

NO. 38246-6

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

STATE OF WASHINGTON, RESPONDENT

v.

KALE VORAK, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Susan K. Serko

No. 08-2-05047-1

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**BRIEF OF RESPONDENT**

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COURT OF APPEALS  
DIVISION II  
JULY 27 PM 1:19  
STATE OF WASHINGTON  
BY *cm*  
IDENTITY

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

1. Should this court uphold the trial court's findings of fact as they are supported by substantial evidence?
2. Did the trial court properly deny defendant's personal restraint petition where he failed to prove by a preponderance of the evidence that he received ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

Procedural History

This is a civil appeal from an order dismissing defendant's personal restraint petition following a reference hearing.

Defendant filed a personal restraint petition in early 2007, claiming ineffective assistance of counsel throughout the plea bargaining process.

CP 1-3. The Court of Appeals remanded the personal restraint petition to the superior court for a reference hearing on the merits. CP 1-3.

Specifically, the Court of Appeals ordered the superior court to resolve a factual dispute on the following issues:

his lawyer (1) did not explain that Petitioner's offender score and standard range would be higher if convicted of more charges after a trial; (2) did not explain that if convicted of both assaults after a trial, those sentences would be served consecutively; (3) did not explain that if convicted of all counts at trial Petitioner would serve three consecutive firearm enhancements, not just the one in the

offer; and (4) provided poor advice about the prospects for trial success and for merger of the offenses if convicted.

CP 1-3.

On August 6, 2008, Pierce County Superior Court Judge Susan Serko presided over the reference hearing. RP 1. The judge heard testimony from the defendant and Mr. Sepe, defendant's trial counsel. RP 1-76. The court also reviewed several exhibits, including the information and judgment and sentence relating to defendant's criminal charges, a copy of the State's plea offer, sentencing memorandum from both parties, and the verbatim transcript of the sentencing hearing. *See* Ex. 1-8.

Defendant had been convicted following a jury trial of one count of first degree robbery, two counts of first degree assault, and one count of unlawful possession of a firearm. Ex. 1. Prior to trial, the State offered to dismiss one count of first degree assault, and recommend a low-end, standard-range sentence of 212 months in exchange for defendant's plea of guilty. Ex. 6. The State's offer also required defendant to forgo any merger argument. Ex. 6.

At the reference hearing, defendant testified that Mr. Sepe advised him not to take the State's plea offer because the State was being "greedy," and that defendant should go to trial. RP 15. Defendant stated that Mr. Sepe told him that if he ended up losing at trial, he "wouldn't get much more than [the State's offer] anyways, so that there was no risk." RP 16. Defendant also claimed that Mr. Sepe told him "he's going to the

Supreme Court with [the case], he's going to win it and all that." RP 16. In addition, defendant claimed that Mr. Sepe never told him how much time he would be sentenced to if he were convicted of all charges, never explained that three firearm enhancements would run consecutive, never explained that the two assault charges would run consecutive, and never gave him any kind of "worse case scenario." RP 14, 17.

Defendant testified that, if he had known that he was facing a potential sentence of 44 years, 11 months, he would have accepted the State's offer. RP 23. However, defendant also insisted that he had never assaulted anybody. RP 13, 34. Also, when asked what remedy defendant wanted, he responded, "I'd like a new trial and a new attorney so that he can pursue a plea bargain for me that would be more reasonable; you know, one that he actually advocates for rather than recommending then rejecting." RP 31. Defendant stated, "I want an attorney that's willing to advocate for my defense and give me the best deal attainable." RP 31.

Defendant also admitted at the reference hearing that he did not know what kind of prison sentence he would have been facing as he is "kind of an optimistic person so I didn't really dwell on that too much," but he did not believe he would be facing any more than 30 years. RP 19. When the court sentenced defendant, he was surprised and "the realization that I might actually have to go to jail hit me kind of hard." RP 20.

Mr. Sepe also testified at the reference hearing. RP 35. He is an experienced criminal trial attorney who has represented criminal

defendants for over twenty years. CP 23-25 (finding of fact 3); RP 35-36. His caseload consists primarily of complex Class A felonies, including death penalty cases. CP 23-25 (finding of fact 3); RP 36. Mr. Sepe is also qualified to handle appeals, and usually has one or two appeals pending at any given time. CP 23-25 (finding of fact 3); RP 36, 54.

