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Court of Appeals
Division III
State of Washington

COA NO. 34741-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER JOHN CANNATA,

Appellant.

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

The Honorable James M. Triplet, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's Sixth Amendment right to counsel was violated at the plea withdrawal hearing.

2. The court violated due process, ER 605 and the appearance of fairness requirement in denying appellant's motion to withdraw his guilty pleas.

3. The court erred in denying appellant's motion to withdraw his guilty pleas because they were not knowing, voluntary and intelligent, in violation of due process.

4. The court erred in entering the following denominated "findings of fact" regarding the motion to withdraw the guilty pleas:

a. "The defendant was advised of all direct consequences of his plea by both his counsel and plea judge." CP 295.

b. "The defendant's pleas of guilty were knowingly and intelligently made with the assistance of competent counsel. The defendant's pleas of guilty were entered into and made voluntarily by the defendant." CP 295.

Issues Pertaining to Assignments of Error

1. Whether appellant was denied his right to effective, conflict-free counsel to assist him with his plea withdrawal motion, where counsel served as a witness against him at the evidentiary hearing?

2. Whether the judge violated due process, ER 605 and the appearance of fairness requirement when he considered evidence outside the record in denying appellant's motion to withdraw the guilty pleas, where the judge set forth his personal experience with defense counsel in other cases to show counsel exercised extraordinary care in explaining things to his clients?

3. Due process requires a guilty plea to be knowing, voluntary, and intelligent. Must appellant be allowed to withdraw his pleas because he was misinformed about (1) his eligibility for an exceptional sentence on his Drug Offender Sentencing Alternative (DOSA); (2) the standard range sentence for one of the counts; and (3) the correct length of the DOSA sentence on that count?

B. STATEMENT OF THE CASE

1. Charges

The State charged Christopher Cannata under three cause numbers. Under 15-1-01161-9, the State charged second degree burglary and first degree theft. CP 1. Under 15-1-03254-3, the State charged theft of a motor vehicle. CP 16. Under 15-1-03270-5, the State charged second degree assault, second degree burglary and first degree theft. CP 10-11. The State later amended the second degree assault charge to attempted second degree assault. CP 37-38. For each count under 03270-5 and

03254-3, the State alleged the "free crimes" and "rapid recidivism" aggravators. CP 16, 37-38. For the burglary count under 01161-9, the State alleged the "rapid recidivism" aggravator. CP 1.

2. Guilty Plea

On June 20, 2016, Cannata pleaded guilty as charged. CP 30-36, 39-45, 46-52; 1RP¹ 11-13. The "Statement of Defendant on Plea of Guilty to Non-Sex Offense" for each case lists a number of paragraphs under the heading "In Considering the Consequences of my Guilty Plea, I Understand That:" CP 31, 40, 47. Each plea statement lists the standard range and statutory maximum for the crimes. CP 31, 40, 47.

Paragraph (t) in each plea statement provides:

"The judge may sentence me under the drug offender sentencing alternative (DOSA) if I qualify under RCW 9.94A.660. ~~If I qualify and the judge is considering a residential chemical dependency treatment based alternative, the judge may order that I be examined by DOC before deciding to impose a DOSA sentence. If the judge decides to impose a DOSA sentence, it could be either a prison-based alternative or a residential chemical dependency treatment based alternative.~~

If the judge imposes the prison-based alternative, the sentence will consist of a period of total confinement in a state facility for one-half of the mid-point of the standard range, or 12 months, whichever is greater. During confinement, I will be required to undergo a comprehensive

¹ The verbatim report of proceedings is cited as follows: 1RP - 6/20/16; 2RP - 8/25/16, 9/2/16.

substance abuse assessment and to participate in treatment. The judge will also impose a term of community custody of one-half of the midpoint of the standard range.

CP 34, 43-44, 50

Paragraph (h) in each plea statement provides:

The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless the judge finds substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:

(i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.

(ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.

(iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.

(iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

CP 33-34, 42-43, 49-50.

Paragraph (g) in the plea statement for case 03270-5 provides:

The prosecuting attorney will make the following recommendation to the judge:

The defendant agrees to enter pleas of guilty to all pending cases and counts "as charged" except the Assault Second Degree. The State agrees to amend the Assault Second to an Attempted Assault Second (this is still a strike or most serious offense). Regarding the single amended count, the amendment will include (preserve) the "free crime" and "rapid recidivism" aggravators as originally charged. The Defendant agrees and stipulates to all prior criminal convictions contained in the Prosecutor's Understanding of Criminal History. Further, the Defendant understands that the plea of guilty includes pleas to all charged "aggravating factors" (i.e. free crimes, rapid recidivism). Thus, at the plea-sentencing hearing, the Defense would be in affirmative agreement with State's proposed SRA score (well over 9+) and any and all factual bases for the State to argue and for a sentencing court to impose exceptional sentences beyond the standard sentencing range for each crime plead [sic]. The Defense is aware the result could be the imposition of the statutory maximum for each crime pled consecutive to one another. There is a total prison possibility of 55 years that the defendant could be sentenced to and the State is free to recommend up to 55 years in prison. To put [sic] another way, the State is free to argue for the imposition of statutory maximum consecutive sentences on each count and file. The Defense on the other hand would be free to argue sentence regarding the imposition of prison time with some limitation. The Defense agrees not to argue, the SRA score, aggravating factors as valid basis for imposition of an exceptional sentence, imposition of an exceptional down, standard fees/costs, nor restitution (as all these issues are jointly agreed by both parties.

In summary, the State would vigorously argue for any sentence up to the statutory maximum on each count and file to run consecutive, the Defense is free to make their own sentencing request regarding prison time imposed including argument for prison DOSA. However, the defense will not argue for an exceptional down. The pleas of guilty all include pleading to the aggravating factors and

the Defense agrees there is a legally valid basis to impose an exceptional sentence above the standard range on each count and file.

.....

The defense attorney will recommend the following sentence:

Prison Based Drug Offender Sentencing Alternative: Mid point of the range is 59.5 months, 29.75 months to be served in confinement; CFTS _____ days, 29.75 months to be served on community custody (DOSA conditions); standard fines/fees/restitution. The defense contends that this sentence should run concurrent to the sentence imposed in case #15-1-01161-9 and 15-1-03254-3.

CP 41-42.

Section (g) of the plea statement for case 01161-9 is identical except the final sentence reads "in case #15-1-03270-5 and 15-1-03254-3."

CP 48-49. Section (g) of the plea statement for case 03254-3 is identical except (1) the last sentence reads "in case #15-1-03270-5 and 15-1-03254-3" and (2) the DOSA portion reads "Mid point of the range is 50 months, 25 months to be served in confinement, CFTS _____ days, 25 months to be served on community custody." CP 33.

The plea statement signed by Cannata in each case states "My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this 'Statement of Defendant on Plea of Guilty.' I have no further questions to ask the judge." CP 35-36, 45, 51-52.

In all three cause numbers, Cannata stipulated that the "free crime" and "rapid recidivism" aggravators applied to each count, and that he had received notice that the State intended to seek an exceptional sentence on each count charged. CP 65-66.

