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NO. 38246-6-II

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

IN RE: PERSONAL RESTRAINT OF KALE VORAK

STATE OF WASHINGTON,

Respondent,

v.

KALE VORAK,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Kale Vorak rejected a plea bargain offer based on his attorney's confidence that he would not face a greater sentence if convicted after trial because of double jeopardy prohibitions. Since defense counsel's advice was based on an unreasonable assessment of the law, and would have required the sentencing court to ignore recent decisions from the Court of Appeals, Vorak did not receive competent legal advice and was denied his right to effective assistance of counsel.

B. ASSIGNMENTS OF ERROR.

1. Vorak was denied effective assistance of counsel as guaranteed by the Sixth Amendment and Washington Constitution, Article I, section 22.

2. The court erroneously entered Finding of Fact 6, which is not supported by substantial evidence.¹

3. The court erroneously entered Finding of Fact 7, which is not supported by substantial evidence.

4. The court erroneously entered Finding of Fact 8, which is not supported by substantial evidence.

¹ The court's findings of fact and conclusions of law are attached as Appendix A.

5. The court erroneously entered Finding of Fact 9, which is not supported by substantial evidence.

6. To the extent they are construed as findings of fact, the court erroneously entered Conclusions of Law 1 (a) and (b).

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

The right to effective assistance of counsel includes the right to an attorney who accurately informs the accused of the sentence he or she reasonably faces if convicted, thus enabling the accused to make an informed decision whether to accept a plea bargain. Here, defense counsel told Vorak he was confident that his first degree assault convictions would merge into his robbery conviction and advised him to reject a plea bargain. Where defense counsel's confidence in a merger of offenses at sentencing was unreasonable because it was either contrary to, or unlikely based on, recent Court of Appeals cases, and this erroneous advice caused Vorak to reject a plea bargain, did Vorak receive ineffective assistance of counsel?

D. STATEMENT OF THE CASE.

On September 17, 2003, Pierce County prosecutors filed an information accusing Kale Vorak of one count of first degree robbery and two counts of first degree assault, with firearm sentencing enhancements for all three counts, as well as one count of unlawful possession of a firearm in the first degree. CP 21-22; Ex. 1 (Information). Vorak was 18 years old at the time. Ex. 1.

The charges stemmed from an incident where Vorak tried to take property from a grocery store without paying. Id., p. 4 (probable cause certification). Two store employees wrestled with Vorak in an effort to detain him. During the struggle, Vorak took out a gun and said he would kill the employees. The employees tried to grab the gun. Vorak fired two shots during the struggle. Id.

Before trial, the prosecution offered Vorak a plea bargain: if he pleaded guilty to reduced charges of one count of first degree robbery and one count of first degree assault, with one firearm sentencing enhancement, the prosecution would recommend the low end of the standard range, which was 212 months. 8/6/08RP 15;² Ex. 6 (letter from prosecutor to defense attorney). The plea

² The verbatim report of proceedings from the reference hearing and ruling are referenced herein by the date of proceeding.

bargain required Vorak to forgo any “merger” argument at sentencing. Id.

Defense counsel Dino Sepe informed Vorak of this offer, but simultaneously told him there was a very good “merger” argument and he was “confident” and “adamant” the offenses would merge if convicted after trial. 8/6/08RP 16, 43, 45-47. Sepe told Vorak that even if convicted of all charges, he would not receive more than a few additional years than the plea offer. 8/6/08RP 16, 47. He told Vorak that the law governing “merger” was not resolved by the Supreme Court, and even though some cases said the opposite, he was “absolutely” confident he would prevail on merger. 8/6/08RP 49-50. Based on his attorney’s advice, Vorak rejected the plea offer and went to trial. 8/6/08RP 16. He was convicted of all charges. The trial court refused to merge the offenses at sentencing. 5/7/04RP 279.³

At sentencing, the court imposed a standard range term of 719 months. Ex. 3 (original Judgment and Sentence). Later the court realized it had double-counted the firearm enhancements, thus miscalculating Vorak’s standard range, and instead imposed a

³ The transcript from the sentencing hearing was presented to the trial court as Exhibit 7, and has been designated as a supplemental clerk’s paper for this appeal.

sentence of 539 months, the high end of the standard range. Ex. 8 (corrected Judgment and Sentence). The sentence was premised on consecutive terms for each count of first degree assault, as well as three consecutive firearm sentencing enhancements. The Court of Appeals denied Vorak's double jeopardy argument on direct appeal. COA No. 31788-5-II.

Vorak filed a personal restraint petition, arguing that his trial attorney improperly pressured him to reject the plea bargain based on his legally erroneous anticipation of merger, never advised him of the maximum sentence if convicted of all charges, and did not explain the three mandatory firearm enhancements were consecutive or there would be consecutive sentences for each count of first degree assault. The Court of Appeals ordered a reference hearing and directed the trial court to resolve Vorak's claims of ineffective assistance of counsel. CP 1-3.