Mr. Sepe testified that he discussed the State's plea offer with defendant, including the demand that defendant forgo a merger argument. RP 50. He also advised defendant that if he were convicted of all the charges, his offender score and standard range would be higher than what was in the offer. RP 44, 60. He informed defendant that the assault charges would run consecutively and that three firearm enhancements would run consecutively. RP 47. Mr. Sepe testified that he explained the status of merger law in Washington, particularly the split between Division I and Division III, and that Division II had yet to decide the issue. RP 12-13; 42-43. Mr. Sepe stated that he told defendant that he was confident they would win a merger argument, but cautioned defendant that he could not guarantee the outcome. RP 43, 47. Mr. Sepe testified that he would never advise a client to forgo a reasonable plea offer just because he wanted to litigate an issue. RP 50-51.

Defendant ultimately lost the merger argument at sentencing, and appealed<sup>1</sup> on that issue. While his appeal was pending, the Supreme Court decided *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), which controlled the disposition of defendant's case. The Court of Appeals affirmed defendant's convictions and sentence. After losing his appeal, defendant filed a personal restraint petition. CP 1-3.

At the end of the reference hearing, the court reviewed all of the exhibits, her own notes from the hearing, the verbatim transcript of the sentencing hearing, the order transferring the petition from the Court of Appeals to the superior court, defendant's personal restraint petition, the State's response, defendant's reply, and case law; specifically *State v. Davis*<sup>2</sup>, *State v. Osborne*<sup>3</sup>, and *State v. Holm*<sup>4</sup>. RP 83, 90. The court also restated the exact issues she was directed to address by the Court of Appeals. RP 91. The court held that the defendant did not meet his burden of proving ineffective assistance of counsel by a preponderance of the evidence, and denied defendant's personal restraint petition. RP 92, 95. The court found no attorney error and no violation of the ethical

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<sup>1</sup> See Court of Appeals No. 31788-5. The Court of Appeals opinion for defendant's first appeal was not made part of the record at the reference hearing. The State has included the citation for the sole purpose of clarifying the procedural history of the case.

<sup>2</sup> As the court did not give any citation to the legal authority she relied on, the State is assuming the court is referring to *In re Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004), which was referenced in the State's Brief for Reference Hearing under defendant's Personal Restraint Petition (CP 4-6).

<sup>3</sup> *State v. Osborne*, 102 Wn.2d 87, 684 P.2d 683 (1984).

<sup>4</sup> *State v. Holm*, 91 Wn. App. 429, 957 P.2d 1278 (1998).

obligation to discuss plea negotiations. RP 92. The court also held that there was no reasonable probability that the defendant would have accepted the plea agreement. RP 92. The court based that decision on two factors:

First, the state of the law on the issue of merger was in flux until the Supreme Court decided *Freeman*. It appeared at that time that this matter went to trial and at the time that Mr. Sepe was advising Mr. Vorak that some of these charges would merge, but that changed in 2005 post sentencing with the decision in *Freeman*. More importantly perhaps is that defendant testified at the hearing that he wanted a new trial and new counsel and not the benefit of this bargain or the plea bargain that was offered to him, 212 to 276 months.

CP 92. The court issued findings of fact and conclusions of law supporting its decision. CP 21-25.

Defendant filed a timely notice of appeal. CP 26-32.

C. ARGUMENT.

1. THIS COURT SHOULD TREAT THE TRIAL COURT'S FINDINGS OF FACT AS VERITIES AS THEY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those

findings are also binding upon the appellate court. *Id.* Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Id.*

Because the written record of a proceeding is an inadequate basis on which to decide issues of credibility, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In the present case, the court entered findings of fact and conclusions of law to support her dismissal of defendant’s personal restraint petition. CP 21-25. Defendant assigns error to findings of fact 6, 7, 8, and 9, asserting that the findings are not supported by substantial evidence. *See* Appellant’s brief at 1-2. All of the challenged findings of fact are supported by substantial evidence in the record.

- a. Finding of fact 6 should be treated as a verity.

The court’s finding of fact 6 stated:

6. Sepe discussed the substance of both letters with Vorak, but a plea agreement was never reached. Throughout the plea negotiations, Sepe advised Vorak of the following:
  - a. If Vorak rejected the offer he would go to trial on *all* the charges listed in the original information and, if convicted, Vorak’s offender score and standard range would be higher than that represented in the plea offer;

- b. If Vorak were convicted of both first degree assaults at trial, the sentences on those offenses would be consecutive;
- c. Vorak would serve three consecutive firearm enhancements if he were convicted of all charges and the enhancements at trial;
- d. Vorak's prospects of succeeding on the merger issue were good, but Sepe could not make any guarantees as to how the trial court or, ultimately, the Supreme Court would resolve this issue;
- e. Vorak's prospects for avoiding conviction on the assaults at trial were good, but Sepe could not guarantee that he would be acquitted.

