

No. 35577-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

RICHARD A. NAPIER,
Appellant.

APPELLANT'S BRIEF

FILED
COURT OF APPEALS
DIVISION II
07 MAY 22 AM 11:49
STATE OF WASHINGTON
BY *NAPIER*

Carol A. Elewski, WSBA # 33647
Attorney for Appellant
P.O. Box 4459
Tumwater, WA 98501
(360) 570-8339

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

A. ASSIGNMENTS OF ERROR 1

 Assignments of Error 1

 1. The superior court erred in failing to ensure that Defendant was informed of all the direct consequences of his guilty plea, in particular, of the fact that Defendant's sentence could be consecutive to a sentence he was then serving on another matter. 1

 2. The superior court erred in allowing the defendant to plead guilty in violation of his constitutional rights to competent counsel. 1

 Issues Pertaining to Assignment of Error 1

 1. Was Defendant's guilty plea not knowing and voluntary when he was not informed of the direct consequence of the plea, *i.e.*, the fact that he could receive a sentence that ran consecutively to the sentence he was then serving on a King County matter, he affirmatively believed he could only receive a concurrent sentence, and his misunderstanding formed the basis for the plea? 1

 2. Alternatively, was trial counsel ineffective when she misinformed Defendant about the possibility of a consecutive sentence and the record of the sentencing hearing reveals that Defendant would not have pleaded guilty had he known he could receive a consecutive sentence? 2

Standards of Review	2
B. STATEMENT OF THE CASE	3
Introduction	3
Statement of Facts Relevant to Appeal	4
C. ARGUMENT	8
Point I: Mr. Napier's Guilty Plea Not Knowing and Voluntary When He Was Not Informed That He Could Receive a Consecutive Sentence, He Affirmatively Believed He Could Only Receive a Concurrent Sentence, and His Misunderstanding Formed the Basis for the Plea	8
Point II: Alternatively, Trial Counsel Was Ineffective When She Misinformed Mr. Napier about the Application of RCW 9.94A.589(3) and He Would Not Have Pleaded But for the Erroneous Advice	14
D. CONCLUSION	20
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

Table of Cases

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) 8

Chizen v. Hunter, 809 F.2d 560 (9th Cir. 1987) 13

Hill v. Lockhart, 474 U.S. 52, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985) 15, 19

In re Mathews, 128 Wn. App. 267, 115 P.3d 1043 (2005)
. 10

In re Vensel, 88 Wn.2d 552, 564 P.2d 326 (1977) 10

State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980)
. 10

State v. Champion, 134 Wn. App. 483, 140 P.3d 633
(2006) 16

State v. Kern, 55 Wn. App. 803, 780 P.2d 916 (1989)
. 16

State v. King, 78 Wn. App. 391, 897 P.2d 380 (1995)
. 12

State v. Linderman, 54 Wn. App. 137, 772 P.2d 1025
(1989) 16

State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006)
. 9, 11

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004)
. 15

State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996) 9

<u>State v. S.M.</u> , 100 Wn. App. 401, 996 P.2d 1111 (2000)	2
<u>State v. Stowe</u> , 71 Wn. App. 182, 858 P.2d 267 (1993)	15, 19
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	15
<u>United States v. Cortez</u> , 973 F.2d 764 (9th Cir. 1992)	13
<u>Wood v. Morris</u> , 87 Wn.2d 501, 554 P.2d 1032 (1976)	2, 9

Statutes

RCW 69.50.4013	4
RCW 9.94A.589(3)	10, 14, 16, 18-19

Constitutional Provisions

U.S. Const. amend. VI	14
U.S. Const. amend. XIV	8
Wash. Const. art. 1 § 22	14
Wash. Const. art. 1, § 3	8

A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The superior court erred in failing to ensure that Defendant was informed of all the direct consequences of his guilty plea, in particular, of the fact that Defendant's sentence could be consecutive to a sentence he was then serving on another matter.

2. The superior court erred in allowing the defendant to plead guilty in violation of his constitutional rights to competent counsel.

Issues Pertaining to Assignment of Error

1. Was Defendant's guilty plea not knowing and voluntary when he was not informed of the direct consequence of the plea, *i.e.*, the fact that he could receive a sentence that ran consecutively to the sentence he was then serving on a King County matter, he affirmatively believed he could only receive a concurrent sentence, and his misunderstanding formed the basis for the plea? This issue pertains to Assignment of Error No. 1.

