

Nº. 35326-1-II

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

STATE OF WASHINGTON
Respondent,

v.

PATRICK BOYD DRUM,
Appellant.

COURT OF APPEALS
DIVISION II
07 FEB 20 11 51:33
STATE OF WASHINGTON
BY _____
DEPUTY

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 05-1-00007-2

Eric M. Fong
WSBA No. 26030
Attorney for Appellant
569 Division Street, Suite A
Port Orchard, Washington 98402-4629
(360) 876-8205

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A. ASSIGNMENTS OF ERROR

- (1) The trial court erred in changing Mr. Drum's sentence at the request of the Department of Corrections.
- (2) Mr. Drum received ineffective assistance of counsel.
- (3) The trial court erred in denying Mr. Drum's pro se Motion to Amend Sentence.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- (1) Is it error to "amend" a sentence based on a Plea Agreement because it is contrary to law without allowing the defendant to select a remedy? (Assignments of Error No. 1, 2, and 3)
- (2) Does a defendant receive ineffective assistance of counsel where counsel misstates the law applicable to plea bargains and agrees that the court should amend a sentence based on a plea bargain without seeking a remedy? (Assignment of Error No. 2)
- (3) Does the court err in denying a CrR 7.8 motion as "untimely" where the amended judgment and sentence was not "valid on its face"? (Assignment of Error No. 3)

C. STATEMENT OF THE CASE

On January 3, 2005, an Information was filed charging Mr. Drum with one count of residential burglary in violation of RCW 9A.52.025(2) and one count of attempted assault in the third degree in violation of RCW 9A.36.031 and RCW 9A.28.020(1). CP 1-3.

On February 22, 2005, an Amended Information was filed charging Mr. Drum with one count of burglary in the second degree in violation of RCW 9A.52.030. CP 11-12.

Also on February 22, 2005, Mr. Drum signed and the trial court (Hon. Sally F. Olsen) accepted a plea agreement with the following provisions:

- An offender score of 9
- Mr. Drum's criminal history included
 - residential burglary 9/29/04
 - witness tampering 5/26/02
 - VUCSA 3/25/02
 - PSP 2nd degree 5/15/01
 - UIBC 12/31/99
 - residential burglary 6/24/98
 - burglary 1st degree (juvenile) 10/29/94
- 60 months recommended sentence
- DOSA of 30 months; standard range waived

Other provisions of the Plea Agreement state:

The Defendant agrees that any attempt to withdraw the Defendant's guilty plea(s), or any attempt to appeal or collaterally attack any conviction or agreed sentence entered under this cause number will constitute a breach of this agreement.

* * *

The Defendant agrees that upon a finding by the Court that the Defendant has breached any term of this agreement:

(i) That the State will be released from its obligations under this agreement, but that the Defendant will still be bound by the guilty plea(s); and

(ii) That the State will be authorized to file any additional charges, any greater offenses based on the same conduct, and/or any statutory enhancements that were not filed or were dismissed as part of this plea agreement, and that neither double jeopardy nor mandatory joinder rules will be cause for dismissal of the new and/or additional charges or enhancements; and

(iii) That the Defendant may be sentenced anew; and

(iv) That the State's exercise of any of its rights under this agreement shall not be grounds to vacate any guilty plea, conviction or sentence entered under this cause number.

CP 21-26; 2/22/05 RP 1-10.

On February 22, 2005, the court entered judgment by guilty plea and sentenced Mr. Drum to a DOSA Sentence of 59.5 months, with actual time to be served 30 months. CP 28; CP 36.

On March 22, a letter from the Department of Corrections to Judge Sally F. Olsen, Prosecutor James T. Mitchell, and defense counsel Timothy P. Kelly was filed in Superior Court, stating in pertinent part:

Mr. Drum was received at the Washington Corrections Center on February 24, 2005 on one count of Burglary 2nd

with an offense date of January 1, 2005. After review of the Judgment and Sentence, it appears there may be an error in sentencing.

Per RCW 9.94A.660(1)(a)(b) An offender is eligible for the special drug offender sentencing alternative if: “The offender is convicted of a felony that is not a violent offense. . . .” and “The offender has no current or prior convictions for a sex offense or violent offense in this state, another state, or the United States.” Since Section 2.2 reflects a prior violent offense (Burglary 1st), it appears Mr. Drum would be ineligible for the DOSA sentencing option on this new conviction.

Please review this information and advise the Department of Corrections if you still feel the DOSA sentence is appropriate. If you determine that Mr. Drum is not eligible, we respectfully request the court amend the Judgment and Sentence to remove the DOSA option and sentence him within the standard range.