CP 21-25 (emphasis in original). Substantial evidence supports each section of this finding of fact.

Mr. Sepe "went over the letter and the details of the [State's] recommendation." RP 50. When asked if he specifically remembered advising defendant regarding his offender score and standard range would be greater if convicted of all charges, Mr. Sepe admitted that, as the case was five years old, he did not have specific recollection, but added, "I know what I've done for the past 20 years and would have had no reason to vary from it, so my answer would be yes." RP 44. Mr. Sepe likes to use the word "whacked," and tells clients "if you get whacked on everything here, here's what's going to happen." RP 45-46. He also advised defendant if he did not win the merger issue, the time he was facing would be "considerably more" than the offer. RP 60.

Mr. Sepe informed defendant that, if the merger argument failed, the two assault charges would run consecutively, as would the three firearm enhancements. RP 47. He also told defendant that, while he was confident of success on the merger issue, there were no guarantees that they would win. RP 38, 43, 46-47.

Mr. Sepe testified that he is careful about how he conveys a client's chances of winning at trial. RP 38. He will not give the client "odds," but will discuss "holes" in his client's case and "potential pitfalls" in the State's case. RP 38. He does not like to give a client "false hope," and instead only gives his opinion on the outcome of a case when the case is "really, really bad." RP 53.

Defendant argues that the court's findings of fact misconstrue the evidence by indicating that Mr. Sepe unambiguously and repeatedly explained defendant's sentencing consequences. *See* Appellant's brief at 24. As noted above, Mr. Sepe testified that it was his habit to explain the sentencing consequences to a defendant, and that he recalled specific discussions regarding the merger issue in this case and what would happen if defendant got "whacked" at trial. This finding should be upheld as supported by substantial evidence in the record.

Defendant's claim actually relates to the court's credibility determination. While Mr. Sepe did not testify that he had an independent recollection of every conversation with defendant in this case, he did testify as to what his general practice has been over twenty years of

experience, and his belief that he did not deviate from his standard practice or violate his ethical obligations in this case. RP 35-37, 43, 44-45, 47, 50-51. The judge clearly found it credible that someone with Mr. Sepe's experience and responsibilities had not deviated from his standard practice in this case. Moreover, while defendant's representations of what happened during pretrial discussions somewhat differed from Mr. Sepe's, the court did not find his testimony credible. The court noted that all of defendant's contentions were countered by Mr. Sepe's "sworn testimony." RP 93.

As this court cannot review the trial court's credibility determinations, substantial evidence supports finding of fact 6 and it should be considered a verity on appeal.

- b. Finding of fact 7 should be treated as a verity.

The court's finding of fact 7 is also supported by sufficient evidence and should be treated as a verity on appeal. Finding of fact 7 states:

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

CP 21-25. Mr. Sepe testified that he discussed the plea offer with defendant and compared it to a "worse case" scenario if defendant rejected the offer and proceeded to trial. RP 37-38, 44-45, 55-56. Mr. Sepe even

included figures that reflected defendant's potential time off for good behavior. RP 56. He discusses "numbers," and keeps the calculations simple to make sure his clients understand. RP 45. In Mr. Sepe's experience, clients want to know how long their prison sentence will be, and how that time is calculated. RP 45.

Again, defendant's claim is that this finding of fact mischaracterizes Mr. Sepe's testimony; however, this is another challenge to the court's credibility determination. As the court found Mr. Sepe credible, his testimony is sufficient evidence to support the finding of fact. Finding of fact 7 should be treated as a verity on appeal.

- c. Finding of fact 8 should be treated as a verity.

Most of the testimony adduced at the reference hearing related to Mr. Sepe's confidence in his argument that defendant's two counts of assault would merge into the single robbery. The court's finding of fact 8 stated:

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

CP 21-25. Mr. Sepe testified that he explained to defendant how Division I and Division III were at odds with their rulings on whether assault and

robbery merged. RP 42. Even defendant's testimony reflected he had a very sophisticated understanding of the split between the divisions, based on Mr. Sepe's discussions with him. RP 12-13. Mr. Sepe acknowledged at the reference hearing that he did, indeed, tell defendant he was confident in the merger argument. RP 42-43. He also testified that he was careful to remind defendant that there was no guarantee of a win. RP 42-43. He also confirmed that defendant was informed that if he did not win the merger issue, the time defendant was facing would be "considerably more" than what was offered by the State. RP 60.

