No. 49616-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ARIANNA EISELE-CHAVEZ, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni. A. Sheldon, Judge

No. 14-1-00251-3

BRIEF OF RESPONDENT (Amended)

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TABLE OF CONTENTS

Page

A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 1

B. FACTS AND STATEMENT OF CASE.....2

C. ARGUMENT.....6

1. Eisele-Chavez contends that her trial counsel's failure to inform her of the consequences of entering a diversion agreement denied her effective assistance of counsel and required vacation of the conviction that followed her unsuccessful completion of the diversion agreement. The State responds that appeal on this issue is untimely under RAP 5.2(a) because it is an appeal of the underlying judgment and sentence, which was entered ten months before notice of appeal in the instant case, and the only appeal that is timely is an appeal of the trial court's denial of Eisele-Chavez's motion to vacate the judgment.....6

a) Appellant's effort to assert error related to issues that were not raised below and that are outside the scope of the order appealed from should be denied under RAP 2.5(a) and are untimely under RAP 5.2(a).....6

b) Eisele-Chavez's assignment of error alleges ineffective assistance of counsel, but in her brief she alleges not only that her

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

counsel was ineffective, but also alleges error by the court. In response, the State contends that neither of these claims was raised in the trial court and are, thus, bared by RAP 5.2(a) and RAP 2.5(a).....9

c) *Although the State contends that Eisele-Chavez's claim of ineffective assistance of counsel is not properly before this Court because it is untimely under RAP 5.2(a), even if the claim were properly before the Court, the claim should nevertheless fail, because Eisele-Chavez cannot show that counsel was ineffective on the facts of the instant case*.....14

2. Irrespective of whether the State is the substantially prevailing party in this case, the State does not intend to seek appellate costs.....22

D. CONCLUSION.....22

TABLE OF AUTHORITIES

Table of Cases

Page

State Cases

Bjurstrom v. Campbell,
27 Wn. App. 449, 618 P.2d 533 14

City of Sunnyside v. Lopez,
50 Wn. App. 786, 751 P.2d 313 (1988) 20

State ex rel. Green v. Superior Court,
58 Wn.2d 162, 361 P.2d 643 (1961) 14

State v. Barton,
93 Wn.2d 301, 609 P.2d 1353 (1980) 18

State v. Cervantes,
169 Wn. App. 428, 282 P.3d 98 (2012) 19, 20

State v. Drum,
168 Wn.2d 23, 225 P.3d 237 (2010) 16

State v. Foster,
140 Wn. App. 266, 166 P.3d 726 (2007) 15

State v. Gaut,
111 Wn. App. 875, 46 P.3d 832 (2002) ..... passim

State v. Grier,
171 Wn.2d 17, 246 P.3d 1260 (2011) 14, 21, 22

State v. Holley,
75 Wn. App. 191, 876 P.2d 973 (1994) 20

State v. Martinez,
161 Wn. App. 436, 253 P.3d 445 (2011) 19

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

State v. Neal,
144 Wn.2d 600, 30 P.3d 1255 (2001).....19

State v. Schwab,
141 Wn. App. 85, 167 P.3d 1225 (2007).....7, 20

State v. Swan,
114 Wn.2d 613, 790 P.2d 610 (1990).....19

State v. Ward,
123 Wn.2d 488, 869 P.2d 1062 (1994).....18

Federal Cases

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).....14, 15, 21

Statutes

RCW 10.73.090.....5

RCW 10.73.100.....5

Rules

CrR 7.8.....7, 12, 19

CrR 7.8(b).....5

RAP 2.5(a).....passim

RAP 5.2(a).....passim

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Eisele-Chavez contends that her trial counsel's failure to inform her of the consequences of entering a diversion agreement denied her effective assistance of counsel and required vacation of the conviction that followed her unsuccessful completion of the diversion agreement. The State responds that appeal on this issue is untimely under RAP 5.2(a) because it is an appeal of the underlying judgment and sentence, which was entered ten months before notice of appeal in the instant case, and the only appeal that is timely is an appeal of the trial court's denial of Eisele-Chavez's motion to vacate the judgment.

