

NO. 35577-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD ALLEN NAPIER, APPELLANT

STATE OF WASHINGTON
BY *[Signature]*
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Clerk of Court

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stoltz

No. 06-1-02271-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant's plea voluntary when he was advised of all the direct consequences of his plea?
2. Was defense counsel deficient when she informed defendant that the sentencing judge did not have to follow the parties' joint sentencing recommendation, but could impose any sentence up to the maximum authorized by law?

B. STATEMENT OF THE CASE.

On May 22, 2006, the State charged Richard Allen Napier, hereinafter "defendant," with one count of unlawful possession of a controlled substance, methamphetamine. CP1. On October 11, 2006, defendant and his attorney appeared before the Honorable Katherine M. Stoltz for plea and sentencing. RP 3-12. The parties made a joint sentencing recommendation of 12 months plus one day to run concurrent with defendant's sentence on a King County conviction, plus standard costs, fines, and community custody. CP 2-5; RP 5, 8. The court sentenced defendant to a standard range sentence of 24 months, standard costs, fines, and 9-12 months community custody. CP 9-21; RP 9-10. The

court ordered that defendant's sentence be served consecutively to defendant's King County sentence. CP 9-21; RP 10.

This timely appeal follows.

C. ARGUMENT.

1. DEFENDANT'S PLEA WAS KNOWING, INTELLIGENT, AND VOLUNTARY AND WITH AN UNDERSTANDING OF THE NATURE OF THE CHARGES AND THE CONSEQUENCES OF HIS PLEA.

- a. The court's discretionary ruling imposing consecutive sentences pursuant to RCW 9.94A.589(3) was not a direct consequence of defendant's guilty plea.

To be valid, a guilty plea must be knowing, intelligent, and voluntary. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). "An involuntary plea produces a manifest injustice." In re Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). In addition to the constitutional requirements, criminal pleas are governed by rules of court. CrR 4.2(d) provides:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

A criminal defendant must be informed of all the direct consequences of his plea prior to the court's acceptance of the defendant's guilty plea. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). However, a defendant need not be advised of all possible collateral consequences of his plea. Barton, at 305; State v. Mace, 97 Wn.2d 840, 841, 650 P.2d 217 (1982). "The distinction between direct and collateral consequences of a plea 'turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" Barton, at 305 (quoting Cuthrell v. Director, 475 F.2d 1364, 1366 (4th Cir.), cert. denied, 414 U.S. 1005 (1973)); see State v. Olivas, 122 Wn.2d 73, 96, 856 P.2d 1076 (1993).

Courts have found that mandatory community placement is a direct consequence of a defendant's guilty plea. State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996). Community placement affects the punishment flowing immediately from the guilty plea and, in and of itself, imposes a punishment. Id. at 285, 286. In the context of a direct consequence, the courts examine whether the effect of the consequence enhances the defendant's sentence or alters the standard punishment. Id. at 285. The courts have found that community placement is a punishment because it places significant restrictions on a defendant and it furthers the punitive purposes of deterrence and protection. See In re Davis, 67 Wn. App. 1, 9

n.5, 834 P.2d 92 (1992) (describing community placement as part of an inmate's punishment).

In contrast, mandatory DNA testing, discretionary habitual criminal proceeding, federal sentence restricting possession of firearms, and registration requirements for sex offenders are all collateral consequences of a guilty plea. See State v. Olivas, 122 Wn.2d 73, 99, 856 P.2d 1076 (1993) (holding that DNA testing is a collateral consequence of a guilty plea); Barton, 93 Wn.2d at 305 (a defendant need not be informed of the possibility of a habitual criminal proceeding because it is a collateral consequence of a guilty plea); In re Ness, 70 Wn. App. 817, 823, 855 P.2d 1991 (1993) (federal sentence restricting possession of firearms is a collateral consequence of a guilty plea); and State v. Ward, 123 Wn.2d 488, 513-14, 869 P.2d 1062 (1994) (although the duty to register as a sex offender flows from a conviction for a felony sex offense, it does not enhance the sentence or punishment and is, therefore, a collateral consequence of a plea). Failure to notify a defendant of a collateral consequence of a guilty plea will not render the plea involuntary.