On June 20, 2016, the plea hearing for all three cases was held before Judge Cooney. 1RP 2-17. Cannata was represented by appointed counsel Kevin Griffin. 1RP 2. When asked if he had gone over the plea statements with his attorney, Cannata answered "Yeah, I did." 1RP 4. The court confirmed Cannata's understanding of his offender score (9+) and the standard range sentences and statutory maximums for each count. 1RP 5-7. Griffin summarized the State's recommendation as "up to the statutory maximum to run consecutive which is – could be a total of 55 years in prison." 1RP 7. Griffin described the defense recommendation as "a prison-based DOSA or something in between, some combination of sentences." 1RP 7. The court reiterated "the State's free to recommend up to 55 years in prison total. That would be the maximum consecutive sentences on everything." 1RP 7. The court continued: "It says you are free to make a recommendation for a Drug Offender Sentencing Alternative but you won't be arguing for an exceptional sentence downward. You also agreed that there's a valid basis to impose an exceptional sentence above the standard range although, obviously, you're

probably not recommending that." 1RP 8. For the DOSA, "the midpoint of the range is 50 month [sic], so it'd be 25 months to be served in confinement; the balance to be served on community custody." 1RP 8.

Cannata answered affirmatively to whether he understood the State's recommendation. 1RP 8-9. He said "Yeah" to whether he understood the court did not need to follow either recommendation. 1RP 9. Among other topics, the court confirmed Cannata's understanding that the court could impose a DOSA. 1RP 10.

Cannata pleaded guilty under all three cause numbers in open court. 1RP 11-12. The court found the pleas were knowing, voluntary and intelligent. RP 13-14. The court went over the stipulation to the aggravating factors as a basis to impose an exceptional sentence. 1RP 15-16. Cannata said he understood the stipulation and had no questions about it. 1RP 16-17.

c. Hearing on Motion to Withdraw Plea

Before sentencing, Cannata moved to withdraw his guilty pleas in all three cases. CP 57-59, 60-62, 63-65. Cannata's attorney filed a written motion under each cause number in which he stated:

The Defendant in this case asserts that he was not properly informed about multiple direct consequences of his plea before the plea hearing. The Defendant further asserts that he was pressured by counsel to plead guilty, rather than being properly advised by competent counsel. Specifically,

Mr. Cannata asserts that he was not advised that the state would be seeking more than ten years in total confinement before the plea hearing, and that he has never been advised about the amount of restitution the state will be seeking. The Defendant is respectfully arguing that he received ineffective assistance of counsel at the time of the guilty plea hearing, and that he would not have entered a guilty plea if he had been properly advised. The Defendant asserts that he was stunned by learning the prosecutor could seek as much as 55 years of confinement at sentencing, and had not time to fully consider the implications of the guilty plea before the hearing began.

CP 58-59, 61-62, 64-65.

The State opposed the motion, arguing the pleas were valid. CP 240-48.

At the August 25, 2016 hearing on the motion before Judge Triplet, defense counsel Griffin requested that the court make a factual inquiry into the circumstances of the plea entry. 2RP 4-5. Griffin thought it best to hear from his client to determine "whether or not his representations were reliable." 2RP 5-6. The State argued an ineffective assistance allegation waived the attorney-client privilege and deferred to the court on whether to allow Cannata to give a factual basis for his motion at the hearing. 2RP 6. Griffin believed Cannata's testimony would help the court understand what was going on inside Cannata's head that day. 2RP 7. The court said if Cannata were to argue ineffective assistance, that could potentially waive the attorney-client privilege and expose him to

cross-examination by the State. 2RP 7. The prosecutor interjected, saying he would want to question Griffin on whether he had informed Cannata of certain matters. 2RP 8. The court said it was comfortable allowing Griffin to make a representation as an officer of the court without cross-examination and he trusted both attorneys to candidly answer any questions. 2RP 8. The court "would require Mr. Griffin to put his side of the story on the record if issues about effective assistance of counsel and notice and opportunities to talk to him about things are raised as an issue." 2RP 8.

The court asked Griffin to check with Cannata to make sure he wanted to be subject to cross examination, which "potentially will require you to respond to any issues about ineffective assistance," and allow the State to question Cannata about the things they talked about. 2RP 9. Griffin responded, "It's exactly how we were expecting things to play out if the Court would entertain this issue." 2RP 9.

Griffin then told the court there were three reasons for why there "could be" a manifest injustice: involuntariness of the plea, "Cannata believes he did not understand the consequence of the plea," and "he believes he may not have received effective assistance from me in adequately preparing him to understand those consequences." 2RP 9-10.

Cannata testified under oath. 2RP 10-26. The court asked Cannata to explain why he thought his plea was involuntary. 2RP 12. Cannata testified that, going into the plea hearing, he believed he was going to enter an agreement for a 120-month recommendation from the prosecutor's office and that he could argue for 51 to 68 months. 2RP 12. When the paperwork was laid out in front of him, he went into shock. 2RP 12. He had five to seven minutes. 2RP 12. Griffin tried to communicate with him, but the prosecutor (Mr. Hazel) tried to talk to Griffin the whole time and Cannata could not get a word in edgewise. 2RP 12-13. Griffin did not go over the paperwork with him. 2RP 13. He signed off on the paperwork in about 20 seconds. 2RP 13. He was in shock and felt terrified because he "went in there" thinking it was going to be a 120-month recommendation and "it went from that to 55 years instantly." 2RP 13. He "went from court in a suicide watch." 2RP 13.

To determine when Cannata spoke with Griffin about the plea deal, the court referenced an email received from Griffin on June 19 stating the parties had reached a tentative settlement and that a plea hearing could be set for the next morning. 2RP 13-16. Cannata testified he met with Griffin on June 19, during which time Griffin and the prosecutor exchanged email messages. 2RP 16. "There was an undisclosed part of this plea agreement that was never entered into that record that I didn't -- I

should've brought up that day, the day that I took this plea, but I mean, like I said, I just couldn't think clearly." 2RP 16-17. He met with Griffin for 20-30 minutes. 2RP 17. Griffin did not discuss with him that the State requested 55 years. 2RP 17-18. The first time he heard about that request was when he "walked into court that morning and the paperwork was slid across from Mr. Hazel to my side of the courtroom." 2RP 18.

Cannata also explained he did not know certain requirements were needed to withdraw a plea. 2RP 18-19. He believed the full recommendation set forth in the plea statement should have been read to him at the plea hearing, rather than having his attorney give a shortened version of it after interrupting the judge. 2RP 20. Cannata confirmed he had entered guilty pleas many times before. 2RP 19. He understood the importance of understanding the offer, the recommendations, and what the judge tells him. 2RP 19-20.

The State then cross-examined Cannata. 2RP 21-26. Cannata said it was hard paying attention at the plea hearing, as he was "in shock." 2RP 22. He was under the impression that "as long as I went through with whatever I had to, I could withdraw my plea." 2RP 22. Referencing the plea hearing transcript, there was a point where there was a "pause" in

proceedings,² during which time Griffin explained to him that he could withdraw his plea. 2RP 22-23. He didn't have time to go over the plea statements. 2RP 23. When he told the judge at the plea hearing that he had gone over them, he was "in a sense" lying but was under the impression that "I pretty much had to go along." 2RP 23. He was also under the impression that the State had made an offer of 10 years. 2RP 25. Upon further questioning, Cannata again affirmed that Griffin spent 20-30 minutes with him on June 19 and that at no time did Griffin tell him the State could recommend 55 years. 2RP 25-26.