At a hearing before Judge Susan Serko, Sepe and Vorak testified about their conversations regarding the plea bargain offer and the sentencing consequences of a conviction. Sepe said he had no recollection of his conversations with Vorak regarding Vorak's sentence, but said his general practice was to inform his clients of the worst case scenario. 8/6/08RP 56. Sepe

remembered that he was excited about the merger issue presented in Vorak's case and felt confident Vorak would prevail in this merger argument either at sentencing or on appeal. Id. at 49-50.

Vorak similarly testified that Sepe was "adamant" and confident he would win on the merger issue. 8/6/08RP 16. Vorak also denied Sepe ever explained to him that there were three firearm sentencing enhancements would be consecutive to each other, and said Sepe never told him that the assaults would be consecutive, or that his standard range would be higher if convicted on all counts. 8/6/08RP 16-19. He said Sepe encouraged him to reject the prosecution's offer because he would not face very much more time if convicted at trial. Id. at 16.

After a reference hearing, the court rejected Vorak's claim of ineffective assistance of counsel, finding that Sepe fully advised him of the sentencing consequences of the charges. CP 21-25. The court did not address whether Sepe's confidence he would prevail in the merger argument was unreasonable and caused him to give less than competent legal advice. Vorak timely appeals.

E. ARGUMENT.

VORAK RECEIVED INEFFECTIVE ASSISTANCE
OF COUNSEL DUE TO HIS ATTORNEY'S FAILURE
TO INVESTIGATE THE LAW AND COMPETENTLY
ADVISE HIM OF THE SENTENCING
CONSEQUENCES IF CONVICTED

1. Vorak has the constitutional right to effective assistance of counsel. A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6⁴ Wash. Const. art. 1, § 22. Sentencing "is a critical stage of the criminal proceeding at which [an accused person] is entitled to the effective assistance of counsel." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); State v. Bandura, 85 Wn.App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997).

To succeed in a claim of ineffective assistance of counsel, Vorak must show that (1) his trial counsel's performance "fell below

⁴ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

an objective standard of reasonableness” and (2) “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,” quoting Strickland, 466 U.S. at 688).

While an attorney’s decisions are treated with deference, his or her actions must be reasonable based on all circumstances. Wiggins, 123 S.Ct. at 2541; State v. Tilton, 149 Wn.2d 775, 72 P.2d 735 (2003). To assess prejudice, the defense must demonstrate grounds to conclude a reasonable probability exists of

a different outcome, but need not show the attorney's conduct altered the result of the case. Tilton, 149 Wn.2d at 784.

2. Vorak's attorney's failure to competently advise him of the sentence he faced if convicted constituted deficient performance. An attorney fails to exercise the skills and diligence required of a reasonable attorney if he or she does not provide sufficient information so an accused person may make an informed decision as to whether to plead guilty. Boria v. Keane, 99 F.3d 492, 497 (2nd Cir. 1996), cert. denied, 521 U.S. 1118 (1997); In re Pers. Restraint of McCready, 100 Wn.App. 259, 263, 996 P.2d 658 (2000). When an attorney does not accurately inform a defendant about the sentences he faces if convicted after trial, the defendant does not make an informed decision to reject a plea bargain offer. McCready, 100 Wn.App. at 263; see Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 92 L.Ed.2d 309 (1948) ("prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.").

Standards of professional behavior from the American Bar Association are used to assess whether an attorney's conduct was

reasonable under prevailing professional norms. Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 2460, 162 L.Ed.2d 360 (2005). The ABA Standard for advising an accused person provides that “Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused’s decision as to his or her plea.” ABA Standards for Criminal Justice, Prosecution Function and Defense Function, 3rd Ed., 4-5.1 Advising the Accused (1993).

There is no doubt that a lawyer exercising reasonable professional skill and judgment would have recognized that the double jeopardy argument presented in Vorak’s case was contrary to other Court of Appeals cases, and at best, an extremely long shot for relief. Sepe’s “absolute” confidence in the face of contrary case law was a fundamentally unreasonable basis for Sepe to encourage Vorak to reject the plea bargain. 8/6/08RP 49-50.

a. At the time of Vorak’s plea bargain offer, there was no reasonable grounds to be “confident” Vorak’s convictions would merge. The right to be free from multiple prosecutions for the same crime emanates from the Fifth Amendment of the United States Constitution, and Article I, section 9 of the Washington Constitution. The merger doctrine is a rule of statutory

construction that bars multiple punishments when the Legislature “has clearly indicated” that to prove a certain crime, the prosecution must prove an act which is defined as a crime elsewhere in the criminal statutes. State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). Additionally, crimes do not merge when one of the crimes involves an injury that is separate and distinct from that of the other crime. Id. at 421.

