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BY RONALD S. CONNERTER

41783-9-II
No. 84248-5

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JD KIENITZ,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

In this prosecution for delivery of a controlled substance, the prosecutor conditioned a guilty plea offer on the nondisclosure of the identities of two key eyewitnesses who participated in the crimes. No defense attorney under those circumstances could effectively assist his client in determining whether to accept the State's plea offer, because the attorney could not assess the strength of the State's evidence or the defendant's chances of prevailing at trial. By conditioning the plea offer on the nondisclosure of two key eyewitnesses, the State improperly restricted counsel's ability to engage fully and fairly in the adversary factfinding process and prevented JD Kienitz from receiving the effective assistance of counsel during a critical stage of the proceedings. As a result, Mr. Kienitz's federal and state constitutional right to counsel was violated.

In addition, the jury was erroneously instructed that it must be unanimous in order to find that Mr. Kienitz was not subject to sentence enhancements based on the allegation that he delivered marijuana within 1,000 feet of a school bus route stop. As a result, the sentence enhancements must be reversed.

B. ASSIGNMENTS OF ERROR

1. Mr. Kienitz was denied his Sixth Amendment right to the effective assistance of counsel during plea negotiations.

2. Mr. Kienitz was denied his article 1, section 22, right to the effective assistance of counsel during plea negotiations.

3. The trial court erred in instructing the jury it must be unanimous in order to answer "no" on the special verdict forms.

4. To the extent any error in the jury instructions was invited by defense counsel, Mr. Kienitz received ineffective assistance of counsel.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor may not plea bargain in a manner that imposes restrictions upon counsel's constitutional function. Counsel's primary duty during plea negotiations, a "critical stage" of the proceedings, is to investigate the facts, assess the defendant's chances of prevailing at trial, and advise the defendant whether or not to accept the offer. Was Mr. Kienitz denied his right to the effective assistance of counsel during a critical stage, where the prosecutor conditioned the plea offer on the non-disclosure of two key eyewitnesses who participated in the crime, thereby precluding

defense counsel from conducting a proper investigation or effectively assisting his client in deciding whether to plead guilty?

2. Were the jury instructions for the special verdict forms erroneous under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010)?

3. To the extent any error in the jury instructions was invited by defense counsel, did Mr. Kienitz receive ineffective assistance of counsel?

D. STATEMENT OF THE CASE

Mr. Kienitz was charged in Clark County on February 17, 2009, with three counts of delivery of a controlled substance (marijuana) (RCW 69.50.401(1), (2)(c)). CP 1-2. The State alleged all three deliveries occurred within 1,000 feet of a school bus route stop, justifying an additional 24-month sentence enhancement to be added to the sentences imposed on each count (RCW 69.50.435(1)(b) and RCW 9.94A.533(6)). CP 1-2.

For each alleged delivery, police claimed a confidential informant paid cash to Mr. Kienitz at his home in exchange for marijuana. CP 136.

On February 18, 2009, the deputy prosecutor sent defense counsel a letter containing a guilty plea offer. CP 38-42. According

to the terms of the offer, Mr. Kienitz was to plead guilty to three counts of delivery of a controlled substance (marijuana), and the State was to drop the school bus zone allegations. CP 39. But the State's offer was contingent on the non-disclosure of the identities of the confidential informants. CP 43. When defense counsel insisted he could not properly advise Mr. Kienitz whether to plead guilty without knowing the identities of the informants, the State withdrew the plea offer and refused to make any new offers. CP 43-45.

On July 30, 2009, defense counsel filed a motion to dismiss the charges based on prosecutorial misconduct. CP 15-43. Counsel argued the prosecutor's conduct in conditioning the plea offer on the non-disclosure of the informants precluded Mr. Kienitz from receiving effective assistance of counsel. CP 15-17. The trial court denied the motion, reasoning "there is no right to a plea bargain." 8/05/09RP 539.

The two informants testified at the jury trial. Dustin Edwards testified he agreed to work with police in order to receive leniency in regard to charges he potentially faced for possessing stolen auto parts and burning a stolen car. 1/25/10RP 240, 248-49. He and Mr. Kienitz were former friends and Mr. Edwards was currently

dating Mr. Kienitz's ex-girlfriend. 1/25/10RP 261. The ex-girlfriend, Amber Moos, testified she agreed to work with police in order to help Mr. Edwards. 1/26/10RP 307-08, 327-29.