Griffin asked no questions of his client.

Following Cannata's testimony, the State argued the pleas were valid. 2RP 26-31. The prosecutor represented that he at no time made an offer of 120 months despite defense counsel's efforts to secure such a recommendation. 2RP 27. On the morning of June 20, at the start of the hearing, Cannata immediately indicated he did not want to go through with the plea. 2RP 29. The prosecutor said he gave the defense a half hour for discussion. 2RP 29.

The court told Griffin, as an officer of the court, to tell his side of the factual issues raised by Cannata, focusing on how much time Griffin spent discussing the plea with Cannata and whether he talked about the

² Apparently referencing 1RP 16-17.

State asking for 55 years. 2RP 31-32. Griffin said he went over the settlement on multiple occasions. 2RP 32. In response to the judge's question of whether he had advised Cannata that the State was free to ask for the 55-year maximum, Griffin said he had. 2RP 32-33. He did not remember telling Cannata that he could withdraw the plea. 2RP 33. On the day of the plea, he went through "everything in the recommendation" and "reviewed the plea statements with him." 2RP 34. Cannata was having an incredibly tough time listening and focusing. 2RP 34. But Griffin said he "discussed with him every single thing in the plea statements." 2RP 34. Griffin referenced a text message conversation he had with the prosecutor regarding the prospects of a plea deal on June 19, which started at 2:57 p.m. 2RP 34-35. The prosecutor said the last text message he received was 4:47 p.m. 2RP 37. Regarding how much time he spoke with Cannata on the morning of June 20, Griffin declined to dispute what either Cannata or the prosecutor said on the point. 2RP 35. Cannata's reference to an "undisclosed" part of the plea agreement referred to asking the State to clear up some criminal matters in other counties. 2RP 36.

Judge Triplet denied Cannata's motion to withdraw his guilty pleas. CP 294-96; 2RP 54-55. The judge described Griffin's personal experience with Griffin in other cases that showed he was a sought-after and careful

lawyer that zealously advocated for his clients. 2RP 40-42. The judge rejected Cannata's allegation that he had limited time to talk with Griffin before entry of the plea and his allegation that Griffin did not discuss the 55-year recommendation. 2RP 42. It was clear from cross-examination and Griffin's representations that the State never recommended 120 months and that Cannata had known all along about the maximum penalty of up to 55 years. 2RP 42-43. The text message exchange on June 19 went on for almost two hours, which suggested Cannata had more than 20-30 minutes to discuss the specifics of the plea agreement at that time. 2RP 43. The judge stated "I have no question, based on Mr. Griffin's representations, that he discussed . . . to Mr. Cannata that the state was requesting and was arguing 55 years." 2RP 43. The judge was satisfied that Griffin had numerous opportunities to talk with Cannata about the consequences that Cannata faced. 2RP 43-44. Cannata's recollection that he had only five minutes to talk with his attorney in private on the morning of June 20 was contrary to "everyone else's" recollection that he had 30 minutes. 2RP 45-46. The plea colloquy on June 20 showed a knowing, voluntary and intelligent plea. 2RP 46-55.

d. Sentencing

At the sentencing hearing, the State requested exceptional sentences in all three cases for a total of 40 years in confinement. 2RP 80-

88. Defense counsel noted Cannata stipulated to the basis for an exceptional sentence and advocated for a DOSA. 2RP 91, 98-99, 102-06. Counsel told the court his client had expressed interest in getting consecutive DOSA sentences, and although counsel was not "specifically asking that," he wanted the court to know his "client's position on that." 2RP 99. The court wondered how it was possible to run DOSA sentences back-to-back because an offender needed to complete one sentence, including the treatment portion in the community, before he could start the other. 2RP 126-27. Defense counsel responded back-to-back DOSA's were permitted and were not a hybrid sentence "where a court has increased the range." 2RP 127.

The court expressed its goal of balancing various considerations to arrive at a punishment that was proportionate to the seriousness of the offenses and Cannata's extensive criminal history. 2RP 136-38. There was a need to protect the community, but there was also a need to "try something different." 2RP 138. The court imposed a total confinement period of 27 and a half years, including a total of seven and one half years on DOSA because it was important that Cannata get treatment. 2RP 141-42.

In case 01161-9 (second degree burglary and first degree theft), the court imposed an exceptional sentence of 120 months confinement on

each count, to run concurrently to each other but consecutive to the sentences imposed under cases 03254-3 and 03270-5. CP 133-34; 2RP 138-39, 145.

In case 03270-5 for the second degree burglary and first degree theft counts, the court imposed an exceptional sentence of 120 months on each count, to run concurrently to each other but consecutive to the sentences imposed under 01161-9 and 03254-3. CP 119-20; 2RP 139, 145-46.

For the attempted second degree assault in case 03270-5, the court imposed an exceptional prison-based DOSA sentence above the standard range consisting of 30 months in confinement and 30 months in community custody, "consecutive to all other J&S's entered today." CP 104-05; 2RP 139, 145-46.

In case 03254-3 (motor vehicle theft), the court imposed an exceptional prison-based DOSA sentence above the standard range consisting of 60 months in confinement and 60 months in community custody, to run consecutive to "all other files entered today." CP 88-89; 2RP 139, 146. The two DOSA sentences were to run consecutive to each other, with seven and one half years in confinement, seven and one half years on community custody with treatment. 2RP 139, 145-47.

The court entered written findings of fact and conclusions of law justifying the exceptional sentences based on the "free crime" and "rapid recidivism" aggravators. CP 148-52. Cannata appeals under all three cause numbers. CP 153-69, 170-200, 201-16.

C. ARGUMENT

1. **CANNATA WAS LEFT WITHOUT THE ASSISTANCE OF COUNSEL AT A CRITICAL STAGE OF THE PROCEEDINGS WHEN HIS COUNSEL AT THE PLEA WITHDRAWAL HEARING BECAME A WITNESS AGAINST HIM.**

Cannata was denied his Sixth Amendment right to counsel when his defense counsel expressly contradicted the basis on which Cannata sought to withdraw his plea. The denial of Cannata's motion must be reversed and the case remanded for a new hearing with conflict-free counsel.

Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. The right to effective assistance of counsel encompasses the plea process. State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). Counsel has a duty to assist the defendant "actually and substantially" in determining whether to plead guilty. State v.

Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). A trial court must allow withdrawal of a guilty plea when necessary to correct a manifest injustice. CrR 4.2(f); State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001). Ineffective assistance of counsel at the plea stage constitutes a manifest injustice. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

A plea withdrawal hearing is a critical stage at which the right to assistance of counsel attaches. State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996). The Sixth Amendment right to effective assistance of counsel guarantees the right to counsel free from conflicts of interest. State v. Regan, 143 Wn. App. 419, 425-26, 177 P.3d 783, review denied, 165 Wn.2d 1012, 198 P.3d 512 (2008). "Whether the circumstances demonstrate a conflict of interest under ethical rules is a question of law, which is reviewed de novo." Regan, 143 Wn. App. at 428.