Double jeopardy questions largely rest on whether the legislature intends separate punishments. “In determining the permissibility of the imposition of cumulative punishment . . . the ‘dispositive question’ was whether Congress intended to authorize separate punishments for the two crimes.” Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). In the case at bar, the prosecution offered Vorak a plea bargain involving guilty pleas to one count each of first degree robbery and assault, with one firearm sentencing enhancement, along with an agreement to waive any merger or double jeopardy arguments. Under this plea bargain, the standard range would be 212-276 months, and the prosecution would recommend 212 months. 8/6/08RP 15; Ex. 6 (letter from prosecutor).

Sepe agreed he told Vorak he “was confident” that Vorak’s robbery and assault offenses would merge at sentencing and encouraged Vorak to reject the plea offer on this basis. 8/6/08RP 43, 45-47, 49-50. He told Vorak that if the offenses merged, he would only be sentenced on the robbery and the firearm enhancement, and under this scenario, he would face seven years for the robbery, along with five years for a firearm enhancement. 8/6/08RP 12. Vorak said that if he knew he would likely receive 45 years after conviction, he would have taken the plea bargain offer that would have resulted in a sentence between 17 and 23 years. 8/6/08RP 23.

i. Defense counsel incorrectly advised Vorak of the sentence he faced if the offenses merged. Sepe told Vorak that even if convicted, he was “confident” the assaults would merge with the robbery and he would only be sentenced on the robbery and a single firearm enhancement. 8/6/08RP 45. He told Vorak that the plea offer “wasn’t good enough” because it included an assault conviction and he should only be sentenced on the robbery. Id. But Sepe’s “confidence” and his basis for discouraging the plea bargain were unreasonable for several reasons.

First, Sepe never doubted that if he prevailed in his merger argument, both first degree assault convictions would merge into the robbery. 8/6/08RP 45. Although some older cases followed this approach, the modern trend sharply departed from it. Sepe relied on cases decided twenty years earlier, when the Sentencing Reform Act was new, such as State v. Davis, 47 Wn.App. 91, 99, 734 P.2d 500, rev. denied (1987). Ex. 2 (defense sentencing memorandum); ch. 9.94A RCW (enacted in 1981).

But in more recent years, courts adhere to the principle that “[t]he appropriate remedy for a double jeopardy violation is vacation of the ‘lesser’ conviction.” In re Pers. Restraint of Burchfield, 111 Wn.App. 892, 899, 46 P.3d 840 (2000). The lesser conviction is the offense with the lower seriousness level and shorter sentence. Id. at 900; see also State v. Jones, 117 Wn.App. 721, 727 n.11, 72 P.3d 1110 (2003); State v. Portrey, 102 Wn.App. 898, 906-07, 10 P.3d 481 (2000).

Sepe’s confident scenario ignored the critical role of proving legislative intent, necessary for merger issues, as based on the offenses’ classification in the SRA. The legislature defined first degree assault as a “most serious offense,” and “serious violent” felony, with a seriousness level of XII, and it has never altered this

classification of first degree assault, nor has it changed its characterization of first degree robbery. As first degree robbery is neither a “most serious” nor “serious violent” offense, and has a seriousness level of IX, first degree assault would be the conviction that remained under a double jeopardy analysis. Under an offender score of “6,” Vorak’s standard range for first degree assault would be 162-216 months, while a first degree robbery conviction would have a standard range of 77-102 months. The very significantly different way the legislature treats first degree assault from first degree robbery makes it far less likely a court will find the Legislature did not intend to separately punish any assault that occurs during a robbery, but Sepe was unwavering in his confidence that Vorak would not be sentenced on the assaults.

Sepe’s confident sentencing prediction also raises the question of whether both first degree assaults would merge with each other if the court agreed that merger applied. The probable cause certification alleged Vorak pointed a gun at two store employees after one saw him taking store property, Vorak said he would kill the men, and then he fired the gun two times as the three men wrestled for control of the gun. Ex. 1, p. 4. Generally, offenses are “separate and distinct” if there are two victims. See

State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). If the first degree assaults counted as separate offenses against Vorak, they would run consecutively to one another as two “separate and distinct” serious violent offenses. RCW 9.94A.589(1)(b). The possibility of separate and consecutive sentences on the assault offenses, even if the robbery merged into one of the assaults, is certainly not far-fetched based on the facts of the case and should not have inspired a competent defense counsel’s confidence in a merger that would void any assault convictions based on double jeopardy.

ii. Defense counsel urged Vorak to reject the plea based on counsel’s unreasonable confidence that the trial court would reject controlling Court of Appeals precedent and his incorrect understanding of the “merger” doctrine for robbery and assault. At the time Vorak was offered a plea bargain in November 2003, Division One of the Court of Appeals had issued a lengthy decision rejecting a merger argument for the very offenses with which Vorak was charged, in State v. Freeman, 118 Wn.App. 365, 76 P3d 732 (2003), affirmed, 153 Wn.2d 765, 108 P.3d 753 (2005),

and this ruling was consistent with other recent cases.⁵ Sepe was unaware of Freeman at the time he encouraged Vorak to refuse the plea bargain offered, and once made aware of the Court of Appeals decision, he told the trial court to disregard it as a “maverick” decision. 5/7/04RP 270; 8/6/08RP 43. Sepe’s reliance on cases decided in the 1970s and 1980s, and his ignorance of current caselaw prompted him to encourage Vorak to refuse a plea bargain based on his unreasonable confidence that Vorak would face a lesser sentence if convicted after trial.