2. Alternatively, was trial counsel ineffective when she misinformed Defendant about the possibility of a consecutive sentence and the record of the sentencing hearing reveals that Defendant would not have pleaded guilty had he known he could receive a consecutive sentence? This issue pertains to Assignment of Error No. 2.

Standards of Review

Issue 1: The record of a plea hearing or clear and convincing extrinsic evidence must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea. Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976).

Issue 2: Appellate courts review a claim of ineffective assistance of counsel *de novo*. State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

B. STATEMENT OF THE CASE

Introduction

Appellant, Richard Allen Napier, committed the instant offense prior to the imposition of sentence in a King County criminal case. He was serving the sentence in that matter when the sentence in this case was imposed.

Mr. Napier pleaded guilty in the instant case knowing that the State would ask the sentencing court to impose a sentence to run concurrently to his King County sentence. He was also informed that the court did not have to follow the recommendation. However, the record does not indicate that he was informed he could receive a consecutive sentence. To the contrary, the record reveals that Mr. Napier was under the false impression that the court was required to impose a concurrent sentence.

The superior court declined to follow the parties' recommendations, imposing a sentence to run consecutively to the King County matter.

On appeal, Mr. Napier argues that the failure to inform him he could receive a consecutive sentence made his plea involuntary in that he was not informed of the direct consequences of the plea. Alternatively, if this Court finds that his plea was knowing and voluntary, Mr. Napier submits that trial counsel was ineffective in misinforming him regarding the possibility of a consecutive sentence.

Statement of Facts Relevant to Appeal

Mr. Napier pleaded guilty to a one-count information charging him with possession of a controlled substance, methamphetamine, in violation of RCW 69.50.4013. Verbatim Report of Proceedings (RP) at 3-8; CP 1. In the Statement of Defendant on Plea of Guilty (Statement), Mr. Napier stated that on April 17, 2006, he unlawfully possessed methamphetamine. CP 5.

The Statement also contained the State's recommendation as to sentence. The State agreed to recommend, *inter alia*, twelve months plus a day in confinement, to run concurrently with the sentence

imposed in a King County matter, case number 06-11-04-222-7. CP 3. The Statement additionally noted that the judge was not required to follow anyone's recommendation as to sentence. *Id.* However, it did not explain that the sentence might be imposed to run consecutively to the King County case. See CP at 2-5.

The King County matter was resolved and sentenced prior to imposition of sentence in this case, but after commission of the instant crime. (King County Superior Court records indicate Mr. Napier was sentenced on June 30, 2006 in case number 06-11-04-222-7; the instant crime was committed on April 17, 2006.) Mr. Napier was sentenced to a total of 60 months' confinement on that case. RP at 8.

At the plea hearing in this case, occurring on October 11, 2006, Mr. Napier was informed of most consequences of his guilty plea, including the standard sentencing range and the fact that the court was not bound by the State's recommendation as to sentence. RP at 4 & 5. However, he was not informed that the court could impose a consecutive sentence. See RP at 3-7.

At sentencing, the court, viewing Mr. Napier's Stipulation on Prior Record and Offender Score, CP 6-8, determined, in light of his 33 prior felonies, to impose a 24-month sentence to run consecutively to the King County matter. RP at 9-10. At that point in the proceedings, Mr. Napier interrupted, "Your Honor, it's my understanding that it had to be concurrent." RP at 10. The court explained, "Well, that was the recommendation; but that's a King County case. It's an entirely separate matter, and I'm not going to run the Pierce County charge concurrent with the King County charge. I'm going to make it consecutive." RP at 10.

Defense counsel and Mr. Napier both tried to discuss the matter:

MS. CARNELL: And if I can, Your Honor --

THE DEFENDANT: Well, Your Honor, my --

RP at 10. However, the court declined to alter its decision. RP at 10-11.

Mr. Napier then asked to withdraw his plea, stating (apparently to defense counsel) "You told me that the case law was on my side." RP at 11. Counsel

and Mr. Napier briefly spoke off the record. Then the following discussion occurred:

MS. CARNELL: Because you can appeal it.

