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Court of Appeals  
Division II  
State of Washington  
11/9/2017 12:37 PM**

**NO. 49912-6-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**RANDY RICHTER,**

**Appellant.**

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**RESPONDENT'S BRIEF**

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## **I. ISSUE**

1. Did the trial court abuse its discretion when it denied Mr. Richter's CrR 7.8 motion?
2. Did the trial court misapply CrR 7.8?

## **II. SHORT ANSWER**

1. **No.** The trial court correctly denied Mr. Richter's CrR 7.8 motion.
2. **No.** The trial court properly held a hearing to determine the merits of Mr. Richter's CrR 7.8 motion.

## **III. STATEMENT OF FACTS**

On September 3, 2013, the Cowlitz County Prosecutor's Office charged Mr. Richter with three counts of Violation of Uniform Controlled Substances Act – Delivery with School Bus Stop Enhancement and one count of Violation of Uniform Controlled Substances Act – Possession with Intent to Deliver. CP 5. On each of the four counts, the State had also alleged an aggravating factor that Mr. Richter's high offender score would result in some of the current offenses going unpunished.<sup>1</sup> CP 5. Mr. Richter was initially appointed Richard Suryan with Office of Public Defense to represent him. Mr. Richter was present with Mr. Suryan in Cowlitz County Superior Court on October 21, 2013 for his pre-trial hearing. 1RP at 3-8. On November 25, 2013, Mr. Suryan had to withdraw from the case due to a conflict. Kevin Blondin was then appointed to represent Mr. Richter. On

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<sup>1</sup> RCW 9.94A.535(2)(c)

February 11, 2014, Mr. Blondin was also forced to withdraw from the case due to a conflict. Bruce Hanify was then appointed to represent Mr. Richter.

On April 25, 2014, after a two day jury trial, Mr. Richter was convicted of three counts of Violation of Uniform Controlled Substances Act – Delivery with School Bus Stop Enhancement and one count of Violation of Uniform Controlled Substances Act – Possession with Intent to Deliver. 2RP at 348-49. At his sentencing hearing, the State requested an exceptional sentence above the standard range of 240 months, arguing that Mr. Richter’s high offender score justified such a sentence. The trial court agreed with the State and sentenced Mr. Richter to 240 months, including 72 months in school bus stop enhancements. Mr. Richter made no claim of being unaware that his sentence could exceed the 10 year maximum for a class B felony. 3RP at 359-387. Mr. Richter was next seen in Cowlitz County Superior Court on June 5, 2014 to address a scrivener’s error on his judgment and sentence. Again, Mr. Richter did not make any claims that he was unaware his sentence could exceed the 10 year maximum. 3RP at 385-87.

Mr. Richter filed a timely appeal. The Court of Appeals affirmed the convictions, but remanded for resentencing to vacate two of the school bus

stop enhancements.<sup>2</sup> The Court of Appeals mandate was issued on June 7, 2016. CP 86. On June 26, 2016, Mr. Richter appeared in Cowlitz County Superior Court for resentencing. At that hearing, he filed his initial motion for a new trial. CP 89. Dan Morgan was appointed to assist him with his motion. On August 23, 2016, Mr. Morgan filed his CrR 7.8 motion for relief of judgment. CP 90.

On September 6, 2016, both Mr. Morgan's CrR 7.8 motion and Mr. Richter's pro se motion for a new trial were heard by Judge Michael Evans. 3RP at 388-421. In lieu of testimony, both parties agreed to rely upon Mr. Hanify's declaration. 3RP at 388. Mr. Richter argued that he was never actually told by Mr. Hanify that his sentence could exceed the 10 year statutory maximum. 3RP at 393-396. Mr. Richter did not provide the court with anything other than his own statement in support of this argument. After considering the arguments from both parties, Judge Evans denied Mr. Richter's CrR 7.8 motion. 3RP at 408-15. Mr. Richter filed a timely appeal. CP 104.

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<sup>2</sup> The Court of Appeals' decision was in accordance with *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015), which held that multiple school bus stop enhancements were to run concurrent, not consecutive, to each other.

#### IV. ARGUMENT

##### A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED MR. RICHTER'S CRR 7.8. MOTION.

###### a. Applicable Law.

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under subsection (b) does not affect the finality of the judgment or suspend its operation.

CrR 7.8(b).<sup>3</sup>

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted

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<sup>3</sup> The State initially argued that Mr. Richter's motion was untimely due to the fact that it was filed over 2 years after his initial conviction and sentencing. The trial court found that motion was timely filed. 3RP at 409-10.

from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 335.

Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978) (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his...lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166,

173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

In regards to plea bargaining, “counsel must communicate actual offers, discuss tentative plea negotiations, and discuss the strengths and weaknesses of the defendant’s case so the defendant knows what to expect and can make an informed decision on whether to plead guilty.” *State v. Edwards*, 171 Wn. App. 379, 394, 294 P.3d 708 (2012) (citing *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987)). The court reviews this issue by “asking whether defense counsel communicated the offers to the defendant and whether the defendant has demonstrated a reasonable possibility that the defendant would have accepted the offer.” *Edwards*, 171 Wn. App. at 394 (citing *Lafler v. Cooper*, 556 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012); *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012)).