Here, Cannata sought to withdraw his plea based on ineffective assistance of counsel. The first problem is that Griffin, the attorney who was claimed to be ineffective, represented Cannata at the plea withdrawal hearing. A lawyer generally cannot represent a client under the Rules of Professional Conduct if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer. RPC 1.7(a)(2). Consistent with that mandate, counsel cannot ethically argue his

own ineffectiveness. See Garland v. State, 283 Ga. 201, 203, 657 S.E.2d 842 (Ga. 2008) ("a lawyer may not ethically present a claim that he/she provided a client with ineffective assistance of counsel") (quoting Hood v. State, 282 Ga. 462, 463, 651 S.E.2d 88 (Ga. 2007)). "[I]t is unrealistic to expect trial counsel to argue his own ineffectiveness" and it cannot be assumed counsel will provide the zealous advocacy to which his client is entitled. Commonwealth v. Fox, 476 Pa. 475, 478, 383 A.2d 199 (Pa. 1978).

"A per se conflict of interest arises when attorneys argue motions in which they allege their own ineffectiveness." People v. Keener, 275 Ill. App.3d 1, 4, 211 Ill. Dec. 391, 655 N.E.2d 294 (Ill. App. Ct. 1995). Arguing one's own incompetence creates an actual conflict of interest. United States v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996). The inherent conflict stems from competing interests: "On the one hand, it is his duty as a member of the bar to argue in behalf of the defendant as vigorously as possible. On the other hand, he has his own self-interest to consider: that is, his reputation as an attorney." Shelton v. United States, 323 A.2d 717, 718 (D.C. 1974). "Not only does such a conflict harm the interests of the client, who is entitled to the assistance of a zealous advocate, . . . but the integrity of the entire judicial process is drawn into question." Murphy v. People, 863 P.2d 301, 304 (Colo. 1993) (counsel

arguing his own ineffectiveness clearly causes an impermissible conflict of interest).

Cannata's attorney could not ethically argue his own ineffectiveness as a basis to withdraw the pleas. But instead of removing himself from the case, he continued to represent Cannata at the evidentiary hearing. Cannata should not have been put in the position of having to rely on an attorney that had a conflict of interest regarding the ineffective assistance claim lodged against that same attorney.

But the conflict of interest goes deeper. The dispositive point is that Cannata's attorney functioned as a witness against his own client at the hearing, thereby depriving Cannata of his right to counsel under the Sixth Amendment. "When an attorney testifies against his client during the course of representation, he has an actual conflict of interest." State v. Fualaau, 155 Wn. App. 347, 364, 228 P.3d 771 (2010) (citing Regan, 143 Wn. App. at 430).

In Harell, the defendant moved to withdraw his guilty plea based on an allegation that his counsel had rendered ineffective assistance during the plea bargain process. Harell, 80 Wn. App. at 803. The trial court found the defendant had alleged sufficient facts to warrant an evidentiary hearing on his motion. Id. at 804. During the hearing, defense counsel testified as a witness for the State and declined to assist Harell with his

motion. Id. at 805. The trial court denied Harell's motion to withdraw his guilty plea. Id. at 805. The Court of Appeals reversed and remanded for a new plea withdrawal hearing with new counsel, holding the defendant's right to counsel was violated by the outright denial of counsel during a critical stage of the prosecution. Id. at 805. Counsel's "direct conflict of interest" was "evidenced by his direct testimony against Harell's interest at the hearing." Id. Denial of counsel was presumed prejudicial and warranted reversal without a harmless error analysis. Id.

Cannata's case compares favorably to Harrel. In both cases, the claimed basis for withdrawing the plea was substantial enough to warrant an evidentiary hearing on the matter. See id. at 804 ("Implicit in the trial court's decision to hold a hearing is a finding that sufficient facts were alleged to warrant a hearing."). As in Harell, counsel served as a witness against his client in a manner that torpedoed the client's ineffective assistance claim.

Before taking testimony, Griffin asked the court to hear what Cannata had to say and offered "I am happy to share my perspective with the Court if the Court is interested in hearing." 2RP 10. Cannata testified under oath. 2RP 10-11. Griffin did not conduct any direct examination, instead leaving it up the judge and the prosecutor to examine Cannata without any guidance whatsoever. Although Griffin remained Cannata's

attorney in name, Cannata was left to fend for himself at the hearing when it came to telling the judge why his pleas were invalid.

Defense counsel did not testify under oath because the judge trusted counsel to make an honest representation without being subject to examination. 2RP 8, 31. The judge directly asked Griffin "Did you specifically tell Mr. Cannata the state was asking for -- was free to ask for the maximum penalty, which could be 55 years?" 2RP 32. Griffin directly answered "Yes, Judge." 2RP 33. Griffin went on to say he was trying to get the State to agree to recommend a 10-year maximum, but was unsuccessful. 2RP 33. Griffin continued: "Yes, I specifically discussed that the state was free to ask for up to 55 years." 2RP 33. Griffin also represented that, contrary to Cannata's testimony, he had gone over the settlement and plea statements with him. 2RP 32, 34. In the end, Griffin told the court "I think there's factual inquiry about whether or not I adequately prepared him for the plea. I think the Court's heard some evidence along those lines. If the Court found that he did not understand any of the direct or some of the significant indirect consequences, then perhaps he should be permitted to withdraw his plea. That is certainly his position. I support it." 2RP 37.

Having just destroyed the basis for withdrawing the pleas by contradicting his client's claim, counsel ended by incongruently voicing

support for withdrawal of the pleas. Griffin should not have been the attorney to represent Cannata at the hearing for just this reason. Counsel was not loyal to his client. Cannata was entitled to an attorney able to zealously advocate for his position, not an attorney who sabotaged it.

In representing Cannata at the plea withdrawal hearing, defense counsel did not function as the counsel guaranteed by the Sixth Amendment. The framers of the Sixth Amendment "did not propose it to assure an individual counsel a right to testify against his own client and still participate in the case." Gov't of Virgin Islands v. Zepp, 748 F.2d 125, 138 (3d Cir. 1984). In making his statements to the court, Griffin essentially functioned as a State's witness against Cannata. Griffin's representations to the court defeated Cannata's motion and showed a direct conflict of interest with Cannata. See Harell, 80 Wn. App. at 805 (counsel's "direct testimony against Harell's interest at the hearing" showed a "direct conflict of interest"). These circumstances establish denial of assistance of counsel at a critical stage of the proceedings. Id. This type of error is not subject to harmless error analysis. Id. The remedy is reversal of the denial of the plea withdrawal motion and remand for a new hearing on Cannata's motion at which conflict-free counsel assists him. Id. at 804.

2. THE COURT'S IMPROPER CONSIDERATION OF EVIDENCE OUTSIDE THE RECORD VIOLATED DUE PROCESS, ER 605 AND THE APPEARANCE OF FAIRNESS REQUIREMENT.