CP 38.

On May 3, 2005, the court entered an Order for Production of Prisoner (Patrick Boyd Drum) For Hearing to be Held on May 20, 2005 on “oral motion of the Prosecutor.” CP 49. Mr. Drum appeared before the trial court (Hon. Theodore Spearman). During the hearing, defense counsel told the court:

Mr. Drum is here on an order of production from the Department of Corrections. The Department of Corrections has taken the position that a DOSA sentence that was previously imposed was unlawful because of a prior violent offense as a juvenile. And in reviewing the applicable statutes and case law, it appears that the Department of Corrections is correct. But I think Judge Olsen probably

should hear this because she would be amending her own sentence, and I think that's the custom.

5/20/05 RP 2.

On May 27, Mr. Drum appeared before Judge Olsen. Defense counsel stated:

Your Honor, in this matter he originally received a DOSA sentence sometime I believe it was last year, the beginning of this year. Unfortunately, certain case law has come to our attention that makes his juvenile burg 1 conviction – precludes him from doing a DOSA.

* * *

I've done my research. The court granted me an additional week, since I was unavailable last week. The case still is valid law, and there is no way to get around that. So at this point, unfortunately, I think we have to sentence Mr. Drum to a non-DOSA conviction. I believe the state is going to recommend bottom end of the standard range, and we concur with that.

5/27/05 RP 3.

The following then took place:
JUDGE OLSEN: All right.

For the record, could you indicate what the standard range is again?

MS. BARHAM [Prosecutor]: Yes, your Honor. He has an offender score of 9. So he's looking at a standard range of 51 to 68 months. And the state's recommendation is for bottom of the range.

JUDGE OLSEN: All the other financials in the previous judgment and sentence remain in effect? That's the states [sic] recommendation?

MS. BARHAM: Yes, your Honor.

JUDGE OLSEN: Thank you.

Mr. Drum, I will impose the bottom of the range, 51 months.

It's unfortunate that we have to do this, but –

MR. DRUM: Yeah. That's the way it goes when you get high and go into people's houses.

JUDGE OLSEN: You are still ordered to do the drug and alcohol eval as part of the community custody.

MR. DRUM: Yeah.

JUDGE OLSEN: Just not – not a DOSA.

In this matter I am imposing the bottom of the range, 51 months confinement, to be served concurrently with 04-1-00110-8.

5/27/05 RP 3-4.

The court then entered an Amended Judgment and Sentence of 51 months imprisonment, to be served concurrently with the sentence ordered in cause number 04-1-00110-8. CP 50, 53; CP 60.

On July 20, 2006, Mr. Drum filed a pro se "Motion to Amend Sentence" pursuant to CrR 7.8, and noted the motion for August 18, 2006. CP 74-78. On August 18, 2006, the trial court (Hon. Karlynn Haberly) stated on the record:

Mr. Drum was sentenced on February 22, 2005 to the current sentence. He has now filed a motion to amend the sentence, and I am going to reject it as being untimely. I will deny the motion.

Anything state wants to add?

MS. HATHORN: No, Your Honor.

8/18/06 RP 2; CP 79.

On August 28, 2006, Mr. Drum filed a pro se Notice of Appeal seeking review of “the Decision of Denial of ‘Motion to Amend Sentence.’” CP 82. Pro se, Mr. Drum also obtained an Order of Indigency (CP 91-92) and appellate counsel was subsequently appointed. *See* CP 93-94.

D. ARGUMENT

1. *The Court should consider the May 22, 2005 ruling of the Court in addition to the August 18, 2006 Order identified in the pro se Notice of Appeal.*

The pro se Notice of Appeal in this case identifies only the August 18, 2006 Order denying Mr. Drum’s Motion to Amend Sentence. However, RAP 2.4(a) and (b) provide that in addition to the decision designated in the notice of appeal, the Court will, “at the instance of the appellant”

review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the

notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

In this case, the trial court's May 22, 2005 ruling changing Mr. Drum's sentence prejudicially affected its August 18, 2006 decision denying Mr. Drum's Motion to Amend Sentence, and the ruling to "amend" the sentence was made before acceptance of review.

In accordance with RAP 2.4(a) and (b) and to give effect to RAP 1.2(a) that "[t]hese rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits," Mr. Drum requests the Court to consider the May 22, 2005 ruling in addition to the August 18, 2005 Order identified in the pro se Notice of Appeal.