The sentencing memorandum Sepe filed after Vorak’s conviction ignored contrary cases, despite his “duty” to disclose adverse legal authority issued by a higher court in Washington. RPC 3.3(a)(3); Ex. 2. When the prosecution pointed to several Court of Appeals decisions refusing to find double jeopardy violations for robbery and assault convictions, Sepe told the trial judge to ignore those rulings. 5/7/04RP 270, 274. He argued the Court of Appeals was wrong in ruling that robbery and assault convictions did not merge based on double jeopardy. Id. In fact,

⁵ After Vorak was sentenced, the Supreme Court ruled in Freeman that first degree robbery and first degree assault never merge, because the legislature clearly indicated it intended separate punishment. 153 Wn.2d at 776. Vorak does not contend Sepe should necessarily have predicted this *per se* rule, as opposed to a more fact-centered assessment used by courts before the Supreme

Sepe failed to appreciate the weak legal support for his argument based on a number of recent cases.

For example, in one case decided shortly before Vorak's charges arose, the Court of Appeals found "there is a strong presumption" the legislature intended separate punishments for robbery and assault because they have different elements. State v. Cole, 117 Wn.App. 870, 875, 73 P.3d 411 (2003), rev. denied, 151 P.3d 1005 (2004).⁶ In Cole, Division One held it was unlikely the legislature intended robbery and assault to merge because "the placement of the two offenses in different chapters of the criminal code is evidence of the legislature's intent to punish them as separate offenses." Id. Although Cole involved different degrees of the offenses charged in Vorak's case, i.e. attempted first degree robbery and second degree assault rather than completed first degree robbery and first degree assaults, the language in Cole did not bode well for Sepe's "confidence" in Vorak's double jeopardy claim. The Court of Appeals broadcast a strong inclination to reject any merger arguments for robbery and assault unless the force used was no more than strictly necessary to complete the robbery.

Court ruling in Freeman.

Cole, 117 Wn.App. at 876. The Cole Court concluded, “[t]he assault and robbery statutes do not address identical evils.” Id. at 877.

The Court of Appeals relied on the same principle in its decision in Freeman, also decided before Vorak’s case arose but which Sepe addressed by telling the trial court to ignore it. Sepe similarly argued that the trial court should ignore State v. Vermillion, 112 Wn.App. 844, 861, 51 P.3d 188 (2002), rev. denied, 148 Wn.2d 1022 (2003), which used reasoning similar to Freeman in rejecting a merger argument for robbery and threat to bomb where the threat constituted the force used to commit the robbery. 5/7/04RP 271.

Ignoring these Court of Appeals cases, Sepe’s confidence that Vorak’s robbery and assault merged rested heavily on State v. Zumwalt, 119 Wn.App. 126, 82 P.3d 672 (2003), affirmed sub. nom Freeman, 153 Wn.2d at 778. But while the Court of Appeals in Zumwalt found a robbery and second degree assault “merged” under double jeopardy analysis, the decision did not reasonably encompass the allegations against Vorak.

⁶ The Court of Appeals decided Cole on July 28, 2003, before Vorak’s case arose, and the Supreme Court denied review on March 2, 2004, before Vorak’s sentencing.

In Zumwalt, the defendant was convicted of first degree robbery and second degree assault for punching a woman in the face and then stealing money from her pockets. 119 Wn.App. at 128. The robbery was elevated in degree due to the bodily injury inflicted. The Court of Appeals found the offenses merged under these facts, because the robbery was elevated solely because of the injury that served as the basis of the assault.

Yet Zumwalt did not dictate the same result would apply to Vorak. The Court of Appeals decision was narrow, and rested on the trial court's finding in the bench trial that only a single act of force occurred. Id. at 132. Unlike Zumwalt, the probable cause certification accused Vorak of displaying a gun, threatening to kill store employees, and then firing several shots after stealing property and while struggling with security officers. Ex. 1, p. 4. Simply displaying something that appeared to be a firearm would satisfy the force needed for first degree robbery, but by not only displaying an object, but also threatening to kill the store employees with a firearm and firing it several times, even under Zumwalt a court could find readily that a "separate act of force" occurred under the analysis used by the Court of Appeals in Zumwalt.