THE DEFENDANT: No. No. No. You told me that the case law was on my side --

MS. CARNELL: I never said that.

THE DEFENDANT: -- and that it would be concurrent.

MS. CARNELL: I also told you, she didn't have to follow the recommendation.

THE DEFENDANT: The problem with --

THE COURT: Okay. It's not your attorney's fault, sir. You pled guilty, and I have the ability to sentence you to anything within the standard range. That's 12 months plus one day to 24 months. You've got a horrendous criminal history.

THE DEFENDANT: That's not my point, Your Honor. My attorney told me that the case law was in my favor as far as current [sic] and consecutive, that it would be ranked concurrent --

THE COURT: Well, I'm not running it concurrent. I'm running it consecutive.

THE DEFENDANT: Well, then I want to pull my plea.

THE COURT: Well, I'm not going to deal with that today.

MS. CARNELL: Just hang in there for right now.

RP at 11-12. As the court imposed sentence, Mr. Napier interjected, apparently to his attorney, "You lied to me." RP at 12. The proceedings concluded with Mr. Napier's statement, "My lawyer lied to me." *Id.*

This appeal followed. CP 22.

C. ARGUMENT

Point I: Mr. Napier's Guilty Plea Not Knowing and Voluntary When He Was Not Informed That He Could Receive a Consecutive Sentence, He Affirmatively Believed He Could Only Receive a Concurrent Sentence, and His Misunderstanding Formed the Basis for the Plea

The superior court violated Mr. Napier's due process rights in permitting him to plead guilty without being informed of all the direct consequences of his plea. See U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. A guilty plea must be knowing, intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The record of a plea hearing or clear and convincing extrinsic evidence must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an

understanding of the full, direct consequences of the plea. Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976). "A defendant need not be informed of all possible consequences of a plea but rather only direct consequences." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The State bears the burden of proving the validity of a guilty plea. Ross, 129 Wn.2d at 287.

Here, due process was violated when Mr. Napier was not informed of the direct consequence of his plea: a consecutive sentence. See State v. Mendoza, 157 Wn.2d 582, 586, 141 P.3d 49 (2006) (noting Court has "repeatedly held that a defendant may challenge the voluntariness of a guilty plea when the defendant was misinformed about sentencing consequences resulting in a more onerous sentence than anticipated"). Whether a sentence is consecutive or concurrent determines the maximum sentence. Thus, failure to advise Mr. Napier that his sentence could be consecutive was a failure to apprise him of the maximum sentence.

It is well-established that being informed of the direct consequences of a plea includes being informed

of the maximum sentence. CrR 4.2(g); In re Vensel, 88 Wn.2d 552, 564 P.2d 326 (1977); see also State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980) (citing Vensel and holding habitual criminal finding not direct consequence of plea); In re Mathews, 128 Wn. App 267, 272, 115 P.3d 1043 (2005), quoting 5 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 21.4(d), at 167 (2d ed. 1999) ("When one enters a plea of guilty he should be told what is the worst to expect. At the plea he is entitled to no less--at sentence he should expect no more.").

Accordingly, while a consecutive sentence in this case was not an automatic consequence of the guilty plea,¹ it was just as direct a consequence as the

¹ Under the circumstances present here, RCW 9.94A.589(3) requires a concurrent sentence, unless the court explicitly makes the sentence consecutive: whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

maximum possible sentence, the imposition of which is also not an automatic consequence. Cf. Mendoza, 157 Wn.2d at 588 (noting that a sentencing consequence is direct when "the result represents a definite, immediate and *largely automatic* effect on the range of the defendant's punishment") (citations and internal quotations omitted, emphasis added). For these reasons, the court erred in accepting Mr. Napier's plea without informing him of the likelihood of a consecutive sentence.