2. *Mr. Drum is entitled to appeal from the standard-range sentence.*

The trial court imposed the low end of the standard range sentence on Mr. Drum. A sentence within the standard range is generally not appealable. RCW 9.94A.210(1). However, an appellate court will allow a challenge to a standard range sentence where, as here, the appellant challenges the procedure used by the court to impose the standard range sentence. *State v. Henderson*, 99 Wn. App. 369, 373, 993 P.2d 928 (2000), citing *State v. Ammons*, 105 Wn.2d 175, 182-183, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

3. ***The trial court erred in changing Mr. Drum's sentence at the request of the Department of Corrections.***

Mr. Drum's DOSA sentence was a term of the Plea Agreement accepted by the trial court. CP 21-26. After entry of the judgment and sentence imposing the DOSA sentence, the Department of Corrections pointed out that under RCW 9.94A.660(1)(a) and (b), Mr. Drum "would be ineligible for the DOSA" based on a juvenile offense of first degree burglary. CP 38. This first degree burglary is identified on the Plea Agreement (CP 22) as well as on the original judgment and sentence. CP 28.

- (a) The terms of the plea agreement conflict with the law.

RCW 9.94A.660(1) (a) and (b) provides:

(1) An offender is eligible for the special drug offender sentencing alternative if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533(3) or (4);

(b) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

In *State v. Smathers*, 109 Wn. App. 546, 548-550, 36 P.3d 1078 (2001), *review denied*, 146 Wn.2d 1017, 51 P.3d 87 (2002), this Court

made clear that juvenile adjudications for violent offenses constitute prior convictions for violent offenses, precluding DOSA eligibility. Burglary in the first degree is a “violent” offense. RCW 9.94A.030(50) (defining “violent offense” as any Class A felony); RCW 9A.52.020(2) (stating that burglary in the first degree is a Class A felony).

Under RCW 9.94A.660(1)(a) and (b), Mr. Drum was not eligible for a DOSA sentence.

- (b) Upon discovery that the terms of the plea agreement conflicted with the law, Mr. Drum was entitled to a choice of remedies.

[W]here the terms of a plea agreement **conflict with the law** or the defendant was not informed of the sentencing consequences of the plea, the defendant must be given the initial choice of a remedy to specifically enforce the agreement or withdraw the plea.

State v. Miller, 110 Wn.2d 528, 536, 756 P.2d 122 (1988) (emphasis added).

Here, the trial court accepted the defense counsel’s statements that Mr. Drum was not eligible for a DOSA sentence and, without giving Mr. Drum an opportunity to withdraw his guilty plea or enforce the plea agreement, simply resentenced him to 51 months imprisonment. This was a violation of Mr. Drum’s due process rights, and “[d]efendants’ constitutional rights under plea agreements take priority over statutory provisions.” *Miller*, 110 Wn.2d at 533, 756 P.2d 122. Not only was Mr.

Drum denied the opportunity to choose a remedy, he was denied any remedy at all.

(c) Mr. Drum is entitled to the benefit of his bargain.

In his pro se “Motion to Amend Sentence,” Mr. Drum asked for alternative relief, including reinstatement of his DOSA sentence. CP 74; CP 77.

This Court has written that “[t]he defendant is entitled to the benefit of his original bargain.” *State v. Tourtelotte*, 88 Wn.2d 579, 585, 564 P.2d 799 (1977) (citations omitted). “[T]he integrity of the plea bargaining process requires that once the court has accepted the plea, it cannot ignore the terms of the bargain, unless the defendant . . . chooses to withdraw the plea.” *Miller*, 110 Wn.2d at 536, 756 P.2d 122. Mr. Drum did not request to withdraw his plea: instead, he has asked for reinstatement of his DOSA sentence. In other words, Mr. Drum has selected the remedy of specific performance, to which he is entitled:

We have held that where fundamental principles of due process so dictate, the specific terms of a plea agreement based on a mistake as to sentencing consequences may be enforced despite the explicit terms of a statute.

Miller, 110 Wn.2d at 532, 756 P.2d 122.

Specific performance is available to Mr. Drum even though there is no breach of the plea agreement by the prosecutor. *See Miller*, 110

Wn.2d at 534, 756 P.2d 122 (“Although this case does not involve a prosecutor’s deliberate breach of a plea agreement, the defendant’s preference as to a remedy should be the primary focus of the court.”).

There are no “compelling reasons” in this case not to allow specific performance of the Plea Agreement. *See Miller*, 110 Wn.2d at 535, 756 P.2d 122. This is not a case such as *In re Baca*, 34 Wn. App. 468, 662 P.2d 64 (1983), identified by the *Miller* Court as a case where the defendant’s choice of specific performance would have been unfair because the violation of the plea agreement was caused by misinformation provided by the defendant about his criminal history. *Id.* Here, the juvenile first degree burglary was properly listed in Mr. Drum’s criminal history both on the Plea Agreement and on the Judgment and Sentence. The State and the trial court were both aware of Mr. Drum’s criminal history but recommended and imposed a DOSA sentence.

