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No. 36771-1-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

TANDY SHIREE LUNA, APPELLANT

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**BRIEF OF RESPONDENT**

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## I. STATEMENT OF THE CASE

In 2017, Tandy Luna was accused of multiple counts of forgery, theft, and identity theft. CP 1-9. The State ultimately charged her with four counts of forgery and four counts of identity theft in the second degree. CP 12-17.

Due to a combination of continuances and failures to appear by Luna, the case stretched-out for more than two years. See 1RP 5-6, 2RP 1-22. At least once during that period, Luna was offered a plea bargain and agreed to plead guilty, but failed to appear for her change of plea. 1RP 7-9.

In early 2019, as her trial date approached, Luna was offered a plea deal whereby she would receive significantly less prison time than if found guilty on all eight counts. See 1RP 200-201. On March 27, 2019, the day before trial, Luna requested a continuance for more time to talk to her lawyer. 1RP 11. She contended that she “[had] not gotten to see him, which he refuted. 1RP 11-12. The court denied her request. *Id.* The State informed Luna that the “deal” was valid until a witness travelling from Oregon had to leave in order to make it to Waterville, Washington in time to testify. *Id.*

Luna did not formally accept the offer in time and trial commenced on March 28, 2019. 1RP 14. After jury selection, but

prior to opening arguments, Luna gave the court a hand-written letter stating that she had wanted to accept the State's offer, but was unable to reach her attorney in time. CP 91-92.

The jury convicted Luna on all eight counts. 1RP 194. The judge sentenced her to 45 months in prison. 1RP 201-202. At sentencing, Luna's attorney told the court that she had not taken the State's offer because she did not want to go to prison at all because her mother was dying. 1RP 197. Luna, herself, told the court that she was "scared to be locked up that long." 1RP 198.

Luna asked the judge to consider a Drug Offender Sentencing Alternative ("DOSA"), stating:

"[I]f I can do some kind of a DOSA or something that I can really speak to me, like, still trying to work for my dependency. Like, I have that open dependency case and I want to at least be doing something productive and not just sitting away my time. I want to get my kids back; they need me and I'm a really good mom and I'm a good person and I – I don't know."

1RP 200.

Judge Hotchkiss replied:

"I'm not sure you have a drug problem. If you did then you never suggested to me that you had a drug problem, so, no."

1RP 202.

Luna now appeals.

## II. ARGUMENT

The United States Supreme Court addressed the core of the issue of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In the context of plea bargains, both Federal and Washington State courts have tackled the issue considerably, examining a range of scenarios, including when an attorney fails to convey a plea offer, when an attorney fails to accurately convey the consequences of a plea to a defendant, and when an attorney fails to understand the consequences of a plea themselves. See *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010), *State v. Estes*, 188 Wn.2d 450, 395 P.3d 1045 (2017). Under these holdings and guidelines, Luna's claims of ineffective assistance fail for lack of any evidence beyond her self-serving letter and statements. As such, the Court should affirm her convictions and deny her request to order the State to reoffer a plea deal.

Luna's claim that the trial judge did not meaningfully consider a DOSA also fails. The standard established by Washington courts demands that a denial of a DOSA be left undisturbed unless a showing can be made of a categorical denial or a complete failure to

exercise discretion. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183, 1188 (2005). Luna offers evidence of neither, and the Court should deny her request for resentencing to impose a DOSA.

Luna's only claim of merit may be that the trial court erroneously ordered that her legal financial obligations, including nonrestitution, should bear interest, in apparent contradiction with RCW 10.82.090(1). CP 63. This error, however, is the result of pre-printed language on Luna's Judgment and Sentence, and could be corrected in the manner of a Scrivener's error through a *nunc pro tunc*. Consequently, the Court should deny her request to remand the case for resentencing.

A. Luna Should Seek Review of Her Claims Through a Personal Restraint Petition.

As an initial matter, the State argues that a personal restraint petition ("PRP"), not a direct appeal, is the proper method for Luna to seek review of her sentence stemming from her claim of ineffective assistance of counsel. Matters on appeal are limited to the court record, consisting typically of reports of proceedings, clerk's papers, exhibits, and certified records. RAP 9.1. A PRP, however, may contain evidence extrinsic from the court record to support its factual allegations, such as a declaration. RAP 16.7(a)(2).

When an ineffective assistance claim is raised on appeal, a court may consider only facts contained in the record. *State v. Estes*, 188 Wn.2d 450, 467 (2017). Off-the-record conversations between a defendant and his or her attorney must be raised in a personal restraint petition. *Estes*, 188 Wn.2d at 467.

Here, the evidence and information needed by this Court to decide this issue is outside the trial court record. Luna's claims of ineffective assistance of counsel are based solely on her self-serving assertions made in her letter of March 28, 2019 and her statements to the trial court at her sentencing. Luna's letter is not a declaration and is not signed under penalty of perjury. Her statements at sentencing were, likewise, not made under oath.

