

34741-9-III
(Consolidated with 34742-7-III and 34743-5-III)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER J. CANNATA, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Samuel J. Comi
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. ISSUES PRESENTED

1. Did Mr. Cannata's appointed counsel satisfy his right to the effective assistance of counsel at the plea withdrawal hearing?
2. Were the Judge's statements about defense counsel somehow improper?
3. Was Mr. Cannata correctly informed concerning the potential sentence lengths?

II. STATEMENT OF THE CASE

On the night of February 22, 2015, Mr. Cannata broke into a Spokane area restaurant and stole various electronics as well as more than \$12,000 in cash. CP 3-6. In March of 2015, the State charged Mr. Cannata with second degree burglary and first degree theft stemming from that incident. CP 1. Later, in August of 2015, Mr. Cannata stole a panel van, and used it in the commission of another burglary in the Spokane area, where he stole a variety of tools. A few days later he hit an individual in the head with a baseball bat, causing lacerations. CP 12-15. Subsequently, the State charged Mr. Cannata with second degree assault, second degree burglary, and first degree theft. CP 10-11. In a third information, the State charged Mr. Cannata with theft of a motor vehicle, relating to the panel van. CP 16.

Pursuant to a plea agreement, the State amended the second degree assault charge to attempted second degree assault. Verbatim Report of

Proceedings for June 20, 2016 (Plea RP) 2-3. By agreement, Mr. Cannata stipulated to the aggravating factors to justify an exceptional sentence. Plea RP 15-16. At the plea hearing, the trial court went through the plea paperwork and confirmed that Mr. Cannata understood each section, and understood that the State could ask for a sentence as high as 55 years. Plea RP 4-15. Throughout that process, Mr. Cannata affirmed his understanding and did not express any surprise at the statements. *Id.*

After pleading guilty, but before sentencing, Mr. Cannata moved the court to withdraw the plea based on ineffective assistance of counsel. CP 60-62. Mr. Cannata claimed not to have been told that the State would be asking for 55 years, but instead believed the agreement restricted the State to ask for 10 years. Verbatim Report of Proceedings for August 25, and September 2, 2016 (RP) at 12. He stated that when he went in to sign the plea he only had five minutes to go over it, and that he was in shock that the State's recommendation had risen from 10 years to 55 years. RP 12-13. He stated that he had previously spoken with his attorney, Kevin Griffin, about this, but only for 20 minutes or so and that no mention had been made of the potential 55-year recommendation. RP 17-18. On cross examination, though, Mr. Cannata agreed that he had never been offered the 10-year recommendation. RP 25.

After hearing from Mr. Cannata, the prosecutor told the court that there was substantial communication between himself and defense counsel concerning plea negotiations. RP 27. He stated that defense counsel had sought a 10-year recommendation, but that no agreement was ever made. *Id.* The court then asked Mr. Griffin to give a statement as an officer of the court detailing what had happened. RP 31. Mr. Griffin detailed the time he had spent with Mr. Cannata. RP 32-33. He stated that he specifically discussed the State's potential 55-year recommendation. RP 34. On a weekend prior to the plea hearing, Mr. Griffin had discussed with Mr. Cannata for two hours the various intricacies of the plea agreement, during which Mr. Griffin and the Prosecutor carried on a text conversation about the plea. RP 34-35, 37. After hearing from all parties, the court denied Mr. Cannata's motion. RP 39-55.

At the subsequent sentencing hearing, the State highlighted Mr. Cannata's criminal history, including 43 convictions, 18 of which were for burglaries. RP 78. Based on the stipulated rapid recidivism and free crimes aggravators, the State asked for an exceptional sentence upward of 40 years, composed of consecutive sentences. RP 80-81. Defense counsel highlighted Mr. Cannata's troubled past, and then passionately argued that the court should impose a DOSA. RP 93-106. Although, he did not suggest it, defense counsel did state that his client repeatedly suggested consecutive

DOSA sentences. RP 99. Mr. Cannata then spoke to the court and asked for any opportunity to have treatment and argued that the court should impose consecutive DOSAs. RP 110. Before ruling, the court asked counsel about consecutive sentences. RP 126. The State expressed doubt as to whether such was contemplated by the statutes, but defense counsel assured the court that consecutive DOSAs “would not be considered the hybrid sentence that has been found to not be appropriate.” RP 127.