4. *Mr. Drum received ineffective assistance of counsel.*

Courts have interpreted the constitutional right to counsel as a guarantee of effective assistance by counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The right to counsel attaches at every critical stage of a criminal prosecution, including

sentencing. *State v. Bandura*, 85 Wn. App. 87, 97, 931 P.2d 174, review denied, 132 Wn.2d 1004, 939 P.2d 215 (1997).

To prevail on an ineffective assistance of counsel claim, a defendant must establish that (1) his counsel's performance was deficient and (2) the deficient performance was prejudicial. *Strickland*, 466 U.S. at 688-689; *Hendrickson*, 129 Wn.2d at 77, 917 P.2d 563. This Court reviews a claim of ineffective assistance of counsel de novo. *State v. SM*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

When a defendant is considering a plea bargain, effective assistance of counsel requires that counsel "actually and substantially [assist] his client in deciding whether to plead guilty." *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)).

(a) Mr. Murphy's assistance was deficient.

"In general, performance is deficient when it falls below an objective standard of reasonableness (citation omitted), but not when it is undertaken for legitimate reasons of trial strategy or tactics (i.e., for the defendant's ultimate benefit)." *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003).

Following the discovery by the Department of Corrections that Mr. Drum's plea agreement was contrary to law, Mr. Murphy's assistance was

deficient because Mr. Murphy failed to seek a remedy for Mr. Drum. Mr. Murphy simply told the court that since case law precluded Mr. Drum from receiving a DOSA sentence, “I think we have to sentence Mr. Drum to a non-DOSA conviction.” 5/27/05 RP 3. This statement is contrary to law governing plea agreements. Not only did trial counsel misstate the applicable law, but trial counsel failed to seek a remedy for Mr. Drum. This failure was not objectively reasonable, nor can it be characterized as legitimate “trial strategy.”

Mr. Murphy’s assistance was deficient, satisfying the first prong of the *Strickland/Hendrickson* test.

(b) Mr. Murphy’s deficient assistance was prejudicial to Mr. Johnson.

To show prejudice, a defendant must show that there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Horton*, 117 Wn. App. at 921-922, 68 P.3d 1145, quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *State v. Brett*, 126 Wn.2d 136, 199, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996).

Based on Mr. Murphy’s statements to the court, his “research” indicated there was “no way to get around” imposition of a “non-DOSA conviction.” 5/27/05 RP 3. Mr. Drum rightfully relied on Mr. Murphy to

explain the law to him. Had Mr. Murphy explained to Mr. Drum that he had a right to specific performance of the Plea Agreement, including the DOSA sentence, he undoubtedly would have sought specific performance to obtain the benefit of his bargain.

The second prong of the *Strickland/Hendrickson* test is also satisfied: the Court should rule that Mr. Johnson received ineffective assistance from Mr. Murphy.

5. *The trial court erred in denying Mr. Drum's pro se Motion to Amend Sentence.*

Under CrR 7.8(b), a court may relieve a party from a final judgment, order, or proceeding for mistakes in obtaining the judgment or order, newly discovered evidence, fraud, void judgment, or any other reason justifying relief from the operation of the judgment. This court reviews a trial court's CrR 7.8 ruling for an abuse of discretion. *State v. Forest*, 125 Wn.App. 702, 706, 105 P.3d 1045 (2005).

On July 20, 2006, fourteen months after the trial court amended Mr. Drum's sentence, Mr. Drum filed a pro se "Motion to Amend Sentence," citing CrR 7.8 as the basis for his motion. The trial court "rejected" the motion "as being untimely," and denied the motion. 8/18/06 RP 2. The court made no oral ruling on the merits of the motion, and entered no written findings of fact.

- (a) Mr. Drum’s amended judgment and sentence was not “valid on its face.”

CrR 7.8(b) requires that a motion filed pursuant to that rule “be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140.”

RCW 10.73.090(1) provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final **if the judgment and sentence is valid on its face** and was rendered by a court of competent jurisdiction.

(Emphasis added.)

Mr. Drum’s amended judgment and sentence included the documents signed as part of his Plea Agreement. *In re Goodwin*, 146 Wn.2d 861, 866 fn2, 50 P.3d 618 (2002). In determining whether a judgment and sentence is “valid on its face” for purposes of RCW 10.73.090(1), a court must also consider the plea agreement documents. *Id.*; see also *In re Pers. Restraint of Stoudmire*, 141 Wash.2d 342, 354, 5 P.3d 1240 (2000); *In re Pers. Restraint of Thompson*, 141 Wash.2d 712, 719, 10 P.3d 380 (2000).