a) Appellant's effort to assert error related to issues that were not raised below and that are outside the scope of the order appealed from should be denied under RAP 2.5(a) and are untimely under RAP 5.2(a).

b) Eisele-Chavez's assignment of error alleges ineffective assistance of counsel, but in her brief she alleges not only that her counsel was ineffective, but also alleges error by the court. In response, the State contends that neither of these claims was raised in the trial court and are, thus, bared by RAP 5.2(a) and RAP 2.5(a).

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

c) *Although the State contends that Eisele-Chavez's claim of ineffective assistance of counsel is not properly before this Court because it is untimely under RAP 5.2(a), even if the claim were properly before the Court, the claim should nevertheless fail, because Eisele-Chavez cannot show that counsel was ineffective on the facts of the instant case.*

2. Irrespective of whether the State is the substantially prevailing party in this case, the State does not intend to seek appellate costs.

B. FACTS AND STATEMENT OF THE CASE

On June 4, 2014, the Mason County Sheriff's Office went to a residence in Mason County to investigate a disturbance. CP 70-73. Based on facts discovered during the investigation of this incident, the State charged the defendant, Arianna Eisele-Chavez, with one count of malicious mischief in the second degree. CP 64.

Rather than proceed to trial on the charge, Eisele-Chavez entered into a diversion agreement with the State. CP 45, 51-56. The diversion agreement provided that if Eisele-Chavez successfully completed the terms of the agreement, then the trial court would dismiss the charge. CP 52. Pursuant to the agreement, Eisele-Chavez stipulated to the

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

admissibility of the record, to include the police reports, and stipulated to admissibility of her own statements during the investigation. CP 52-53.

While the diversion was pending, Eisele-Chavez violated the terms of the agreement by causing a disturbance that resulted in her treatment provider discharging her from her required treatment program. CP 40. As a consequence, the State filed an allegation of non-compliance with the terms of the agreement and moved to revoke the diversion. CP 39.

At the hearing on the State's allegation, the defense contended that Eisele-Chavez couldn't "meet the condition of the treatment program" and that the defense had "no objection to the State's motion." RP 9. The court accepted Eisele-Chavez's stipulation and set the matter over for two weeks for sentencing. RP 11.

When the parties returned to court for sentencing, the prosecutor mentioned that at the prior hearing there had been an oral stipulation from the defense, but that there was no formal order from the court finding Eisele-Chavez guilty. RP 12-13. In response, defense counsel informed the court as follows: "Yeah, I would agree to allow the Court to review the probable cause statement and make a finding." RP 13. The trial court judge then stated for the record that he had "reviewed the declaration of probable cause and the Court does find that there is a factual basis to

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

support a finding beyond a reasonable doubt of the commission of the crime of malicious mischief in the second degree." RP 13. The court also entered a written order that revoked the diversion and declared the court's finding of guilty. CP 31; RP 14.

The probable cause statement describes malicious damage to two vehicles. CP 70-73. One of the vehicles was an F150 pickup truck, and the other was a Volkswagen Jetta. *Id.* On the morning of June 4, 2014, a female by the name of Cassie damaged the Volkswagen by kicking out the windshield and by throwing a brick through the rear window. *Id.* There was conflicting information about whether the defendant, Eisele-Chavez, was with Cassie when Cassie damaged the Volkswagen. *Id.* Damage to the Volkswagen was estimated to be $1,500.00. *Id.*

The probable cause statement also reports that, later on the same day, Cassie returned to the residence and that Eisele-Chavez was with her when she returned. *Id.* The probable cause statement reports that Cassie and Eisele-Chavez then poured bleach all over the interior of pickup truck. Damage to the pickup truck was estimated to be $2,000.00. *Id.*

The probable cause statement reports that Eisele-Chavez admitted that she damaged the pickup truck by pouring bleach on the interior. *Id.*