The court provided the jury with special verdict forms regarding the school bus zone enhancements. CP 109, 111, 113.

The court instructed the jury:

You will also be given special verdict forms, Special Verdict Forms A for the crime of Delivery of a Controlled Substance - Marijuana, as charged in Counts 1, 2 and 3. If you find the defendant not guilty of the crime of Delivery of a Controlled Substance - Marijuana in Count 1, 2 or 3, do not use the Special Verdict Form A for that Count. If you find the defendant guilty of the crime of Delivery of a Controlled Substance - Marijuana in Count 1, 2 or 3, you will then use the Special Verdict Form A for that Count and fill in the blank with the answer "yes" or "no" according to the decision you reach as to that Count. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms, Special Verdict Form A. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer as to each count. If you unanimously have a reasonable doubt as to this question, you must answer "no."

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. . . .

CP 106-07; WPIC 50.60; WPIC 151.00.

The jury found Mr. Kienitz guilty as charged of three counts of delivery of a controlled substance and answered "yes" on all

three of the special verdict forms.¹ CP 108-13. The court imposed a standard-range sentence of 12 months, plus 72 months for the three 24-month school bus zone enhancements, which were ordered to be served consecutively. CP 119.

E. ARGUMENT

1. MR.KIENITZ WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING A CRITICAL STAGE OF THE PROCEEDINGS

- a. A criminal defendant has a state and federal constitutional right to the assistance of counsel during the plea bargaining process. The United States Constitution and the Washington Constitution both guarantee a criminal defendant the right to counsel. U.S. Const. amend. 6; Const. art. 1, § 22. "Lawyers in criminal cases 'are necessities, not luxuries.'" United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (quoting Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)). The right to the assistance of counsel is "fundamental to, and implicit in, any meaningful modern concept of ordered liberty." State v. A.N.J., 168 Wn.2d 91, 96, 225 P.3d 956 (2010).

¹ The jury also found Mr. Kienitz guilty of one count of witness tampering, a charge that had been added in an amended information. CP 58-59, 116.

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." Cronic, 466 U.S. at 654 (citations omitted). Without the assistance of counsel, the other fundamental rights guaranteed by the constitution "are often just words on paper." A.N.J., 168 Wn.2d at 97. Fundamentally, the right to the assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." Cronic, 466 U.S. at 656. The right is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Id.

Although the purpose of the right to counsel is to ensure the accused receives a fair trial, the right is not merely "a more detailed version of the Due Process Clause." United States v. Gonzalez-Lopez, 548 U.S. 140, 145-46, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). In other words, the right to counsel cannot be disregarded even if the accused ultimately receives a fair trial. Id. Like the constitutional right to confront one's accusers, the right to counsel is separate and distinct from the right to due process. Id. The constitutional right to counsel commands not that the accused receive a fair trial, but that the fairness of the trial

be achieved in a particular manner—through the effective assistance of counsel. Id.

The constitutional right to counsel unequivocally includes the right to effective assistance of counsel during the plea bargaining process. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). This Court has long recognized that "[t]he presence of counsel during all stages of plea bargaining is mandated by the courts." State v. Swindell, 93 Wn.2d 192, 198, 607 P.2d 852 (1980). Plea bargaining should consist of a "give-and-take" negotiation between parties who have relatively equal bargaining power. Id. at 198-99. Generally, only competent counsel can discern from the facts whether a plea of guilty would be appropriate and "[a] layman is usually no match for the skilled prosecutor." Id. at 198 (quoting Williams v. Kaiser, 323 U.S. 471, 475-76, 65 S.Ct. 363, 89 L.Ed. 398 (1945)). On the other hand, "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation." Swindell, 93 Wn.2d at 98 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978)).