Moreover, the court's failure to inform Mr. Napier of the direct consequences of his plea caused a material misunderstanding which formed the basis for the plea. The record reveals that Mr. Napier affirmatively believed that he could not receive a consecutive sentence: As soon as the court imposed a consecutive sentence, Mr. Napier stated, "Your Honor, it's my understanding that it had to be concurrent." RP at 10. When the court explained its discretion to impose a consecutive sentence, Mr. Napier became increasingly upset, averring that his attorney told him

he would get a concurrent sentence, asking to withdraw his plea, and ultimately calling the attorney a liar for her representations to him. RP at 10-12. Under these circumstances, it is clear that he actually did not know that he could receive a consecutive sentence. Cf. State v. King, 78 Wn. App. 391, 396-97, 897 P.2d 380 (1995) (concluding defendant understood that sentence could be consecutive when prosecutor advised that it would recommend "that those prison terms be served consecutively, one after another").

Mr. Napier's reaction to the sentence distinguishes this situation from ones where the court simply declines to follow the parties' recommendation. Here, the record reveals that while Mr. Napier knew the court could impose a higher sentence, he did not know that it could impose a sentence consecutive to the King County sentence he was then serving. And the difference between a consecutive and a concurrent sentence was crucial to the plea decision in this case.

When Mr. Napier believed he could only get up to a 24-month sentence that was concurrent to the 60-month

sentence he was then serving, whatever length the judge ultimately imposed was almost irrelevant. Indeed, to a person with his criminal history, an additional conviction could not make much difference, so long as it did not increase his prison time. Thus, the whole basis of the plea hinged on the fact that Mr. Napier believed he could only get a concurrent sentence. The possibility of a consecutive sentence changed the very the foundation for the plea.

Further, Mr. Napier's misunderstanding regarding his sentence was based not only on the court's failure properly to advise him, but on counsel's erroneous advice. See Point II, below. Under these circumstances, the involuntary nature of his plea is only more evident. See United States v. Cortez, 973 F.2d 764 (9th Cir. 1992) (holding guilty plea involuntary when defendant was misinformed of his right to assert selective prosecution motion on appeal); Chizen v. Hunter, 809 F.2d 560 (9th Cir. 1987) (guilty plea involuntary when attorney misinformed defendant about maximum sentence).

For all of these reasons, when the possibility of a consecutive sentence increased the maximum sentence in this case and undermined the entire basis for the plea, Mr. Napier's guilty plea was not knowing and voluntary when the court failed to ensure he understood he could receive a consecutive sentence. Accordingly, he respectfully requests this Court to vacate his guilty plea.

Point II: Alternatively, Trial Counsel Was Ineffective When She Misinformed Mr. Napier about the Application of RCW 9.94A.589(3) and He Would Not Have Pleaded Guilty But for the Erroneous Advice

Mr. Napier was denied his right to effective counsel when his trial attorney misinformed him regarding the application of RCW 9.94A.589(3). A defendant's right to counsel includes the right to effective counsel. See U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both that defense counsel's representation fell below an objective standard of reasonableness and that, but for

this deficient representation, there is a reasonable probability that the result of the proceeding would have been different. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citations omitted). If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The Strickland test applies to claims of ineffective assistance of counsel in the plea process. Hill v. Lockhart, 474 U.S. 52, 57, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985). "During plea bargaining, counsel has a duty to assist the defendant actually and substantially in determining whether to plead guilty." State v. Stowe, 71 Wn. App. 182, 186, 858 P.2d 267 (1993) (citations and internal quotation marks omitted) (finding ineffective assistance of counsel when attorney misinformed defendant of ability to maintain army career after Alford plea). Counsel must inform a defendant of all direct consequences of a guilty plea

and must not affirmatively misinform the defendant of the collateral consequences. Id. at 186-87.

Here, both prongs of the Strickland test are met. First, counsel affirmatively misinformed Mr. Napier about the application of RCW 9.94A.589(3), amounting to deficient performance. See Stowe, 71 Wn. App. at 186-87. Under RCW 9.94A.589(3), a sentencing court has full discretion to impose a consecutive sentence for any reason or for no reason, and its decision is not appealable. See State v. Champion, 134 Wn. App. 483, 487, 140 P.3d 633 (2006) (denying Blakely challenge to sentence imposed under RCW 9.94A.589(3) because statute does not require judicial fact-finding; discussing sentencing court's "unfettered discretion" under statute); State v. Linderman, 54 Wn. App. 137, 139, 772 P.2d 1025 (1989) (noting "total discretion" applicable in trial judge's decision whether to impose a consecutive sentence under predecessor statute to RCW 9.94A.589(3)); State v. Kern, 55 Wn. App. 803, 806, 780 P.2d 916 (1989) (similar). Thus, in this case, counsel gave erroneous advice to the extent she conveyed any message other than "the judge has full discretion to

make this sentence consecutive to the King County matter, and there would be nothing you could do about it."

