

No. 38246-6-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE: PERSONAL RESTRAINT OF KALE VORAK

STATE OF WASHINGTON,

Respondent,

v.

KALE VORAK,

Appellant.

CO COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *S*
IDENTITY

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT 1

 1. THE PROSECUTION IGNORES THE UNREASONABLENESS OF THE ATTORNEY’S PATENT DISREGARD FOR CURRENT LAW AND USES IMPROPER STANDARDS TO CLAIM A LACK OF PREJUDICE FROM DEFENSE COUNSEL’S INEFFECTIVE ASSISTANCE..... 1

 a. The defense attorney unprofessionally clung to an incorrect view of the law in advising his client of the risks of being convicted rather than pleading guilty 1

 b. Defense counsel’s “confident” advice of Vorak’s likely sentence was both wrong and unreasonable 4

 2. VORAK WAS MISADVISED AND PLAINLY PREJUDICED BY THIS MISADVICE 7

 a. The prosecution misrepresents the court’s factual findings and misconstrues the testimony at the reference hearing 7

 b. Vorak relied on and was prejudiced by his attorney’s misadvice 9

B. CONCLUSION..... 12

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999)..... 6

Washington Court of Appeals Decisions

In re Pers. Restraint of Burchfield, 111 Wn.App. 892, 46 P.3d 840
(2000); 5

In re Pers. Restraint of McCready, 100 Wn.App. 259, 996 P.2d 658
(2000) 3

State v. Jones, 117 Wn.App. 721, 72 P.3d 1110 (2003)..... 5

State v. Portrey, 102 Wn.App. 898, 10 P.3d 481 (2000)..... 5

State v. Stowe, 71 Wn.App. 182, 858 P.2d 267 (1993) 9

United States Supreme Court Decisions

Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)
..... 10

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461
(1938) 2

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80
L.Ed.2d 674 (1984)..... 2, 10

Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed.2d 309
(1948) 2

Federal Decisions

Boria v. Keane, 99 F.3d 492 (2nd Cir. 1996), cert. denied, 521 U.S.
1118 (1997) 2

Statutes

RCW 9.94A.589 6

Court Rules

RPC 1.1 3

RPC 3.3 3, 4

RPC Preamble 3

A. ARGUMENT.

1. THE PROSECUTION IGNORES THE UNREASONABLENESS OF THE ATTORNEY'S PATENT DISREGARD FOR CURRENT LAW AND USES IMPROPER STANDARDS TO CLAIM A LACK OF PREJUDICE FROM DEFENSE COUNSEL'S INEFFECTIVE ASSISTANCE

- a. The defense attorney unprofessionally clung to an incorrect view of the law in advising his client of the risks of being convicted rather than pleading guilty. The prosecution does not address the unprofessional and unreasonable representation rendered by defense counsel who "confidently" and "adamantly" advised Vorak that double jeopardy principles would bar the court from imposing a sentence in any amount appreciably longer than the 20 year term offered in the prosecution's plea bargain. In fact, not only did defense counsel say that he truly believed Vorak would and should prevail in his sentencing merger arguments, counsel's legal research advocating for such merger demonstrates his assessment of the current state of the law was patently unreasonable and predicated on an unethical disregard for contrary cases.

The constitutional guarantee of the right to the assistance of counsel recognizes that "the average defendant does not have the

professional legal skill to protect himself” when facing a criminal prosecution. Johnson v. Zerbst, 304 U.S. 458, 462-63, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). “Prevailing professional norms” guide the court’s assessment of an attorney’s. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Put simply, Vorak is not expected to understand complex legal nuances.

Several fundamental professional requirements dictate the scope of an attorney’s basic duties to perform with the minimum level of competence. First, the defense attorney must realistically assess the factual and legal circumstances of the case, and render accurate, not sugar-coated or unrealistic, advice. 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.”); Boria v. Keane, 99 F.3d 492, 497 (2nd Cir. 1996), cert. denied, 521 U.S. 1118 (1997) (“A defense lawyer in a criminal case has the duty to advise his client fully on *whether a particular plea to a charge appears to be desirable.*” (emphasis added by court, internal citation omitted)).

For example, defense counsel must provide sufficient information so an accused person may make an informed decision as to whether to plead guilty. In re Pers. Restraint of McCready, 100 Wn.App. 259, 263, 996 P.2d 658 (2000). In McCready, the court found counsel's performance deficient when the attorney did not explain that the details of the mandatory sentence the defendant would face if he rejected a guilty plea and was convicted after trial, although counsel did tell McCready of the standard range following trial. Id. at 262-63. Here, defense counsel's legal analysis rested on a doubtful if not incorrect view of the law.

