

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

NO. 39054-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES LEWIS MATCHETTE,

Appellant.

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

The Honorable Kathryn Nelson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Matchette's motion to withdraw his plea where it was not knowing, voluntary and intelligent due to a misrepresentation as to his offender status under the POAA.

2. Mr. Matchette was denied effective assistance of counsel when his attorney, without researching the issue, misinformed him that he was facing a third strike.

3. Mr. Matchette assigns error to the findings and conclusions regarding his motion to withdraw his plea.

4. Mr. Matchette assigns error to the legal and factual representations in the trial court's letter ruling dated February 18, 2009.

5. Mr. Matchette's waiver of counsel at his evidentiary hearing was not knowing, voluntary and intelligent because he was not advised of the risks and disadvantages of proceeding pro se.

Issues Presented on Appeal

1. Did the trial court err in denying Mr. Matchette's motion to withdraw his?

2. Was Mr. Matchette denied effective assistance of counsel when his attorney, without researching the issue, misinformed him that he was facing a third strike based on the federal bank robbery counting as a

strike?

3. Did the trial court err as a matter of law in setting forth incorrect findings and conclusions regarding Mr. Matchette's motion to withdraw his plea?

4. Did the trial court commit legal error in her legal and factual representations in the trial court's letter ruling dated February 18, 2009?

5. Was Mr. Matchette denied due process when unable to make a knowing, voluntary and intelligent waiver of his right to counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Mr. Matchette was charged by information with rape in the second degree, Supp. CP (information 7-25-06). On December 29, 2006, before the beginning of trial, Mr. Matchette was charged by amended information with rape second, felony harassment and unlawful imprisonment. CP 203. On December 12, 2006, the state a persistent offender case. CP 1. Pursuant to plea negotiations, by second amended information, on April 30, 2007 during the middle of trial, Mr. Matchette was charged with unlawful solicitation to possess a controlled substance and felony harassment. CP 433-45.

On April 30, 2007, Mr. Matchette pleaded guilty as charged in the second amended information. CP 46-53. Mr. Matchette stipulated to his

offender score. Supp. CP. (stipulation to offender score 4-30-07). The trial court sentenced Mr. Matchette to an agreed exceptional sentence. CP 54-56; 70-74.

Following sentencing, on October 16, 2008, Mr. Matchette filed a CrR 7.8 motion which the trial court transferred to the Court of Appeals. CP 78-84. Mr. Matchette moved to withdraw his appeal on grounds that he had been misinformed as to his status under POAA as facing life in prison without the possibility of parole. CP 1; 78-84. The Court of Appeals remanded to the Superior Court for resolution on the merits. Supp CP (Letter ruling form COA 10-28-08) The trial court in a letter ruling denied the motion and entered findings and conclusions which are challenged herein. CP 137-140, 141-142. On March 6, 2009, the trial court Nunc Pro Tunc “corrected” the judgment and sentence.¹ CP 143-44. This timely appeal follows. CP 166-174.

2. SUBSTANTIVE FACTS

The state began a rape in the second degree jury trial with Mr. Matchette on April 16, 2007 without a complaining witness. On several occasions, the Defense moved to dismiss the case due to the absence of the complaining witness. RP 78, 205, 383. The trial court denied the motions. CP

¹ The total number of months of confinement was not changed. CP 143-44.

81, 385. On April 30, 2007, to avoid risking a third strike, pursuant to plea negotiations, Mr. Matchette pleaded guilty to felony harassment and solicitation to possess a controlled substance. RP 570-76. On June 1, 2007 the trial court sentenced Mr. Matchette to an agreed exceptional sentence of 132 months. RP 582-85. Mr. Hershman informed the trial court that even though trial was going well, Mr. Matchette was taking the plea deal to avoid “two potential third strike[s]”. RP 588; 591-93; CP 700-74.

On April 11, 2008, pro se, Mr. Matchette moved to withdraw his plea. RP 599-600. Mr. Matchette informed the court that Mr. Hershman no longer represented him, but the trial court did not engage in any colloquy with Mr. Matchette. Mr. Matchette explained to the court that he wanted to withdraw his pleas because his attorney Mr. Hershman mis-informed him that he was facing a third strike and that was the reason for his decision to plead guilty. RP 606-07.