Similarly, the imposition of a consecutive sentence under RCW 9.94A.589(3) is a collateral consequence to defendant's guilty plea. While there is no Washington case on point, the Ninth Circuit has consistently held that a consecutive sentence is a collateral consequence of a plea.

Torrey v. Estelle, 842 F.2d 234 (9th Cir. 1988); see United States v. Kikuyama, 109 F.3d 536 (9th Cir. 1997) (court's failure to inform defendant that he was subject to a consecutive sentence did not make defendant's plea involuntary); United States v. Rubalcaba, 811 F.2d 491 (9th Cir. 1986) (citing United States v. Hamilton, 568 F.2d 1302, 1305-06 (9th Cir. 1978)) (defendant need not be told that the sentences to each count may run consecutively); Johnson v. United States, 460 F.2d 1203 (9th Cir. 1972) (citing Tibbs v. United States, 459 F.2d 292 (9th Cir. 1972), and Hinds v. United States, 429 F.2d 1322 (9th Cir. 1970)) ("sentencing court is not required to advise a defendant that prison terms could be made to run consecutively"). Because the possibility of a consecutive sentence is a collateral consequence, there is no duty to advise defendant of the courts discretion.

In the present case, defendant incorrectly asserts that the court's discretionary ruling to impose a consecutive sentence pursuant to RCW 9.94A.589(3) was a direct consequence to his guilty plea. Defendant offers no authority to support his assertion. Brief of Appellant 9, 10. Contrary to defendant's assertion, under RCW 9.94A.589(3), a consecutive sentence is discretionary, and therefore not "largely automatic" and, unlike community placement, does not enhance defendant's punishment.

RCW 9.94A.589(3) states in the relevant part:

[W]henever 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.

Because the presumption under RCW 9.94A.589(3) is for a concurrent sentence, a consecutive sentence is not “largely automatic” as required by Barton. In fact, for the court to impose a consecutive sentence, the court must make an express order to that effect. RCW 9.94A.589(3). When the court orders a defendant’s standard range sentence to run consecutively to a sentence the defendant is currently serving, the resulting sentence is not enhanced and no additional punishment has been imposed. Defendant’s claim that his plea was not voluntary must fail because defendant was informed of all direct consequences of his plea.

- b. Defendant’s plea was voluntary because he was aware the court did not have to follow the parties’ joint recommendation for concurrent sentences and could impose any sentence so long as it was within the standard range.

Assuming *arguendo*, that this court were to find the sentencing court’s discretionary ruling to run defendant’s King County and Pierce

County sentences consecutively as a direct consequence of his plea, defendant's argument still fails because his attorney advised him that the sentencing court did not have to follow the parties' joint recommendation.

When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g), and acknowledges that he or she has read it and understands it, and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. In re Keene, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); In re Teems, 28 Wn. App. 631, 626 P.2d 13 (1981); State v. Ridgley, 28 Wn. App. 351, 623 P.2d 717 (1981). "When the judge inquires 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." State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982); State v. Hystad, 36 Wn. App. 42, 45, 671 P.2d 793 (1983).

In the present case, defendant signed a statement of defendant on plea in which he stated he was entering the plea voluntarily. CP 2-5. The plea form clearly advised defendant that the judge did not have to follow anyone's recommendation as to sentence. CP 2-5. Defendant's attorney advised the court that it was her belief defendant was entering into the plea voluntarily, and the defendant responded affirmatively to the court's oral inquiry that he was voluntarily entering into the plea. RP 3-4, 7.

The record reflects that both the defendant and the defense attorney were aware the sentencing court did not have to follow the parties' recommendation for a concurrent sentence. RP 4-5. At the outset, the defense attorney advised the court that

[She and the defendant]...discussed the standard range for this matter and the maximum term; and [defendant] understands that the recommendation being made is just a recommendation, that Your Honor is not bound by that recommendation. I believe...Mr. Napier is making a knowing, intelligent, and voluntarily [sic] plea.

RP 4.

Later in the hearing, the sentencing court engaged the defendant in the following colloquy prior to taking his plea.

COURT: You have an offender score of 9 plus. The standard range is 12 months plus to 24 months in custody. Community custody would be 9 to 12 months, and the maximum is 5 years and/or 10,000. Is that your understanding?