Conspicuously absent from Luna's filings in this matter are declarations from her former attorney or any other persons who might confirm any of her claims. Luna claims her attorney hung up on her, but this Court has no evidence whether that is true, or why. Luna claims she tried "frantically" to call her attorney, but that he would not accept her calls. This Court has no evidence whether that is true, how many times she tried to call, or what time those calls were allegedly made. Her claim of ineffective assistance of counsel cannot survive without this and other vital information.

For these reasons, Luna's request for review would be more appropriately framed within a PRP, not a direct appeal. It is true that Washington courts have, previously, waived this procedural defect to reach the merits of a defendant's claims so long as they met the PRP standards of RAP 16.4. *State v. Bassett*, 198 Wn. App. 714, 721, 394 P.3d 430, 434 (2017). The State here nevertheless respectfully asks this Court to invite Luna to obtain the determinative evidence, be it in the form of sworn declarations or otherwise, and resubmit her claims as a PRP accordingly.

B. Under *Strickland v. Washington* and Its Progeny, Luna Received Effective Assistance of Counsel.

In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his or her defense. U.S. Const. amend. VI. Washington's Constitution similarly provides that in criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel. Wash. Const. art. I, § 22.

The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). That a person who happens to be a lawyer is present at trial alongside the accused is not enough to satisfy the constitutional command. *Strickland*, 466 U.S. at 686.

The test for ineffective assistance of counsel was established in *Strickland v. Washington*, 466 U.S. 668 (1984). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 686. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. *Id.* at 687. First, the defendant must show that counsel's performance was deficient, requiring a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.*

Washington courts have adopted the *Strickland* two-pronged test for evaluating whether a defendant had constitutionally sufficient representation. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045, 1049 (2017). Thus, to prevail on an ineffective assistance claim, a defendant must show both (1) deficient performance and (2) resulting prejudice. *Estes*, 188 Wn.2d at 457-458. Performance is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *Id.* at 458. Prejudice

exists if there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceedings would have been different. *Estes* at 458.

The right to the effective assistance of counsel applies equally to certain steps before trial. *Missouri v. Frye*, 566 U.S. 134, 140, 132 S. Ct. 1399, 1405, 182 L. Ed. 2d 379, 387 (2012). This includes negotiations between a defendant and the State that might lead to a plea bargain. *Frye*, 566 U.S. at 144. A defense attorney has a duty to communicate formal offers from the prosecution. *Id.* at 135. Where an attorney fails to convey a formal offer with a fixed expiration date, and allows the offer to expire, it is not effective counsel as the constitution requires. *Frye* at 135. Notably, in order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. *Id.* at 148.

“Effective assistance” also includes assisting a defendant in making an informed decision as to whether to plead guilty or to

proceed to trial. *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956, 966 (2010). At the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty. *A.N.J.*, 168 Wn.2d at 111-112.

Washington courts indulge a strong presumption that counsel's representation was reasonable. See *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177, 181 (2009), *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260, 1268 (2011). In fact, this Court has warned against solely accepting self-serving statements by defendants after they have rejected a plea deal and been convicted. *State v. Cox*, 109 Wn. App. 937, 938, 38 P.3d 371, 371 (2002). A defendant's self-serving statement-after trial, conviction, and sentence-that with competent advice he or she would have accepted a proffered plea bargain, is insufficient in and of itself to sustain defendant's burden of proof as to prejudice due to ineffective assistance of counsel, and must be corroborated independently by objective evidence. *Cox*, 109 Wn. App. at 938. A contrary holding would lead to an unchecked flow of easily fabricated claims. *Id.*

Here, the record simply does not indicate ineffective assistance of counsel. Luna was appointed an attorney, Jeff Barker, who represented her for the entirety of her case—more than two years. During that time, he effectively obtained continuances for Luna, including one to facilitate her seeking treatment. 2RP 4-5. He obtained further continuances when Luna failed to appear for hearings. See 2RP 12, 14-15.

Specifically, in regard to plea bargains, the record indicates that Barker negotiated for them and properly conveyed them to Luna. In fact, she was scheduled to accept a plea offer and enter a change of plea on at least two occasions: once on May 29, 2018, and again on March 27, 2019. 1RP 8-9, 11-12. Luna failed to appear for the first change of plea, and asked for a continuance at the second. *Id.* While these pleas did not go forward as planned, they tend to prove that Barker fulfilled his duty in reasonably evaluating the evidence against Luna and the likelihood of a conviction if the case proceeded to trial, as evidenced by his trying to reach a “bargain” beneficial to her. 1RP 8-9.