Mr. Matchette told the court that a friend informed him that his prior federal bank robbery was not a strike and therefore Mr. Matchette could not be facing a third strike under *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005). RP 604, 608.

On November 14, 2008, the trial court engaged in a preliminary evidentiary hearing to address Mr. Matchette’s claims of ineffective

assistance of counsel regarding his plea. RP 628, 634-35. According to the prosecutor, Mr. Matchette agreed to waive his right to confidentiality regarding privileged communications with Mr. Hershman. RP 629. There is no document memorializing this waiver. There was also no colloquy regarding Mr. Matchette's proceeding pro se. Rather the trial court asked Mr. Matchette:

Would you like to proceed pro se today or - - ...because if you believe that you need the assistance of counsel and wish to have counsel, this court would certainly consider that and allow you to have counsel come to court today. So we are not proceeding today unless you are waiving your right to counsel and requesting to represent yourself. .

RP 642-43. Mr. Matchette responded that he wanted to represent himself. RP 643. The trial court proceeded to ask "tell me if I'm correct it is my understanding that you wish the Court to consider the confidentiality between you [Mr. Matchette] and Mr. Hershman waived as to matters relating to the two cases that were before me for pleas and sentencing?". Mr. Matchette responded "yes". RP 646.

Mr. Hershman, testified that initially, Mr. Matchette was not interested in pleading guilty but after a week or two into trial indicated that he wanted to pursue a plea deal. RP 657. Previously, Mr. Matchette had wanted Mr. Hershman to try to get the POAA filing by the state reversed, but Mr.

Hershman indicated that he was unaware of how to proceed with that request. RP 658-59. Mr. Hershman admitted that he was wrong when he advised Mr. Matchette that his federal bank robbery was a strike case. RP 660-662.

Mr. Hershman did not investigate the issue of whether the federal bank robbery was a felony because Mr. Matchette had initially been opposed to pleading guilty. RP 660.

I told him I believed federal bank robbery was a strike offense, that I couldn't imagine to the contrary, and I will admit in open court, that was wrong. But I also told him that I wasn't going to research it because he wanted to go to trial. He did not want to negotiate, and I told him that as long as he wanted to just go to trial and not negotiate, that was a moot point. It didn't warrant my research, and I wasn't going to waste time with irrelevant topics, and that was one.

RP 660. After Mr. Matchette, informed Mr. Hershman that he wanted to negotiate a plea, Mr. Hershman admitted that he did not research the issue of whether federal bank robbery was a strike offense. RP 672. Mr. Hershman also admitted that even though Mr. Matchette "repeatedly asked me [,][.] I repeatedly told him it was a moot issue." RP 674.

Mr. Hershman told Mr. Matchette that he was facing a third strike and if convicted he would die in prison. RP 697. Mr. Hershman brought Mr. Matchette's father in to help pressure Mr. Matchette into taking a plea deal because Mr. Hershman mistakenly believed Mr. Matchette was facing the

possibility of life in prison without the possibility of parole. RP 698-700.

Mr. Hershman even negotiated with the prosecutors and insisted that if Mr. Matchette was to plead guilty it had to be to a non-strike offense because he mistakenly believed Mr. Matchette already had two strikes. RP 705.

Mr. Matchette testified that he decided to plead guilty because he was misinformed that he was facing a third strike and did not want to risk life in prison without the possibility of parole. RP 738. Mr. Matchette also agreed to the exceptional sentence based on Mr. Hershman's representations that federal bank robbery was a strike offense and that as a result Mr. Matchette was facing his third strike. RP 738-39, 763.

The state argued that to prevail on his motion to withdraw his plea, Mr. Matchette had the burden of proving a manifest injustice. RP 775. The prosecutor further argued that he did not find Mr. Matchette credible as to his reliance on Mr. Hershman's misrepresentations. RP 777-79.

The trial court issued a letter ruling denying Mr. Matchette's motion to withdraw on grounds that Mr. Matchette was not credible regarding his reliance on Mr. Hershman's misrepresentations. The trial court further ruled that even though Mr. Hershman did in fact misinform Mr. Matchette that federal bank robbery was a strike offense, he was inexplicably justified in failing to research the issue even after Mr. Matchette indicated he wanted to

plead guilty to avoid life in prison without the possibility of parole. CP 137-140. The trial court's ruling both acknowledges the misrepresentation and somehow justifies it.