A judge sitting as trier of fact is limited to the record made before him at the formal adjudicative hearing, and to draw conclusions based on facts outside the record violates due process. U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Further, a judge's insertion of his or her own personal experience into the decision-making process violates ER 605 as well as the appearance of fairness doctrine. The judge in Cannata's case violated due process, ER 605 and the appearance of fairness requirement by relying on his personal experience with defense counsel in other cases to resolve the crucial credibility determination against Cannata. Reversal and remand for a new plea withdrawal hearing before a different judge is required because this error prejudiced the outcome.

In making his ruling, Judge Triplet set forth his own personal experience with Cannata's attorney:

Let me talk about assistance of counsel first. And, you know, I've had both of these attorneys in my court many times. Probably of all publicly appointed defense attorneys in this county, I have had more defendants specifically ask me to appoint Kevin Griffin to represent them than any other attorney by name. In fact, I can't count on one hand the number of times I've ever had a lawyer asked to be appointed a certain public defender or counsel for defense lawyer that wasn't Mr. Griffin.

So I think certainly the view from defendants that are expressed to me in court is that he is not only their preferred lawyer to be appointed to represent them, but they often ask for him by name. And to me, that says a lot, because defendants talk. Defendants talk about their lawyers and about the system. I'm sure they talk about judges and prosecutors. But when they -- when they have a chance to say who they want sitting next to them, I've never had anybody else requested as much as Mr. Griffin.

I've had him before me in trials, in pleas, in motion practice, status conferences, pretrials. I cannot think of another attorney that practices in front of me routinely on these criminal dockets that is as careful as he is to make sure that he is zealously advocating for clients, that he is carefully explaining things and researching issues so that he can uncover any legal theories or flesh them out.

He's constantly pointing out, "I agonized over this decision," "My client and I have had numerous discussions about this particular issue," and I appreciate and respect the care that he takes and the seriousness that he approaches his defense of people accused of crimes in this jurisdiction. It is unmatched by anyone else that practices, at least in my court.

Now, does that mean that in a particular case that any good attorney couldn't drop the ball? No. But I just want to generally have those things on the record regarding my experiences with how Mr. Griffin has practiced in my courtroom.

2RP 40-42.

Whether a proceeding satisfies constitutional due process is a question of law reviewed de novo. In re Welfare of J.M., 130 Wn. App. 912, 920, 125 P.3d 245 (2005). Due process requires the court to "only consider adjudicative evidence that the parties in an adversarial context have 'the opportunity to scrutinize, test, contradict, discredit, and correct.'"

State v. Grayson, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005) (quoting George D. Marlow, From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process, 72 St. John's L. Rev. 291, 319 (1998)).

A trial judge violates due process in making a determination based on private knowledge, untested by cross-examination, or any of the rules of evidence. People v. Wallenberg, 24 Ill.2d 350, 354, 181 N.E.2d 143 (Ill. 1962); see State v. K.N., 124 Wn. App. 875, 877, 103 P.3d 844 (2004) (judge violated due process in taking improper judicial notice of a fact the State needed to prove). "It is a fundamental principle of our jurisprudence that a factfinder may not consider extra-record evidence concerning disputed adjudicative facts." Lussier v. Runyon, 50 F.3d 1103, 1113 (1st Cir. 1995) (vacating judgment because judge relied on evidence outside trial record in violation of federal judicial notice rule).

Judges functioning as triers of fact are therefore not allowed to rely on personal knowledge in resolving a legal dispute. See Dep't of Licensing v. Sheeks, 47 Wn. App. 65, 72, 734 P.2d 24 (1987) (personal knowledge of judge not subject to judicial notice). Under ER 605, "The judge presiding at the trial may not testify in that trial as a witness." "This evidentiary rule can apply even when the trial judge does not formally

testify, but inserts his or her own personal experience into the decision-making process." In re Estate of Hayes, 185 Wn. App. 567, 599, 342 P.3d 1161 (2015).

The judge in Cannata's violated due process and ER 605 because the judge inserted his personal experience with defense counsel into his decision-making process. The judge knew Griffin as an extremely careful attorney unmatched by his peers. 1RP 41-42. The judge could not "think of another attorney that practices in front of me routinely on these criminal dockets that is as careful as he is to make sure that he is zealously advocating for clients, that he is carefully explaining things." 1RP 42. The judge's personal experience with Griffin went to the heart of what was at issue in Cannata's hearing. The judge denied Cannata's motion to withdraw the guilty pleas because the judge credited Griffin's representation that he informed Cannata of the consequence that he faced up to 55 years in prison. 2RP 42-43. The judge's personal experience with defense counsel tainted his credibility determination that counsel told the truth and Cannata didn't.

Cannata had no opportunity to cross-examine the judge to challenge the accuracy of his observations and belief. "A party may not cross-examine the knowledge and experience of a judge." Hayes, 185 Wn. App. at 598. Cannata could not even challenge the judge's reliance on

evidence outside the record because Cannata was represented by the very attorney that was the subject of the judge's personal knowledge. The judge, meanwhile, did not disclaim reliance on his personal experience with counsel. Cf. Choate v. Swanson, 54 Wn.2d 710, 716-17, 344 P.2d 502 (1959) (rejecting contention that trial judge unfairly allowed personal knowledge to influence his decision in part because the judge expressly disclaimed reliance on personal knowledge). Rather, the judge made a point of putting his personal experience with counsel on the record in rendering his decision.

The appearance of fairness doctrine is also implicated. "Criminal defendants have a due process right to a fair trial by an impartial judge." In re Pers. Restraint of Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010) (citing Wash. Const. art. I, § 22; U.S. Const. amends. VI, XIV). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) (quoting State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). The appearance of fairness doctrine applies where there is evidence of a judge's actual or potential bias. State v. Dominguez, 81 Wn. App. 325, 329, 914 P.2d 141 (1996). "The test is whether a reasonably prudent and disinterested observer would conclude

[the party] obtained a fair, impartial, and neutral trial." Dominguez, 81 Wn. App. at 330.

Canon 2.11 of the Code of Judicial Conduct provides: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or *a party's lawyer*, or personal knowledge of facts that are in dispute in the proceeding." (emphasis added). The test for whether a judge's impartiality might reasonably be questioned is an objective one. Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). It assumes that the reasonable person knows and understands all the relevant facts. State v. Davis, 175 Wn.2d 287, 306, 290 P.3d 43 (2012). "[W]here a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." Sherman, 128 Wn.2d at 205.

"Frequency of appearance by an attorney before a judge is not in and of itself sufficient to create an appearance of partiality such that the judge would be required to recuse himself from a matter in which that attorney's testimony is at issue." State v. Leon, 133 Wn. App. 810, 812, 138 P.3d 159 (2006), review denied, 159 Wn.2d 1022, 157 P.3d 404 (2007). But here we have something much more than Griffin's frequent

appearance before Judge Triplet. Bias in Cannata's case is demonstrated by the judge's own words on the record. The judge expressly incorporated his personal experience with defense counsel's actions in other cases into his decision-making process in ruling against Cannata. Judge Triplet's decision to deny Cannata's plea withdrawal motion is tainted by at least a suspicion of partiality toward Cannata's attorney. A reasonably prudent and disinterested observer would not conclude Cannata received a fair, impartial, and neutral hearing. On the contrary, such an observer would conclude the deck was stacked against Cannata due to the judge's personal knowledge of Cannata's attorney as incredibly scrupulous and careful, which the judge relied on to credit counsel's representations and discredit Cannata's testimony, resulting in the denial of Cannata's motion.