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Eisele-Chavez denied causing any damage to the Volkswagen. *Id.* She said that Cassie acted alone when she damaged the Volkswagen. *Id.*

The trial court entered judgment and sentence on November 24, 2015. CP 20-30. Almost ten months later, on September 20, 2016, Eisele-Chavez, through counsel, brought a motion to vacate the judgment. CP 17-18. In her motion, Eisele-Chavez said that she was bringing the motion "under RCW 10.73.090, 10.73.100 and CrR 7.8(b)." CP 18. In a statement under the heading "DECLARATION," counsel said that Eisele-Chavez had "advised that because of her felony conviction her landlord is evicting her from her residence," CP 17, and that he did "not remember advising the defendant of this consequence at any stage of the proceedings nor is it listed in any of the Friendship documents that failure to complete Friendship and the subsequent felony would affect the ability to obtain rental housing." CP 18.

On October 10, 2016, the trial court held a hearing on Eisele-Chavez's motion. RP 20-24. At this hearing, Eisele-Chavez's attorney informed the court as follows:

> I received information from Ms. Chavez that she was going to lose her housing, her Section 8 housing, because of this felony conviction. And in thinking about it, I don't think that she was ever advised that she would potentially lose that federal benefit with a felony conviction.

RP 21.

After taking the matter under advisement for two weeks, the trial court entered a written order and denied Eisele-Chavez's motion to vacate the judgment. RP 28-29; CP 11. Eisele-Chavez now appeals the "denial by the court of the defendant's motion to vacate the judgment [and] sentence." CP 7.

C. ARGUMENT

1. Eisele-Chavez contends that her trial counsel's failure to inform her of the consequences of entering a diversion agreement denied her effective assistance of counsel and required vacation of the conviction that followed her unsuccessful completion of the diversion agreement. The State responds that appeal on this issue is untimely under RAP 5.2(a) because it is an appeal of the underlying judgment and sentence, which was entered ten months before notice of appeal in the instant case, and the only appeal that is timely is an appeal of the trial court's denial of Eisele-Chavez's motion to vacate the judgment.

a) Appellant's effort to assert error related to issues that were not raised below and that are outside the scope of the order appealed from should be denied under RAP 2.5(a) and are untimely under RAP 5.2(a).

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

On October 24, 2016, the trial court issued an order denying Eisele-Chavez's motion to vacate the judgment. CP 11. One week later, on October 31, 2016, Eisele-Chavez filed a notice of appeal of the trial court's October 24, 2016, denial of her motion to vacate the judgment. CP 7. Eisele-Chavez's appeal of the order denying her motion to vacate the judgment was timely because she filed the notice of appeal within 30 days of the entry of the order from which she was seeking review. RAP 5.2(a). The only issue raised in Eisele-Chavez's motion to vacate the judgment, and thus the only issue decided in the trial court's order denying the motion, was whether the judgment should be vacated based on Eisele-Chavez's assertion that when entering into the diversion agreement with the State, she was not informed that her landlord would evict her from her residence if she were found guilty as charged. CP 11, 17. Review of an order denying a CrR 7.8 motion to vacate a judgment and sentence is limited to issues raised in the motion. *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002); *State v. Schwab*, 141 Wn. App. 85, 96, 167 P.3d 1225 (2007). Therefore, Eisele-Chavez's claim in the instant appeal, that her attorney was ineffective for failing to inform her of the consequences of entering into the diversion agreement, is time-barred by RAP 5.2(a). *Id.*

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

The court entered judgment and sentence in this case on November 24, 2015, which was almost one year before Eisele-Chavez filed the notice of appeal at issue now. CP 21-30, 31. Therefore, any attempt by Eisele-Chavez to raise appeal issues related to the judgment and sentence, as distinguished from the court's denial of her motion to vacate the judgment, would be untimely under RAP 5.2(a). *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). Nevertheless, Eisele-Chavez, devotes parts of her brief on appeal to assertions that are unrelated to any timely assignment of error on appeal.

