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36038-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER MAHONE,

Appellant.

FILED  
COURT OF APPEALS DIVISION II  
STATE OF WASHINGTON  
2008 JAN 24 PM 4:51

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

FILED  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
08 JAN 28 PM 12:01  
BY DEPUTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Sylvester Mahone contends he was denied his Sixth Amendment right to the effective assistance of counsel when his trial attorney failed to object or move to withdraw Mr. Mahone's guilty plea when it became clear Mr. Mahone had been misadvised regarding a direct consequence of his plea. Thus, Mr. Mahone contends the trial court wrongly denied his motion for relief from judgment.

B. ASSIGNMENTS OF ERROR

1. Mr. Mahone was denied his Sixth Amendment right to the effective assistance of counsel.
2. The trial court erred in denying Mr. Mahone's motion for relief from judgment.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The Sixth Amendment guarantees a defendant the effective assistance of counsel at every critical stage of a criminal proceeding. While a guilty plea may be challenged as involuntary if the defendant was misadvised of a direct consequence of the plea, such a challenge is waived if the misadvisement is corrected and the defendant is afforded the opportunity to withdraw the plea prior to entry of the judgment. Where it became clear that Mr.

Mahone had been misadvised of a direct consequence of his plea, and defense counsel did not object of move to withdraw the plea prior to sentencing was Mr. Mahone denied the effective assistance of counsel.

D. STATEMENT OF CASE

Mr. Mahone pleaded guilty to one count of second degree murder in October 1995. CP 5-9. In his written statement on plea of guilty he acknowledged he would receive at least one year of community placement. CP 8. Before accepting Mr. Mahone's plea, the trial court engaged in a colloquy with him regarding the rights he was waiving and consequences he faced but did not mention any term of community placement as a consequence of the plea. CP 499-503. At the sentencing hearing, the trial court stated Mr. Mahone would be required to serve 24 months community placement. CP 519-520. However, the trial court did not impose any term of community placement in its judgment and sentence. CP 18-28.

Ten years later, the State brought a motion to "correct" the judgment, asserting the omission of a 24-month term of community placement was merely a clerical mistake. CP 283-84. Mr. Mahone responded that his lack of knowledge of the proper term of

community placement at the time he entered his guilty plea rendered his plea involuntary and thus he sought to withdraw it. CP 279-84. The trial court granted the state's motion to correct the judgment and transferred Mr. Mahone's motion to vacate his plea to this Court to be considered as a Personal Restraint Petition (PRP). CP 283-84.

This Court affirmed the trial court's correction of the judgment and denied Mr. Mahone's PRP. State v. Mahone, 34134-4-II (October 31, 2006) (consolidated with In re the Personal Restraint Petition of Mahone, 34562-5). Specifically, the Court found Mr. Mahone waived his challenge to the voluntariness of his plea by failing to move to withdraw the plea at the sentencing hearing when the court stated Mr. Mahone's offense required 24 months community placement. Id. at 5 (citing State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006)) The Court reached this result despite the fact that the trial court did not actually impose any term of community placement prior to 2005. In fact, while it rejected Mr. Mahone's arguments on the merits, the Court specifically found Mr. Mahone's was not time-barred under RCW 10.73.090 because the judgment was not final until 2005 or in the alternative because the 1995 judgment was facially invalid. Id. at 5-6.

Mr. Mahone then filed a motion for relief from judgment alleging his attorney was ineffective for failing to object or move to withdraw the guilty plea at the 1995 sentencing hearing when the trial court advised Mr. Mahone of the correct term of community placement. CP 485-559. The trial court denied Mr. Mahone's motion without a hearing. CP 564.