**b. Mr. Richter has not shown deficient performance.**

Mr. Richter cannot satisfy the first prong of this test. He claims that his trial counsel, Mr. Hanify, never properly informed him of the possible sentencing consequences of rejecting the State’s plea offer and proceeding

to trial. The State contends that Mr. Richter was aware of the possible sentencing consequences well before Mr. Hanify began to represent him. Mr. Richter's first attorney was Mr. Suryan. A review of the record shows that on October 21, 2013, Mr. Richer appeared in Cowlitz County Superior Court for his pretrial hearing. At that hearing, Mr. Richter requested a new attorney, stating "we're not seeing eye-and-eye, *he's bringing up plea bargains that I'm not taking. I don't want to take a plea bargain.*" 1RP at 3-4 (emphasis added). The court denied Mr. Richter's request, stating "It sounds like you've had at least some contact related to you, plea bargains..." 1RP at 4. Mr. Richter stated "yeah." 1RP at 4. Mr. Suryan requested the confidential informant packet from the State, stating "Obviously, this matter is going to trial, so we need that." 1RP at 6. The State informed the court and Mr. Richter "The State's [offer] has now expired based on the request for the CI packet. There will be no more offers in this case." 1RP at 7. Mr. Suryan, on behalf of Mr. Richter, replied, "We're aware of that." 1RP at 7.

The State's offer clearly noted the possible sentencing range as charged exceeded 10 years and that the State would be seeking an exceptional sentence above the standard range upon conviction at trial. CP 93, Appendix B. This is the offer that was extended to Mr. Richter when he was represented by Mr. Suryan, which technically became void when he

requested the CI packet. Mr. Richter acknowledged on the record that he was presented with a plea bargain that he never had a single intention of accepting.

In addition, Mr. Hanify's declaration clearly states two key points. First, that by rejecting the State's offer, Mr. Richter was facing over the maximum 10 years for his charged offenses. Mr. Hanify informed Mr. Richter that a conviction after trial would result in a significantly higher sentence than the State's plea offer of 84 months: "it would be completely unrealistic to expect any sentence of less than 20 years, and I told him so more than once." CP 93, Appendix A. Secondly, Mr. Hanify's declaration states that he showed and discussed the State's offer with Mr. Richter on multiple occasions. CP 93, Appendix A. During these times, Mr. Hanify told Mr. Richter that he could not plausibly expect a sentence within the range of the State's plea offer if he was convicted at trial. CP 93, Appendix A.

Thus, not only was Mr. Richter informed by two different attorneys as to the State's plea offer, but he was also shown on numerous occasions that he was facing more than 10 years in prison and the State would be seeking an exceptional sentence. Mr. Richter rejected the State's offer when Mr. Suryan represented him. Mr. Hanify's declaration establishes that Mr.

Richter was informed on multiple occasions that he facing an exceptional sentence.

Additionally, Mr. Richter offers nothing in support of his argument that he was never properly informed of the sentencing consequences. “a defendant ‘must affirmatively *prove* prejudice, not simply show that the errors had some conceivable effect on the outcome.’” *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052). He offers no evidence, statements, witnesses, or facts to even suggest that these conversations with Mr. Suryan or Mr. Hanify did not take place. Instead, two years after his conviction and initial sentencing, Mr. Richter suddenly claimed that he was never informed of the possibility of a 20 year sentence. Mr. Richter does not show a reasonable probability that he would have accepted the plea offer. Therefore, his appeal should be denied.

**B. THE TRIAL COURT PROPERLY CONDUCTED A FACTUAL HEARING PRIOR TO RULING UPON MR. RICHTER’S CrR 7.8 MOTION.**

Mr. Richter also argues that the trial court failed to properly conduct a “factual hearing” prior to denying his CrR 7.8 motion. However, it is clear from the record that the trial did in fact conduct a hearing to consider the merits of the motion. 3RP at 388-415. Both the State and Mr. Richter agreed to rely upon Mr. Hanify’s declaration in lieu of live testimony. 3RP at 388.

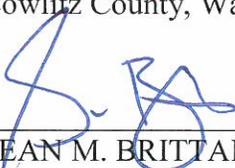
Both sides were permitted an opportunity to argue their facts and interpretations of the applicable case law and authority. The trial court had an opportunity to ask questions and conduct an analysis of the issue at hand. Mr. Richter fails to show how this process is deficient. The trial court's hearing involved "more than a mere review of the affidavits" and was a factual hearing.

#### V. CONCLUSION

For the above stated reasons, the Appellant's appeal should be denied.

Respectfully submitted this 9 day of November, 2017.

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Cowlitz County, Washington



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SEAN M. BRITTAIN  
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**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 9<sup>th</sup>, 2017.

  
\_\_\_\_\_  
Michelle Sasser

# COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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## Transmittal Information

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