Accordingly, Sepe unreasonably relied on Zumwalt as the basis for his absolute confidence Vorak's first degree robbery and assaults would merge. Sepe unreasonably relied on cases decided many years ago while simultaneously ignoring contrary cases decided more recently. At the sentencing hearing, when the prosecutor cited more recent Court of Appeals cases, Sepe told the court that Division One was "a maverick" and its rulings should be disregarded. 5/7/04RP 270. Sepe maintained his "absolute" confidence even in the face of contrary decisions. 8/6/08RP 49-50. Because Sepe discouraged Vorak from pleading guilty based on his far-fetched and largely unendorsed claim of merger, Sepe denied Vorak the competent legal advice to which he was entitled.

iii. Sepe disregarded current double jeopardy law. Sepe's sentencing memorandum quoted extensively from Zumwalt, and relied on cases from the Court of Appeals decided in the 1970s and early 1980s. Ex. 2. But Washington courts rely upon State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995). Calle held that offenses do not merge absent clear legislative support for a single punishment. Calle requires a "clear indicator" that the Legislature intended a single punishment and mandates a "strong presumption" of separate punishment, otherwise offenses will not

merge. Id. Calle marks a significant change in the law from the cases on which Sepe's sentencing memorandum relied, such as Davis; State v. Bresolin, 13 Wn.App. 386, 534 P.2d 1394 (1975); and State v. Springfield, 28 Wn.App. 446, 624 P.2d 208 (1981), all of which predate Calle. See Freeman, 118 Wn.App. at 375 (distinguishing cases predating Calle as based on incorrect or incomplete legal analysis).

Sepe did not have any reasonable basis for proving the necessary legal standard that the Legislature clearly indicated the first degree robbery and two counts of first degree assault must merge. The robbery certainly could have been accomplished with far less force than that used by Vorak. The Court of Appeals in Freeman found the Legislature did not intend a single punishment for violence inflicted by a defendant using a firearm during a robbery, and Sepe unreasonably disregarded this holding when he encouraged Vorak to proceed to trial and reject the plea bargain on the basis that Vorak should never be sentenced on an assault. No reasonable attorney should be confident of prevailing on an argument seeking a greatly reduced sentence that requires a sentencing court to disregard recent decisions issued by a higher court.

c. The court erroneously concluded Vorak did not demonstrate he was erroneously advised or affirmatively misled about the consequences of a conviction. The court did not decide whether Sepe's unreasonable confidence that Vorak would prevail on the merger argument constituted a deficient performance. Instead, the court ruled that Vorak had not disproven Sepe's claim that he routinely advised clients of the sentences they faced and did not know why he would have departed from that practice in Vorak's case. CP 24-25. Even if Sepe mentioned that Vorak faced more time if convicted, the court's analysis simply ignored the central hub of Sepe's ineffective assistance of counsel, which was Sepe's testimony that he confidently encouraged Vorak to reject the plea based on his belief Vorak would not receive any additional time for the assault offenses, and Sepe's legal advice on merger was deficient to a degree that constitutes unreasonable legal advice.

Sepe had no particular recollection of explaining Vorak's sentencing consequences to him. 8/6/08RP 44, 56. He testified it was his practice to tell clients of the worst case scenario they faced, and at times he would bring a calculator and worksheets to explain the sentence possibilities. 8/6/08RP 44. Yet Sepe did not

offer any evidence of having discussed Vorak's sentencing maximum with him. He did not have any scoring sheets that he had shown Vorak or any specific memory of his sentencing conversations with Vorak, other than recalling that he was "confident we would win" the merger argument. Moreover, when Vorak was sentenced, Sepe had no idea that the sentence imposed far exceeded the standard range despite Sepe's claims of educated familiarity with Vorak's specific sentencing consequences. 8/6/08RP 59.

Vorak testified that his talks with Sepe focused on the double jeopardy or merger issue and Sepe did not explain the sentence he faced if convicted. 8/6/08RP 15-16. He said he was not informed that the three firearm sentencing enhancements must run consecutively; or the two assault in the first degree charges would be consecutive as well. Vorak explained that Sepe encouraged him to reject the plea bargain because he was unlikely to face more time after trial, and Sepe agreed with this assessment. 8/6/08RP 16.

The court's written findings of fact are either misleading or unsupported by the record regarding Sepe and Vorak's conversations and the essential impact of Sepe's confidence in his

merger advice. CP 23-24 (App. A). Findings of Fact 6, 7, 8, and 9 misconstrue the evidence by indicating Sepe unambiguously and repeatedly explained Vorak's sentencing consequences. CP 23-24. But Sepe did not claim to have done so and the record does not support this interpretation of events. While Sepe claimed that he would have discussed Vorak's sentence with him, even if he did not specifically recall doing so, he offered no concrete evidence or explicit claim of exactly what conversation he had with Vorak. 8/6/08RP 56. Moreover, he echoed Vorak's testimony that he was very confident of the merger argument and spent most of his time discussing merger. 8/6/08RP 42, 43, 45, 46-47, 49-50. Sepe professed his confidence in the merger argument at least nine times in his testimony at the reference hearing. Sepe's confidence plainly caused Vorak to reject the plea offer and this confidence was unreasonable.