While the transcript does not record the actual pre-plea discussions between Mr. Napier and his counsel, three aspects of the record compel the conclusion that counsel misinformed him about the application of RCW 9.94A.589(3). First, the record reveals Mr. Napier's sincere belief that the court could only impose a concurrent sentence. See RP at 10 ("Your Honor, it's my understanding that [the sentence] had to be concurrent."); RP at 11 (Mr. Napier asked to withdraw his plea); RP at 12 (same). His evident belief that the court had to impose a concurrent sentence is consistent with counsel's misstatements on this matter.

Second, the transcript records what Mr. Napier stated his counsel told him. At least three times he stated that counsel told him the case law was on his side. RP at 11. While counsel denied it once, she also answered "I also told you, she didn't have to follow the recommendation." Id. Moreover, without

objection by counsel, Mr. Napier stated that counsel told him "that [his sentence] would be ranked concurrent." RP at 12. Under these circumstances, it is fairly clear that, at a minimum, counsel told him that the case law favored a concurrent sentence.

Of course, this representation was not true. As discussed above, no case law inhibits a court's unfettered discretion to impose a consecutive sentence under RCW 9.94A.589(3). Accordingly, counsel's representation to Mr. Napier that the case law was on his side was an erroneous statement of the law.

Third, it is a matter of record that counsel told Mr. Napier that he could appeal the consecutive nature of the sentence:

THE DEFENDANT: I want to withdraw my plea.
You told me that the case law was on my side.
(Brief pause while Defendant confers with
Counsel.)

MS. CARNELL: Because you can appeal it.

THE DEFENDANT: No. No. No. You told me
that the case law was on my side --

RP at 11. When no appeal lies from the imposition of a consecutive sentence under RCW 9.94A.589(3), this statement was also an erroneous statement of the law.

Accordingly, the record compels the conclusion that counsel misinformed Mr. Napier regarding the application of RCW 9.94A.589(3), the erroneous advice amounts to deficient performance, and the first prong of the Strickland test is satisfied.

Next, the second prong of Strickland is satisfied because Mr. Napier was prejudiced by the deficient performance. Prejudice in the plea context is established by showing "a reasonable probability that, but for counsel's unprofessional errors, defendant would not have pleaded guilty and would have insisted on going to trial." Stowe, 71 Wn. App. at 188, citing, Hill v. Lockhart, 474 U.S. at 58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Stowe, 71 Wn. App. at 188 (citation omitted).

Here, Mr. Napier made clear at the sentencing hearing that the only reason he pleaded guilty was because he believed the court had to impose a concurrent sentence. Once disabused of that belief, he repeatedly asked to withdraw his plea. RP at 10-12. Under these circumstances, it is plain that Mr. Napier

would not have pleaded guilty had he known the court could impose a consecutive sentence. See Point I, above (explaining basis for guilty plea). Accordingly, counsel's erroneous advice prejudiced Mr. Napier, he pleaded guilty in violation of his right to effective counsel, and this Court should vacate his conviction.

D. CONCLUSION

For all of these reasons, Richard Allen Napier respectfully requests this Court to vacate his conviction.

Dated this 21st day of May, 2007.

Respectfully submitted,



Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 21st day of May, 2007, I served the original and one copy of the attached brief by U.S. mail, postage prepaid, to:

The Court of Appeals
Of the State of Washington
950 Broadway, Suite 300
Tacoma, WA 98402-4454;

and one copy of the attached brief to:

Ms. Kathleen Proctor
Pierce County Deputy Prosecuting Attorney
930 Tacoma Avenue South
Tacoma, Washington 98402-2102
Respondent's Attorney; and

Mr. Richard A. Napier
DOC # 631136 C-W-A-9-L
Olympic Corrections Center
11235 Hoh Mainline
Forks, WA 98331-9492.

FILED
COURT OF APPEALS
DIVISION II
07 MAY 22 AM 11:49
STATE OF WASHINGTON
BY Carol Elewski
DEPUTY


Carol Elewski