Mr. Hershman was patently correct to inform the court that defendant was entering his pleas knowingly, intelligently and voluntarily after full consultation with him of all pertinent circumstances. . . .

Defendant and Mr. Hershman negotiated a resolution that avoided the possibility of receiving a third persistent offender conviction and minimized his period of incarceration by avoiding sex offense convictions which would qualify as indeterminate.

Id.

C. ARGUMENT

1. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS MISINFORMED BY HIS ATTORNEY OF HIS STATUS UNDER THE PERSISTENT OFFENDER ACCOUNTABILITY ACT (POAA).

Mr. Matchette pleaded guilty under *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976), to two felony non-strike cases. Mr. Hershman, Mr. Matchette's attorney misrepresented to Mr. Matchette, that if convicted at trial he would be sentenced to life without the possibility of parole under the POAA.

RP CP 137-40 Mr. Matchette was never facing a third strike during these proceedings. RP 660.

A criminal defendant has the right to assistance of counsel under the sixth amendment to the United States Constitution. Washington courts consider this right to be “ ‘the right to the effective assistance of counsel.’ ” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). To show that counsel provided ineffective assistance, a defendant must show:

(1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wash.2d 222, 225-26, 743 P.2d 816 (1987)). The reviewing Court must reverse a lower court decision where the defendant demonstrates *both* deficient performance and resulting prejudice. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

In evaluating a claim for ineffective assistance of counsel, “the

performance inquiry must be whether counsel's assistance was *reasonable* considering all the circumstances.” *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052 (emphasis added). In engaging this inquiry, the reviewing courts are generally deferential to the performance of counsel. *Id.* at 689, 104 S.Ct. 2052. A defendant can overcome the presumption of effective representation by demonstrating “that counsel failed to conduct appropriate investigations.” *Thomas*, 109 Wash.2d at 230, 743 P.2d 816 (citing *State v. Jury*, 19 Wash.App. 256, 263, 576 P.2d 1302 (1978)). The defendant may also meet this burden by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *McFarland*, 127 Wash.2d at 336.

The *Strickland* test applies to claims of ineffective assistance of counsel in the plea process. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). During plea bargaining, counsel has a duty to assist the defendant “actually and substantially” in determining whether to plead guilty. *State v. Osborne*, 102 Wash.2d 87, 99, 684 P.2d 683 (1984) (quoting *State v. Cameron*, 30 Wash.App. 229, 232, 633 P.2d 901 (1981)). A guilty plea must be knowing, intelligent, and voluntary in order to satisfy due process requirements. *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 2257, 49 L.Ed.2d 108 (1976); *In re Hews*, 108 Wash.2d 579, 590, 741

P.2d 983 (1987) (*Hews II*); *In re Montoya*, 109 Wash.2d 270, 277, 744 P.2d 340 (1987). Counsel has an obligation to inform a defendant of all “direct” consequences of a guilty plea. *State v. Barton*, 93 Wash.2d 301, 305, 609 P.2d 1353 (1980). An *Alford*/*Newton* plea is valid when it “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, ---, 27 L.Ed.2d 162 (1970); *Montoya*, 109 Wash.2d at 280.

In *State v. Crawford*, 159 Wn.2d 86, 147 P.3d 1288 (2006), the State Supreme Court held that counsel was deficient for failing to investigate the defendant’s out of state criminal convictions to determine if they would be considered strike cases under POAA. *Crawford*, 159 Wn.2d at 99. In making this finding, the Supreme Court distinguished *In re Personal Restraint of Jeffries*, 110 Wash.2d 326, 752 P.2d 1338 (1988) and *State v. Benn*, 120 Wash.2d 631, 663-65, 845 P.2d 289 (1993), cases in which the Court held that counsel’s failure to investigate out of state convictions was “tactical”. *Crawford*, 159 Wn.2d at 99-100. In *Crawford*, “unlike *Benn* and *Jeffries*, there was no tactical basis for counsel's performance.” *Crawford*, 159 Wn.2d at 99-100.