Second, ethical rules and professional standards mandate the attorney's honesty to both the client and the court. Washington's Rules of Professional Conduct (RPC) "establish standards of conduct by lawyers." RPC Preamble, § 20. As a basic principle, a lawyer must know the pertinent, current, law, i.e., "keep abreast of changes in the law and its practice." RPC 1.1, cmt. 6. And as a corollary, a lawyer must candidly tell the court what the law is, without omitting contrary controlling cases. RPC 3.3, cmt. 2 (while the lawyer is not expected to be impartial, "the lawyer must not allow the tribunal to be misled by false statements of law").

b. Defense counsel's "confident" advice of Vorak's likely sentence was both wrong and unreasonable. Here, defense counsel relied on outmoded caselaw in proffering his "very confident" opinion that Vorak would prevail in his merger arguments after sentencing and therefore the plea offer was not good enough. 8/6/08RP 43. His advice contrary to the sentencing calculations of the Sentencing Reform Act (SRA), and further in violation of his ethical and professional obligations to inform the court of current legal authorities, he did not include current law in his sentencing brief and told the court it should simply disregard contrary rulings. See RPC 3.3 (duty of candor to tribunal); Ex. 2 (defense sentencing memorandum). It is unreasonable and unprofessional to rely on legal arguments that are not supported by current case law.

Not only was defense counsel's adamant and confident merger argument tenuous, it rested on a fundamentally flawed calculation of Vorak's likely offender score. Defense counsel told Vorak that if the first degree robbery and two first degree assaults merged, he would only be sentenced on the robbery and a single firearm enhancement, for a total sentencing exposure of 12 years. 8/6/08RP 12.

In fact, even if the court found that robbery and assault merged at sentencing, robbery would be the lesser offense and the assault would be the offense of conviction. The lesser conviction is the offense with the lower seriousness level and shorter sentence. In re Pers. Restraint of Burchfield, 111 Wn.App. 892, 900, 46 P.3d 840 (2000); 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). First degree robbery has a significantly lower seriousness level and associated sentencing range than first degree assault. See Appellant's Opening Brief, at 13-14.

Additionally, Vorak was accused of assaulting two people with a firearm, and thus there were two victims and two first degree assaults. He was not merely accused of brandishing a firearm during a robbery, but of threatening to kill the two victims and firing the gun several times. Ex. 1, p. 4 (probable cause certification). This use of force is not a "single" act incidental to a robbery, but separate and distinct from it, or at least there is a significant probability a sentencing court would find it to be so.

Thus, the most likely sentencing scenario is that the first degree assault would count as separate, distinct offenses against Vorak, and would run consecutively to one another as two

“separate and distinct” serious violent offenses, with consecutive firearm enhancements. RCW 9.94A.589(1)(b); see State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). Even if the robbery merged into the assault convictions, Vorak would be left with a sentence close to the 40 years he received, and far from the 20 years he was offered and discouraged from taking in a plea.

Defense counsel misadvised Vorak based on his own misunderstanding of sentencing law and his refusal to acknowledge the current state of the law. As explained in detail in the Opening Brief, defense counsel was unaware of very similar cases pointedly contrary to his sentencing advice, and once the prosecution cited these contrary decisions, he urged the court to disregard them as “maverick.” 5/7/04RP 270; 8/6/08RP 43; Opening Brief, at 15-22. He rested his legal arguments on double jeopardy analysis that has not been the law in Washington in many years. Opening Brief at 20-22.

Defense counsel’s belief that the merger issue strongly favored Vorak was not reasonable, and presenting the likelihood of a far more lenient sentence as something in which he had great “confidence” is simply contrary to professional norms of competent behavior. The prosecution neglects to respond to Vorak’s

explanation of counsel's fundamental misrepresentation of the current law at the time of Vorak's sentencing, but this significant lapse caused counsel to encourage Vorak to refuse a plea even though the most likely result of a trial would be Vorak's conviction and consecutive sentences and twenty additional years of imprisonment.

2. VORAK WAS MISADVISED AND PLAINLY PREJUDICED BY THIS MISADVICE

a. The prosecution misrepresents the court's factual findings and misconstrues the testimony at the reference hearing.

One of the most telling facts supporting Vorak's version of events and largely ignored by the prosecution and trial court, is that when Vorak was originally sentenced, the court imposed the wrong sentence by a significant amount. The court added 120 months, or 10 years to Vorak's sentence.