An appearance of fairness claim will generally not be considered for the first time on appeal. State v. Morgensen, 148 Wn. App. 81, 90-91, 197 P.3d 715 (2008). For several reasons, Cannata asks this Court to consider his appearance of fairness claim for the first time on appeal.

First, the claim is inextricably linked to his ER 605 argument. ER 605 expressly states "No objection need be made in order to preserve the point." Since the ER 605 argument is preserved by operation of the rule, the appearance of fairness argument based on the same facts should be addressed as well.

Second, Cannata was represented by an attorney implicated in the judge's partiality. In the usual course of things, an attorney can be expected to object on behalf of a client to challenge a judge's bias. But an attorney who is being flattered by the judge, and who already labors under a conflict of interest in defending himself against an ineffective assistance claim, cannot be expected to object to the judge's flattery on the point. Counsel's failure to question the judge's partiality should not be held against Cannata under these circumstances.

Third, the reasoning behind waiver of the claim is that a party cannot tactically "delay a request for recusal until after the judge has issued an adverse ruling." State v. Blizzard, 195 Wn. App. 717, 725-26, 381 P.3d 1241 (2016), review denied, 187 Wn.2d 1012, 388 P.3d 485 (2017). Here, the judge's comments that form the basis for Cannata's appearance of fairness claim were not uttered before the judge issued a ruling. Those comments were part of his ruling. Before then, there was no basis to question the judge's partiality.

Whether Cananta's claim is considered as a due process, ER 605, or appearance of fairness violation, Cannata was prejudiced. An ER 605 error is harmless only if the trial court would necessarily have arrived at the same conclusion in the absence of the error. Hayes, 185 Wn. App. at 602 (citing Vandercook v. Reece, 120 Wn. App. 647, 652, 86 P.3d 206

(2004)). Judge Triplet relied on personal, extra-record knowledge of attorney Griffin to credit Griffin's representation that he correctly informed Cannata of the plea consequences and to discredit Cannata's contrary testimony. This credibility determination doomed Cannata's motion to withdraw his pleas. The prejudice is obvious.

Cannata requests remand for a new hearing before a different judge. "[A] party may seek reassignment for the first time on appeal, which is usually done where the trial judge 'will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue.'" State v. Solis-Diaz, __Wn.2d__, 387 P.3d 703, 706 (2017) (quoting State v. McEnroe, 181 Wn.2d 375, 387, 333 P.3d 402 (2014)). "[W]here review of facts in the record shows the judge's impartiality might reasonably be questioned, the appellate court should remand the matter to another judge." Solis-Diaz, 387 P.3d at 706.

Judge Triplet's impartiality is reasonably questioned for the reasons set forth above. And because Judge Triplet cannot be expected to put aside the improper personal experience he relied on in the first hearing to make the key credibility determination needed to resolve the plea withdrawal motion, the appropriate remedy is to remand for a new trial

before a different judge. See State v. Cloud, 95 Wn. App. 606, 615-16, 976 P.2d 649 (1999) (trial court's consideration of erroneously presented evidence at a post-trial hearing required remand before new judge because it would be extremely difficult set aside improper information).

3. THE GUILTY PLEAS ARE INVALID BECAUSE CANNATA WAS MISINFORMED ABOUT A DIRECT CONSEQUENCE OF HIS PLEA.

Cannata's guilty pleas are not knowing, voluntary and intelligent because he was misinformed that an exceptional sentence could be imposed as part of a DOSA sentence. Further, Cannata was misinformed about the standard range sentence for the attempted second degree assault count. Cannata was also misinformed about the length of the DOSA sentence for that count. Cannata is entitled to withdraw his indivisible pleas for each of these three reasons.

a. Misinformation about sentencing consequences renders a guilty plea involuntary and results in a manifest injustice.

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3. A guilty plea is otherwise invalid. Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v.

Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). The State bears the burden of establishing a guilty plea is valid. Ross, 129 Wn.2d at 287.

The standard for a valid plea is reflected in CrR 4.2(d), "which mandates that the trial court 'shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). "Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). "An involuntary plea produces a manifest injustice." Isadore, 151 Wn.2d at 298.

A guilty plea is not knowingly made when it is based on misinformation regarding a direct sentencing consequence. Mendoza, 157 Wn.2d at 584, 590-91. A sentencing consequence is direct when "the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Ross, 129 Wn.2d at 284 (internal quotation marks omitted) (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). The length of a sentence is a direct consequence of a guilty plea. Mendoza, 157 Wn.2d at 590. A DOSA is a direct consequence. In re Pers. Restraint of Fonseca, 132 Wn. App. 464, 469, 132 P.3d 154 (2006). An exceptional sentence is a direct consequence.

State v. Hilyard, 63 Wn. App. 413, 417-19, 819 P.2d 809 (1991), review denied, 118 Wn.2d 1025, 827 P.2d 1393 (1992) (plea valid where defendant understood he was subject to lawful exceptional sentence). To make a knowing and intelligent plea of guilty, the defendant must understand the possibility of receiving a sentence outside the standard range. State v. Dennis, 45 Wn. App. 893, 898 n.2, 728 P.2d 1075 (1986).

b. The issues may be raised for the first time on appeal.

Cannata did not seek to withdraw his pleas before the trial court on the grounds that he was misadvised about the exceptional sentence, the standard range for the attempted second degree assault count or the length of the DOSA sentence. Cannata may raise the issue of the voluntariness of his plea for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001). The claim that a guilty plea is invalid based on misinformation of direct sentencing consequences may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). Mendoza, 157 Wn.2d at 589.

c. Cannata was misinformed that he was subject to an exceptional DOSA sentence.

The plea statements under case numbers 03254-3 (motor vehicle theft) and 03270-5 (attempted second degree assault) state the judge could sentence Cannata to a prison-based DOSA sentence. CP 34, 43-44. RCW

9.94A.662 provides: "(1) A sentence for a prison-based special drug offender sentencing alternative shall include: (a) A period of total confinement in a state facility for one-half the midpoint of the standard sentence range or twelve months, whichever is greater; (b) One-half the midpoint of the standard sentence range as a term of community custody[.]"

The plea statements also inform Cannata that he is subject to an exceptional sentence on every count based on the presence of stipulated aggravating factors. CP 33-34, 42-43. The trial court sentenced Cannata to a prison-based DOSA on two counts: the attempted second degree assault under 03270-5 and the motor vehicle theft under 03254-3. CP 88-89, 104-05. For each of these counts, the court determined an exceptional sentence was warranted based on the aggravating factors. CP 88, 104, 148-52. Each of these DOSA sentences were above half of the mid-point of the standard range, ran consecutive to each other, and ran consecutive to other counts. CP 88-89, 104-05.