After argument by the parties, and additional statements by interested persons, the court sentenced Mr. Cannata to 10 years on each charge related to the restaurant burglary, running concurrent to each other. RP 138. Then the court sentenced him to 10 years on the burglary and theft charges relating to the second incident, those also to run concurrent to each other, but consecutive to the first 10-year sentence. RP 139. The court then sentenced Mr. Cannata to the maximum 5- and 10-year sentences on the attempted assault and theft of a motor vehicle charge consecutively, but converted them into a 15-year DOSA. RP 139. In sum, the court sentenced Mr. Cannata to 20 years in custody, with 7.5 years in custody treatment under the DOSA and 7.5 years community custody under the DOSA. RP 139-140. Mr. Cannata then appealed.

III. ARGUMENT

Mr. Cannata presents three issues that are treated in order below:

(A) Should counsel have withdrawn after filing the motion to withdraw Mr. Cannata's plea? (B) Were the Judge's statements about defense counsel prejudicial? (C) Was Mr. Cannata's plea voluntary?

A. RIGHT TO COUNSEL

For the first time here on appeal, Mr. Cannata argues that his appointed counsel should have withdrawn because of a conflict of interest arising at the hearing on the motion to withdraw his guilty plea. He contends that when defense counsel became a witness against him, it created a conflict of interest and denied him his right to counsel. However, the record reflects something else altogether: that defense counsel had no conflict of interest concerning his representation of Mr. Cannata.

A criminal defendant is constitutionally entitled to the effective assistance of counsel. U.S. Const. amend VI; Const. art. 1, § 22. This right includes the right to assistance of counsel free from conflicts of interest. *State v. Davis*, 141 Wn.2d 798, 860, 10 P.3d 977 (2000). However, the mere possibility of a conflict of interest will not impugn a conviction. *Id.* at 861. Rather, on appeal a defendant who did not raise an objection must demonstrate an actual conflict of interest that adversely affected his representation. *Id.* Here, Mr. Cannata has demonstrated neither an actual

conflict of interest nor any adverse effects on the quality of his representation.

Mr. Cannata's argument that his counsel had a conflict of interest misperceives both the facts of this case and what constitutes a conflict of interest. Initially, Mr. Cannata characterizes the motion to withdraw his guilty plea as based on counsel's failure to adequately advise him on the plea. However, he contends that because his counsel's statements to the court conflicted with his own, counsel became an "adverse" witness. However, Mr. Cannata's motion was premised more on his confusion and misunderstanding of the advisements rather than their inadequacy. RP 5. At the plea withdrawal hearing, Mr. Cannata described to the court his mental state and what he recalled. RP 12-13. The court then engaged in a substantial colloquy to go over Mr. Cannata's mental state and recollections. RP 14-20. Mr. Cannata told the court that he was in shock and was terrified, and was surprised because he did not recall being told of the high recommendation by the State. RP 13. He described his perception of the time he had to go over everything. RP 12, 17. Although these recollections differed from those of counsel, this does not mean that counsel's statements to the court rendered him an adverse witness. Rather, counsel argued that Mr. Cannata should be allowed to withdraw his plea because Mr. Cannata did not understand what he had been told. RP 37.

In any event, Mr. Cannata's argument misperceives what a conflict of interest actually is. A conflict of interest exists where a client's representation will be adversely affected by the attorney's responsibilities to some other person or the attorney's own interests. RPC 1.7. If there was a conflict here, it was between counsel's duties to his client and his duty of candor to the court under RPC 3.3. This is a conflict that all attorneys must balance and resolve on a daily basis, but its existence is not inherently concerning. Counsel had no personal interest at stake, nor any duties to any other person whose interests were at stake. Consequently, there was no conflict of interest that necessitated counsel to withdraw, and Mr. Cannata's right to counsel was satisfied by Mr. Griffin's presence and advisement.

Furthermore, Mr. Cannata cannot show that he was adversely affected by Mr. Griffin's representation.¹ The record indicates that Mr. Cannata was thoroughly advised about how the withdrawal hearing would proceed. *See* RP 9. Mr. Cannata has not pointed to any additional evidence that would have come out with different counsel, or any evidence

¹ Mr. Cannata relies heavily on *State v. Harrell*, 80 Wn. App. 802, 911 P.2d 1034 (1996). That case involves a similar set of circumstances except for one major difference: there counsel refused to aid his client in presenting a motion to withdrawal a guilty plea, and the defendant pursued the motion pro se. *Harrell*, 80 Wn. App. 805. It was that absence of counsel that this Court found to be a violation of the defendant's rights. *Id.* Mr. Cannata's situation differs because the records shows active and continuous aid of counsel in pursuing his motion to withdrawal his plea.

that should have been withheld. Finally, after the withdrawal hearing there was some discussion as to whether it would be appropriate to replace counsel, but Mr. Cannata was clear about his desire to continue with Mr. Griffin as counsel. RP 61. As a result, even if this Court found a conflict of interest, Mr. Cannata has not demonstrated any adverse impact resulting from the continued assistance of Mr. Griffin as counsel.

