

FILED

SEP 16 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY: \_\_\_\_\_

28863-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER CONKLIN, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Mark E. Lindsey  
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by denying defendant's request to withdraw his guilty plea.
2. The trial court erred in entering factual finding No. 3.
3. The trial court erred in entering factual finding No. 7.
4. The trial court erred in entering factual finding No. 8.
5. The trial court erred in entering factual finding No. 9.
6. The trial court erred in entering factual finding No. 10.
7. The trial court erred in entering factual finding No. 11.
8. The trial court erred in entering legal conclusion No. 3.
9. The trial court erred in entering legal conclusion No. 4.
10. The trial court erred in entering legal conclusion No. 5.
11. The trial court erred in entering legal conclusion No. 6.

II.

ISSUES PRESENTED

1. Is a defendant entitled to withdraw a guilty plea over six years after its entry?
2. Is a knowingly, intelligently, and voluntarily entered guilty plea rendered involuntary by the parties' mutually agreed

understanding of the amount of early release time that the defendant *may* earn?

3. Does it constitute ineffective assistance of counsel where a defendant's sentence is amended to afford defendant the benefit of his original plea agreement over six years after the plea was entered knowingly, intelligently, and voluntarily and counsel does not advise defendant of the possibility that defendant could withdraw his plea?
4. Does a manifest injustice arise to permit a defendant to withdraw his guilty plea over six years after the entry thereof where counsel did not advise defendant of that possibility during a hearing to amend the sentence to provide defendant the benefit of his plea agreement with regard to possible earned early release time?

### III.

#### STATEMENT OF THE CASE

On September 6, 2002, the defendant precipitated a confrontation with Melvin J. Hendrickson and Richard A. Laws by intentionally ramming his sport utility vehicle into the van they were driving on North Division in Spokane, Washington. CP 148-155. Defendant rammed his

vehicle into the van twice, then cut directly in front of the van and stopped causing the van to stop. CP 148-155. Defendant then exited his vehicle and walked up to the driver's side door where Mr. Laws was seated. Defendant was carrying a handgun as he approached the van and yelled, "I'm going to kill you." CP 148-155. Defendant then put his arm through the open driver's window and struck Mr. Laws in the face with the gun. Mr. Laws closed his eyes, heard a gunshot and smelled burnt gunpowder. CP 148-155. Mr. Laws opened his eyes and saw Mr. Hendrickson had been shot. Mr. Laws then saw defendant walk back to his vehicle still carrying the handgun. CP 148-155.

Numerous other witnesses all provided statements that they witnessed the defendant ram his vehicle into the van causing it to stop, the defendant walk up to the van with a handgun and fire into the van, then return to his vehicle and drive away. CP 148-155.

Officers responded to the scene to investigate a shooting. An investigation revealed defendant as the suspect. Mr. Hendrickson died as a result of the gunshot wound inflicted by defendant shortly thereafter. Defendant was arrested. CP 148-155.

On September 6, 2002, the State charged defendant with first degree murder with a firearm enhancement for the killing of Mr.

Hendrickson and attempted first degree murder with a firearm enhancement with regard to Mr. Laws. CP 1-2.

On September 26, 2002, the State filed an amended information adding a charge of possession with intent to deliver-marijuana with a firearm enhancement to the originally charged crimes. CP 4-5.

If convicted as charged in the September 26, 2002 amended information, the defendant would have faced standard sentences as follows: Count I-First Degree Murder with an offender score of "1" (based upon the possession conviction), 250-333 months plus 60 months for the firearm enhancement for a sentence of 310-393 months (consecutive to Count II pursuant to RCW 9.94A.589(1)(b)); Count II-Attempted First Degree Murder with an offender score as noted, 187.5-249.75 months plus 60 months for the attendant enhancement for a sentence of 247.5-304.75 months; Count III-Possession of a Controlled Substance with intent to deliver-marijuana with a firearm enhancement with an offender score of "2" for a sentence of 0-6 months plus 36 months for the enhancement for a sentence of 32-42 months (concurrent to Counts I and II). The total possible standard range sentence would have been:  $(310 + 247.5 = 557.5)$  to  $(393 + 304.75 = 697.75)$  557.5-697.75 months plus 36 months consecutive from count III for the firearm enhancement attendant thereto. Defendant faced a total term of incarceration of 593.5 to 733.76 months,

156 months of which were enhancements for which he was not entitled to one day of earned early release time.