In *Crawford*, defense counsel was apprised of Crawford’s out of state

² *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, ----, 27 L.Ed.2d 162 (1970);

conviction one month before trial, but failed to investigate the conviction “even though the information given to her by the State indicated that the Kentucky conviction qualified as an ‘adult felony’ conviction.” *Crawford*, 159 Wn.2d at 99-100. The state argued in *Crawford* that *Benn, and Jeffries*, applied to suggest a tactical basis for failing to investigate the out of state convictions because in each case, the defendants indicated that they would not consider pleading guilty. The Supreme Court in *Crawford* disagreed.

A reasonable attorney who knew of her client's extensive criminal record and out-of-state conviction would have investigated prior to recommending trial as the best option. Because there was no tactical reason for such behavior, we find that counsel's failure to investigate Crawford's criminal history amounted to unreasonable performance.

Crawford, 159 Wn.2d at 99-100.

In Matchette’s case, as in *Crawford*, a reasonable attorney who knew of the federal bank robbery criminal history would have investigated its status as a strike before recommending a plea as the best option for avoiding the risk of three strikes. The trial court erred and the he prosecutor was wrong at 99-100.in believing that current law alleviates an attorney’s responsibility to accurately assess a defendant’s criminal history. RP 778.

There are cases which hold that there exist in some circumstances legitimate tactical reasons not to investigate out of state convictions. See

Benn and Jeffries. In *Jeffries* there was no ineffective assistance of counsel where the defendant had specifically stated his wishes that the witnesses not testify and, furthermore, because calling the witnesses likely would have resulted in the defendant's extensive criminal record being put before the jury in rebuttal. *Jeffries*, 110 Wash.2d at 331-33. In *Benn*, the Court found no ineffective assistance of counsel where counsel made a tactical decision to offer limited mitigation evidence after conferring with the defendant, since other mitigation evidence would have been inconsistent with defense strategy. *Benn*, 120 Wash.2d at 663-65.

Benn and Jeffries are distinguishable on grounds that in those cases, trial counsel had legitimate tactical reasons not to investigate whereas in Mr. Matchette's cases, there was no legitimate tactical reason once Mr. Matchette decided he wanted to plead guilty. *Crawford*, 159 Wn.2d at 99-100.

In *Crawford*, the Court held that counsel's performance was deficient under the first prong of the *Strickland* test. On this point, the instant case is indistinguishable from *Crawford*: counsel's performance was deficient and there was no tactical reason to fail to investigate the out of state conviction. In Mr. Matchette's case, counsel admitted during the evidentiary hearing that he was wrong in advising Mr. Matchette that the federal bank robbery charge was a strike case. RP 694, 697, 702-03.

Prejudice

To satisfy the second prong of the *Strickland* test, a defendant must *affirmatively prove prejudice*, not simply show that “the errors had some conceivable effect on the outcome.” *Strickland*, 466 U.S. at 691, 693. In doing so, “[t]he defendant must show that there is a reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. (emphasis added); *Crawford*, 159 Wn.2d at 100.

In *Crawford*, even though counsel was deficient in failing to investigate Crawford’s out of state conviction, the Court held that Crawford was not prejudiced by this deficiency because the outcome would not have differed. *Crawford* is distinguishable on the prejudice prong of the *Strickland* test. In *Crawford* the Court noted that” (1) there was no indication that the prosecutor was willing to offer Crawford the option of pleading guilty to a non strike offense”; and (2) it was “highly speculative” that the prosecutor would have allowed the defendant to plead to a non-strike case. *Crawford*, 159 Wn.2d at 100.

Crawford is inapposite on the issue of prejudice because therein the defendant could only speculate that the outcome might have differed. In

Matchette's case, the outcome would have differed. Moreover, there was no question that the state would offer Mr. Matchette to plead to a non-strike offense because the state had already made the offer; there was no speculation on this point. The issue rather remained whether the outcome would have differed if Mr. Matchette was not misinformed by his attorney's affirmative misrepresentation that he was facing a third strike.

As a fundamental principle, the outcome would have differed because the decision making process would have been knowing, voluntary and intelligent rather than based on misinformation regarding his POAA status. *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005) (federal bank robbery is neither factually nor legally comparable to robbery in the second degree under Washington State statutory authority and is therefore not a strike under POAA).