The constitutional right to counsel during plea bargaining is fundamentally the right to an attorney's assistance in evaluating whether to accept a plea offer. A.N.J., 168 Wn.2d at 109-11. Effective assistance of counsel requires that counsel "actually and substantially [assist] his client in deciding whether to plead guilty." State v. James, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987) (quoting State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984)). Counsel must not only communicate actual plea offers to his client, but must also discuss the strengths and weaknesses of the defendant's case so that the defendant "know[s] what to expect and can make an informed judgment whether or not to plead guilty." James, 48 Wn. App. at 362.

Courts generally agree that the Sixth Amendment right to the effective assistance of counsel is implicated by the decision to reject a plea bargain, even if the defendant subsequently receives a fair trial. Leake v. State, 737 N.W.2d 531, 540 (Minn. 2007) (citing In re Alvernaz, 2 Cal.4th 924, 8 CalRptr.2d 713, 830 P.2d 747, 753-55 (1992); People v. Curry, 178 Ill.2d 509, 227 Ill.Dec. 395, 687 N.Ed.2d 877, 882 (1997); Williams v. State, 326 Md. 367, 605 A.2d 103, 106-08 (1992)); see also Commonwealth v. Mahar, 442 Mass. 11, 14-15 (2004) (and cases cited therein).

While the validity of a guilty plea is different from the validity of the plea process where an accused pleads not guilty, the test for ineffective assistance of counsel should be the same. That is because the result of an error by counsel at this critical stage of the proceedings can have as serious an effect on the defendant who pleads not guilty as on the defendant who pleads guilty.

State v. James, 48 Wn. App. 353, 361 n.2, 739 P.2d 1161 (1987) (citing Johnson v. Duckworth, 793 F.2d 898, 899 (7th Cir. 1986)).

b. The State may not engage in plea negotiations in a manner that restricts the function of defense counsel to engage fully in the adversarial factfinding process. The right to the assistance of counsel precludes the State from imposing restrictions upon the constitutional function of defense counsel in defending a criminal prosecution. Herring v. New York, 422 U.S. 853, 857, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (citing Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972)). The right to the assistance of counsel "ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process." Herring, 422 U.S. at 857.

In Herring, the United States Supreme Court struck down a New York law that conferred upon every judge in a nonjury

criminal trial the power to deny counsel an opportunity to make a summation of the evidence before the rendition of judgment. Id. at 853. The Court explained that closing argument was a basic element of the adversary factfinding process in a criminal trial and was universally recognized as a right of the defense, no matter how strong the State's evidence. Id. at 858-59. Therefore, in denying appellant this right, "New York denied him the assistance of counsel that the Constitution guarantees." Id. at 865.

Similarly, in Brooks, the Court struck down a state law that required the defendant to testify as the first defense witness or not at all. Brooks, 406 U.S. 605. The Court held the statute was unconstitutional because it deprived the defendant of "the 'guiding hand of counsel' in the timing of this critical element of his defense." Id. at 613 (quoting Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). Likewise, in Ferguson, the Court held constitutionally invalid a state statute that, while permitting the defendant to make an unsworn statement to the court and jury, prevented defense counsel from eliciting the defendant's testimony through direct examination. Ferguson, 365 U.S. 570.

Just as the State may not enact statutes that restrict defense counsel's constitutional function to participate fully in the adversarial proceeding, the State may not restrict counsel's function pursuant to a negotiated plea agreement. United States v. Morris, 470 F.3d 596 (6th Cir. 2007); State v. Briggs, 349 N.J.Super. 496, 793 A.2d 882 (2002).

In Morris, Morris was arraigned on drug and firearm charges, and his attorney communicated the State's plea offer to him. Morris, 470 F.3d at 598. But the offer required an immediate decision by Morris, he was not able to discuss his options privately with his attorney, and his attorney was not given time to investigate or interview witnesses. Id. at 599. The Sixth Circuit concluded Morris was constructively denied the effective assistance of counsel, as "counsel was placed in circumstances in which competent counsel very likely could not render assistance." Id. at 601-02 (citing United States v. Cronic, 466 U.S. 648, 659-60, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)).