E. ARGUMENT

MR. MAHONE WAS DENIED HIS SIXTH  
AMENDMENT RIGHT TO THE EFFECTIVE  
ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S  
FAILURE TO OBJECT OR MOVE TO WITHDRAW  
THE PLEA AT THE 1995 SENTENCING HEARING

1. Mr. Mahone had the right to the effective assistance of counsel. The Sixth Amendment guarantees the right to the effective assistance of counsel in a criminal proceeding. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "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 v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United

States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)). If he does not have funds to hire an attorney, a person accused of a crime has the right to have counsel appointed. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Strickland, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. Strickland, 466 U.S. at 687; McMann, 397 U.S. at 771. To prevail on a claim that he was denied this right:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. A claim of ineffective assistance of counsel is not defeated merely by classifying defense counsel's actions as tactical, as the "relevant question is not whether counsel's choices were strategic, but whether they were

reasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

2. Mr. Mahone was denied the effective assistance of counsel. The Fourteenth Amendment’s Due Process Clause requires that a defendant’s guilty plea be knowing, voluntary, and intelligent. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A guilty plea is involuntary if the defendant is not properly advised of a direct consequence of his plea. State v. Turley, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); see also, In re the Personal Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) (“A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.”) Community placement is a direct consequence of a guilty plea. Isadore, 151 Wn.2d at 298.

Mr. Mahone was misadvised of the proper term of community placement. Nowhere in his statement of plea of guilty was Mr. Mahone informed he would serve 24 months of community placement. CP 5-9. Further, the plea colloquy is silent as to the proper term. CP 499-503. Thus, Mr. Mahone was not properly advised of a direct consequence of his plea prior to its entry.

Mendoza allowed that where a defendant has previously been misadvised of the direct consequences of his plea he waives any challenge to its voluntariness if he is properly advised and has the opportunity to withdraw the plea prior to entry of judgment. 157 Wn.2d at 592. As discussed, Mr. Mahone was misadvised of a direct consequence of his guilty plea. The trial court at sentencing, did advise that the proper term was 24 months. CP 519-20. Despite the obvious misadvisement, Mr. Mahone's attorney failed to raise any objection to the voluntariness of the plea.

This Court relied upon the absence of any objection or effort to withdraw the plea to conclude this failing waived Mr. Mahone's ability to assert his plea was involuntary. Mahone, at 5. But for his attorney's failure to object at the 1995 sentencing hearing Mr. Mahone would have succeeded in his 2005 PRP challenging his conviction for second degree murder. Instead, Mr. Mahone has served more than 13 years in prison as a result of an involuntary plea.

It cannot be argued that an objection would not have been ripe had it been raised in 1995. This Court's opinion makes clear that although the judgment was either incomplete or facially invalid with respect to the very direct consequence at issue here until

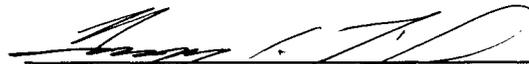
corrected in 2005, Mr. Mahone's objection to the voluntariness of his plea must have been raised in 1995. Indeed, if the objection was not ripe until 2005, this Court wrongly concluded Mr. Mahone waived it by failing to raise the claim in 1995.

Counsel's failure to object was objectively unreasonable and prejudiced Mr. Mahone.

F. CONCLUSION

For the reasons above, this Court should reverse the trial court's order denying Mr. Mahone motion for relief from judgment.

Respectfully submitted this 24th day of January, 2008.

  
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GREGORY C. LINK – 25228  
Washington Appellate Project – 91052  
Attorney for Appellant

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

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|----------------------|---|----------------|
| STATE OF WASHINGTON, | ) |                |
|                      | ) | NO. 36038-1-II |
| RESPONDENT,          | ) |                |
|                      | ) |                |
| v.                   | ) |                |
|                      | ) |                |
| SYLVESTER MAHONE,    | ) |                |
|                      | ) |                |
| APPELLANT.           | ) |                |

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**CERTIFICATE OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 24<sup>TH</sup> DAY OF JANUARY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |                   |                                     |
|--|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> KATHLEEN PROCTOR<br>PIERCE COUNTY PROSECUTING ATTORNEY<br>930 TACOMA AVENUE S, ROOM 946<br>TACOMA, WA 98402-2171       | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| <input checked="" type="checkbox"/> SYLVESTER MAHONE<br>719359<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13 <sup>TH</sup> AVENUE<br>WALLA WALLA, WA 99362 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF JANUARY, 2008.

X \_\_\_\_\_ *maria*

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2008 JAN 28 PM 12:01  
STATE OF WASHINGTON  
DEPUTY  
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