

No. 81236-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

A.N.J.,

Petitioner.

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SUPREME COURT
STATE OF WASHINGTON

RESPONDENT'S OBJECTION
TO THE PETITION FOR DISCRETIONARY REVIEW

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the juvenile court's denial of the motion to withdraw plea. The petition presents no consideration under RAP 13.4(b) meriting review of the appellate court's affirmation.

III. ISSUES

1. Is the decision in conflict with *In re B.J.S.*, 140 Wn. App. 91, 169 P.3d 34 (2007) (finding ineffective assistance where counsel failed to advise his client in a timely fashion of his eligibility for a deferred disposition) where A.N.J. was not eligible for a deferred disposition, where counsel did not misinform or fail to advise, and where no prejudice in the outcome is demonstrated?
2. Is the Court of Appeals' decision to apply the legal standard of review established by case law (rather than the self-imposed duties of defender organizations) a significant constitutional question?

IV. STATEMENT OF THE CASE

On July 2, 2004, A.N.J. was charged in juvenile court with child molestation in the first degree, a class A felony. CP 1; RCW 9A.44.083. On September 21, 2004, A.N.J. pled guilty as charged. CP 3-11; RP September 21, 2004. Under the terms of the plea negotiation, the prosecutor agreed to recommend a SSODA and, if A.N.J. successfully completed the terms of the SSODA, she would move to amend the charge to child molestation in the *second* degree, a class B felony. CP 10; RCW 9A.44.086.

A standard range for child molestation in the first degree is 15-36 weeks and the standard range for child molestation in the second degree is 0-30 days. RCW 13.40.020(16); RCW 13.40.0357. A SSODA is a *suspended* standard range sentence and treatment. RCW 13.40.160.

A.N.J.'s parents were present in his discussions with his attorney. I RP¹ 65, ln. 17-26; II RP² 54-62. In the Statement on Plea of Guilty, A.N.J. signed directly below these words: "I have read or someone has read to me everything printed above, and in Attachment 'A', if applicable, and I understand it in full. I have been given a copy of this statement. I have no

¹ I RP refers to the transcript of proceedings for September 2, 2005.

² II RP refers to the transcript of proceedings for March 16, 2006.

more questions to ask the judge.” CP 11. The attorney Douglas Anderson signed directly below this sentence: “I have read and discussed this statement with the respondent and believe that the respondent is competent and fully understands the statement.” CP 11. The pro tem commissioner indicated that he found that the “respondent’s lawyer had previously read to him [] the entire statement above and that the respondent understood it in full.” CP 11. The commissioner found the plea to be knowingly, intelligently, and voluntarily made with an understanding of the charge and consequences of the plea. CP 11. The statement describes the requirement of sex offender registration at length and with the statutory citation. CP 8.

For the plea, A.N.J. accepted the truth of the police reports. CP 10. Unlike an Alford plea, in this plea, there is no denial of actual guilt. CP 10.

Following the entry of the plea, A.N.J. sought new counsel and filed a motion to withdraw guilty plea, which includes a portion of the police report. CP 12-13, 15-24. The juvenile court decided that it would only consider live testimony subject to cross-examination and not the various declarations filed by Mr. Dano on behalf of A.N.J.. IRP 6, ln. 11 and 7, ln. 4-5, 18-20.

The court heard testimony on September 2, 2005 and March 16, 2006.

I RP; II RP. Mr. Dano attempted to dissuade Mr. Anderson from testifying with threats of perjury. I RP 9, ln. 11 - 11, ln 4. Mr. Anderson's only expressed concern was the extent of the waiver of attorney-client privilege. I RP 11, ln. 5-6 and 40, ln. 1-5.

Mr. Anderson testified that Mr. Dano prepared a declaration for him to sign and that Mr. Dano had added the handwritten addendum. I RP 24, 37. Mr. Anderson signed the statement having no doubt that Mr. Dano would accurately reflect their conversation. I RP 48. Unfortunately, the declaration turned out to be an inaccurate and misleading synopsis. I RP 29, 45.

Mr. Anderson testified that A.N.J. and A.N.J.'s father admitted to him that A.N.J. had committed the conduct that was alleged in the police report, and they characterized the conduct as "opportunistic" in nature, not premeditated. I RP 48-49; Exh. #3.