Similarly, in State v. Briggs, 349 N.J.Super. 496, 498, 793 A.2d 882 (2002), defendant entered a guilty plea to aggravated manslaughter pursuant to a negotiated plea agreement that precluded defense counsel from arguing for a sentence of less than

twenty years. The New Jersey court held the State could not condition a guilty plea offer on the defendant's agreement to restrict counsel's ability to engage fully in the adversarial proceeding. Citing Herring, the court explained the ability of counsel to provide a meaningful argument at sentencing, even in a case that appears "open and shut," is no less important than the opportunity to give a summation in a nonjury case. Briggs, 349 N.J.Super. at 501 (citing Herring, 422 U.S. 853). Therefore, notwithstanding the guilty plea, the defendant was entitled to an effective and forceful argument by counsel to the sentencing court. Briggs, 349 N.J.Super. at 503.

Morris and Briggs rest on the recognition that, although a plea of guilty waives fundamental constitutional rights such as the right to a jury trial, to confront one's accusers, and to be free from compelled self-incrimination, a plea of guilty does not waive the constitutional right to counsel. See Wilken v. Squier, 50 Wn.2d 58, 61, 309 P.2d 746 (1957). To prove a defendant waived the right to counsel, the State must show he intentionally relinquished a known right, which is not shown merely by the entry of a guilty plea. Id. (citing Johnson~~Error! Bookmark not defined.~~ v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938)). As discussed above, the constitutional right to counsel applies with equal force during

the plea bargaining process as it does during any other critical stage. The State may not restrict counsel's constitutional function through the terms of a guilty plea agreement, unless the defendant knowingly and intelligently waives the right to counsel.

Thus, although prosecutors are not required to tender plea offers, prosecutors who do tender offers may not engage in plea bargaining in a manner that infringes the right to counsel. State v. Zhao, 157 Wn.2d 188, 205, 137 P.3d 835 (2006) (Sanders, J., concurring); see also, e.g., People v. Curry, 178 Ill.2d 509, 530, 687 N.E.2d 877 (1997) (although defendant not entitled to plea offer, once prosecutor tendered plea offer, question was whether defense counsel's deficient performance deprived defendant of his right to be reasonably informed as to consequences of accepting or rejecting the offer).

In State v. Moen, this Court held the Spokane County Prosecutor's Office policy of refusing to plea bargain with a defendant who successfully compelled disclosure of a confidential informant's identity did not violate due process. State v. Moen, 150 Wn.2d 221, 76 P.3d 721 (2003). But had the prosecutor actually tendered a plea offer to Moen, the prosecutor would have been required to engage in plea bargaining in a manner that did not

restrict counsel's constitutional function during the plea bargaining process.

c. Counsel's constitutional function during plea bargaining includes the duty to attempt to contact and interview key witnesses. As discussed above, counsel's primary duty during plea bargaining is to assist his client in deciding whether to plead guilty. In A.N.J., this Court recognized that "a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." A.N.J., 168 Wn.2d at 109. Therefore, the constitutional right to effective assistance of counsel during plea bargaining includes the right to have counsel conduct a reasonable investigation of the State's factual allegations. Id. at 111-12.

The degree and extent of investigation required by defense counsel during plea bargaining varies from case to case, but at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial. Id. Other jurisdictions recognize that the constitutional right to effective assistance of counsel during guilty plea negotiations includes the right to have counsel attempt to contact and interview key witnesses. See, e.g., Thomas v.

Lockhart, 738 F.2d 304 (8th Cir. 1984); Hawkman v. Parratt, 661 F.2d 1161 (8th Cir. 1981).

In Thomas, defense counsel provided ineffective assistance of counsel where he did not adequately investigate the facts prior to Thomas's guilty plea. Thomas, 738 F.2d 304. For example, Thomas provided counsel with the names of three alibi witnesses but the attorney made no attempt to contact any of them. Id. at 307. Where the attorney's investigation of the case consisted only of reviewing the investigative file of the prosecuting attorney, his investigation fell short of what a reasonably competent attorney would have done. Id. at 308.

In Hawkman, prior to Hawkman's guilty plea, counsel did not contact or interview any of the three independent eyewitnesses to the crime. Hawkman, 661 F.2d at 1168. The court explained, a reasonably competent attorney would ordinarily conduct an in-depth investigation of the case which includes an independent interviewing of witnesses. Id. at 1169. Because counsel did not do so, Hawkman received ineffective assistance of counsel. Id.