On July 17, 2003, the State filed the second amended information pursuant to the plea agreement with defendant. The plea agreement provided that the defendant would enter a guilty plea to Count I with the firearm enhancement and the State would dismiss Counts II and III. Defendant readily accepted the State's part of the plea agreement whereby his jeopardy was very significantly reduced by over a half.

The defendant thereafter entered his Statement on Plea of Guilty. CP 12-18. Therein, defendant provided a sufficient factual basis for the guilty plea, including that the murder was committed with a firearm. Additionally, the defendant agreed that the trial court could utilize the Affidavit of Facts filed in support of the original information as a factual basis for his guilty plea to the amended information. CP 12-18; RP 12-13. Defendant's Statement on Plea of Guilty acknowledged his constitutional rights and his waiver thereof by his execution of the Statement. CP 12-18; RP 6-7.

The parties recommended an agreed sentence to the trial court. CP 12-18.

At the hearing, the court went through Defendant's Statement on Plea of Guilty section by section. CP 12-18; RP 3-13. The defendant

acknowledged and agreed that he had thoroughly gone over the plea statement and signed it with his counsel. CP 12-18, RP 3-13. Defendant orally acknowledged that he understood that the sentencing judge was not bound by the plea recommendation. RP 10. Defendant acknowledged and agreed to waive the rights set forth in the plea statement, including the right to appeal his guilty plea in §6(h). CP 12-18, RP 3-13. Defendant acknowledged that the court would consider the document as defendant's own statement. Defendant indicated that he understood what he was giving up and that he did not have any other questions regarding his pleading guilty. RP 3-13. As a result, the court indicated that it had reviewed the defendant's written statement, listened carefully to his verbal statement, and was satisfied that the plea had been given freely and voluntarily with an adequate understanding of the nature of the charge and the consequences of the plea. CP 12-18, RP 3-13.

At sentencing, the State recommended the sentence per the plea agreement. RP 2-3. The court listened to the comments of counsel and defendant before imposing the sentence. RP 17-22. Thereafter, the trial court imposed the sentence a sentence independent of the agreed recommendation by the parties. CP 21-32, RP 23-26.

During the ensuing five years, defendant filed collateral attacks regarding the legal financial obligations imposed by the sentence, yet did

not file any claim that his guilty plea had been involuntary. CP 35-37, 43-45. The trial court heard defendant's motion regarding the legal financial obligations and denied same on November 5, 2004. CP 49.

It is unclear from the record when defendant decided that his perception of the earned early release aspect of his sentence was incorrect in light of his guilty plea statement which acknowledges the legal impact of his being sentenced on a charge of first degree murder. CP 12-18. Nevertheless, in March 2008, the trial court ordered defendant returned to court to correct the earned early release issue. On October 1, 2008, the trial court amended the sentence to place defendant in the position he bargained for in his original guilty plea agreement. The trial court granted defendant the relief he originally sought, a 15% reduction of his sentence.

It was not until a year later that defendant filed his CrR 4.2(f) motion to withdraw his guilty plea entered claiming that he was not provided the choice. The trial court considered defendant's materials and arguments then denied the motion. Defendant appealed that decision by the trial court.