During Mr. Anderson's representation, A.N.J.'s father called counsel weekly on his son's behalf, because the court had ordered A.N.J. to keep in weekly contact with his attorney. I RP 41. Eventually the father began to inquire about any plea bargain offers. I RP 41. When the State made an offer, Mr. Anderson communicated to his client that the offer was not bad and that A.N.J. was likely to be found amenable to treatment so as to receive

a SSODA. IRP 46, ln. 17-21. Mr. Anderson was also aware of the potential of a second charge involving another victim. I RP 49, ln. 20-22. Before a plea was reached, Mr. Anderson reviewed the State's evidence (I RP 21, ln. 15-16), and he attempted unsuccessfully to contact defense witnesses (I RP 16-17). He never ended up interviewing the State's witnesses or hiring any investigator, because a plea deal had been negotiated. IRP 38, 47, ln. 24-28..

Mr. Anderson recalls at least two office visits with A.N.J. specifically in preparation for the plea. I RP 41, ln. 18-19. A few days before the plea hearing, Mr. Anderson spent well over half an hour going over the plea statement with A.N.J.. I RP 41-42. While counsel did not read it aloud word for word, he paraphrased the language of every paragraph for his client to assure his comprehension. I RP 42, ln. 21-28; Exh. #3. He explained the elements of the crime, the State's offer, the punishment options, sex offender registration, school notification, the firearm consequence, etc.. I RP 43-44. He made sure that the client's decision to plead guilty was a voluntary one. IRP 44, ln. 24 - 45, ln. 5. Mr. Anderson testified he had no concern about his client's mental acuity. I RP 36, ln. 24-26. He was satisfied that his client understood the nature of the charge and the consequences of his plea. I RP 46, ln. 1-8. With that taken care of, on the actual day of the plea hearing,

counsel did not repeat the process, but only spent about five minutes with him before the hearing to explain the court's colloquy procedure. IRP 41, ln. 18-21 and 42, ln. 7-11. The declaration prepared by Mr. Dano mistakenly suggests that those five minutes were the extent of the client's plea hearing preparation. CP 35.

A.N.J.'s parents asked Mr. Anderson about the possibility of having the offense removed from his record. I RP 29, 44. He answered that a conviction for a sex offense could never be sealed. I RP 29, 44. However, there might be a possibility of eventually removing the registration requirement. I RP 29. *See* RCW 9A.44.140.

A.N.J.'s mother testified that her son met with Mr. Anderson at least five times. I RP 65, ln. 17-23. She believes she attended four of those meetings. IRP 65, 24-25. She initially testified that she was not present with her son and counsel for plea discussions between August 2, 2004 and September 21, 2004, but that her husband took her son to the meetings. I RP 58, ln. 26-28. After some prodding, she admitted that she had been at one meeting soon before the plea hearing, which lasted approximately 5-10 minutes, and that she gave counsel names of potential witnesses. IRP 59-60. She said that she did not review the plea form. I RP 59, ln. 26-28. But she

remembered the attorney explaining the consequences regarding firearms, sex offender registration, not attending school with the victim, and no contact with small children. I RP 62, 64. The mother testified that she asked counsel “when it would be off [A.N.J.’s] record,” and counsel responded that “he hadn’t had time to look into that.” I RP 62, ln. 25-28, and 63, ln. 9-16. She admitted and demonstrated that she did not understand the legal terms “seal,” “information,” and “complaint.” I RP 65, ln. 27 through 66, ln. 7; I RP 70, ln. 21-28; I RP 73. She testified that she believed her son innocent and yet thought it best for him to plead guilty to child molestation. I RP 71-72.

A.N.J.’s father testified that his memory of events was “all such a blur” and “there was so much, and things were going so fast” that he did not ask about any details. II RP 57, ln. 17; II RP 64, ln. 3-4. He said that his son maintained his denial as told to the detective. II RP 56. He said that counsel recommended a guilty plea and explained that a SSODA would consist of counseling in Wenatchee. II RP 59, 61. He testified that when A.N.J.’s mother inquired when the conviction would “come off his records,” counsel responded, “the laws change all the time. I’ll have to check into it and get back to you.” II RP 60. The father testified that he permitted his son to plead guilty, because he was “scared to death that [A.N.J.] could end up in juvenile

hall,” because he believed the conviction would be removed from A.N.J.’s record, and for the sake of “neighborhood unity.” II RP 62.