As noted above, defendant's challenge is to the court's credibility determination. Mr. Sepe's testimony provided sufficient evidence to support finding of fact 8. This finding of fact should be treated as a verity.

- d. Finding of fact 9 should be treated as a verity.

Finally, defendant assigns error to finding of fact 9, which reads:

9. Vorak rejected the plea offer and proceeded to trial on February 5, 2004. Vorak's decision to forgo the offer and proceed to trial was a fully informed decision. The decision to reject the plea offer was Vorak's decision alone. Sepe did not put undue pressure on Vorak to reject the offer.

CP 21-25. There can be no dispute that defendant did reject the plea offer, and that the case went to trial. The State presented evidence at the reference hearing that Mr. Sepe complied with his standard practice of telling defendant about the holes in the defense case, the pitfalls in the

State's case, his confidence in the issues that could be raised, and then left the decision of whether or not to go to trial up to defendant. RP 38. Mr. Sepe testified that he would never force a client to go to trial, not even for the opportunity to argue a great issue. RP 38, 50. According to Mr. Sepe, defendant was confident that the only convictions he would be facing was robbery and unlawful possession of a firearm, and defendant was unsatisfied with the State's offer because it included an assault charge. RP 45, 51.

The record clearly contains substantial evidence to support the trial court's finding of fact 9, as defendant's challenge once again is to the court's credibility determination. Finding of fact 9 should be treated as a verity.

2. THE TRIAL COURT ACTED PROPERLY WHEN IT DISMISSED DEFENDANT'S PERSONAL RESTRAINT PETITION AS HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PLEA BARGAINING PROCESS WAS UNSUPPORTED BY THE EVIDENCE PRESENTED AT THE REFERENCE HEARING.

Under RAP 16.14(b), a decision of a superior court in a personal restraint proceeding transferred to that court for a determination on the merits is subject to review in the same manner, and under the same procedure, as any other trial court decision. The appellate court reviews findings of fact for substantial evidence and then determines whether the

findings support the conclusions of law and judgment. *State v. Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996).

In an evidentiary hearing, the defendant bears the burden of proving deficient performance by a preponderance of the evidence. See *State v. Robinson*, 138 Wn.2d 753, 770, 982 P.2d 590 (1999).

A trial court's conclusions of law are reviewed do novo and generally will be upheld if they are supported by the findings of fact. *In re Poole*, 164 Wn.2d 710, 723, 193 P.3d 1064 (2008).

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 421, 114 P.3d 607 (2005). Counsel is ineffective when his performance falls below an objective standard of reasonableness and this failing prejudices the defendant. *Strickland*, 466 U.S. at 687-88.

A defendant establishes prejudice by showing "a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (citing *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. To prevail on an ineffective assistance claim, a defendant must prove both prongs of the

test. *Strickland*, 466 U.S. at 697. To avoid the distortion of hindsight, courts presume that counsel effectively represented the defendant.

*Strickland*, 466 U.S. at 689; *In re Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

During plea bargaining, counsel must “actually and substantially [assist] his client in deciding whether to plead guilty.” *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)). Counsel’s duty includes communicating actual offers, discussing tentative plea negotiations, and discussing the strengths and weaknesses of the defendant’s case so that the defendant knows what to expect and makes an informed decision on whether to plead guilty. *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987).

The record supports the court’s conclusion that defendant failed to prove that Mr. Sepe’s performance during the plea bargaining process was deficient, or that he was prejudiced by Mr. Sepe’s performance. *See* CP 21-25 (Conclusion of law 1). As noted above, Mr. Sepe discussed the plea offer with defendant, informed him of the sentencing risks he was facing by going to trial, and examined the strengths and weaknesses of his case. Mr. Sepe’s performance during the pretrial process did not fall below an objective standard of reasonableness.

Not only had defendant failed to prove that counsel’s performance was deficient, he also fails to make any showing of prejudice. It is clear

from the record that defendant's decision to reject the plea offer was based on many factors other than the potential length of his sentence. First, at the reference hearing defendant still denied that he committed assault. RP 13, 34. It is unlikely that defendant would have been supportive of any plea that involved a plea to an assault.

