Supreme Court No.: 95802-5
Court of Appeals No.: 75918-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HUTTON,

Petitioner.

PETITION FOR REVIEW

Marla L. Zink
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND THE DECISION BELOW 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 4

The lower court opinion undermines the due process right to a knowing, intelligent, and voluntary waiver and to have facts that increase sentences proved beyond a reasonable doubt 4

1. The State misinformed Michael Hutton that the burden of proof for an exceptional sentence was only a preponderance of the evidence 4

2. Mr. Hutton stipulated to facts underlying the exceptional sentence after he was misinformed that the burden was only a preponderance of the evidence 5

3. Contrary to the opinion below, Mr. Hutton's waiver was not knowing, intelligent, and voluntary 7

4. The exceptional sentence should be reversed on the additional basis that the court relied on the unconstitutionally low preponderance burden to find the aggravating factor satisfied 11

E. CONCLUSION 12

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Bradley, 165 Wn.2d 934, 205 P.3d 123 (2009) 6

State v. Humphries, 181 Wn.2d 708, 326 P.3d 1121 (2014) 6, 7, 8, 9

State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006) 7

State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007) 4, 10

Washington Court of Appeals Decision

State v. Cham, 165 Wn. App. 438, 267 P.3d 528 (2011) 6, 7, 9

State v. Sandoval, 137 Wn. App. 532, 154 P.3d 532 (2007) 9, 10

State v. Steele, 134 Wn. App. 844, 142 P.3d 649 (2006) 6

U.S. Supreme Court Decisions

Blakely v. Washington, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) 4, 10

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) 6

Statutes

RCW 9.94A.530 4

RCW 9.94A.537 5

Rules

RAP 13.4 1

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Michael Hutton, the appellant below, requests this Court grant review pursuant to RAP 13.4 of the decision of the Court of Appeals, Division One, in *State v. Hutton*, No. 75918-3-I, filed March 5, 2018. Mr. Hutton's motion to reconsider was denied on March 26, 2018. A copy of the opinion is attached as Appendix A and the order denying the motion to reconsider is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. The Fourteenth Amendment requires that facts supporting an exceptional sentence be proved beyond a reasonable doubt and a guilty plea must be knowing, intelligent, and voluntary. Should the Court grant review where the opinion below holds misinformation as to the burden of proof, even assertion of a lesser burden, does not affect the voluntariness of a stipulation? RAP 13.4(b).

2. Should the Court grant review to determine whether the sentencing court applied the incorrect, lower burden to find grounds for the exceptional sentence were satisfied based on the stipulation and other evidence? RAP 13.4(b).

C. STATEMENT OF THE CASE

Michael Hutton was remorseful for his actions and did not want to subject his estranged wife to a trial. RP 1-2, 6-7, 16. He was also eager to be sentenced to the Department of Corrections because, in jail, he was not receiving the mental health treatment he now realized he needed. RP 6-7, 16. He decided to plead guilty to the amended information, which included an aggravating factor for a prolonged pattern of abuse. CP 1-25; RP 1-20, 27.

The guilty plea statement sets forth facts supporting the four charged counts. CP 24-25. However, as to the aggravating factor, Mr. Hutton simply pleaded "My conduct was part of a [sic] ongoing pattern of physical and psychological abuse of the same victim manifested by multiple incidents over a prolonged period of time." CP 25.

At sentencing, the State argued, because Mr. Hutton did not stipulate to supporting facts in his plea statement, the court had to find the facts supporting the aggravating factor and it should apply the preponderance of the evidence standard. RP 38-39; CP 123-25. Over defense counsel's advice, Mr. Hutton stipulated to the following evidence: Ms. Hutton's petition in support of her request for a protection order and police reports from Arizona. RP 40-46; CP 37-58

(appendices A and B to State's sentencing memorandum), 138 (findings 4, 5, 6). The State also handed the court copies of three prior convictions from Arizona. Exhibits 1-3; RP 46-47.