The Sentencing Reform Act provides a sentence may be exceptional in two different respects: it may be outside the standard range or it may be consecutive to another sentence. State v. Flake, 76 Wn. App. 174, 182-83, 883 P.2d 341 (1994); see RCW 9.94A.535 ("The court may impose a sentence outside the standard sentence range for an offense if it

finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence."; "A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section.").

The DOSA sentences were exceptional in both respects: they went beyond half the mid-point of the standard range sentence and they ran consecutive to other sentences. The problem is that an exceptional sentence cannot be part of a DOSA sentence. The DOSA sentences imposed on Cannata are illegal.

"A DOSA sentence is an alternative form of standard range sentence, not an exceptional sentence." State v. Murray, 128 Wn. App. 718, 726, 116 P.3d 1072 (2005); see also State v. Mohamed, 187 Wn. App. 630, 647, 350 P.3d 671 (2015) ("an exceptional sentence is separate from the alternative sentencing provisions of a DOSA or PSA"). A trial court cannot "construct a 'hybrid' of an exceptional sentence and a DOSA sentence." Murray, 128 Wn. App. at 725. "A trial court's conclusion that the midpoint prescribed by DOSA is insufficient to meet the needs of a particular offender impermissibly invades the province of the legislature." Id. at 726.

In creating exceptional sentences, the court here exceeded the standard midpoint-based sentence for both the motor vehicle theft (60 months instead of 25) and attempted second degree assault (30 months instead of 26.8125.)³ CP 88-89, 104-05. This is an impermissible exceptional sentence under Murray because the legislature has not authorized it.

The DOSA sentences also run consecutive to each other and other sentences. These are unauthorized exceptional sentences. No case precisely addresses the propriety of running DOSA sentences consecutively, but comparison to the Special Sex Offender Sentencing Alternative (SSOSA) gives the answer. The SSOSA, like the DOSA, is a sentencing alternative that calls for the sentence to run within the standard range. State v. Goss, 56 Wn. App. 541, 543-44, 784 P.2d 194 (1990). "Because courts are not allowed to impose exceptional sentences under SSOSA, the trial court could not have ordered that Goss's sentences run consecutively. It logically follows that the conditions imposed when Goss's sentence was suspended also may not run consecutively." Goss, 56 Wn. App. at 544.

³ See section C.3.d., infra, setting forth the correct half of the midpoint for the attempted second degree assault count.

The same reasoning applies to DOSA sentences. The legislature has dictated a sentence for prison-based DOSA's based on the mid-point of the standard range. Compare RCW 9.94A.662(1) (prison-based DOSA sentence "shall include: (a) A period of total confinement in a state facility for one-half the midpoint of the standard sentence range or twelve months, whichever is greater; (b) One-half the midpoint of the standard sentence range as a term of community custody.") with RCW 9.94A.670(4) (if SSOSA is appropriate, "the court shall then impose a sentence or, pursuant to RCW 9.94A.507, a minimum term of sentence, within the standard sentence range."). Under the Goss court's reasoning, consecutive DOSA sentences are impermissible exceptional sentences.

As part of his plea, Cannata was misinformed that an exceptional sentence could be imposed on a DOSA sentence. The plea statements that included DOSA availability informed Cannata that he was subject to an exceptional sentence on all counts. CP 33-34, 42-43. Cannata entered a stipulation to aggravating factors that could be relied on to support an exceptional sentence on all counts, without distinguishing between DOSA and non-DOSA sentences. CP 65-66. His pleas involving the DOSA are not knowingly, voluntary and intelligent because he was misinformed about an exceptional sentence as a consequence of his plea.

A guilty plea is deemed involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentence received was more or less onerous than anticipated. Mendoza, 157 Wn.2d at 590-91. In Mendoza, for example, the Supreme Court held the defendant may withdraw a guilty plea based on involuntariness where the plea is based on misinformation regarding the direct consequences of the plea, including a miscalculated offender score resulting in a lower standard range than anticipated by the parties when negotiating the plea. Id. at 584. "Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." Id. at 591.

Cannata need not show reliance on the misinformation. "[A] defendant who is misinformed of a direct consequence of pleading guilty is not required to show the information was material to his decision to plead guilty." Id. at 589; see also State v. Weyrich, 163 Wn.2d 556, 557, 182 P.3d 965 (2008) ("The defendant need not establish a causal link between the misinformation and his decision to plead guilty."). "A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision." Mendoza, 157 Wn.2d at 590 (quoting Isadore, 151 Wn.2d at 302).

d. Cannata was misinformed about the standard range for attempted second degree assault count and the applicable DOSA sentence for that count.

The plea is invalid for two other reasons. Cannata was misinformed about the standard range sentence for the attempted second degree count. He was also misinformed about the length of the DOSA sentence for this count.

Again, a guilty plea is not knowingly made when it is based on misinformation regarding a direct sentencing consequence. Mendoza, 157 Wn.2d at 584, 590-91. The length of a sentence, including the applicable standard range, is a direct consequence. Id. at 590, 594. A DOSA sentence is a direct consequence because it directly reduces the defendant's prison time by one-half of the midpoint of the standard range. Fonseca, 132 Wn. App. at 469.

Section (a) of the plea statement lists the standard range for count 1, the attempted second degree assault offense, as 47.25 – 63 months. CP 40. This is incorrect. The standard range for this offense is 47.25 – 60 months because the statutory maximum for the offense is 60 months.

The range of 47.25 – 63 months listed in the plea statement is the result of (1) taking the seriousness level of the offense (IV) under RCW 9.94A.515 and the offender score (9+); (2) finding the range under the sentencing grid set forth in RCW 9.94A.510 (63-84 months); and (3)

multiplying that range by 75 percent as required for attempt crimes under RCW 9.94A.533(1).

Attempted second degree assault is a class C felony. RCW 9A.36.021(2)(a) (second degree assault is a class B felony); RCW 9A.28.020(3)(c) ("An attempt to commit a crime is a . . . Class C felony when the crime attempted is a class B felony"). The statutory maximum for a class C felony is five years. RCW 9A.20.021(1)(c).

Under the sentencing grid, the top of the standard range for an offense with a seriousness level of IV and an offender score of 9+ is 63 months. But that standard range is reduced if it exceeds the statutory maximum for a given offense: "If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence." RCW 9.94A.599. Under this provision, "the standard range must be reduced where the sentencing grid takes that range above the statutory maximum." State v. Brooks, 107 Wn. App. 925, 933, 29 P.3d 45 (2001) (addressing former RCW 9.94A.420, recodified as RCW 9.94A.599 by Laws 2001, ch. 10, § 6).

The plea statement correctly lists the statutory maximum for the offense as 5 years, but fails to correctly set forth the top of the standard range as 60 months. CP 40. Cannata was misinformed that the upper

limit of the standard range sentence for this offense was 63 months. In actuality, it is 60 months. Brooks, 107 Wn. App. at 933. Nothing in the plea statement or plea colloquy informed Cannata that the standard range needed to be reduced so as not to exceed the statutory maximum. In fact, during the plea colloquy, the court asked "do you understand for attempted second degree assault the standard range of confinement is 43 and a quarter months to 63 months?" IRP 6. Cannata answered "Yeah, I do." IRP 6. Cannata was therefore misinformed about a direct consequence of his plea. Mendoza, 157 Wn.2d at 590, 594. This misinformation, by itself, renders the plea invalid.