For example, Eisele-Chavez asserts that when she initially attempted to enter the diversion agreement with the court, the diversion form mistakenly contained sentencing information for a gross misdemeanor rather than for a class C felony as charged. Br. of Appellant at 2-5, 11-14. But the trial court caught the mistake and brought it to the parties' attention, after which defense counsel corrected the form, and Eisele-Chavez then initialed the correction before the court accepted the diversion agreement. Br. of Appellant at 4-5, 11-14; CP 54; RP 4-5.

Eisele-Chavez's instant appeal is limited to appeal of the court's denial of her motion to vacate the judgment, and the only issue raised in her motion that led to the judgment was her claim that she was not

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

informed that a conviction would result in her landlord evicting her from her residence. CP 7, 17-18. In fact, the written motion at issue here does not even mention the words "Section 8," nor does the motion mention any claim of ineffective assistance of counsel or any error arising out of confusion about whether the charge was a felony rather than a misdemeanor. CP 17-18. Eisele-Chavez did not raise the subject of Section 8 housing until Eisele-Chavez's counsel first used the term at the hearing on the motion. RP 21, 26.

Nevertheless, on appeal Eisele-Chavez now asserts (without a corresponding assignment of error) as follows: "The first deficiency was in both trial counsel and the court's failure to inform the defendant that she was stipulating to facts and waiving jury on a felony charge as opposed to a misdemeanor charge." Br. of Appellant at 11. Eisele-Chavez did not raise this issue in the trial court, and any attempt to raise it for the first time now should be rejected under RAP 2.5(a) and is untimely under RAP 5.2(a).

b) Eisele-Chavez's assignment of error alleges ineffective assistance of counsel, but in her brief she alleges not only that her counsel was ineffective, but also alleges error by the court. In response, the State

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

contends that neither of these claims was raised in the trial court and are, thus, bared by RAP 5.2(a) and RAP 2.5(a).

Eisele-Chavez's assignment of error asserts that "[t]rial counsel's failure to inform the defendant of the consequences of entering her diversion agreement denied her effective assistance of counsel" under the United States and Washington constitutions "and required vacation of the conviction that followed her unsuccessful completion of the diversion agreement." Br. of Appellant at 1 (Assignment of Error No. 1). In the body of her brief, Eisele-Chavez reasserts this claim, as follows: "In the case at bar, petitioner claims ineffective assistance of counsel based upon trial counsel's failure to inform her of the consequences that would occur were she terminated from the diversion agreement she was considering entering." Br. of Appellant at 9. But Eisele-Chavez failed to allege ineffective assistance of counsel in her motion to the trial court to vacate the judgment. CP 17-18.

However, elsewhere in the body of her brief, Eisele-Chavez also attributes error to the court, even though her claim does not correspond to any formal assignment of error. Br. of Appellant at 11, 15. At page 11 Eisele-Chavez asserts that the trial court erred by failing to inform her that the diversion agreement pertained to a felony charge rather than a

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

misdemeanor charge, and at page 15 Eisele-Chavez asserts that the trial court's failure to inform her of the potential loss of Section 8 housing benefits "vitiated her waiver of constitutional rights found in the diversion agreement." Eisele-Chavez then argues that "the trial court erred when it denied the defendant's motion to vacate her conviction and set the case for trial." Br. of Appellant at 15.

Eisele-Chavez did not appeal her conviction, and other than as it pertains to her motion to vacate the judgment, she did not raise any claim of error in the trial court. The State contends that if Eisele-Chavez wished to assign error and seek appellate review based on her contention that the trial court did not inform her that the underlying charge was a felony rather than a misdemeanor, then she was required to file a notice of appeal on that issue within 30 days of entry of the judgment and sentence. RAP 5.2(a); *State v. Gaut*, 111 Wn. App. 875, 46 P.3d 832 (2002). Likewise, the State contends that if Eisele-Chavez wished to assign error and seek review based on her contention that the trial court erred by not informing her that she might potentially lose her Section 8 housing benefits if she were convicted of a felony, then again, Eisele-Chavez should have filed notice of appeal of that issue within 30 days of entry of the judgment and sentence. *Id.*

