, however, to ensure that Rueda-Nacaspaca understood he could not appeal the *length* of a standard range sentence.

When a defendant accepts a plea deal and gives up his constitutional right to a jury trial, counsel must be vigilant to ensure the defendant is fully informed and makes any decision with his eyes wide open. That did not happen in this case, and counsel's failure constituted deficient performance.

The second prong of the Strickland test requires a showing that counsel's deficient performance prejudiced the defense. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. Thomas, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

It is clear from the procedural posture of this case as well as Rueda-Nacaspaca's comments at resentencing that Rueda-Nacaspaca was hoping to obtain a reduction in his confinement time. He had successfully challenged the length of his sentence in a personal restraint petition, and he asked the court to consider imposing an exceptional sentence downward. It is also clear that, due to counsel's deficient performance, he did not understand that choosing to proceed under the plea agreement

would preclude him from seeking that outcome. This deficient performance undermines the outcome of the case, because there is a reasonable probability that Rueda-Nacaspaca was prejudiced by the lost opportunity to make a fully-informed decision.

D. CONCLUSION

Rueda-Nacaspaca did not receive the effective assistance of counsel guaranteed to him by the state and federal constitutions, and the Court should remand for resentencing.

DATED this 21<sup>st</sup> day of February, 2007.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Luis Rueda-Nacaspaca*, Cause No. 35041-6-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski  
Done in Port Orchard, WA  
February 21, 2007

DEPUTY  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
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COURT OF APPEALS  
DIVISION II