Yet no one noticed this mistake. Defense counsel, who claimed to go over all sentences with clients using worksheets, although he had no specific recollection of doing so with Vorak, had no idea that the sentence imposed was **15 years too long**.

8/6/08RP 44, 56, 59. The fact that defense counsel did not even suspect a sentence of 719 months was wrong by 180 months

illustrates defense counsel's focus on his "merger" argument and his lack of attention if not ignorance of the high end of the standard range that Vorak actually faced if convicted. (corrected Judgment and Sentence attached as Appendix H to State's Response to Personal Restraint Petition).

In its response brief, the prosecution essentially claims that all factual findings were in fact credibility determinations that cannot be reviewed on appeal. But the court did not make express credibility findings and Vorak's testimony was not significantly different from his trial attorney's, except that Vorak offered his specific recollection of conversations and the defense attorney described his general practice but the only specific recollections he had were of confidently encouraging Vorak to reject the plea bargain because there was little to risk by going to trial.

Additionally, the prosecution is critical of Vorak's motives and treats his every word at the hearing as something to be parsed and prodded. But by the time of the reference hearing, Vorak had participated in a direct appeal and written a pro se motion seeking relief in a personal restraint petition, therefore, his knowledge of the laws at sentencing was far different than at the time of the plea discussions and trial. Yet he remains a non-lawyer and largely self-

educated person with a great deal of personal emotion wrapped up in his appeal. Thus, it is unfair to parse his words and misrepresent their import.

The prosecution unfairly complains Vorak really wants a different plea deal, even though Vorak said he was not in a position to be picky and the purpose of his petition was to get back the plea offer that he rejected without understanding the consequences. The prosecution faults him for his desires to be in a better position than a person serving 45 years in prison for a botched shoplifting. Picking apart Vorak's motives is unfair because his emotions cannot be singular. That Vorak felt wronged, and misled by this trial attorney, and wanted a different attorney, does not undermine his claims. Vorak cannot be expected to completely separate his desire not to be in prison at all from his legitimate and largely corroborated claim that he was misled and improperly advised by his attorney.

b. Vorak relied on and was prejudiced by his attorney's misadvice. When counsel misrepresents the applicable law, including the collateral consequence of a plea, the defendant must be allowed to withdraw the plea. State v. Stowe, 71 Wn.App. 182, 187-89, 858 P.2d 267 (1993); see also Hill v. Lockhart, 474

U.S 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (counsel's advice about the parole eligibility after a guilty plea must fall "within the range of competence demanded of attorneys in criminal cases.").

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. Lockhart, 474 U.S. at 59. In the context of the case at bar, the probability of a "different" result includes the likelihood that the defendant would have pled guilty or sought a different plea resolution. Id.

Vorak said repeatedly and unambiguously that if he accurately understood the weakness of the merger argument and appreciated the actual length of the sentence he faced if convicted, "he never would have went to trial he would have accepted the plea bargain." Personal Restraint Petition, p. 6; 8/6/08RP 16, 30. His attorney told him he would not get "any more time than" the 212 months offered in the plea bargain if he pled guilty, without explaining the three firearm enhancements alone would be 180 months, not to mention the consecutive nature of serious violent offenses. 8/6/08RP 16, 30. He said if he understood the

consequences, "I would have accepted" the plea bargain.

8/6/08RP 16, 30.

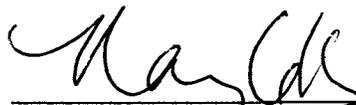
Vorak was not simply fishing for a different outcome. His attorney substantially agreed with Vorak's testimony and the extrinsic evidence corroborating his claim is strong. The defense attorney said multiple times during his testimony that he was "confident" in his merger argument, without regard to its tenuous legal basis. The defense attorney had no idea that 719 months was substantially longer than the highest sentence available and did not even make note that it seemed like too long of a sentence, thus showing that he spent little if any time thinking about the standard range as properly calculated under the SRA. The defense attorney unreasonably and unprofessionally encouraged Vorak to reject a guilty plea based on a misunderstanding of the law and because Vorak would have accepted the plea if he understood that he would likely receive at least another 22 years in prison, thus showing the prejudice that attached. Reversal is required.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Kale Vorak respectfully requests this Court reverse his convictions and remand his case for further proceedings where he may have the opportunity to plead guilty.

DATED this 22nd day of June 2009.

Respectfully submitted,



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