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Similarly, to the extent that Eisele-Chavez asserts error based on her assertion that her trial counsel provided her with ineffective assistance of counsel, her claim is untimely because she did not file notice of appeal within 30 days of the judgment and sentence. *Id.*

As argued elsewhere in the State's brief, the State contends that the only appeal that is timely before this Court under RAP 5.2(a) is an appeal of the trial court's denial of Eisele-Chavez's motion to vacate the judgment. The only issue raised in Eisele-Chavez's motion to vacate the judgment was Eisele-Chavez's assertion that the trial court should vacate the judgment because she was not informed that a conviction would result in her being evicted from her residence. CP 17-18. Thus, the State contends, the only issue that is permitted under RAP 5.2(a) to be brought before this Court on appeal is the issue of whether the trial court erred by denying Eisele-Chavez's motion notwithstanding her assertion that she was not informed that a guilty finding would result in her losing Section 8 benefits. CP 7, 17-18. On appeal of a CrR 7.8 motion to vacate the judgment, the "scope of review is limited to the trial court's exercise of its discretion in deciding the issues that were raised by the motion." *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002).

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

On appeal, Eisele-Chavez now alleges that her trial counsel was ineffective for failing to inform her that a felony conviction would result in her losing Section 8 housing benefits. Br. of Appellant at 1, 6, 8, 9. Eisele-Chavez avers that in her trial-court motion to vacate the judgment, she claimed "that trial counsel's failure to inform her that she would lose her federal welfare benefits upon conviction constituted ineffective assistance of counsel." Br. of Appellant at 6. But nowhere in her motion to the trial court does Eisele-Chavez use the term of art "ineffective assistance of counsel," nor does she frame an argument related to such a claim. CP 17-18. Perhaps, arguably, her trial counsel admits facts from which she can in good faith make such an argument now, but she did not make that argument in the trial court. CP 17-18; RP 20-30.

The only reference to ineffective assistance of counsel in the trial court was defense counsel's suggestion that "perhaps" he provided "ineffective assistance of counsel because [he] did not follow up on the amount of damages with the victim here." RP 27. But a claim of error related to the amount of damages was not raised in the trial court and has not been raised in the instant appeal. It follows, therefore, that because ineffective assistance of counsel was not presented to the trial court as a basis for Eisele-Chavez's motion to vacate the judgment, review of a

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

claim of ineffective assistance of counsel is not timely before this Court on appeal. RAP 5.2(a); *State v. Gaut*, 111 Wn. App. 875, 46 P.3d 832 (2002). A "claim that the judgment is erroneous as a matter of law is a matter to be raised by appeal, writ, or personal restraint petition[, and] "'it is no ground for setting aside the judgment on motion."'" *Gaut* at 881, quoting *Bjurstrom v. Campbell*, 27 Wn. App. 449, 451, 618 P.2d 533 (quoting *State ex rel. Green v. Superior Court*, 58 Wn.2d 162, 165, 361 P.2d 643 (1961)).

c) *Although the State contends that Eisele-Chavez's claim of ineffective assistance of counsel is not properly before this Court because it is untimely under RAP 5.2(a), even if the claim were properly before the Court, the claim should nevertheless fail, because Eisele-Chavez cannot show that counsel was ineffective on the facts of the instant case.*

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

demonstrate prejudice, defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Here (on appeal, but not in the order appealed from or the motion giving rise to the order appealed from), Eisele-Chavez "claims ineffective assistance based upon trial counsel's failure to inform her of the consequences that would occur were she terminated from the diversion agreement she was considering entering." Br. of Appellant at 9. To support her claim of error, Eisele-Chavez avers that in her motion to the court to vacate the judgment, she claimed "that had counsel informed her that she would lose [Section 8] benefits as a result of a conviction she would have taken the case to trial[.]" Br. of Appellant at 6. But the actual claim that Eisele-Chavez presented to the trial court was a statement made by her counsel in an unsworn declaration that was attached to the motion. CP 17-18. In his unsworn declaration, counsel, referring to Eisele-Chavez and her claim that her landlord was evicting her because of her felony conviction, commented as follows: "Had she been made aware of this potential the defendant would have handled this matter entirely different." CP 18. This comment might accurately reflect what counsel believed, but