Furthermore, Sepe's claim that he fully understood Vorak's sentence upon conviction is undercut by his performance at the sentencing hearing. The prosecution miscalculated Vorak's standard range and claimed it was 180 months higher than it should have been. Exs, 3, 8. Sepe did not notice this very

significant discrepancy and even adopted this standard range as correct in his argument. 5/7/04RP 283; 8/6/08RP 59.

Finally, the court relied in part on the prosecution's argument that Vorak's failure to raise ineffective assistance of counsel on direct appeal demonstrates his personal restraint petition is a last-ditch, disingenuous effort for relief. Finding of Fact 13. The prosecution was apparently unfamiliar with well-established law pronouncing it at least disfavored if not improper to present a claim of ineffective assistance of counsel on direct appeal when the record necessary to decide the claim is not part of the direct appeal. See McFarland, 127 Wn.2d at 338 ("If either [appellant] wishes a reviewing court to consider matters outside the record, a personal restraint petition is the appropriate vehicle for bringing those matters before the court."). Vorak could not legitimately present his claim that his attorney had inadequate private conversations with him about the plea bargain on direct appeal when these conversations were not part of the record on review, and the court should have disregarded this argument rather than lend it legitimacy by repeating it in the findings of fact. CP 24 (Finding of Fact 13).

Consequently, the findings of fact must be disregarded to the extent they misrepresent Sepe's testimony about the conversations he had with Vorak and falsely depict Sepe as having a clear recollection of specific conversations with Vorak.

3. Vorak was plainly prejudiced by his attorney's unreasonable and inaccurate legal advice. In the Strickland prejudice analysis, the determinative question is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Glover v. United States, 531 U.S. 198, 202-03, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). In the context of improper advice encouraging a defendant to reject a plea bargain, the defendant needs to show that had his attorney given competent advice, it is reasonably probable he would not have proceeded to trial. See Tilton, 149 Wn.2d at 784.

Vorak explained that if he had adequate legal representation, he would have understood the consecutive sentences he faced based on multiple counts and firearm enhancements and "[h]ad Mr. Vorak known all of this he never would have went to trial he would have accepted the plea bargain." Personal Restraint Petition, p. 6; 8/6/08RP 16, 30.

Vorak further explained that his trial attorney encouraged him to reject the plea offer. Sepe did not dispute this characterization. Sepe repeated at least nine times in his testimony that he was "confident" Vorak would prevail on the merger argument. 8/6/08RP 42, 43, 45, 46-47, 49-50. Although Sepe mentioned that winning was not guaranteed, Sepe conceded he was enthusiastic and confident he would win the merger argument. Sepe told Vorak that with merger he faced little risk if he lost at trial. 8/6/08RP 16, 30. Vorak rejected the plea based on this misadvice. Had Vorak been advised of the actual likelihood that he would not win the merger argument and would face a mandatory term of at least 451 months, he would have accepted the plea bargain offering 212-271 months, or attempted to negotiate its terms, and would not have rejected the offer and gone to trial and received more than double this sentence, resulting in 45 years incarceration imposed upon a then-19 year-old man. Sepe's depiction of events is consistent with Vorak's. Vorak did not simply reject a plea offer and then wish it back after trial. Rather, Sepe informed Vorak of the plea offer but at the same time Sepe expressed great confidence that Vorak would face similar sentencing consequences if convicted. Sepe's unreasonable

confidence in the merger doctrine was the predicate for his advice to his client and his misplaced enthusiasm caused Vorak to reject the plea. If Sepe had not insisted that Vorak would prevail on the merger issue, Vorak would not have rejected the guilty plea.

The prosecution unfairly questioned Vorak in an effort to claim he was just fishing for a second chance at a better outcome. The prosecutor asked Vorak whether he hoped for something better than the original plea bargain offer. 8/6/08RP 31. This question improperly framed the issue, because Vorak need not prove he hoped only for the same offer rather than a better offer. 8/6/08RP 31. His mere hope that he could have a better outcome does not detract from his understanding that he is not in a position to be picky and would accept a plea that was less than the 45 years he received. 8/6/08RP 34.