Seeking assistance with substance abuse and mental health concerns, Mr. Hutton requested a prison-based drug offender sentencing alternative sentence (DOSA) within the standard range of 33 to 43 months. CP 120-22, 126-29; RP 50-52. The court agreed that the jail mental health resources were "abysmal," but rejected the requested DOSA. RP 54-55.

Finding the aggravating factor adequately supported, the court imposed an exceptional sentence of 120 months, the statutory maximum. CP 112-19; RP 55-56. The sentence imposed was three times as great as the standard range. *See* CP 113.

D. ARGUMENT

The lower court opinion undermines the due process right to a knowing, intelligent, and voluntary waiver and to have facts that increase sentences proved beyond a reasonable doubt.

1. The State misinformed Michael Hutton that the burden of proof for an exceptional sentence was only a preponderance of the evidence.

"When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." *Blakely v. Washington*, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). While Mr. Hutton pleaded guilty, he did not stipulate in the plea agreement to facts supporting the exceptional sentence. CP 25; RP 38. Thus, the factual basis for the aggravating factor was addressed at the sentencing hearing.

The Fourteenth Amendment requires that facts supporting an exceptional sentence be proved beyond a reasonable doubt. *State v. Pillatos*, 159 Wn.2d 459, 466, 150 P.3d 1130 (2007) (citing *Blakely*, 542 U.S. 296). Yet, at the sentencing hearing, the State argued the preponderance of the evidence standard applied. CP 123-25; RP 39.

The State argued for an incorrect, lower standard, citing RCW 9.94A.530(2). *Id*. However, that statute provides an explicit exception

for aggravating factors in RCW 9.94A.537(3) and for sentences "above the standard range." RCW 9.94A.530(2) provides "In determining any sentence other than a sentence above the standard range, . . . The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537." Section .537(3) provides that aggravating factors must be proved beyond a reasonable doubt:

> The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

RCW 9.94A.537(3).

The parties and the court proceeded as if the burden was simply a preponderance of the evidence. CP 123-25; RP 39-46. Mr. Hutton was asked if he stipulated on that record.

2. Mr. Hutton stipulated to facts underlying the exceptional sentence after he was misinformed that the burden was only a preponderance of the evidence.

Against the advice of his attorney and after the State misrepresented the burden of proof, Mr. Hutton stipulated to the facts supporting the charged aggravating factor—a copy of police reports and a petition in support of protective order. RP 44-46.

Mr. Hutton was misadvised of the standard of proof. Thus, his stipulation was not knowing, intelligent, or voluntary. The Due Process Clause of the Fourteenth Amendment requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Humphries*, 181 Wn.2d 708, 717, 326 P.3d 1121 (2014); *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009). It applies to pleas relevant to aggravating factors. *See State v. Steele*, 134 Wn. App. 844, 850-51, 142 P.3d 649 (2006). A waiver is not knowing, intelligent, and voluntary where it is based on misinformation. *State v. Cham*, 165 Wn. App. 438, 448, 267 P.3d 528 (2011).

Courts indulge in every reasonable presumption against waiver, and the State bears the burden of establishing a valid waiver. *E.g.*, *Id*. at 447.

Because it was not made knowingly and intelligently, Mr. Hutton's stipulation is not a sufficient basis to impose the exceptional sentence. Mr. Hutton is entitled to withdraw his stipulation without showing prejudice. *Humphries*, 181 Wn.2d at 717-18 (a stipulation entered after defendant was misadvised cannot be considered knowing,

intelligent, and voluntary); *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006).

3. Contrary to the opinion below, Mr. Hutton's waiver was not knowing, intelligent, and voluntary.

The Court of Appeals opinion improperly concludes that Mr. Hutton's stipulation was knowing, intelligent, and voluntary "despite the State's statement that the preponderance of the evidence standard would apply." Slip Op. at 5.