In sum, counsel's constitutional function during plea bargaining includes the duty to attempt to contact and interview key witnesses.

d. In this case, the State impermissibly restricted Mr. Kienitz's right to have counsel engage fully and fairly in the adversarial process by conditioning the guilty plea offer on the nondisclosure of the identities of key eyewitnesses to the crime.

In the present case, the State alleged that for each of the three charges of delivery of marijuana, a confidential informant paid cash to Mr. Kienitz at his home in exchange for marijuana. CP 136. The confidential informants were therefore allegedly not only eyewitnesses to the crimes, but also participants in the crimes. Under A.N.J. and the other authorities cited, defense counsel would ordinarily have a duty to try to contact and interview such witnesses before advising his client whether to accept a guilty plea offer. Had counsel not done so, he would have undoubtedly provided ineffective assistance of counsel.

As discussed, because counsel had a constitutional duty to attempt to contact and interview the eyewitnesses before advising Mr. Kienitz whether to accept the prosecutor's plea offer, the prosecutor impermissibly restricted counsel's constitutional

function by conditioning the plea offer on the nondisclosure of the witnesses. A prosecutor who conditions the availability of a plea bargain on a limited investigation infringes the right to counsel. State v. Zhao, 157 Wn.2d at 205 (Sanders, J., concurring). By withholding the informants' identities while simultaneously tendering a plea offer, the prosecutor violated Mr. Kienitz's right to counsel.

Although the State has a legitimate interest in protecting the identities of confidential informants, that interest must give way "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." Roviaro v. United States, 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

Here, the identities of the informants were relevant and helpful to the defense. Generally, where an informant provided information relating only to probable cause rather than the defendant's guilt or innocence, disclosure of the identity of the informant is not required. State v. Atchley, 142 Wn. App. 147, 156, 173 P.3d 323 (2007). But "[t]he identity of an informant is generally considered relevant and helpful to the accused's defense or

essential to a fair determination in cases when the informant set up the commission of the crime, participated in the crime, or was present at its occurrence" or when the informant is a potential witness or will provide testimony. Id.; see also CrR 4.7(f)(2) ("Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.").

Here, as stated, the informants were eyewitnesses and participants in the crimes, and the State called them as witnesses at trial after Mr. Kienitz rejected the State's guilty plea offer. It is undisputed that the State had an obligation to disclose their identities prior to trial. As discussed above, the prosecutor also had an obligation to disclose their identities prior to engaging in plea bargaining, in order to avoid violating Mr. Kienitz's constitutional right to counsel.

Standards of professional conduct support the conclusion that prosecutors should not condition guilty plea offers on nondisclosure of information the State would be required to disclose if the case went to trial. The ABA Standards of

professional conduct affirm that prosecutors "should not, because of the pendency of plea negotiations, delay any discovery disclosures required to be made to the defense under applicable rules." ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.1(g).²

Commentators also widely recognize the importance of disclosing the facts of the case to the accused before he pleads guilty, in order to avoid circumstances that give rise to inaccurate and otherwise faulty guilty pleas. See, e.g., Erica Hashimoto, Toward Ethical Plea Bargaining, 30 *Cardozo L. Rev.* 949 (Dec. 2008); Kevin C. McMunigal, Guilty Pleas, Brady Disclosure, and Wrongful Convictions, 57 *Case W. Res. L. Rev.* 651 (Spring 2007); Ellen Yaroshefsky, Ethics and Plea Bargaining, 23(3) *Criminal Justice* (Fall 2008), accessed at <http://www.abanet.org/crimjust/cimag/23-3/yaroshefsky.pdf>.

A study of exonerations in the United States from 1989 through 2003, suggests that a significant percentage of defendants who plead guilty are actually innocent of the crime. See Samuel R.

² Available at http://www.abanet.org/crimjust/standards/guiltypleas_blk.html#3.1 (accessed September 10, 2010).

Gross et al., Exonerations in the United States: 1989 Through 2003, 95 J. Crim. L. & Criminology 523, 536 (2005).