#### IV.

#### ARGUMENT

##### A. THE DEFENDANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO APPEAL BY HIS ENTRY OF HIS PLEA OF GUILTY.

Defendant appeals his guilty plea despite his knowing, intelligent and voluntary agreement to waive his right to appeal the finding of guilt (§5(f)) and the sentence imposed pursuant thereto (§6(h)). “Ordinarily, a plea of guilty constitutes a waiver by the defendant of his right to appeal, regardless of the existence of a plea bargain.” *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980) (citing *Young v. Konz*, 88 Wn.2d 276, 283, 558 P.2d 791 (1977)). Nothing in the pleadings executed by the defendant indicates that he had any concerns regarding the effect of his guilty plea. Nothing in the record indicated that defendant had any concerns regarding his decision to enter a guilty plea. Rather, the record affirmatively reflects that the defendant knowingly, intelligently, and voluntarily entered his guilty plea to the amended charge and thereby obtained the benefit of the bargain negotiated with the State to resolve the case. A resolution that significantly limited his jeopardy to a maximum 393 months as noted.

B. A GUILTY PLEA IS VALID WHEN THE TRIAL COURT FORMALLY ACCEPTS IT FOLLOWING A REVIEW OF THE WRITTEN PLEA STATEMENT WITH THE DEFENDANT ON THE RECORD.

The defendant argues that his guilty plea was rendered involuntary and void because the trial court was required to, yet did not, advise him that he had the choice to withdraw his guilty plea or hold the State to its bargained plea agreement. The defendant contends that had he been properly advised of his remedies, defendant would have decided to withdraw his guilty plea. A review of the jeopardy that defendant would face if he elected to withdraw his guilty plea leads to a different conclusion. If defendant had been advised of the consequences of a withdrawal of his guilty plea, then he would have been advised that he faced all the original charges and the attendant sentences therefore if convicted. The situation is such that defendant would be returned to a position wherein he faced a standard range sentence plus two firearm enhancements that totaled 593.5 to 739.75 months. Defendant would only be able to earn early release time after having served the 120 months represented by the two firearm enhancements. Defendant's claim disregards the fact that the court followed the very procedure set forth by the Supreme Court in CrR 4.2(d) in accepting defendant's guilty plea.

CrR 4.2 outlines the procedures for a plea, but strict compliance with CrR 4.2 is not of constitutional magnitude. *In re Vensel*, 88 Wn.2d 552, 554, 564 P.2d 326 (1977). CrR 4.2(d) prohibits a court from accepting a guilty plea that is not made voluntarily, competently, and with a complete understanding of the nature of the charges and the consequences of the plea. A defendant's guilty plea must be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). CrR 4.2(g) mandates that the court be certain that defendant has read or had the statement read to him and that he understands the rights that he is waiving as a result.

Here, the court properly viewed the defendant's statement on a plea of guilty as the formal written memorandum that the plea was entered knowingly, intelligently, and voluntarily. CP 12-18, RP 3-13. Defendant's written guilty plea statement set forth each of the constitutional rights which he waived by the entry of the guilty plea. CP 12-18. The court only accepted the guilty plea after defendant acknowledged in writing and orally the rights he was waiving by signing the statement. CP 12-18, RP 3-13. Defendant's guilty plea statement included his acknowledgement that the mandatory minimum sentence for first degree murder was 240 months. CP 12-18 ((§6(1))).

When a defendant completes a plea statement and admits to reading, understanding, and signing such a statement, there is a strong presumption that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). Here, the trial court's colloquy regarding the basis for defendant's plea coupled with his signed plea statement gives rise to a presumption of voluntariness that is "well nigh irrefutable." *Id.* To overcome this presumption, defendant must provide objective proof that his plea was entered involuntarily. No such proof has been proffered. The Statement on Plea of Guilty reflects that: defendant certified to the court that his counsel had explained to him, and they had fully discussed, all the sections of the Statement; he understood all the sections; he had no further questions to ask the judge; defendant's counsel certified to the trial court that counsel had read and fully discussed the Statement with defendant and believed that defendant is competent and fully understands his statement. CP 12-18; RP 3-13. Finally, defendant's Statement reflects that the trial court found that defendant had read the entire Statement and fully understood its content and effect. CP 12-18; RP 3-13. The trial court found that defendant's counsel had previously read to him the entire statement and that he fully understood its content and effect. CP 12-18; RP 3-13. The record reflects that the trial court did not finally accept defendant's guilty plea until after it had gone over his written plea

statement with him and was satisfied that he was entering his guilty plea knowingly, intelligently, and voluntarily. CP 12-13; RP 3-13.