But there is yet another reason why the plea is infirm. Cannata was misinformed about the length of the DOSA sentence for the attempted second degree assault count.

Section (t) of the plea statement informed Cannata:

If the judge imposes the prison-based alternative, the sentence will consist of a period of total confinement in a state facility for one-half of the mid-point of the standard range, or 12 months, whichever is greater. . . . The judge will also impose a term of community custody of one-half of the midpoint of the standard range. CP 44.

Reading the standard range for the offense listed in section (a) in conjunction with section (t) results in the mid-point of a DOSA sentence for count 1 (attempted second degree assault) of 55.125 months. One-half

of the mid-point is 27.5625 months. Read together, sections (a) and (t) informed Cannata he would be subject to 27.5625 months in confinement and 27.5625 months on community custody for a DOSA sentence imposed on this count. But that is wrong information.

For a DOSA sentence, "the standard range . . . is dictated by the statutory maximum for the offense." Brooks, 107 Wn. App. at 934. Because the statutory maximum for the offense is 60 months, the standard range and resulting half of the midpoint for that offense is different. Id. at 932-34 (defendant's DOSA sentence should have been calculated with a presumptive sentence limited to 60 months, even though sentencing grid range had maximum sentence of 63 months, where statute capped presumptive sentence to the statutory maximum sentence for the offense). The midpoint for the standard range of 47.25 to 60 months is 53.625 months and half that mid-point is 26.8125. The correct DOSA sentence for the attempted second degree assault count was therefore 26.8125 months in confinement and 26.8125 months on community custody, not the 27.5625 months derived from the plea statement. RCW 9.94A.662.

During the plea colloquy, the court told Cannata: "You're asking that the Court impose a prison-based Drug Offender Sentencing Alternative meaning that the Court would impose, under that alternative, the midpoint of the range is 50 month [sic], so it'd be 25 months to be

served in confinement; the balanced to be served on community custody." IRP 8. That information is correct in relation to the motor vehicle theft count, but is incorrect in relation to the attempted second degree assault count.

To make matters worse, the plea was predicated on the ability of defense counsel to argue for a DOSA sentence on this count consisting of "29.75 months to be served in confinement" and "29.75 months to be served on community custody." CP 42. As set forth above, that is not the correct number of months for a DOSA sentence on this count.

Cannata was misinformed about the amount of prison time and community custody he was subject to for a DOSA sentence, both of which are direct consequences of the plea. Mendoza, 157 Wn.2d at 590, 594 (length of sentence and standard range are direct consequences); Fonseca, 132 Wn. App. at 469 (DOSA sentence based on half of midpoint of standard range is direct consequence); Ross, 129 Wn.2d at 285-86 (community custody is direct consequence). The plea is invalid for this reason.

Where a defendant is misinformed of a direct consequence, the plea is invalid even where the misinformation has no practical effect on the sentence. In re Pers. Restraint of Bradley, 165 Wn.2d 934, 939-41, 205 P.3d 123 (2009) (even though the defendant's concurrent sentences

meant he would never serve the lower standard range about which he was misinformed, the defendant was still not properly advised on the direct consequences of his plea and was entitled to withdraw it); Walsh, 143 Wn.2d at 5, 9-10 (authorizing plea withdrawal based on misinformation about standard range even though defendant received exceptional sentence). The fact that the trial court imposed exceptional DOSA sentences rather than a non-DOSA standard range sentence or a standard DOSA sentence is therefore immaterial. Misinformation of a direct sentencing consequence renders the pleas invalid.

- e. **Cannata seeks to withdraw all of his guilty pleas and he is entitled to that remedy because the three plea agreements are indivisible.**

Where a guilty plea is based on misinformation regarding the direct consequences of the plea, the defendant may withdraw the plea based on involuntariness. Mendoza, 157 Wn.2d at 584. Cannata is entitled to withdraw each of his pleas under the three cause numbers because they are indivisible. This remedy is available to a defendant where, as part of a "package deal," the defendant was correctly informed of the consequences of one charge, but not of another charge. Bradley, 165 Wn.2d at 941. A plea bargain is a package deal if the agreements to individual charges are indivisible from one another. Id. Courts look to objective manifestations of the parties' intent to determine whether a plea

is indivisible. State v. Chambers, 176 Wn.2d 573, 581, 293 P.3d 1185 (2013).

The record shows the parties' intent to create an indivisible plea agreement. Each of the separate plea documents referenced the other charges under the other cause numbers. Bradley, 165 Wn.2d at 942 (recognizing this as factor supporting indivisibility). Cannata entered his pleas on the same day at the same hearing. See State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003) (pleas to multiple counts or charges were made at the same time and accepted in a single proceeding are factors supporting indivisibility). As part of the plea agreements, the State advocated for the sentence under one cause number to run consecutive to sentences in the other cause numbers, thus objectively demonstrating an intended interrelationship. See Chambers, 176 Wn.2d at 581 (letter stating the sentences for the February and May charges would run concurrently to one other but consecutively to the November charges demonstrated the interconnectedness of the charges). Because the pleas are part of a package deal, the remedy is withdrawal of all the pleas. Bradley, 165 Wn.2d at 941.

4. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.

The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. State v. Sinclair, 192 Wn. App. 380, 386, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016). The imposition of costs against indigent defendants raises serious concerns well documented in State v. Blazina: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). The concerns expressed in Blazina are applicable to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. Sinclair, 192 Wn. App. at 391.

Cannata had appointed counsel in the trial court. CP 238-39. He continued to qualify for indigent defense services on appeal. CP 221-23, 228-30, 235-37. He has no money and no assets. CP 231-34. He is already at least \$80,000 in debt. CP 233; See Blazina, 182 Wn.2d at 838 (defendant's other debts factor into ability to pay). He has a seven-year-old dependent child. CP 232. There is a presumption of continued indigency throughout the review process. Sinclair, 192 Wn. App. at 393; RAP 15.2(f). Under newly revised RAP 14.2, the indigency finding remains in

effect unless the commissioner or clerk determines by a preponderance of the evidence that financial circumstances have significantly improved since the last determination of indigency. There is no such evidence in Cannata's case. He has been incarcerated since sentencing and is serving a lengthy prison sentence. Under these circumstances, this Court should exercise its discretion by denying any request for appellate costs.

D. CONCLUSION

For the reasons set forth, Cannata requests remand to allow him to withdraw his guilty pleas. In the event this Court declines to afford this remedy, Cannata alternatively requests remand for a new plea withdrawal hearing at which he is represented by conflict-free counsel before a new judge.

DATED this 13th day of March 2017

Respectfully Submitted,

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State V. Christopher Cannata

No. 34741-9-III

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Cause No., 34741-9-III in the Court of Appeals, Division III, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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03-13-2017

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Done in Seattle, Washington