Full disclosure of the facts of the case to the accused before he pleads guilty is critical to ensuring an accurate and equitable plea process. Hashimoto, Toward Ethical Plea Bargaining, *supra*. Innocent defendants often cannot accurately evaluate the strength of the case against them, especially if they were not present; if they are unaware of potentially exculpatory evidence, they may prefer the certainty of a plea to the uncertainty of trial. *Id.* at 951. Even defendants who were present may not have accurate memories of what transpired and may not know whether they even committed an offense. *Id.* Further, "[!]ack of information about impeachment or exculpatory evidence exacerbates the inequity of the plea process because without access to this information, defendants have no leverage to obtain pleas that accurately reflect the strength of the government's case against them." *Id.* at 952.

In sum, the prosecutor was obligated, prior to engaging in plea negotiations with defense counsel, to disclose the identities of the confidential informants so that counsel could conduct a reasonable investigation before advising Mr. Kienitz whether to plead guilty. The prosecutor's failure to do so violated Mr. Kienitz's

constitutional right to counsel. In addition, ethical and policy considerations support the conclusion that prosecutors should disclose the identities of confidential informants prior to engaging in plea bargaining, where the information is necessary to allow the defendant to make a fully informed plea.

e. Mr. Kienitz is entitled to a remedy without a showing of prejudice. Where defense counsel is prevented from participating fully and fairly in the adversarial factfinding process through State action, the defendant's constitutional right to the effective assistance of counsel has been denied. Herring, 422 U.S. at 857. In that situation, both the overall performance of counsel apart from the interference and the lack of any showing of actual outcome prejudice are irrelevant—the interference in itself establishes ineffective assistance of counsel and requires a remedy without a showing of prejudice. See Wayne R. LaFare, et al., 3 Criminal Procedure, § 11.8(a), 840-45 (3rd ed. 2007).

In United States v. Cronin, 466 U.S. at 659-60, the United States Supreme Court explained that the usual test for determining ineffective assistance of counsel claims set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), does not apply in circumstances where "although counsel is

available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Strickland itself draws a distinction between cases where the government violated the right to effective assistance by "interfer[ing] in certain ways with the ability of counsel to make independent decisions about how to conduct the defense," and cases where counsel simply failed to render adequate legal assistance. Strickland, 466 U.S. at 686.

"A presumption of prejudice arises when the process loses its character as a confrontation between adversaries." State v. Webbe, 122 Wn. App. 683, 694, 94 P.3d 994 (2004). Such situations include those where "the state somehow interferes in the representation" and the question is not whether defense counsel made an error in judgment or strategy. Id. at 695.

The D.C. Circuit explained why such "state-created" impediments to defense counsel's constitutional function call for a "categorical approach":

These state-created procedures impair the accused's enjoyment of the Sixth Amendment guarantee by disabling his counsel from fully assisting and representing him. Because these impediments

constitute direct state interference with the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate.

United States v. Decoster, 624 F.2d 196, 201 (D.C. Cir. 1976)

(plurality opinion).

In the cases cited above, where State action precluded defense counsel from participating fully in the adversarial factfinding process, the courts reversed the judgments without a showing of prejudice. See Herring v. New York, 422 U.S. at 865; Brooks, 406 U.S. at 613; Ferguson, 365 U.S. at 596; Morris, 470 F.3d at 603; Briggs, 349 N.J.Super. at 502.

Similarly, here, the State's plea bargaining tactics prevented defense counsel from conducting a reasonable investigation and providing effective assistance before advising his client whether to accept the State's plea offer. Because counsel was precluded from constitutionally adequate representation through State action, no showing of prejudice should be required to entitle Mr. Kienitz to a remedy.

f. Mr. Kienitz is entitled to reinstatement of the plea offer or resentencing according to the plea offer. Where a defendant is denied the effective assistance of counsel, relief should be tailored to the circumstances of the case. United States

v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981).

If a defendant rejects a plea offer as a result of receiving ineffective assistance of counsel, an appropriate remedy is to reinstate the plea offer and give the defendant an opportunity to accept it with the effective assistance of counsel. Williams, 326 Md. at 382-83; Alvernaz v. Ratalle, 831 F.Supp. 790, 798 (S.D. Cal. 1993). Such a remedy places the parties in the position they were in prior to counsel's deficient representation. Williams, 326 Md. at 382-83. Where the violation did not impact the fairness of the trial, a new trial is not the appropriate remedy. Williams, 326 Md. at 382-83; Alvernaz, 831 F.Supp. at 798.