In addition, defendant indicated that he was not expecting to be convicted. Defendant stated that he was surprised<sup>5</sup> at his sentencing; up until that moment he had not realized he was going to jail. RP 20. When asked what kind of sentence he was expecting, defendant responded, "I'm kind of an optimistic person so I didn't really dwell on that too much," and later stated, "Miracles do happen." RP 19, 29. This indicates that defendant was prone to go to trial as he was expecting an acquittal.

While defendant asserts that he would have taken the plea now that the issue of merger has been decided against him, the court noted that defendant did not want the benefit of the State's original offer, but he wanted a new trial and "a complete fresh start." RP 31, 95. She also considered defendant's statements that his focus was how the case was just before his nineteenth birthday and that he was hoping to not lose so

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<sup>5</sup> The court had a transcript of the sentencing hearing during the reference hearing. Contrary to defendant's claim that his silence was due to surprise, when asked by the sentencing court if he had anything to say, defendant responded, "I won't say nothing." Ex. 7 (RP 284). Also, the court noted, "[i]f you want to yawn and look bored with me, that's fine, I will let you do that." Ex. 7 (RP 285).

much of his life. RP 23, 95. The court clearly stated the inferences she drew from defendant's testimony in her oral ruling:

And what I took from that was that Mr. Vorak really wanted to take the risk of going to trial. He didn't believe that he could possibly get 45 years, but that was not because Mr. Sepe did not advise him. He is a very intelligent young man; he was facing a very lengthy downside; he was hoping for the best at trial

RP 95. This statement shows that the court recognized that defendant was hoping for an acquittal at trial.

It would appear to the State that it is only now that he has been convicted of his crimes that defendant *may* be willing to accept a plea agreement for anything less than his 45-year sentence. While defendant claimed he was not "picky," about the terms of a plea offer, he did not request to be put back at the position he was in when he rejected original offer. RP 34. Instead, he wanted a new trial. RP 31. This testimony does not support defendant's contention that he would have taken a pretrial offer the first time around. The record clearly supports the trial court's conclusion that defendant would not have accepted the pre-trial offer prior to his conviction, not because he was misinformed, but because he was hoping for a "miracle."

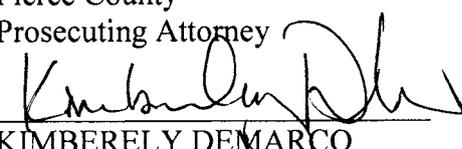
Defendant has failed to meet his burden of proving by a preponderance of the evidence that Mr. Sepe's performance fell below an objective standard of reasonableness and that he suffered prejudice.

D. CONCLUSION.

Defendant failed to prove by a preponderance of the evidence that he received ineffective assistance of counsel. For the reasons stated above, the State respectfully requests this court to affirm the trial court's denial of defendant's personal restraint petition.

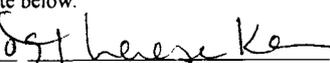
DATED: May 27, 2009.

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WSB # 39218

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.

5-27-09   
Date Signature

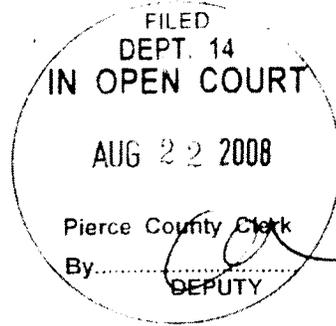
COURT OF APPEALS  
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## **APPENDIX "A"**

*Findings of Fact and Conclusions of law*



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

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

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

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

17 5. Fred Wist responded to Sepe's letter on November 19, 2003. Wist accepted Sepe's  
18 proposal, but clarified that Vorak's offender score was one point higher than Sepe believed it to  
19 be based on Vorak being on community custody at the time he committed the present crimes.  
20 Wist advised Sepe of Vorak's potential sentencing range with the higher offender score and of  
21 Wist's intention to recommend a sentence at the low end of the sentencing range. A copy of  
22 Wist's letter was admitted into evidence at the reference hearing as Exhibit No. 6.  
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6. Sepe discussed the substance of both letters with Vorak, but a plea agreement was never reached. Throughout the plea negotiations, Sepe advised Vorak of the following:

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

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

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

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

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

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

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

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

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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.  
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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. M...  
JUDGE*

Presented by:

*Alice Burton*  
ALICIA BURTON  
Deputy Prosecuting Attorney  
WSB# 29285

*Phil Sorensen*  
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, <sup>filed on 10/30/06</sup> under Pierce County Cause # 03-1-04329-1. \*

*Sus*

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