Because Mr. Cannata has failed to demonstrate an actual conflict of interest or any adverse impact from counsel's continued representation, this Court cannot find that counsel should have withdrawn or that Mr. Cannata was deprived of his right to counsel.

B. JUDICIAL COMMENTS ON DEFENSE COUNSEL

Next, Mr. Cannata asserts that the trial court's statements about his counsel violated the rules of evidence and due process because the court considered facts not presented to it in making its determination, and that these statements gave the appearance that the judge was biased in favor of Mr. Cannata's counsel. While these comments may have been injudicious, there is no evidence in the record that the court's previous interactions with defense counsel affected its decision in any way. The appearance of fairness doctrine requires not just that a judge be unbiased, but that there be no apparent bias of the judge. *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172 (1992). Ordinarily, this will occur when there is an appearance that there is

(1) prejudgment concerning some issue of fact, (2) evidence of a personal bias for or against a party, or (3) a personal interest of the judge in the outcome of his decision. *See Fleck v. King Cnty.*, 16 Wn. App. 668, 673, 558 P.2d 254 (1977).

After the judge briefly stated his opinion about defense counsel, he explicitly stated that any good attorney could drop the ball and that he merely wanted to place his history with Mr. Griffin into the record. RP 42. The judge then proceeded to make detailed findings, based solely on the evidence presented by the parties in court. RP 42-55. There is nothing in the record to indicate any prejudice, bias, or interest of the judge that might affect his decision. The judge merely stated a professional respect for defense counsel, before disclaiming that any good attorney could still make a mistake.

Even if the judge did rely upon his knowledge of Mr. Griffin as counsel, that reliance was harmless. A judge's reliance upon his own knowledge can be harmless where the independent evidence supports the judge's ultimate conclusion. *See In re Estate of Hayes*, 185 Wn. App. 567, 342 P.3d 1161 (2015); *Vandercook v. Reece*, 120 Wn. App. 647, 86 P.3d 206 (2004). Contrary to Mr. Cannata's representations here on appeal, the court's decision was not merely a weighing of credibility between Mr. Cannata and his counsel. Rather, all the independent evidence

corroborated counsel's statements.² The record reflects that the court relied primarily on that extrinsic evidence in determining whether Mr. Cannata's plea was knowing and voluntary. *See* RP 42-55.

In sum, there is nothing in the record to indicate that the trial judge's comments about defense counsel affected its ruling. Consequently, there is no reason to vacate that ruling, or to find any violation of the appearance of fairness.

C. INFORMATION ABOUT SENTENCE LENGTHS IN PLEA AGREEMENT

Due process requires a plea to be knowing, voluntary, and intelligently given. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). A criminal defendant need not be informed of all consequences of a plea, but when he is misinformed about a direct consequence of the plea, that plea is not voluntarily given. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A direct consequence of a plea

² Mr. Cannata's statements at the plea hearing contradict his later statements at the withdrawal hearing. Furthermore, the number and frequency of conversations between counsel and Mr. Cannata supported the inference that counsel had thoroughly discussed these issues and the negotiation process with Mr. Cannata. *See* RP 14-18. Furthermore, a series of 11 text messages were sent over a period of two hours between defense counsel and the prosecutor while defense counsel was discussing the plea agreement with Mr. Cannata. *See* RP 34-35, 37. This conflicted with Mr. Cannata's recollection that that meeting was only 20 minutes and he did not have enough time to really understand what was happening.

is any result that is definite, immediate and largely automatic in affecting the range of the defendant's punishment. *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). Where the defendant can show that withdrawal is necessary to correct a manifest injustice, he is entitled to withdraw that plea. *State v. Robinson*, 172 Wn.2d 783, 794, 263 P.3d 1233 (2011).

Preliminarily, the record is clear that Mr. Cannata was correctly informed on both possibilities of a DOSA and an exceptional sentence. CP 33-35, 42-44, 49-52. Mr. Cannata simply contends that these advisements left open the possibility that multiple DOSAs could be imposed to run consecutively. While the plea paperwork did not affirmatively state such a possibility, defense counsel and Mr. Cannata clearly believed that such a possibility was possible. RP 99, 110, 127. Now, on appeal, Mr. Cannata argues that this possibility would be an unlawful "hybrid" sentence. However, this argument is made without support in the law.