An alternative remedy is to remand for resentencing according to the terms appellant would have received had he received effective assistance of counsel. United States v. Carmichael, 216 F.3d 224, 227 (2nd Cir. 2000).

2. THE TRIAL COURT ERRED IN
INSTRUCTING THE JURY THAT THEY MUST
BE UNANIMOUS IN ORDER TO ANSWER
"NO" ON THE SPECIAL VERDICT FORMS

The State charged Mr. Kienitz with performing the three alleged marijuana deliveries within 1,000 feet of a school bus route stop. CP 1-2. The trial court provided the jury with special verdict

forms regarding the school bus zone allegations. CP 109, 111,

113. The court also instructed the jury:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms, Special Verdict Form A. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer as to each count. If you unanimously have a reasonable doubt as to this question, you must answer "no."

Because this is a criminal case, each of you must agree for you to return a verdict. . . .

CP 106-07.

Under this Court's recent decision in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), and the Court's prior decision in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), this instruction was error.

In Bashaw, Bashaw was charged with three counts of delivery of a controlled substance based on three separate sales to a police informant. Bashaw, 169 Wn.2d at 137. The State sought sentence enhancements, pursuant to RCW 69.50.435(1)(c), based on the allegation each sale took place within 1,000 feet of a school bus route stop. Id. The jury was given a special verdict form for each charge, which asked the jury to find whether each charged delivery took place within 1,000 feet of a school bus route stop; in the jury instruction explaining the special verdict forms, jurors were

instructed: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Id. at 139. The jury found Bashaw guilty of all three counts of delivery of a controlled substance and found that each took place within 1,000 feet of a school bus route stop. Id.

Relying on Goldberg, 149 Wn.2d 888, the Court held the jury need not be unanimous in a special finding for a sentence enhancement: "A nonunanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt." Bashaw, 169 Wn.2d at 145.

The Court explained:

The rule from Goldberg, then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A nonunanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt.

Id. at 146. The rule adopted in Goldberg and reaffirmed in Bashaw serves several important policies: it avoids the substantial burdens and costs of a new trial; it effects the defendant's right to have the charges resolved by a particular tribunal; and it serves the interests of judicial economy and finality. Id. at 146-47.

Applying the Goldberg rule, the Court held,

the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, it is not required to find the *absence* of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Id. at 147. Further, the Court held the error was not harmless, as it was impossible to discern what might have occurred had the jury been properly instructed. Id. at 148. The Court therefore vacated the sentence enhancements. Id.

The same error that occurred in Bashaw also occurred in this case. The jury was instructed that all twelve of them must agree in order to answer the special verdict forms and that they must be unanimous in order to answer "no" on the forms. CP 106-07. Because it is impossible to discern what the jury might have found if properly instructed, the sentence enhancements must be vacated. Bashaw, 169 Wn.2d at 148.

3. TO THE EXTENT THE ERROR IN THE JURY INSTRUCTIONS WAS INVITED BY DEFENSE COUNSEL, MR. KIENITZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

After the State rested its case, defense counsel objected to the court's proposed instruction regarding the special verdict forms, arguing the court should give the defense proposed instruction on

the affirmative defense to the school bus zone allegations.

1/26/10RP 421-23; CP 68. Counsel offered the following instruction, based on WPIC 50.60.01:

You will also be given a special verdict form for the crimes charged, Delivery of a Controlled Substance. If you find the defendant not guilty of these crimes, do not use the special verdict form. If you find the defendant guilty of these crimes, you will then use the special verdict form and fill in the blanks with the answer "yes" or "no" according to the decision you reach.

The special verdict form for these offenses has two questions. Because this is a criminal question, all twelve of you must agree in order to answer each question.

The first question will ask you to consider the place where the crime occurred. For this question, the State has the burden of proof beyond a reasonable doubt. An earlier instruction defines this burden of proof.