Similarly, Vorak's desire for a new lawyer does not undercut the probability he wanted the plea bargain. Vorak had no confidence in Sepe and Sepe was presently testifying against him. Vorak had every right to a new lawyer in this circumstance and his request for one did not mean he must want a second chance and a better trial. Strickland, 466 U.S. at 688; State v. Regan, 143 Wn.App. 419, 431, 177 P.3d 783, rev. denied, 165 P.3d 1012

(2008) (finding conflict of interest when attorney testifies against client).

Additionally, Vorak cannot be faulted for wishing the prosecution would make a better plea bargain offer, as the 217-271 month range offered initially is hardly an easy pill for anyone to swallow. Still, Vorak did not waiver from his claim that if the negotiated plea was the best the State would offer, and if he understood he indeed faced 45 years in prison if convicted, he would have accepted it. 8/6/08RP 30. The crime Vorak committed began as a shoplift or petty theft, and although Vorak does not contest his responsibility for elevating the offense because he brought a gun, he reasonably wished he did not face such serious charges from the incident. Ex. 1, p. 4 (probable cause certification). Vorak understood that he was not likely to receive a better offer, said he was "not exactly picky" at the moment, would accept any plea offer, and would have accepted the plea had he realistically been advied of the consequences. 8/6/08RP 34.

Vorak rejected the plea bargain because his attorney offered not only faulty but unreasonable and deficient advice and thus failed to provide effective assistance of counsel. Sepe agreed he gave Vorak this incompetent advice and the sentencing

memorandum he filed shows that Sepe not only disregarded pertinent case law, but he actually expected a trial court to ignore recent controlling precedent in order to prevail on the merger argument. Had his attorney properly explained the likelihood that Vorak would received a far greater sentence if convicted of all offenses, Vorak would not have gone to trial. There is a reasonable probability of a different outcome had Sepe given Vorak competent legal advice, and thus Vorak was prejudiced by his attorney's ineffective assistance of counsel. Tilton, 149 Wn.2d at 784; State v. James, 48 Wn.App. 353, 364, 739 P.2d 1167 (1987).

F. CONCLUSION.

For the reasons stated above, Mr. Vorak respectfully asks this Court to reverse his convictions based on the ineffective assistance of counsel and remand the case so that Vorak may accept a plea bargain offer.

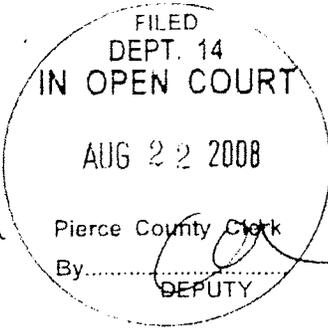
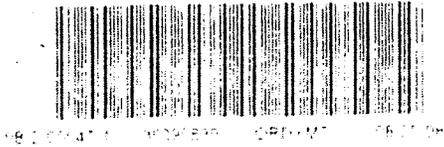
DATED this 27th day of February 2009.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A



RECEIVED
JAN 22 2009
Washington Appellate Project

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

IN RE THE PERSONAL RESTRAINT
PETITION OF:

CAUSE NO. 08-2-05047-1

KALE A. VORAK,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOLLOWING
REFERENCE HEARING

Petitioner.

THIS MATTER having come on before the Honorable Susan K. Serko, Judge of the above entitled court, for reference hearing, the defendant, Kale Vorak, having been present and represented by his attorney, Robert Quillian, and the State being represented by Deputy Prosecuting Attorneys Phil Sorensen and Alicia Burton, and the court having reviewed the records and files herein, the remand order by the Court of Appeals, Division II, the exhibits admitted into evidence and having heard testimony from Dino Sepe and Kale Vorak, hereby finds as follows:

FINDINGS OF FACT

I.

1. On September 17, 2003, the State charged Kale Vorak in Pierce County Superior Court (cause number 03-1-04329-1) with one count of first degree robbery with firearm enhancement,

ORIGINAL

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two counts of first degree assault with firearm enhancement and one count of first degree unlawful possession of a firearm.

2. Department of Assigned Counsel attorney Dino Sepe represented Vorak throughout all of the proceedings in the trial court.

3. Dino Sepe is an experienced criminal trial attorney who has been defending criminal defendants for over 20 years. Sepe was admitted into practice in 1986. Sepe's caseload has consisted of primarily Class A felonies for the past 10 years. Sepe has been approved by the Washington Supreme Court to defend death penalty cases at trial and on appeal. Sepe is also an experienced appellate attorney who has argued several cases before the Court of Appeals and Supreme Court.

4. Sepe initiated plea negotiations in this case on October 31, 2003 by sending a letter to Fred Wist, the deputy prosecutor handling Vorak's case. Sepe proposed a plea to one count of first degree assault, one count of first degree robbery and one firearm enhancement. In exchange for the amended charges, Vorak would agree to forgo a merger argument, which Sepe believed "to be a viable argument based on long existing case law." A copy of Sepe's letter was admitted into evidence at the reference hearing as Exhibit No. 5.