Mr. Cannata essentially asserts that any "exceptional" sentence is inapposite to the drug offender sentencing alternative. However, the prohibition against such "hybrid" sentences only arises because the DOSA statute fixes the length of confinement in prison and community custody relative to the midpoint of the standard range. *See* RCW 9.94A.662. Consequently, the court cannot choose to impose a DOSA of any other

length within or outside the standard range.³ See *State v. Murray*, 128 Wn. App. 718, 116 P.3d 1072 (2005); *State v. Mohamed*, 187 Wn. App. 630, 350 P.3d 671 (2015). However, there is nothing in the DOSA statutes nor in case law that requires a DOSA to run concurrent with other sentences.⁴ Mr. Cannata is attempting to manufacture misinformation in his plea by asking this Court to expand previous holdings and find unlawful the very sentence he defended as lawful to the trial court. RP 127.

Next, Mr. Cannata argues that he was misinformed about the potential length of his sentence for attempted assault. On the plea form, and at the hearing, Mr. Cannata was informed that the “standard range” for his attempted assault was 47.25 to 63 months. CP 40; Plea RP 6. He now contends that this misinformed him that he could be sentenced to more than five years despite the statutory maximum for the charge. However, he was

³ It should be noted that the DOSA imposed on Mr. Cannata was converted from two statutory maximum sentences, and not based on the midpoints of the standard ranges. This sentence was entered without objection by Mr. Cannata, and has not been challenged on appeal.

⁴ Mr. Cannata argues by analogy that because exceptional, consecutive sentences cannot be imposed on a special sex offender sentencing alternative (SSOSA), it cannot be imposed on a DOSA. However, these sentencing alternatives are substantially different in nature and type. A SSOSA is only available to a first time sex offender with no history of violence. See RCW 9.94A.670. The imposition of consecutive sentences conflicts with the text and nature of the SSOSA statute. See *State v. Goss*, 56 Wn. App. 541, 784 P.2d 194 (1990).

contemporaneously informed in both the paperwork and the judge's advisements of that statutory maximum, and could not have believed that the sentence over 60 months was possible. *Id.*

He continues to assert that because the standard range is truncated by the statutory maximum, the DOSA must be calculated using the range 47.25 to 60 months instead of the standard range of 47.25 to 63 months. This is the holding in *State v. Brooks*, 107 Wn. App. 925, 29 P.3d 45 (2001). This is a correct statement of law. The standard range is constrained by the statutory maximum. RCW 9.94A.506(3). However, there is nothing in the record to indicate that Mr. Cannata was misinformed on how these standards affect each other. Rather, the court informed Mr. Cannata that the mid-point of the standard range was 50 months, which was true for the first degree theft charge. Since the DOSAs were requested as concurrent sentences on all charges, this obviated further inquiry into the specific DOSA lengths.

What's more, the timing of Mr. Cannata raising this issue belies its importance in his plea process. Mr. Cannata unsuccessfully moved to withdraw his guilty plea before the trial court. After failing in that challenge he now asserts that his plea was involuntary because he was informed that the DOSA on one charge was 1.5 months longer than what is actually permitted by law. However, such a minor distinction was clearly harmless

to Mr. Cannata. Mr. Cannata stipulated to two aggravating factors, supporting an exceptional sentence above the standard range. He then implored the court to give him some form of treatment as part of his sentence, and acknowledged that a simple DOSA was “probably too lenient.” RP 110. “I think you should stack them, if need be. But please, just please give me a chance.” *Id.* A difference of one and a half months on a “possible” DOSA was clearly irrelevant to any decision on the plea agreement. Notably, the trial court ultimately decided to impose the statutory maximum, and then convert that into a DOSA, without objection by Mr. Cannata. RP 138-40. Even more tellingly, Mr. Cannata does not assign error to that sentence here on appeal.

In sum, the record does not show any affirmative misstatement, and Mr. Cannata has only demonstrated that there were potential ambiguities, where he might have misinterpreted the plea agreement concerning factors that were not material to him in the least. Consequently, this Court should find the plea to be voluntarily entered.

IV. CONCLUSION

Mr. Cannata’s plea was knowing, voluntary, and intelligent, and, as such, was valid. He was adequately advised by counsel throughout the process, including at the hearing on his motion to withdraw the plea. And,

the judicial officer was unbiased throughout the process. Consequently, this Court should affirm Mr. Cannata's judgment and sentence.

Dated this 12th day of June, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Samuel J. Comi #49359
Deputy Prosecuting Attorney
Attorney for Respondent

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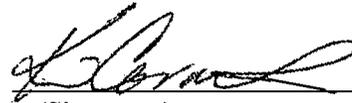
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SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on June 12, 2017, I e-mailed a copy of Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Casey Grannis
grannisc@nwattorney.com; SloaneJ@nwattorney.net

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