DEFENDANT: Yes.

COURT: The State's recommending 12 months plus one day confinement with credit for time served concurrent with another cause number –

DEFENSE ATTORNEY: From King County, Your Honor.

COURT: -- from King County, \$200 costs, \$500 crime victim penalty assessment, \$400 recoupment to DAC...Is that your understanding?

DEFENDANT: Yes.

COURT: *You also understand that I do not have to follow that recommendation, but I could sentence you to anything I choose within the standard range. Do you understand that?*

DEFENDANT: *Yes.*

RP 4-5 (emphasis added).

The record is clear that the defendant, and his attorney, understood that the sentencing court did not have to follow the recommendation made by the parties.

Additionally, defense counsel urged the court to impose a concurrent sentence. RP 8. To buttress the parties' recommendation for a concurrent sentence, defense counsel went to great lengths to explain defendant's efforts to resolve this case after he was sentenced on the King County matter and transported the Department of Corrections. RP 8. Her argument explained that defendant had been in custody in Pierce County before being transported up to King County where he was sentenced on that case. RP 8. She told the court that King County had then sent defendant to the Department of Corrections, at which time defendant had to make special arrangements to return to Pierce County to resolve this case. RP 8. Had the defense attorney believed, as defendant suggests, that the court lacked discretion to run the two sentences consecutively, then

there would have been no reason for her to argue for a concurrent sentence by explaining defendant's efforts to bring this case before the court for plea and sentencing.

Finally, when defendant claimed that his attorney told him "the case law was on my side," defense counsel refuted this allegation saying "I never said that." RP 11. When the defendant claimed his attorney told him the sentence was going to be concurrent, defense counsel reminded him "I also told you [the court] did not have to follow the recommendation." RP 11. Defendant's frustration with a consecutive sentence was clear. However, it was equally clear that his attorney had advised him that the court did not have to follow the recommendation for a concurrent sentence so long as defendant was sentenced within the standard range.

2. COUNSEL WAS NOT DEFICIENT WHEN SHE INFORMED DEFENDANT THAT THE SENTENCING JUDGE DID NOT HAVE TO FOLLOW THE PARTIES' JOINT SENTENCING RECOMMENDATION, BUT COULD IMPOSE ANY SENTENCE UP TO THE MAXIMUM AUTHORIZED BY LAW.

A criminal defendant claiming ineffective assistance of counsel must show that counsel's performance fell below an objective standard of reasonableness and prejudice resulting from that performance. State v. Sherwood, 71 Wn. App. 481, 483, 860 P.2d 407 (1993). Prejudice is

established where there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable probability is "probability sufficient to undermine confidence in the outcome." In re Pers. Restraint of Davis, 152 Wn.2d 647, 273, 672, 101 P.3d 1 (2004) (quoting Strickland v. Washington, 466 U.S. 668, 694, 685-86, 104 S. Ct. 2052, 80 L.Ed.2d 674, (1984)). The reviewing court begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. State v. Israel, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002). The presumption of counsel's competence can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (citing State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)). In order for counsel to be found ineffective, both prongs 1) deficient performance, and 2) prejudice must be satisfied.

In the present case, defendant asserts his attorney advised him that the court must run his sentence on this case concurrent with the previously imposed sentence on his King County case. As argued above, the record does not support this assertion.

It was clear throughout the sentencing hearing that defense counsel had advised defendant that, while the parties were asking the court to run his sentence on this case concurrent with his King County sentence, the court did not have to follow this recommendation. RP 3-4, 5, 11. At the outset, the defense attorney advised the court that she had gone over the sentencing possibilities and advised her client that the court did not have to follow the recommendation of the parties. RP 3-4. The court clarified with the defendant that he understood that the court was not bound by the parties' recommendation. RP 5. At the end of the hearing, when defendant was arguing with his attorney about the sentence the court had imposed, she reminded defendant that she had told him the court did not have to follow the joint recommendation. RP 11. When defendant accused his attorney of telling him that the case law was on his side, she immediately denied that she had made that statement. RP 11. The defendant knew the court did not have to follow the recommendation to run the two sentences concurrently. Defense counsel was not deficient and defendant's claim must fail.