Regardless of whether Mr. Matchette would have entertained any plea agreement had he known that he was not facing a third strike; the fact remains that Mr. Matchette **was** misinformed and therefore could not make a knowing, voluntary and intelligent decision to plead guilty. The outcome would have likely have differed if Mr. Matchette had been accurately advised that a conviction would not have led to a third strike. Under the correct facts, it is unlikely that Mr. Matchette would have been motivated to agree to an

exceptional sentence to avoid a non-existent third strike.

In sum, counsel's performance was deficient for misrepresenting Mr. Matchette's POAA status and the deficient performance was prejudicial because it precluded Mr. Matchette from making a knowing, voluntary and intelligent decision to continue with trial or plead guilty. *In re Pers. Restraint of Isadore*, 151 Wash.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)).

The remedy is withdrawal of the plea and a new trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

2. MR. MATCHETTE'S PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT BECAUSE IT WAS BASED ON AN AFFIRMATIVE MISREPRESENTATION AS TO HIS OFFENDER STATUS UNDER THE (POAA).

Mr. Matchette's plea was not knowing, voluntary and intelligent because it was based on reliance of his attorney's inaccurate advice regarding Mr. Matchette's status as a POAA third strike offender. Mr. Matchette's attorney and the state informed Mr. Matchette that he was facing two, third strike trials. This was incorrect. CP 1; 137-140; RP 603, 660-661. A plea based on an incorrect information regarding sentencing may be challenged for the first time on appeal. *State v. Walsh*, 143 Wash.2d 1, 7, 17 P.3d 591

(2001); RAP 2.5.

“Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent.” *Isadore*, 151 Wash.2d at 297; *Boykin v. Alabama*, 395 U.S. at 242. If a defendant is not apprised of a direct consequence of his plea, the plea is considered involuntary. *State v. Ross*, 129 Wash.2d 279, 284, 916 P.2d 405 (1996). A direct consequence is one that has a “definite, immediate and largely automatic effect on the range of the defendant's punishment.” *Id.* The length of a sentence is a direct consequence of a guilty plea. *State v. Bradley*, 165 Wn.2d 934, 939, 941, 205 P.3d 123 (2009), citing, *State v. Mendoza*, 157 Wash.2d 582, 590, 141 P.3d 49 (2006).

“The Courts do not require a defendant to show that the misinformation was material to the plea. *Isadore*, 151 Wash.2d at 302, 88 P.3d 390. Misinformation about the length of a sentence renders a plea involuntary, even where the correct sentence may be less than the erroneous sentence included in the plea. *Mendoza*, 157 Wash.2d at 591, 141 P.3d 49.

In Mr. Matchette's case, he was misinformed that he was facing a third strike; this was incorrect and as in the cases cited herein indicate this misrepresentation constituted a due process violation. *Bradley*, 165 Wn.2d at 940-41; *Isadore*, 151 Wn.2d at 297-98; *Ross*, 129 Wash.2d at 284; *Miller*, 110 Wash.2d at 531; *Stowe*, 71 Wn. App. at 189. A mutual mistake regarding

sentencing consequences also renders a guilty plea invalid. *Walsh*, 143 Wash.2d at 8.

In *Bradley*, the defendant Bradley was misinformed as to his offender score and the length of his sentence range for simple possession. The Court held that regardless of whether Bradley relied on this misrepresentation, the fact of the misrepresentation was sufficient to deny him his right to due process. *Bradley*, 165 Wn.2d at 940-41.

In *Isadore*, the defendant was not informed of the community placement portion of his sentence. The Court held that the failure to inform Mr. Isadore of this fact rendered the plea involuntary requiring either reversal or specific performance. *Isadore*, 151 Wn.2d at 302

In *Mendoza*, the defendant was misinformed that his offender score was lower than it actually was when properly calculated. Mr. Mendoza, learned of the error before sentencing and did not object. Later, Mr. Mendoza moved to withdraw his plea on other grounds, but he did not challenge the lowering of his offender score. The Supreme Court held that Mr. Mendoza waived his right to challenge the voluntariness of his plea because he was informed earlier and had not objected. *Mendoza*, 157 Wn.2d at 592.