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

handling the matter differently can mean any of several things other than taking the matter to trial, and counsel's unsworn statement of his own belief does not necessarily accurately speak for Eisele-Chavez.

Also, in essence, Eisele-Chavez did take her case to trial. As noted by the trial court in its order denying Eisele-Chavez's motion to vacate the judgment, she did not enter a guilty plea in this case. CP 11. Instead, she entered into stipulations and agreed to a trial by a "reading of the record by the court." CP 52. Our Supreme Court has held that "a stipulated facts trial, where the trial court independently reviews the evidence and makes its own findings, is not the equivalent of a guilty plea." *State v. Drum*, 168 Wn.2d 23, 39, 225 P.3d 237 (2010) (further citations omitted). A defendant who enters into a diversion agreement and stipulates to trial on a reading of the record is not entitled to due process protections that are equivalent to those applicable to a guilty plea. *Id.*

Additionally, Eisele-Chavez states that in her motion to the trial court she claimed "that she recently lost her Sec[tion] 8 federal housing benefits based upon her conviction in this case[.]" Br. of Appellant at 6. But Eisele-Chavez did not make this claim herself; instead, her trial attorney made this claim, as follows: "Ms. Eisele Chavez contacted my

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

office and advised that because of her felony conviction her landlord is evicting her from her residence." CP 17.

The State contends that eviction by her landlord is not necessarily the same thing as a loss of Section 8 benefits. In fact, there is no proof or corroboration of any kind in the record to show that a felony conviction for malicious mischief will necessarily result in the loss of Section 8 housing benefits. Due to the lack of proof and corroboration in this case, there are many, many other possibilities. If Eisele-Chavez was in fact evicted by her landlord, the eviction may have been a discretionary choice by her landlord rather than a result mandated by any federal agency rule or law. And if so, then even if conviction in this case might have been a contributing factor, her landlord's discretionary choice may have been influenced by many factors beyond a mere conviction in this case. The record simply does not support Eisele-Chavez's assertion that mere conviction in this case caused her, either directly or indirectly, to lose Section 8 housing benefits. For these reasons, even if she were uninformed about how her conviction would affect her Section 8 housing benefits, Eisele-Chavez cannot show prejudice in the instant case.

Additionally, even if the Court analogizes the diversion agreement at issue in this case as a plea bargain (which it is not), the State contends

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

that counsel nevertheless had no duty to inform Eisele-Chavez about every possible or contingent collateral consequence that might flow from Eisele-Chavez's failure to follow the terms of the agreement. *State v. Ward*, 123 Wn.2d 488, 512, 869 P.2d 1062 (1994) (counsel must inform defendant of the direct consequences of a plea but need not offer advice about all possible collateral consequences). Here, the State contends, the prospective and contingent possibility that Eisele-Chavez's landlord might reject her as a Section 8 renter because of her felony conviction is a collateral, rather than a direct, consequence of her felony conviction – particularly where, as here, there is no evidence in the record to show that a malicious mischief felony conviction requires eviction from any Section 8 housing.

"The distinction between direct and collateral consequences of a plea turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980) (internal quotation omitted). Here, there is no showing that either eviction by her landlord or loss of Section 8 housing benefits was a direct consequence of entering into a diversion agreement or a subsequent guilty verdict, as the

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

case may be. Nor is there any showing that it was necessarily a collateral consequence.

