

FILED  
Court of Appeals  
Division III  
State of Washington  
3/13/2020 4:23 PM

NO. 36771-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

TANDY LUNA,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **Where Ms. Luna immediately complained to the court about her lawyer's inaction on a time-sensitive plea offer and the court did nothing in response, despite the attorney's failure to comply with the basic requirements of competent counsel, the record demonstrated she received ineffective assistance of counsel.**

- a. *This Court appropriately addresses the ineffective assistance of counsel that is documented by evidence in the record.*

The prosecution agrees, as it must, that Ms. Luna's right to the effective assistance of counsel includes the right to have a lawyer who assists a client with understanding and accepting an offered plea bargain. *Lafler v. Cooper*, 566 U.S. 156, 168, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Ineffective assistance of counsel requires reversal in a direct appeal. *See, e.g., State v. Maynard*, 183 Wn.2d 253, 262, 351 P.3d 159 (2015). Reversal is required if the record shows the attorney performed deficiently and there is a reasonable probability that the result would have been different. *Strickland*

*v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A “reasonable probability is lower than a preponderance standard.” *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Deficient performance occurs when a lawyer does not convey a plea offer to an accused person or does not do so in a timely fashion, so the offer expires. *Lafler*, 556 U.S. at 165. There is a “reasonable probability” of a different result if there is some evidence an offer was conveyed by the prosecution that the court would have accepted and its was less severe than the judgment and sentence imposed. *Id.* at 164.

The prosecution’s focus on the pleading requirements of a personal restraint petition are irrelevant. *Estes*, 188 Wn.2d at 467. Those pleading requirements are required because the parties are not before the court and cannot answer questions the court could pose. The court does not need to rely on facts that were not presented to the trial court. *Id.* Here, the existing record, presented to the trial court, is sufficient. As the Supreme Court said in *Estes*, the reviewing court “need not be 100 percent sure” or even sure “on a more-likely-than-not basis,” to find

ineffective assistance of counsel. *Id.* at 466. Ms. Luna made a record that the court could have considered in a timely fashion; she is not obligated to be put under oath to preserve an issue in the trial court.

*b. The record shows Ms. Luna was made a plea offer, given time to consider it, and decided to accept it before its expiration but her attorney did not assist her at this critical time.*

There is no dispute that the day before trial was set to begin, the prosecution offered Ms. Luna a plea bargain. 1RP 11. The prosecution said, on the record, the plea bargain would remain valid that day but would expire once its witness who would be traveling from Oregon began that travel. 1RP 11.

Ms. Luna was not present in court for this court hearing. CP 93. She was in custody and appeared by video only. CP 93.

Ms. Luna asked for more time to consider this plea offer and the prosecutor agreed. 1RP 11. The prosecutor advised Ms. Luna and defense counsel “the deal is valid until my witness Morgan has to leave.” 1RP 11.

Thus, contrary to the response brief’s implication in describing the events, the record establishes the existence of a

specific plea offer, the prosecution's willingness to treat this deal as "valid" until the point that her witness would travel to court for the next day's trial, and the court's expectation the plea would be entered. 1RP 11.

The prosecution further insists Ms. Luna must prove the precise time of day the offer would expire. But this parsing of the record is illogical. The prosecution stated it would allow the offer to remain open for some period of time. 1RP 11. The prosecution understood defense counsel would need time to communicate with his client that day because the State did not bring Ms. Luna to court in person, instead having her appear via a video from jail. CP 93. Ms. Luna understood she had until noon that same day before the offer would expire. CP 91. This understanding appears entirely consistent with the record. And before noon that day, Ms. Luna urgently tried to reach her lawyer but he would not take her calls. CP 91.

Ms. Luna's letter to the court the following day corroborates these in-court proceedings. Ms. Luna explained she was told the offer would expire by noon that day. CP 91. And she detailed her efforts to accept the offer by noon. CP 91-92.

Ms. Luna timely objected to the expiration of the offer based on her attorney's deficient performance. She immediately wrote down what happened between herself, her lawyer, and a second lawyer who she reached out to for help, and gave it to the court. 1RP 75-76. No one corrected her explanation of events. *Id.* No one took issue with her recitation of the facts. *Id.* The court noted her letter would be filed for the record because "some appeal issues" may be "contained in that letter" that she should have the opportunity to present. 1RP 76.

The prosecution's central response is that Ms. Luna's explanation of events cannot be considered because she has a personal interest in the outcome of the case. It relies on *State v. Cox*, 109 Wn. App. 938, 38 P.3d 371 (2002), for this proposition. But *Cox* addressed an inapposite scenario and its reasoning or holding do not apply here. On the contrary, *Cox* shows Ms. Luna's prompt explanation of her efforts to accept a guilty plea and the barrier she encountered should have been acted on by counsel and inquired into by the court at the time the court was apprised of the problem.