In summary, there is no evidence in the record of deficient performance by Barker outside of Luna’s unsubstantiated letter and self-serving claims to the court. Absent evidence of deficient

performance, Luna cannot meet the second prong of *Strickland* and demonstrate prejudice.

Even accepting, *arguendo*, Luna's claim that she wanted to take the State's plea offer but could not reach her attorney, Luna fails to make any showing, as required under *Frye*, that the State or judge would have accepted it. Luna appeared before the court the day before her trial on March 27, 2019. 1RP 11. She was aware of the offer, because she requested more time to speak with her attorney about it. *Id.* The State indicated that the offer would expire if not accepted before a State's witness had to depart Oregon to come to Washington. *Id.* The hearing ended and the offer was still valid as of 8:39 a.m. 1RP 12. Contrary to Luna's contention that the offer was open until noon, however, the record contains no information about what specific time the witness planned to depart from Oregon. Thus, even if Luna had reached her attorney later in the day on March 27 to accept the offer, there is no indication that it would have been in time or that the State would have accepted it.

Under this Court's holdings in *Cox*, the court should not accept Luna's self-serving letter and statements as the sole basis for her claims of ineffective assistance of counsel. The record is devoid of evidence to support her contentions that Barker did not review the

plea deal with her, hung up on her, or refused to take her calls. Moreover, the record actually supports that Luna may be fabricating her claims regarding her attorney. At her hearing the day before trial, Luna told the court that she had not “gotten to see” her attorney; a claim Barker immediately refuted on the record. 1RP 11-12.

Based on the record, and a lack of any other evidence supporting Luna’s claims, this Court should presume that Barker provided effective assistance of counsel, affirm her convictions, and deny her request to order the State to reoffer the plea deal.

C. Judge Hotchkiss Denied Luna’s Request for a DOSA Sentence on Specific, Not Catagorical Grounds, and Used His Discretion to Deny the Sentencing Alternative.

Under RCW 9.94A.660, an offender is eligible for a Drug Offender Sentencing Alternative (“DOSA”) for certain non-violent, non-sex, and non-DUI charges, or for certain drug-related crimes. RCW 9.94A.660(1). The purpose of the DOSA act is to provide "treatment-oriented sentences" for drug offenders. LAWS OF 1995, ch. 108. The sentencing court determines if the offender is eligible and if such a sentence is appropriate. RCW 9.94A.660(3). To assist the court in its determination, the court may order either a risk

assessment report or a chemical dependency screening report, or both. RCW 9.94A.660(4).

As a general rule, the trial judge's decision whether to grant a DOSA is not reviewable. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183, 1185-1186 (2005). However, an offender may always challenge the procedure by which a sentence was imposed. *Grayson*, 154 Wn.2d at 338. While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. *Id.* at 342.

A trial court abuses discretion when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." *Id.* Where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal. *Id.*

In *State v. Connors*, this Court took the approach that a trial court's decision to impose a standard range sentence and not grant a DOSA is not reviewable. *State v. Connors*, 90 Wn. App. 48, 53, 950 P.2d 519, 521-522 (1998). In 2005, the Washington Supreme

Court carved out an exception to *Connors* to allow a defendant to challenge the procedure by which a sentence is imposed. *State v. Grayson*, 154 Wn.2d at 338. Practically speaking, a defendant can challenge the underlying reason a trial judge denies a DOSA.

In *State v. Grayson*, the trial judge denied a defendant's request for a DOSA. *Grayson* at 337. While the judge had reviewed the defendant's criminal history and eligibility for screening, he denied the DOSA because he believed the program was underfunded, stating:

"The motion for a DOSA... is going to be denied. And my main reason for denying [the DOSA] is because of the fact that the State no longer has money available to treat people who go through a DOSA program. So I think in this case if I granted him a DOSA it would be merely to the effect of it cutting his sentence in half. I'm unwilling to do that for this purpose alone. There's no money available. He's not going to get any treatment; it's denied."

*Grayson*, 154 Wn.2d at 336-337. While the court did not fault the judge for considering extrajudicial information, namely the judge's understanding of available funding for the DOSA program, the court found that the trial judge had not "meaningfully" considered whether a DOSA was appropriate. *Id.* at 343. In doing so, he had

categorically refused to consider a statutorily authorized sentencing alternative. *Id.* at 342.

Here, contrary to Luna's assertions, the record shows that the judge did meaningfully consider whether a DOSA was appropriate, and did not categorically deny it. Judge Hotchkiss stated that he was denying Luna's request for a DOSA because she had not given him any indication that she had a drug problem. 1RP 202. Nothing in the record suggests that Judge Hotchkiss denied Luna's request for a DOSA on categorical grounds, other than to deny such a sentence to people who have not expressed having or do not appear to have a drug addiction.