In *Walsh*, the defendant was misadvised that his offender score was higher than if properly calculated. Mr. Walsh was not advised of this fact

before sentencing and therefore did not object to his plea before sentencing. *Walsh*, 143 Wash.2d at 5. “[B]ecause Walsh had been misinformed of the sentencing consequences, his plea was involuntary and he was entitled to withdraw it.

Walsh, 143 Wash.2d at 7-8

In *State v. Stowe*, 71 Wn. App. 182, 858 P.2d 267 (1993), the defendant was misinformed that entering an Alford plea would not jeopardize his status in the military. This was incorrect. The Court of Appeals held that the misrepresentation deprived Mr. Stowe of the ability to enter the plea voluntarily and remanded for withdrawal of the plea.

Stowe, 71 Wn. App.188-89.

Mr. Matchette like *Bradley, Isadore, Mendoza, Walsh and Stowe* was misinformed as to a direct consequence of pleading guilty. Regardless of Mr. Matchette’s thought process and consideration of the misrepresentation, the fact of the misrepresentation violated his due process rights because it prevented a knowing, voluntary and intelligent decision to enter the plea. The trial court and the state failed to comprehend the constitutional nature of the claim and instead perseverated on the mistaken belief that the pivotal issue was the degree of Mr. Matchette’s subjective reliance on the misrepresentation rather than on the misrepresentation itself. CP 137-140

(trial court's letter ruling, Attached as Exhibit A). This was a misunderstanding and misapplication of the law. *Bradley*, 165 Wn.2d at 940-41.

Contrary to the state's argument during the plea hearing and contrary to the trial court's understanding of the legal grounds for withdrawing a plea, the defendant's reliance on the misinformation is irrelevant. . *Bradley*, 165 Wn.2d at 940-41; *Isadore*, 151 Wn.2d at 301-02; RP 588 (Mr. Matchette "walked away from two potential three strikes trials to" plead guilty to other charges); CP 137-40. The trial court in her letter ruling on Mr. Matchette's motion to withdraw refused to understand that the fact of Mr. Hershman's misrepresentation that Mr. Matchette's status as facing a third strike was the determinate issue in evaluating the due process violation. *Bradley*, 165 Wn.2d at 940-41; *Isadore*, 151 Wn.2d 302.

The Supreme Court in *Bradley*, *Mendoza* and *Isadore*, explicitly held that it would **not** "engage in a subjective inquiry into the defendant's risk calculation and the reasons underlying his or her decision to accept the plea bargain...." when determining whether the plea was constitutionally valid. *Bradley*, 165 Wn.2d at 940-41; *Isadore*, 151 Wn.2d 302; *Mendoza*, 157 Wn.2d at 590-92:

We decline to adopt an analysis that requires the appellate

court to inquire into the materiality of mandatory community placement in the defendant's subjective decision to plead guilty. This hindsight task is one that appellate courts should not undertake. A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision. If the test is limited to an assertion of materiality by the defendant, it is of no consequence as any defendant could make that after-the-fact claim.

Isadore, 151 Wn.2d 302. It is undisputed that the state and the trial court engaged in an impermissible inquiry into Mr. Matchette's subjective decision making process regarding his plea rather than evaluating the fact of the third strike misrepresentation.

In Mr. Matchette's case, like *Bradley*, *Mendoza*, *Isadore*, *Walsh* and *Stowe*, Mr. Matchette was misinformed about a direct and immediate consequence of pleading guilty: that he was facing a third strike. Where a plea is entered into involuntarily, a defendant may choose to specifically enforce the agreement or to withdraw the plea. *Bradley*, 165 Wn.2d at 941; *State v. Miller*, 110 Wash.2d 528, 536, 756 P.2d 122 (1988). Because Mr. Matchette's plea was not knowing, voluntary and intelligent, he should be permitted to withdraw his plea.

3. MR. MATCHETTE WAS DENIED DUE
PROCESS WHEN THE TRIAL COURT
FAILED TO WARN HIM OF THE RISKS

AND DISADVANTAGES OF
PROCEEDING PRO SE, THUS
RENDERING HIS WAIVER OF COUNSEL
NOT KNOWING, VOLUNTARY AND
INTELLIGENT.