First, the opinion reasons that although the State referenced the incorrect burden of proof, Mr. Hutton's waiver was knowing, intelligent and voluntary because the trial court did not end up applying any burden. Slip Op. at 5. The trial court did not apply the burden because Mr. Hutton stipulated to the aggravating facts after he was misinformed of the burden. *See* CP 123-25; RP 39 (State argues the preponderance of the evidence standard applies). Whether the trial court applied the incorrect burden after Mr. Hutton agreed is irrelevant to whether Mr. Hutton's pre-application waiver was misinformed. The waiver could only be informed by conduct and information dispensed before the waiver was made. *Humphries*, 181 Wn.2d at 717-18 (a stipulation entered after defendant was misadvised is not knowing, intelligent, and voluntary); *Cham*, 165 Wn. App. at 448, (a waiver is

not knowing, intelligent, and voluntary where it is based on misinformation).

The opinion below conflicts with this Court's decision in *Humphries*. There, the trial court and counsel erroneously informed Mr. Humphries that his consent was not necessary to stipulate to an element. 181 Wn.2d at 717. Following this misinformation, Mr. Humphries actually signed the stipulation. *Id*. at 717-18. "At that point, the damage was done." *Id*. at 718. Mr. Humphries signature was based on the erroneous information that the stipulation could be entered regardless of whether he signed it. Therefore, Mr. Humphries's waiver was not knowing, intelligent, and voluntary. *Id*.

Likewise, here, Mr. Hutton agreed to the facts supporting the aggravating factor after the State argued the burden was a mere preponderance of the evidence. Thus, the trial court's actions following Mr. Hutton's waiver should not be relied upon to find the waiver knowing, intelligent, and voluntary. The trial court found the factual predicate adequate only after Mr. Hutton stipulated, and that stipulation arose only after the State misinformed Mr. Hutton of the burden of proof. The misinformation from the State—asserting an incorrect, lower standard of proof—is relevant to determining that Mr. Hutton's

waiver was not made knowingly or intelligently. The court's later actions are not. *See Humphries*, 181 Wn.2d at 717-18.

Second, the opinion interprets the trial court's silence in the State's favor. Slip Op. at 5. However, every reasonable presumption should be indulged against waiver, as the Court acknowledges. Slip Op. at 4 (quoting *Cham*, 165 Wn. App. at 447). In particular, absent an affirmative record to the contrary, courts indulge every reasonable presumption against finding knowing, intelligent, and voluntary a defendant's waiver of the right have an aggravator proved. *See Cham*, 165 Wn. App. at 446-47. The opinion here states, "The trial court did not agree with the State that the preponderance of the evidence standard would apply at the evidentiary hearing." Slip Op. at 5. Yet, the trial court did not correct the State's misunderstanding of the burden. The trial court simply said nothing about the higher burden of proof, and it did not otherwise correct the State's assertion of the lower preponderance standard. *See State v. Sandoval*, 137 Wn. App. 532, 544-45, 154 P.3d 532 (2007) (court's silence construed as tacit approval that lent an aura of legitimacy to prosecution's improper interpretation of law). And, the parties and the court proceeded as if the

burden was simply a preponderance of the evidence. CP 123-25; RP 39-46.

Thus, the record reveals no manner in which Mr. Hutton was informed of the correct burden, which was beyond a reasonable doubt. The trial court's silence cannot be read as correcting the error. *See Sandoval*, 137 Wn. App. at 544-45.

The Court of Appeals opinion illogically concludes "the misstatement of the applicable standard of proof" on the facts supporting an aggravated sentence "did not concern Hutton's sentence." Slip Op. at 6 (without citation). The standard of proof for aggravating factors that would justify an exceptional sentence necessarily concerns Mr. Hutton's sentence. The Fourteenth Amendment requires that facts supporting an exceptional sentence be proved beyond a reasonable doubt. *Pillatos*, 159 Wn.2d at 466 (citing *Blakely*, 542 U.S. 296. An exceptional sentence cannot be imposed unless the court or factfinder finds the facts justifying the sentence proved beyond a reasonable doubt. The aggravating facts are necessarily and directly related to the sentence. The connection in this particular case is clear as well: Mr. Hutton was sentenced to an exceptional term of 120 months after the court found the aggravating

factors adequately supported. CP 112-19; RP 55-56. The standard of proof for the basis of an exceptional sentence related directly to Mr. Hutton's sentence. Therefore, misinformation about that standard is material to whether the plea was knowing, intelligent, and voluntary.