In *Cox*, the defendant rejected a plea offer and went to trial. 109 Wn. App. at 939. While his case was on appeal, he learned that his sentence included community placement. *Id.* At this time, he asserted he would not have gone to trial if he understood he faced community placement. *Id.* He appealed the imposition of community placement and argued that but for his attorney's failure to advise him accurately of the community placement obligation, he would have taken the initial guilty plea. *Id.* at 940.

This Court ruled the issue was moot, since Mr. Cox had served his sentence. *Id.* It also found his belated speculative claim, raised long after he was sentenced, about why he rejected the plea offer was "too tenuous" to rely on as the sole basis for finding ineffective assistance of counsel. *Id.* at 941. It complained that Mr. Cox never raised this issue until after his trial, conviction, and sentence, leaving the court with no ability to discern its reliability. *Id.*

Unlike *Cox*, Ms. Luna immediately apprised the court of her attorney's deficient performance, before she was convicted or sentenced. Before any witnesses were called by the prosecution,

she wrote to the court and provided the judge a letter explaining how she tried to accept the plea offer. CP 91-92.

If the court had questions about the accuracy of Ms. Luna's description of events, it could have asked her, or her lawyer. Instead, it simply filed the letter for appeal and allowed the trial to proceed. 1RP 75-76.

An issue is preserved on appeal when it is brought to the court's attention in a timely manner. *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975). Ms. Luna advised the court about counsel's deficient performance at her first opportunity, and not as a belated, speculative reaction to a conviction or sentence. She afforded the court the opportunity to inquire into and correct the error, demonstrating the issue is preserved for appeal. *Id.*

The prosecution also counters that counsel's apparent failure to communicate with his client before the plea deadline expired should be disregarded because he performed effectively on other occasions, such as when he previously negotiated a potential plea bargain. But a lawyer's adequate performance on

one day, or in one realm, does not authorize counsel to abandon his duties to his client on another day.

At the very least, Ms. Luna's letter triggered an obligation that the court inquire into the effectiveness of counsel's assistance. *State v. Thompson*, 169 Wn. App. 436, 461, 290 P.3d 996 (2012). "A court learning of a conflict between defendant and counsel has an 'obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction.'" *Id.* (quoting *inter alia Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)).

Yet the court did not undertake any inquiry whatsoever. Instead it filed her letter to make a record for appeal. 1RP 76. Ms. Luna plainly described her efforts to accept a plea offer before it expired. P 91-92. Neither the prosecutor nor defense counsel contradicted her assertion. 1RP 75-76. The record shows Ms. Luna received ineffective assistance of counsel and it is reasonably probable, but for this deficient performance, a different outcome would have resulted.

**2. The court abused its discretion in denying Ms. Luna a DOSA for improper reasons.**

The prosecution accurately states “a defendant can challenge the underlying reason a trial judge denies a DOSA.” Resp. Brief at 16. But it inaccurately portrays the reason the judge denied Ms. Luna’s request for a DOSA. *Id.* at 17.

The court expressly denied the DOSA for the categorical reason that no evidence “suggested” Ms. Luna had a drug problem. 1RP 202. But as the prosecution admits, this judge knew she had entered a treatment facility for a drug problem in the course of this case. Resp. Brief at 17; *see* 2RP 4-7, 14, 17; Opening Brief at 19-20 (detailing information about Ms. Luna’s in-patient addiction treatment given to this judge).

The record shows the court had information suggesting Ms. Luna had a drug addiction that required treatment, contrary to the court’s stated reason for summarily denying the DOSA. Ms. Luna met the statutory criteria for eligibility. RCW 9.94A.660. The court abused its discretion by refusing to consider it. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005).

**3. Ms. Luna's unauthorized LFOs should be stricken.**

The prosecution concedes that the law no longer allows the court to order an indigent person pay interest on non-restitution LFOs. Resp. Brief at 19-20 (“the State has no fundamental opposition to the ultimate relief Luna seeks on the issue, namely an adjustment of her legal financial obligations”). It blames an old judgment and sentence form for the erroneous language in Ms. Luna’s sentence. Resp. Brief at 20. It appears to also concede this error should be corrected, but suggests a nunc pro tunc order could be crafted rather than remanding the case.

If Ms. Luna’s conviction and sentence are not otherwise vacated, this Court should direct the trial court to strike the inapplicable language requiring interest from the judgment and sentence.

B. CONCLUSION.

For the foregoing reasons and those explained in Appellant's Opening Brief, this court should reverse Ms. Luna's conviction and sentence.

DATED this 13th day of March 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy Collins', written in a cursive style.

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

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|----------------------|---|-----------------|
| STATE OF WASHINGTON, | ) |                 |
|                      | ) |                 |
| RESPONDENT,          | ) |                 |
|                      | ) |                 |
| v.                   | ) | NO. 36771-1-III |
|                      | ) |                 |
| TANDY LUNA,          | ) |                 |
|                      | ) |                 |
| APPELLANT.           | ) |                 |

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