5. Fred Wist responded to Sepe's letter on November 19, 2003. Wist accepted Sepe's proposal, but clarified that Vorak's offender score was one point higher than Sepe believed it to be based on Vorak being on community custody at the time he committed the present crimes. Wist advised Sepe of Vorak's potential sentencing range with the higher offender score and of Wist's intention to recommend a sentence at the low end of the sentencing range. A copy of Wist's letter was admitted into evidence at the reference hearing as Exhibit No. 6.

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1 6. Sepe discussed the substance of both letters with Vorak, but a plea agreement was never
2 reached. Throughout the plea negotiations, Sepe advised Vorak of the following:

3 a. If Vorak rejected the offer he would go to trial on *all* the charges listed in the
4 original information and, if convicted, Vorak's offender score and standard range would
5 be higher than that represented in the plea offer;

6 b. If Vorak were convicted of both first degree assaults at trial, the sentences on
7 those offenses would be consecutive;

8 c. Vorak would serve three consecutive firearm enhancements if he were convicted
9 of all charges and the enhancements at trial;

10 d. Vorak's prospects for succeeding on the merger issue were good, but Sepe could
11 not make any guarantees as to how the trial court or, ultimately, the Supreme Court
12 would resolve this issue;

13 e. Vorak's prospects for avoiding conviction on the assaults at trial were good, but
14 Sepe could not guarantee that he would be acquitted.

15 7. During these discussions, Sepe gave Vorak various "best case" and "worst case"
16 scenarios based on different results that could occur if Vorak proceeded to trial.

17 8. When Sepe and Vorak discussed whether Vorak's assaults and robbery would merge at
18 sentencing, Sepe advised Vorak that the state of the law on merger was unsettled at the time, but
19 he (Sepe) believed they had a persuasive argument on the issue. Sepe never guaranteed that they
20 would win at trial or on appeal. Sepe advised Vorak that if the crimes did not merge, Vorak
21 would be looking at a much longer sentence than that which was offered in the plea offer.
22

23 9. Vorak rejected the plea offer and proceeded to trial on February 5, 2004. Vorak's
24 decision to forgo the offer and proceed to trial was a fully informed decision. The decision to
25

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1 reject the plea offer was Vorak's decision alone. Sepe did not put undue pressure on Vorak to
2 reject the offer.

3 10. A jury convicted Vorak as charged. Vorak has not challenged the effectiveness of Sepe's
4 representation throughout the trial.

5 11. At the sentencing hearing on May 7, 2004, Vorak argued that his convictions for assault
6 and robbery merged under the double jeopardy doctrine. Vorak and the State each filed briefs on
7 this issue. The briefs were admitted into evidence at the reference hearing as Exhibit Nos. 2 and
8 3. The trial court determined that the convictions did not merge and sentenced Vorak to 539
9 months in custody. The judgment and sentence and order correcting judgment and sentence
10 were admitted into evidence at the reference hearing as Exhibit Nos. 4 and 8, respectively.

11 12. Vorak filed a direct appeal claiming that the trial court erred in its determination that the
12 robbery and assault convictions did not merge. After Vorak filed his opening brief, the Supreme
13 Court decided *State v. Freeman*, 153 W.2d 765, 108 P.3d 753 (2005), which controlled the
14 disposition of Vorak's case. The Court of Appeals affirmed Vorak's convictions and sentence.

15 13. Vorak did not claim ineffective assistance of counsel during trial, sentencing or on
16 appeal when the merger issue was still undecided. Vorak first raised the issue of ineffective
17 assistance of counsel in a personal restraint petition, which was filed in October 2006.
18

19
20 CONCLUSIONS OF LAW

21 1. Vorak has not established by a preponderance of the evidence that Dino Sepe provided
22 ineffective assistance of counsel throughout the pre-trial negotiation stage of this case.

23 a. Vorak has not established by a preponderance of the evidence that Dino Sepe's
24 performance was deficient.
25

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b. Vorak has not established by a preponderance of the evidence that he was prejudiced by Sepe's performance in that there is not a reasonable probability that, but for Sepe's performance, Vorak would have accepted the pre-trial offer.

DONE IN OPEN COURT this 27 day of August, 2008.

Susan M. ...

JUDGE

Presented by:

Alicia Burton

ALICIA BURTON
Deputy Prosecuting Attorney
WSB# 29285

Phil Sorenson

PHIL SORENSEN
Deputy Prosecuting Attorney
WSB# 16441

Approved as to Form:
Robert Quillian

ROBERT QUILLIAN
Attorney for Defendant
WSB#

amb

** Based on the foregoing
FoF + COL, the court
hereby denies the
personal restraint
petition, under
Pierce County Cause #
03-1-04329-1. **

SMB

FILED
DEPT. 14
IN OPEN COURT
AUG 22 2008
Pierce County Clerk
By *CA*
DEPUTY