A.N.J. did not testify. I RP 75.

The juvenile court denied the motion to withdraw the plea. CP 213-17.

V. ARGUMENT

A. THERE IS NO CONFLICT WITH *IN RE B.J.S.*

Under RAP 13.4(b)(2), a conflict between divisions may permit review. A.N.J. claims that the Court of Appeals’ ruling is in conflict with *In re B.J.S.*, 140 Wn. App. 91, 169 P.3d 34 (2007). The claim is untenable.

In the *B.J.S.* case, the juvenile was eligible for a deferred disposition, but his attorney failed to inform him of the need to make a timely motion for a deferred disposition. *In re B.J.S.*, 140 Wn. App. at 101. The court held that it was reasonably likely that the outcome would have been different if the attorney had advised his client of this alternative. *In re B.J.S.*, 140 Wn. App. at 102. The court of appeals held that on these facts, B.J.S. received ineffective assistance of counsel. *Id.*

A.N.J. claims that this case is “indistinguishable” from his own and “presents a direct conflict” with his own. If the cases were truly

indistinguishable, then we would be discussing a *failure to inform a client about his eligibility for a deferred disposition*. A.N.J. was not eligible for a deferred disposition. Under RCW 13.40.127, a juvenile charged with a sex offense, as A.N.J. was, is not eligible for a deferred disposition. Therefore, his counsel behaved reasonably in not advising him about an alternative that was not available to him. Because it was not available to him, counsel's failure to advise on this irrelevant point could have had no effect on the outcome.

In fact, A.N.J. does not claim that he should have been informed about deferred dispositions. He claims that the erroneous advice he received was in regards to "the consequences of a guilty plea." Petition at 13. A.N.J. has claimed (but has not testified) that Mr. Anderson told him the conviction "would come off" his record between the ages of 18 and 21. Brief of Appellant at 29. Mr. Anderson denies this. And both parents admit confusion with legal terms and admit that Mr. Anderson never definitively represented that the charge would be removed. IRP 62, ln. 25-28, and 63, ln. 9-16; II RP 60. There is insufficient evidence on the record for this claim.

The trial court's assessment was that A.N.J. was not motivated to withdraw the plea based on any misrepresentation of counsel regarding

sealing of the conviction. *Rather, the impetus for the motion came after his mother learned about collateral consequences to the plea, namely that the school would closely supervise his contact with other children.* CP 213-17.

The Court of Appeals answered this question in even more thorough detail, finding that A.N.J. has been misrepresenting the facts in this appeal.

First, *the record does not support A.N.J.'s representation of the facts.* A.N.J.'s father testified that "[m]y wife asked him when this would come off his records, and Mr. Anderson's reply was, 'I'm not sure. The laws change all the time. I'll have to check into it and get back to you.'" CP at 122. A.N.J.'s mother testified that when asked when the charge would come off A.N.J.'s record, Mr. Anderson told her that "the laws change all the time, I'll have to look into it. It's either 18 or 21." *Id.* at 198.

Mr. Anderson testified that he advised A.N.J. and his family that sex offenses are not sealed, but that there is, with juveniles, the possibility that the registration requirement could be removed, but that was usually up to the discretion of the court and beyond that, he was unfamiliar with the law with respect to that issue. *Id.* at 164, 179.

First, A.N.J. never testified. So there is no evidence as to what A.N.J. personally heard or understood or what he relied upon when making his guilty plea. Second, it is unclear what issue A.N.J. is concerned about—sealing or registration. Third, the relevant testimony of all three witnesses supports that Mr. Anderson said he did not know the answer and would do some research. Any thought he may have ventured was made in that context.

There is no evidence in the record as to what A.N.J. understood or relied on in making his plea. His parents claim that they relied on Mr. Anderson's statements. But they both admit that Mr. Anderson told them that he did not know the answer and would have to look into it.