As argued above, the only issue that is properly on appeal is whether the trial court erred when it denied Eisele-Chavez's CrR 7.8 motion to vacate the judgment. A trial court's denial of a CrR 7.8 motion to vacate a judgment is reviewed for an abuse of discretion. *State v. Cervantes*, 169 Wn. App. 428, 431, 282 P.3d 98 (2012) (citing *State v. Swan*, 114 Wn.2d 613, 642, 790 P.2d 610 (1990). "A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable or based upon untenable grounds. *Id.* (citing *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Here, the trial court ruled that "[t]his matter is not a plea" and that "[t]he court finds no basis to withdraw plea under court rule 7.8." CP 11. Ineffective assistance of counsel can be a legitimate and valid reason for a trial court to grant a motion to vacate a judgment. *State v. Cervantes*, 169 Wn. App. 428, 434, 282 P.3d 98 (2012), citing *State v. Martinez,* 161 Wn. App. 436, 253 P.3d 445 (2011). But as argued above, Eisele-Chavez did not present ineffective assistance of counsel to the trial court as a basis to vacate the judgment, CP 17-18, and review of an order denying a CrR 7.8 motion to vacate a judgment and sentence is limited to issues raised in the

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

motion. *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002); *State v. Schwab*, 141 Wn. App. 85, 96, 167 P.3d 1225 (2007).

But even if ineffective assistance were properly before this court, Eisele-Chavez nevertheless has not shown that her attorney was required to inform her of the contingent, potential collateral consequence her landlord might choose to evict her if she were found guilty, and she has not shown prejudice. Counsel's failure to advise his or her client of collateral consequences does not amount to ineffective assistance of counsel requiring withdrawal of a plea. *State v. Holley,* 75 Wn. App. 191, 197, 876 P.2d 973 (1994). The State contends that by analogy the failure to advise of collateral consequences of a guilty verdict flowing from revocation of a diversion agreement also is not ineffective assistance that requires the vacation of a final judgment. *Id.*

"A trial court's decision may be affirmed on any basis, regardless of whether that basis was considered or relied on by the trial court." *State v. Cervantes*, 169 Wn. App. 428, 433, 282 P.3d 98 (2012) (citing RAP 2.5(a); *City of Sunnyside v. Lopez,* 50 Wn. App. 786, 794 n. 6, 751 P.2d 313 (1988)). Here, Eisele-Chavez's trial-court motion to vacate the judgment stated as its only basis that no one informed her that if the court ultimately convicted her for the offense to which she entered a diversion

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agreement, she was at risk that her landlord would evict her from her residence, which she occupied as Section 8 housing. CP 17-18. But even if Eisele-Chavez had asserted below that her trial counsel was ineffective for not advising her of the contingent, potential consequence that her landlord might evict her from her housing if the diversion agreement were ultimately revoked and the trial court ultimately found her guilty, and even if Eisele-Chavez had preserved this argument by alleging it as basis for her motion to vacate the judgment below, so that the issue were properly before this Court on appeal, the argument should nevertheless fail, because Eisele-Chavez has not, and cannot on these facts, meet her burden for a claim of ineffective assistance of counsel.

To meet her burden for her claim of ineffective assistance of counsel, Eisele-Chavez would have to show that her counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). But Eisele-Chavez has made no such showing. Still more, Eisele-Chavez would also have to show that counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Id.* But Eisele-Chavez has made no such showing. And finally, Eisele-Chavez would have to show that she

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suffered prejudice from the ineffective assistance she alleges. *Id.* But there is no showing of prejudice.

2. Irrespective of whether the State is the substantially prevailing party in this case, the State does not intend to seek appellate costs.

The State does not intend to seek appellate costs from this appeal irrespective of whether the State is substantially prevailing party on appeal.

D. CONCLUSION

For the reasons argued above, the State asks that this Court deny Eisele-Chavez's appeal and to affirm the trial court conviction.

DATED: May 18, 2017.

MICHAEL DORCY
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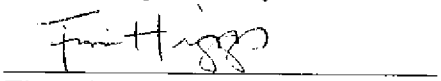
Prosecuting Attorney



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