The second question will ask you to consider a defense raised by the defendant. For this question, the defendant has the burden of proof by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that the defense is more probably true than not true.

CP 68; WPIC 50.60.01.

The court denied counsel's proposed instruction. 1/26/10RP 424.

The instruction counsel proposed was not identical to the instruction the court provided and was less specific regarding jury unanimity. CP 68, 106-07. Further, the court rejected the

instruction. But to the extent the error in the instruction can be considered invited error, counsel provided ineffective assistance.

The doctrine of invited error is intended to prohibit a party from setting up an error at trial and then complaining about it on appeal. State v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

The policy behind the doctrine is as follows:

The law of this state is well settled that a defendant will not be allowed to request an instruction or instructions at trial, and then later, on appeal, seek reversal on the basis of claimed error in the instruction or instructions given at the defendant's request. To hold otherwise would put a premium on defendants misleading trial courts; this we decline to encourage.

State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

In the context of an erroneous jury instruction, this Court has applied the invited error doctrine only where the appellant *requested* the instruction at issue. See, e.g., State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (defendants invited error in jury instructions where they proposed erroneous instructions); State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) (applying invited error doctrine where defense counsel proposed instructions identical to instructions given to jury that defendant later challenged on appeal); Henderson, 114 Wn.2d at 868 (defense counsel requested instructions later challenged on appeal); State v. Smith,

122 Wn. App. 294, 299, 93 P.3d 206 (2004) (defense counsel participated in drafting instructions later challenged on appeal)).

The rule applying the invited error doctrine only where the erroneous instruction at issue was proposed by the defense has been consistent over time. See, e.g., Patu, 147 Wn.2d at 719, 721 (applying invited error doctrine where defense counsel proposed instruction he later challenged); State v. Boyer, 91 Wn.2d 342, 244-45, 588 P.2d 1151 (1979) (instruction at issue was one defendant himself proposed). The rule as stated in Boyer is well settled and has been regularly followed by courts in this state. Henderson, 114 Wn.2d at 870-71 (and cases cited therein).

Here, defense counsel proposed an erroneous instruction, but it was not the same instruction that the court ultimately provided to the jury. Counsel's failure to object to the erroneous instruction, alone, is not invited error. State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999). Therefore, the invited error doctrine should not apply.

To the extent the invited error doctrine does apply, Mr. Kienitz received ineffective assistance of counsel. If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review. State v. Kylo, 166 Wn.2d

856, 215 P.3d 177 (2009). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. Id. at 862. To establish ineffective assistance of counsel Mr. Kienitz must establish his attorney's performance was deficient and the deficiency prejudiced him. Id. (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. Kyllo, 166 Wn.2d at 862. Even if counsel proposed an erroneous instruction taken from the WPICs, counsel's performance is deficient if there was relevant case law at the time of trial that counsel should have discovered. Id. at 868. If, with proper research, counsel could have discovered the error in the instruction proposed, counsel's performance is deficient. Id.

Here, counsel proposed an instruction taken from the WPICs but there was relevant case law at the time indicating the error in the jury instruction that counsel should have discovered. As stated in Bashaw, that decision was based on this Court's earlier decision in Goldberg, which predated the trial in this case. Bashaw, 169 Wn.2d at 145-47 (citing Goldberg, 149 Wn.2d 888).

Further, there is no legitimate tactical or strategic reason for proposing the erroneous instruction. See Kylo, 166 Wn.2d at 869. Because Mr. Kienitz was prejudiced, as discussed above, the sentence enhancements must be reversed.

F. CONCLUSION

The prosecutor violated Mr. Kienitz's constitutional right to counsel by conditioning the plea offer on the nondisclosure of the identities of two key eyewitnesses, as defense counsel could not adequately investigate the State's factual allegations and advise Mr. Kienitz whether to plead guilty under those circumstances. The convictions for delivery of marijuana therefore must be reversed and Mr. Kienitz given an opportunity to accept the original plea offer, or resentenced according to the terms of the offer.

In addition, because the jury was incorrectly instructed they must be unanimous in order to answer "no" on the special verdict forms, the sentence enhancements must be reversed.

Respectfully submitted this 10th day of September 2010.


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