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NO. 36392-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN MANUEL FLORES ARROYO,

Appellant.

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

The Honorable Robert B.C. McSeveney, Judge
The Honorable T. W. Small, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE FAILS TO ADDRESS FLORES ARROYO'S ACTUAL CLAIMS ON APPEAL

The State responds that Flores Arroyo received effective assistance of counsel because the immigration consequences of the guilty plea were not “truly clear.” Br. of Resp’t at 11. Flores Arroyo has not disputed that the immigration consequences are not truly clear. Br. of Appellant at 7-8. “Instead, Flores Arroyo’s contention is that his attorney’s advice was nonetheless inadequate because it was couched with uncertainty, thereby negating, confusing, or minimizing the likelihood of deportation.” Br. of Appellant at 8. The State curiously addresses no aspect this actual argument advanced by Flores Arroyo.

When the State fails to address an appellant’s arguments, the appellate courts deem that the State “concedes the issue.” State v. E.A.J., 116 Wn. App. 777, 789, 67 P.3d 518 (2003); accord State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (“The State does not respond and thus, concedes this point.”). The State’s failure to address Flores Arroyo’s actual claims regarding the deficient advice of his attorney should be taken as a concession that Flores Arroyo is correct.

“The required advice about immigration consequences would be a useless formality if, in the next breath, counsel could give the noncitizen

defendant the impression that he or she should disregard what counsel just said about the risk of immigration consequences.” State v. Sandoval, 171 Wn.2d 163, 173, 249 P.3d 1015 (2011). Counsel’s faulty advice in this case turns his advisement into the very useless formality the Sandoval court warned of. The State makes no argument to the contrary. Counsel’s advice constituted deficient performance for all the unopposed reasons stated in Flores Arroyo’s opening brief. See Br. of Appellant at 8-10.

As for prejudice, the State likewise responds to imaginary arguments, not the arguments actually advanced by Flores Arroyo. According to the State, Flores Arroyo received the “benefit of his bargain” when he pleaded guilty to one count of drive-by shooting and received a 15-month sentence rather than a 60-month sentence. Br. of Resp’t at 13-14. Contrary to the State’s claim, a prosecutor’s opinion of a good plea deal is not how prejudice is measured under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

As Flores Arroyo established in his opening brief, when considering ineffective assistance of counsel in the plea context, the question of prejudice is resolved by asking “whether the defendant was prejudiced by the ‘denial of the entire judicial proceeding . . . to which he had a right.’” Lee v. United States, ___ U.S. ___, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017) (alteration in original) (quoting Roe v. Flores Ortega, 528 U.S. 470, 483, 120 S. Ct. 1029,

145 L. Ed. 2d 985 (2000)); Br. of Appellant at 10-19 (discussing prejudice under Lee). When a defendant claims plea counsel was ineffective, prejudice is established when the defendant can show that, but for counsel's deficient performance, he would not have pleaded guilty but would have insisted on going to trial. Lee, 137 S. Ct. at 1965. The State fails to address any aspect of this actual standard for assessing prejudice stemming from the deficient performance of plea counsel.

This is an especially curious omission, given the State's correct assertion that Flores Arroyo provided an incorrect calculation of the sentencing consequences of risking a trial. Br. of Resp't at 12-14. Though the State could be clearer, it correctly notes that a drug offense under chapter 69.50 RCW with a deadly weapon special verdict under former RCW 9.94A.602 (1983)¹ carries a seriousness level of III pursuant to RCW 9.94A.518's grid. Using a seriousness level of III and an offender score of 2, Flores Arroyo's standard range for the violation of the uniform controlled substance act (VUCSA) is 51 to 68 months, plus the 18-month firearm enhancement for a total range of 69 to 86 months. RCW 9.94A.517. Given that the VUSCA is a class C felony with a maximum penalty of five years, "the presumptive range would be 60 months, inclusive of the 18-month firearm enhancement time." Br. of Resp't at 13.

¹ Recodified by LAWS OF 2009, ch. 28, § 41 (recodified at RCW 9.94A.825).

Thus, Flores Arroyo acknowledges that his initial calculation of sentencing consequences was incorrect because he failed to appreciate that a deadly weapon finding would increase the VUCSA seriousness level from I to III.

However, the State does not follow up on its correct sentencing analysis with any analysis or even acknowledgment of the correct standard for assessing Strickland prejudice. The question is not whether the prosecutor thinks Flores got a good deal. The question is whether, even in spite of facing 60 months instead of 15 months, it would have been irrational for Flores Arroyo to insist on his right to trial rather than plead guilty. The answer to this question is still no.

In Lee, the defendant faced up to two more years of prison had he gone to trial on all counts and lost. 137 S. Ct. at 1969. “Not everyone in Lee’s position would make the choice to reject the plea. But we cannot say it would be irrational to do so.” Id.

Nor can this court say it would be irrational for Flores Arroyo to risk a 60-month sentence instead of pleading guilty and receiving a 15-month sentence. Although the additional risk is more significant than in Lee, Flores Arroyo would risk only 45 additional months of incarceration. This seems to be a small price to pay given Flores’s and his family members’ fear of death or serious violence upon deportation. Br. of Appellant at 13-14. It would

not be irrational to take this risk given that it would risk severing Flores's strong connections to family members in the United States, including his wife, mother, and at least one sibling. Br. of Appellant at 14. As in Lee, even if Flores Arroyo faced 60 full months of incarceration, he still shows that "avoiding deportation was *the* determination factor for him." Lee, 137 S. Ct. at 1967. As such, Flores Arroyo shows prejudice under Strickland and the State presents no argument to the contrary.

Given the State's multiple failures to address the actual issues and arguments raised in Flores Arroyo's appeal, Flores Arroyo asks that this case be remanded to the trial court where he may withdraw his guilty plea and proceed to trial.

2. ATTACKING A WITNESS'S CREDIBILITY IS NEVER A COLLATERAL MATTER

The State claims that Flores Arroyo's proffered evidence intended to attack the credibility of his plea counsel was collateral and properly excluded by the trial court. Br. of Resp't at 15-16. It is true that "[a] witness . . . cannot be impeached upon matters collateral to the principal issues being tried." State v. Deescoteaux, 94 Wn.2d 31, 37, 614 P.2d 179 (1980). The evidence here, however, was not collateral.

Plea counsel George Trejo claimed he always advises all noncitizen clients of immigration consequences. CP 113, 139. As the State points out,

the trial court found Trejo's account of his advisements credible. Br. of Resp't at 11 (quoting CP 198); CP 194. Thus, evidence proffered that contradicted Trejo's account was not collateral: it went directly to the issue being tried—whether Trejo's immigration advisements were appropriately given. As such, evidence that Trejo failed to properly advise at least one other former client should have been admitted.

Credibility of the State's principal witness is never a collateral matter. E.g., State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996); State v. Whyde, 30 Wn. App. 162, 166, 632 P.2d 913 (1981); State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (collecting cases); accord ROBERT H. ARONSON & MAUREEN A. HOWARD, THE LAW OF EVIDENCE IN WASHINGTON § 7:06(2)(a) (5th ed. 2017) (noting that a witness's credibility is *always* in issue). The State's arguments that Flores Arroyo had no right to challenge Trejo's credibility at the plea withdrawal hearing is meritless. The trial court's errors in excluding evidence deprived Flores Arroyo of his due process right to present all evidence and arguments in support of withdrawing his plea, requiring reversal.

B. CONCLUSION

For the reasons stated here and in his opening brief, Flores Arroyo should have been permitted to withdraw his plea, requiring reversal of the trial court's order denying this relief.

DATED this 18th day of November, 2019.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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