And moreover, *the impetus for withdrawing this plea was not misinformation, but A.N.J.'s concern when he later discovered his school's policies on sex offenders.* CP at 216. A.N.J. does not assign error to that finding. *Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d 17 (1999) (citing *Riley v. Rhay*, 76 Wn.2d 32, 33, 454 P.2d 820 (1969)).

A.N.J. was not ineffectively represented nor is there any showing of prejudice.

Unpublished Opinion at 11-13 (emphasis added).

The record is that counsel did not misinform his client that the conviction would “come off” his record. He correctly stated that the conviction would never be sealed but the registration requirement might eventually be removed. The record is also that A.N.J. was willing to plead guilty based on this accurate information. Counsel’s performance did not affect A.N.J.’s decision. A.N.J.’s true concerns regarded the collateral consequences of school policies.

The case is plainly distinguishable from *In re B.J.S.*. There is no conflict.

B. THE PETITIONER’S INSISTENCE THAT CONSTITUTIONAL LAW INCORPORATE DEFENSE BAR STANDARDS IS WITHOUT ANY LEGAL AUTHORITY AND DOES NOT PRESENT A SIGNIFICANT CONSTITUTIONAL QUESTION.

The existence of a significant constitutional question may permit review. RAP 13.4(b)(3). However, A.N.J. provides no legal authority for his

claim of a constitutional violation.

A.N.J. has argued that the standard for deciding claims of ineffective assistance of counsel should be *other than they are* in case law. He argues that the claim of ineffective assistance of counsel should be measured by “prevailing professional and ethical standards.” Petition at 14. He cites standards promulgated by the Washington Defender Association and the Criminal Justice Section of the ABA.

This is not a cognizable claim. It does not speak to the proper standard. Professional organizations do not create constitutional law. Courts do. In deciding ineffective assistance of counsel claims, *Schriro v. Landrigan*, -- U.S. --, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) rejected the application of ABA Criminal Justice Standards 4-4.1(a) and 4-8.1(b); and *Burger v. Kemp*, 483 U.S. 776, 785, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) and *Lambert v. Blodgett*, 248 F. Supp. 2d 988, 1007 (E.D. Wash.2003) rejected the application of the ethical imputed disqualification rule. See Statement of Additional Authorities (filed by the State in May of 2007). This demonstrates authoritatively that defense bar standards do not dictate the legal standard for a Sixth Amendment claim.

All the bar or defense standards in the world do not amount to a

relevant standard in Sixth Amendment law *until adopted by the courts*. They have not been adopted by the courts. The only standard in this case is whether the attorney actually and substantially assisted the client in deciding to plead guilty and whether, but for counsel's failure to assist in this decision, the defendant would not have pleaded guilty. *State v. McCollum*, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997).

Lawyers may impose upon themselves extralegal duties, e.g. a duty to investigate *despite* the client's admissions and expressed desire for a speedy resolution by way of guilty plea. However, this self-imposed duty does not enter into the court's analysis. For that analysis, the standard only requires that a plea be knowing, intelligent, and voluntary and that an attorney sufficiently assist toward that end.

Lawyers' self-imposed duties do not supercede the client's right to decide to plead guilty (RPC 1.2(a)(a lawyer shall abide by the client's decision as to a plea to be entered)) and his constitutional right to speedy trial. A client who wishes to plead guilty before the attorney has had an opportunity to fully investigate, has a right to. **So integral is this right to dignity and autonomy that it supercedes the right to effective assistance of counsel.** *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d

562 (1975) (giving the right to self-representation, which waives claims regarding effective assistance).³

The Court of Appeals has answered each of A.N.J.'s claim coherently and at length.