Mr. Drum’s Plea Agreement included a DOSA sentence: the amended judgment and sentence did not. The judgment and sentence was

not “valid on its face,” and Mr. Drum’s CrR 7.8 motion was therefore not “untimely” under the rule itself or under RCW 10.73.090(1).

- (b) The trial court abused its discretion by “rejecting” and denying Mr. Drum’s pro se Motion to Amend Sentence because it was “untimely.”

The judge abuses his or her discretion if the discretionary decision is based on untenable grounds or untenable reasons. *State v. Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003, 914 P.2d 66, 1996. A decision is based on untenable grounds “if [the] factual findings are unsupported by the record.” *Id.* A decision is based on untenable reasons “if [the court] has used an incorrect standard, or the facts do not meet the requirements of the correct standard.” *Id.*

Here, the standard set out in RCW 10.73.090(1) is that collateral attacks on a judgment and sentence are prohibited after one year from entry if the judgment and sentence is “valid on its face.” Mr. Drum’s amended judgment and sentence is not “valid on its face,” and as in *Goodwin*, his Motion to Amend Sentence was therefore not “untimely” because it was filed over one year after the judgment was final. *Goodwin*, 146 Wn.2d at 866-867, 50 P.3d 618.

Because the judgment and sentence was not valid on its face, Mr. Drum’s Motion was not untimely as defined by RCW 10.73.090(1).

Therefore, the trial court abused its discretion in denying Mr. Drum's motion because it was "untimely."

6. This Court should vacate the amended judgment and sentence and remand for reinstatement of the DOSA sentence.

Mr. Drum is entitled to the benefit of his plea bargain (*Tourtellotte*, 88 Wn.2d at 585, 564 P.2d 799), one term of which was a DOSA sentence. "To place the defendant in a position in which he must again bargain with the state is unquestionably to his disadvantage." *Id.*

Mr. Drum's choice of remedy controls because there are no compelling reasons not to allow that remedy. *Miller*, 110 Wn.2d at 535, 756 P.2d 122. Mr. Drum identified alternative remedies in his pro se Motion to Amend Sentence, one of which is not available to him as a matter of law (removal of his juvenile adjudication of first degree burglary from his offender score). However, in the alternative, Mr. Drum asked the court to "[r]einstate my DOSA sentence, as was originally ordered in this case." CP 74; *see also* CP 78. This constitutes a choice of specific performance as a remedy.

This Court should vacate the amended judgment and sentence and remand for reinstatement of the original judgment and sentence, which included the DOSA sentence.

E. CONCLUSION

After it was discovered that Mr. Drum's Plea Agreement was contrary to law, the court amended his sentence from a DOSA sentence to a sentence in the standard range without the DOSA provision. Mr. Drum's counsel rendered ineffective assistance, and Mr. Drum was given no opportunity to choose a remedy.

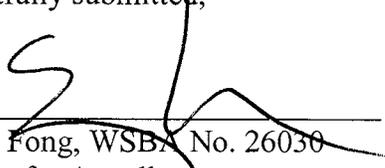
The trial court abused its discretion in denying Mr. Drum's pro se Motion to Amend Sentence because it was "untimely."

Mr. Drum chose the remedy of specific performance in his Motion to Amend Sentence.

The Court should vacate the amended judgment and sentence and reinstate the original judgment and sentence, including the DOSA provision.

DATED this 16 day of February, 2007.

Respectfully submitted,


Eric M. Fong, WSBA No. 26030
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II

07 FEB 20 AM 9:38

STATE OF WASHINGTON
BY an
DEPUTY

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 PATRICK BOYD DRUM,)
)
 Appellant.)

Appeal No. 35326-1-II
Superior Court No. 05-1-00007-2

DECLARATION OF MAILING

On this day I deposited in the United States Mail at Port Orchard, Washington, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

containing the original and one copy of the Brief of Appellant,

Mr. Randall Sutton
Attorney at Law
614 Division Street, MS-35
Port Orchard, WA 98366

Mr. Patrick Boyd Drum
DOC #784289 FN-B-15
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

containing a true copy of the Brief of Appellant.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this 16th day of February 2007, at Port Orchard, Washington.

Ann Blankenship
Ann Blankenship

ROVANG FONG & ASSOCIATES
569 DIVISION, SUITE A
PORT ORCHARD, WA 98366
TEL (360) 876-8205
FAX (360) 876-4745