Luna offers the fact that Judge Hotchkiss had previously granted a continuance so that she could enter a treatment facility as evidence of his awareness that she had a drug problem; but the record before the Court is void of any other evidence that Luna ever sought or expressed interest in a DOSA previously. At the May 29, 2018 hearing when Luna was purportedly going to accept a "bargain" and enter a change of plea, there was no discussion on the record of a possible DOSA. (cite) There is no evidence that Luna was ever screened or evaluated for a DOSA, which the court would typically require pursuant to RCW 9.94A.660(4). At the conclusion of trial,

neither Luna nor her attorney requested to continue sentencing so that she could be screened for a DOSA; the parties agreed to sentencing on the same day the jury reached its verdict. (cite). Even at sentencing, Luna herself suggested the reason she was hoping for a DOSA was to benefit her in terms of a pending dependency action, not because she had a substance abuse problem. 1RP 200.

For these reasons, this Court should deny Luna's request to remand the case for consideration of a DOSA.

D. Luna's Judgment and Sentence Can Be Amended Regarding Interest on Legal Financial Obligations By *Nunc Pro Tunc* and Without Remanding the Case for Sentencing.

RCW 10.82.090 governs interest on judgments and disposition of nonrestitution interest. In 2018, the legislature amended the statute so that, as of June 7 of that year, no interest shall accrue on nonrestitutional legal financial obligations imposed upon an adult offender. RCW 10.82.090(1).

Felony Judgment and Sentence forms available from the Washington Courts website prior to June 7, 2018 contained stock language regarding interest on legal financial obligations, to wit:

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.

RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations.

Felony Judgment and Sentence forms available now from the Washington Courts website include updated language to reflect the legislature's amendment regarding interest on nonrestitution obligations, to wit:

The restitution obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. **No interest shall accrue on non-restitution obligations imposed in this judgment.** RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160. (Emphasis added.)

A *nunc pro tunc* order allows a court to date a record reflecting its action back to the time the action in fact occurred. *State v. Hendrickson*, 165 Wn.2d 474, 479, 198 P.3d 1029, 1031 (2009). A *nunc pro tunc* order is generally appropriate to correct only ministerial or clerical errors, not judicial errors. *Hendrickson*, 165 Wn.2d at 479. A clerical or ministerial error is one made by a clerk or other judicial or ministerial officer in writing or keeping records. *Id.*

In deciding whether an error is 'judicial' or 'clerical,' a reviewing court must ask itself whether the judgment, as amended,

embodies the trial court's intention, as expressed in the record at trial. *Hendrickson* at 479.

A trial court misuses its *nunc pro tunc* power and abuses its discretion when it uses such an order to change its mind or rectify a mistake of law. *Id.* But where the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting, a *nunc pro tunc* order stands as a means of translating the court's intention into an order. *Id.*

Here, the judgment and sentence form used for Luna was outdated, as evidenced by use of language previous to the legislature's amendment of RCW 10.82.090 in 2018. CP 63. In fact, the bottom of the Judgment and Sentence form indicates that it was last revised in December of 2017. *Id.* As such, it is the equivalent of a Scrivener's error. Had the trial court been aware that the form contained outdated language, it surely would have amended the language at the time. There can be little question that the trial court intended to follow the requirements of RCW 10.82.090, but was thwarted by inartful drafting in the form of an outdated court form.

Consequently, while the State has no fundamental opposition to the ultimate relief Luna seeks on this issue, namely an adjustment

of her legal financial obligations, remand of the case is not necessary. The ministerial/clerical error on her judgment and sentence can be rectified through a *nunc pro tunc*.

### **III. CONCLUSION**

Ms. Luna seeks the relief available through a personal restraint petition, yet submits her claim on direct appeal. For this reason, her claim of ineffective assistance of counsel fails. Luna has presented only *prima facie* evidence through her own self-serving statements to the trial court and through an unsworn hand-written statement. The record before this Court is not only void of evidence to support her claim of ineffective assistance of counsel, but actually suggests that she did not accept the State's offer for reasons unrelated to her dealings with her attorney, namely that she did not want to go to prison for any amount of time.

Her claim that the judge did not consider a DOSA equally fails. Not only does the record indicate that Judge Hotchkiss did not categorically deny her DOSA, but it equally suggests that she only wanted a DOSA because it involved less prison time to allow her more time to devote to a dependency action with her children, not a drug addiction.

As for legal financial obligations, the State does not dispute

Luna's claims; but suggests that this can be corrected through a *nunc pro tunc*, and not through the drastic action of remanding the case for sentencing.

For the foregoing reasons, the State respectfully requests this Honorable Court to affirm Luna's convictions, deny her request to order the State to reoffer a plea deal, deny her request for resentencing to impose a DOSA, and deny her request to remand the case for resentencing of legal financial obligations.

Dated this 4<sup>th</sup> day of March, 2020.

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