First, there is *no legal authority* which imposes a categorical obligation on a lawyer to exclude parents from an attorney's conversations with a juvenile client. Unpub. Op. at 7. The opinion also notes that there is no reason to believe that A.N.J.'s parents' presence negatively impacted his decision to plead guilty. *Id.*

Second, *no legal authority* requires a lawyer to continue to investigate a defense after the client has decided to plead guilty. Unpub. Op. at 9. A.N.J. falsely states that his counsel did not investigate his case. The record demonstrates that his counsel investigated the case up until the point that his client decided to plead guilty. Again, no prejudice is demonstrated. *Id.*

We are not sure why A.N.J. believes Mr. Anderson should have gone about the process of preparing and consulting with witnesses in order to properly respond to child-victim witness interviews. After all there was no trial here. Further, the standards on which he relies simply state that such expert services ““should be available to lawyers and to their clients

³ While *Indiana v. Edwards*, -- U.S. --, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008) limits the *Faretta* right to self-representation in cases where defendant lacks mental capacity, A.N.J.'s competency to plead guilty is a resolved fact. Unpub. Op. at 4-5.

at all stages of juvenile ... proceedings.” Appellant’s Br. at 28 (alteration in original) (quoting IJA & ABA, *Juvenile Justice Standards: Standards Relating To Counsel For Private Parties* std. 2.1(c) (1980), reprinted in ABA, *Criminal Justice Section, Juvenile Justice Standards Annotated: A Balanced Approach* (Robert E. Shepherd, Jr., ed. 1996)). We do not read that standard as a mandate that Mr. Anderson make use of those services prior to accepting a guilty plea offer.

And even if there was such a requirement, there is no prejudice here. A.N.J. admitted responsibility and pleaded guilty. We will not assume that he would not have done so had an expert told him how to respond to child-victim testimony. Such speculation does not prove prejudice or overcome the presumption of effective assistance of counsel.

Unpublished Opinion at 10-11.

Third, as explained above in §A, the factual record does not bear out the claim of a misrepresentation of the consequences of the plea.

As the Court of Appeals noted and as A.N.J.’s Petition demonstrates, no legal authority supports this claim.

C. MISCELLANEOUS OBJECTIONS.

The State maintains its objections and maintains its request that the Court strike the first sentence of the Issues statement on page two of the petition and the corresponding footnote in the petition. *See* Respondent’s Brief at 8-11, *citing* ER 402 (irrelevant evidence is inadmissible); ER 403 (unfairly prejudicial evidence is inadmissible); ER 404 (character evidence

is inadmissible when offered for the purpose of proving action in conformity therewith); ER 408 (settlements are inadmissible); ER 603 (evidence offered without oath or affirmation is inadmissible); RAP 9.1 (the court will not consider evidence that is not part of the record in this direct appeal which is offered for an evidentiary purpose).

The pure prejudice of this statement and footnote undermines the State's right to a fair hearing on the *actual* case in controversy.

The State objects to the Petitioner's characterization of the Court of Appeals' decision. The Court of Appeals did not "deny[]" his motion to withdraw his plea." Petition at 2. The juvenile court did this. The Court of Appeals affirmed the decision of the trial court. The error misrepresents the standard of review. The trial court took testimony and made findings of fact on the motion to withdraw plea. The appellate court reviewed that decision on appeal. The opinion acknowledges that reviewing courts are "not in the business of assessing the credibility of the witnesses, weighing evidence, or resolving differing accounts of the circumstances in question; that is for the trial judge." Unpub. Op. at 4.

The State brings to the Court's attention and objects to the argumentative and conclusory nature of the Petitions' Statement of the Case

in violation of RAP 10.3(a)(5). For example, A.N.J. states that his parents' decision to plead him guilty was the result of "misinformation." Petition at 8. This is a conclusion. It is not supported by the citation in the brief or by any part of the record. Neither the juvenile court, nor the Court of Appeals, concluded that there was any misinformation. This unwarranted conclusion argues the claim. Also for example, A.N.J. mocks his trial counsel as "expend[ing] almost no discernible effort on A.N.J.'s behalf." Petition at 9. He then notes that his counsel did not focus his efforts on preparing for trial. This is argumentative and unfairly so. Counsel negotiated a very beneficial plea deal. The deal reduces the standard sentencing range from 15-36 weeks to 0-4 weeks. RCW 13.40.0357. It reduces the risk from two class A felonies to a single class B felony. IRP 49, ln. 20-22; RCW 9A.44.083, .086. Because A.N.J. confessed to his counsel and decided to plead guilty, counsel's efforts were focused on arranging the best plea.

The Court of Appeals has found, and this Court should find, that A.N.J.'s appeal respects neither the record nor the legal standards.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny discretionary review.

DATED: Sept. 12, 2008.

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