If the court were to find defense counsel deficient, defendant must show resulting prejudice. A plea is not automatically deemed involuntary when a defendant is given erroneous advice by his attorney. State v. Stowe, 71 Wn. App. 182, 188, 858 P.2d 267 (1993). To establish prejudice, defendant must show there is a reasonable probability that the result would have been different – that he would not have pled guilty and

insisted on going to trial -- but for counsel's allegedly erroneous advise.

Id.

In State v. Stowe, Stowe was charged with assaulting his seven week old son. Throughout the process, Stowe denied any responsibility for his son's injuries. Stowe, at 184. Stowe joined the Army when he was 17 years old and planned to make the military his career. He was 19 years old when charged with assaulting his son. Stowe told his attorney that he did not cause his son's injuries and that he wanted to go to trial to clear his name and maintain his career. Stowe, at 184. The State made an offer for Stowe to plead guilty with a low end sentence, and defendant could argue for work release and community service. Id. Stowe rejected this offer, maintained his innocence, and refused to enter into any kind of a plea agreement unless he was assured that he could continue with his military career. Stowe, at 184-85. Stowe's attorney advised him that if he entered into an *Alford*¹ plea, "he could probably remain in the Army and that the military would just tack on the jail time to his Army time." Stowe, at 185. Stowe accepted the States offer and entered an *Alford* plea to the charge of second degree assault. Id. The Army discharged Stowe immediately after he entered his plea. Id.

¹ North Carolina v. Alford, 400 U.S. 25, 37, 91 S. Ct. 160 (1970), a defendant "may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

The present case is factually distinguishable from Stowe.

Throughout the process, Stowe consistently denied responsibility for his son's injuries and when he entered a plea, he entered an *Alford* plea, which allowed him to deny guilt, but accept the plea to take advantage of the State's plea offer. Here defendant admitted he was a methamphetamine user, had a syringe on his person, and a pipe, a scale, and methamphetamine in the vehicle he was driving. CP 25-26. Unlike Stowe, when defendant pled guilty, he did a straight plea in which he admitted he was in possession of methamphetamine. In Stowe, there was an extensive record of plea negotiations and Stowe's refusal to contemplate any plea in which his military career would be at risk. In contrast, here there is nothing in the record of plea negotiations or defendant's position on concurrent versus consecutive sentences, beyond defendant's self-serving statements, made after the court sentenced him, which were disputed by his attorney. In fact, the record does not reflect whether or not the potential of a concurrent sentence was the basis for defendant to plead guilty or whether it was the low end sentence recommendation, or whether it was the fact that the recommendation was made jointly by the defense and the State.

In the present case, there is no evidence in the record as to why defendant chose to plead guilty, let alone whether or not defendant would have chosen to go to trial if his attorney had not given him allegedly

erroneous advise. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Defendant also asserts that his attorney advised him that he could appeal the imposition of his consecutive sentence. Brief of Appellant at pg 18. However, this assertion takes defense counsel's statement out of context. Defendant and his attorney confer off the record immediately preceding defense counsel's statement "[b]ecause you can appeal it." As a result, there is no record to what defense counsel's statement refers. When defense counsel's statement is placed in context, it is clear that she did not tell defendant that the case law was on his side.

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.)**

DEFENSE ATTORNEY: Because you can appeal it.

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

DEFENSE ATTORNEY: I never said that.

DEFENDANT – and that it would be concurrent.

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

RP 11 (emphasis added).

Because defendant and defense counsel were conferring off the record immediately preceding defense counsel's statement "[b]ecause you can appeal it," there are insufficient facts in the record to support defendant's claim that he was misinformed regarding his appeal rights. When the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. McFarland, 127 Wn.2d at 333.

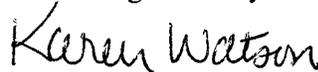
Defendant has failed to meet either prong of the Strickland test. Because defendant cannot show that his attorney was deficient or that defendant was prejudiced by defense counsel's actions, defendant's claim of ineffective assistance of counsel must fail.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the court to affirm the defendant's conviction.

DATED: August 7, 2007.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.7.09 Theresa Ke
Date Signature