The record supports that defendant acknowledged that first degree murder is a most serious violent offense and that it has a mandatory minimum sentence of at least 20 years to total confinement. CP 12-18. Accordingly, there is nothing in the record to support the claim that defendant did not enter his guilty plea knowingly, voluntarily, and intelligently.

At no point during the plea and sentencing, did the defendant claim he did not understand the events. The circumstances support quite the contrary perspective. Defendant was best positioned in this change of plea and sentencing process to know what he stood to gain if the court accepted the negotiated plea. Such is especially the circumstance since the amendment to a charge of first degree murder with the corresponding dismissal of the charge of attempted first degree murder and possession of a controlled substance with the intent to deliver significantly limited defendant's jeopardy by over half.

**C. THE DEFENDANT HAS NOT SHOWN THAT HIS COUNSEL WAS INEFFECTIVE.**

The defendant contends defense counsel was ineffective because counsel did not advise defendant that he was entitled to choose between

specific performance of the guilty plea agreement or the withdrawal thereof based upon an alleged “mutual mistake.” Defendant claims that the plea agreement whereby the parties agreed that he would be eligible “to receive up to 15% good time” on the term of incarceration was statutorily unavailable.

“The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The burden to be carried by the defendant is to meet a two-pronged test: the defendant must show (1) that counsel’s performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to “an objective standard of reasonableness based on consideration of all of the circumstances.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel’s performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, “but

for the ineffective assistance, there is a reasonable probability that the outcome would have been different.” *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (*citing Strickland*, 466 U.S. at 687). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

As noted, defendant’s initial counsel negotiated a resolution whereby defendant obtained a substantial and significant plea bargain. Counsel deftly negotiated a resolution which limited defendant’s rather significant jeopardy by the State’s agreement to dismiss two charges in exchange for a guilty plea to one. The plea agreement limited defendant’s jeopardy by removing the possibility that defendant faced a greater standard sentencing range for all counts if convicted. The plea agreement limited defendant’s jeopardy by removing the statutorily mandated consecutive sentences for convictions of two most serious violent offense (counts I and II) pursuant to RCW 9.94A.589(1)(b). The plea agreement limited defendant’s jeopardy by removing the second firearm enhancement attendant to count II which saved defendant from serving an additional 60 months incarceration consecutive to both the underlying convictions and the other firearm enhancement.

When defendant appeared before the trial court for resentencing, defense counsel advised defendant against withdrawing the guilty plea to avoid greater consequences. The reasonable inference is that counsel advised defendant not to withdraw his guilty plea because of the increased jeopardy defendant would face. If defendant was allowed to withdraw his guilty plea, he would face all three charges with a potential corresponding sentence of 593.5 to 739.75 months incarceration because the plea agreement to dismiss counts II and III would have been voided. At that point, defense counsel provided the most effective counsel possible since he, with the concurrence of the State and the trial court, placed defendant in the position originally bargained for and avoided defendant being exposed to the significantly higher jeopardy represented by potential conviction on all three charged crimes and attendant firearm enhancements.

The defendant's ineffective assistance of counsel argument fails under the provisions of *Strickland*. The defendant has not shown that any of the actions taken by his counsel prejudiced defendant. Quite the contrary is the fact. The first counsel limited defendant's jeopardy, then the second counsel protected that significant achievement to maintain that limit of defendant's exposure to a potential term of incarceration which is more than twice as much as his current sentence. As noted, a lack of prejudice will

terminate a claim of ineffective assistance of counsel. *Strickland*,  
466 U.S. at 697.

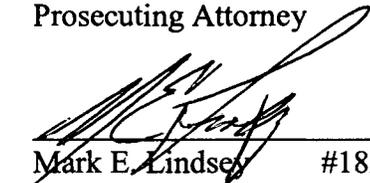
V.

CONCLUSION

For the reasons stated above the defendant's conviction should be  
affirmed.

Dated this 16<sup>TH</sup> day of September, 2010.

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