Mr. Matchette appeared for a motion to withdraw his appeal without an attorney. RP 628. Mr. Matchette again appeared before the court for the evidentiary hearing to address the merits of his motion to withdraw his appeal: again without counsel. RP 642-43. For each of these hearings, the trial court never advised Mr. Matchette of the risks and disadvantages of proceeding pro se. Rather, the trial court simply informed Mr. Matchette that if he wanted an attorney she would appoint one for him. *Id.* The Court simply asked Mr. Matchette if he wanted to proceed pro se or request counsel. Mr. Matchette stated that he wanted to represent himself. RP 642-43.

In all criminal prosecutions, a defendant has a right to assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. 1, § 22 (amend. 10). Indigent defendants charged with felonies, or misdemeanors involving potential incarceration, are entitled to appointed counsel. *State v. Osborne*, 70 Wash.App. 640, 643, 855 P.2d 302 (1993); CrR 3.1(d)(1).

The right to counsel may only be waived, if the waiver is knowing, voluntary, and intelligent. *City of Bellevue v. Acrey*, 103 Wash.2d 203, 208-09, 691 P.2d 957 (1984); *Tacoma v. Bishop*, 82 Wn. App. 850, 855, 920 P.2d

214 (1996). Washington Courts applies the *Faretta*³ test for determining a valid waiver of the right to counsel. This requires that the defendant be made aware of the risks and disadvantages of self-representation, with an indication on the record that “ ‘he knows what he is doing and his choice is made with eyes open.’ ” *Acrey*, 103 Wash.2d at 209, 691 P.2d 957 (quoting 422 U.S. at 835) (citation omitted); *Bishop*, 82 Wn. App. 855; *Osborne*, 70 Wash.App. at 644, 855 P.2d 302.

While a review of the record may be sufficient at times to determine if a defendant has been advised of the risks and disadvantages of proceeding pro se, it is preferable to conduct a colloquy on the record informing the defendant of the nature of the charge, the maximum penalty, and technical rules he must follow in presenting his case. *Acrey*, 103 Wash.2d at 211, 691 P.2d 957; *Bishop*, 82 Wn. App. 856.

In *Bishop*, the Court held that even though defendant was extremely dilatory, he could not have waived his right to counsel through conduct or forfeiture because the trial court never informed him of the risks and disadvantages of proceeding pro se. *Bishop*, 82 Wn. App. at 859-860. The Court held that “the trial court must advise a defendant at the time of arraignment or when counsel is appointed of his right to an attorney and the

³ *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975).

consequences of proceeding pro se if he should choose to do so” *Bishop*, 82 Wn. App. at 861; *See State v. DeWeese*, 117 Wash.2d 369, 378, 816 P.2d 1 (1991); *Acrey*, 103 Wash.2d at 211, 691 P.2d 957.

Mr. Matchette’s case is legally indistinguishable from *Bishop*. In Mr. Matchette’s case as in *Bishop*, he was entitled to counsel at the evidentiary hearing. *Bishop*, 82 Wn. App. at 855; U.S. Const. amend. VI; Wash. Const. art. 1, § 22 (amend. 10); *Osborne*, 70 Wn. App. at 643; CrR 3.1(d)(1). In both cases the trial court never advised the defendants of the risks and disadvantages of proceeding pro se. *Bishop*, 82 Wn. App. at 859. The remedy for violation of the due process right to make a knowing, voluntary and intelligent decision to waive counsel, is to remand for a new hearing with a full colloquy to inform Mr. Matchette of the risks and disadvantages of proceeding pro se so that he may make a knowing, voluntary and intelligent decision regarding proceeding pro se. *Bishop*, 82 Wn. App. at 862.

D. CONCLUSION

Mr. Matchette respectfully requests this Court reverse the trial court’s denial of his motion to withdraw his pleas because they were not knowing, voluntary and intelligent and because he was denied effective assistance of counsel. Mr. Matchette also requests a remand for a new evidentiary hearing with a proper colloquy regarding the risks and disadvantages of proceeding

pro se.

DATED this 14th day of September 2009.

Respectfully submitted,

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and James Matchette DOC# 978609 Washington State Penitentiary 1313 N. 13th Ave. Unit 8 F3 Walla Walla, WA 99362 on September 14, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

09 SEP 15 11:11:47
STATE OF
BY _____
DEPUTY

CLERK OF SUPERIOR COURT
WA 99101