Because Mr. Hutton did not enter the stipulation knowingly, intelligently, and voluntarily, he should be allowed to withdraw it.

4. The exceptional sentence should be reversed on the additional basis that the court relied on the unconstitutionally low preponderance burden to find the aggravating factor satisfied.

Moreover, the exceptional sentence should be reversed on the additional basis that the sentencing court erred by applying the lesser preponderance of the evidence burden. As discussed, the State argued the facts underlying the aggravating factor had to be proved by a preponderance of the evidence. CP 123-25; RP 39. The court proceeded to accept Mr. Hutton's stipulation and receive additional evidence. RP 39-46. The written findings and conclusions are silent as to the burden of proof, and do not indicate the court applied the constitutional beyond a reasonable doubt standard. CP 137-40.

The exceptional sentence should be reversed because the trial court applied the wrong burden of proof. The court erred as a matter of law when it applied an unconstitutional burden of proof in determining

whether a factual basis for the aggravating factor had been proved. *See* RP 54-56; CP 137-40. This Court should grant review and reverse the exceptional sentence.

E. CONCLUSION

Michael Hutton requests the Court review the opinion below, which contravenes Supreme Court and Court of Appeals precedent to hold the State's assertion of a lower burden of proof did not affect Mr. Hutton's stipulation or the court's exceptional 10-year sentence.

DATED this 23rd day of April, 2018.

Respectfully submitted,

s/ Marla L. Zink

_____

Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL WILLIAM HUTTON, Appellant.	No. 75918-3-I DIVISION ONE UNPUBLISHED OPINION FILED: March 5, 2018

TRICKEY, J. — Michael Hutton pleaded guilty to various domestic violence offenses and the aggravating factor of a prolonged pattern of abuse. Hutton stipulated to the facts underlying the aggravating factor. The trial court imposed an exceptional sentence of 120 months of incarceration.

Hutton appeals, arguing that the trial court erred when it applied an incorrect standard of proof to the facts underlying his exceptional sentence and when it found that the victim asked for 120 months of incarceration. Because the trial court did not apply an incorrect standard of proof and the trial court's finding that the victim asked for an exceptional sentence of 120 months to be imposed was supported by the record, we affirm.

FACTS

The State charged Hutton by amended information with two counts of domestic violence felony violation of a court order, one count of felony stalking, and one count of domestic violence telephone harassment. Hutton's felony

stalking charge included the aggravating factor that the offense was part of a prolonged pattern of abuse.

Hutton pleaded guilty to the charged offenses and the aggravating factor. Hutton acknowledged that he was giving up several constitutional rights, that the maximum sentence for one of his offenses was 10 years in prison and a $20,000 fine, that the trial court could impose a sentence up to the maximum, and that the time could run consecutively because of the aggravating factor. The trial court stated that Hutton had knowingly, voluntarily, and intelligently waived his trial rights and entered a plea of guilty to his charged offenses.

In Hutton's statement on his plea of guilty, Hutton wrote, "My conduct was part of a [sic] ongoing pattern of physical and psychological abuse of the same victim manifested by multiple incidents over a prolonged period of time."[1]

At Hutton's sentencing hearing, the State noted that the trial court had to find the facts underlying the alleged aggravating factor before imposing an exceptional sentence. The State requested an evidentiary hearing because Hutton had pleaded guilty to the aggravating factor but had not stipulated to its underlying facts. The State contended that the trial court would apply a preponderance of the evidence standard at the evidentiary hearing. The trial court granted the State's request for an evidentiary hearing to clarify the State's alleged aggravating factor and the basis for an exceptional sentence.

Following the trial court's statement that it would continue proceedings to allow the evidentiary hearing, Hutton stated that he had no objection to the trial

[1] Clerk's Papers (CP) at 25.

court considering the offered evidence. The evidence included the victim's petition in support of her request for a protection order and police reports from Arizona for Hutton's prior offenses. Hutton stated that he was stipulating to those facts, and that he understood that the victim had requested 120 months of incarceration and that he was facing up to 10 years in prison. The State submitted copies of Hutton's prior Arizona convictions to the trial court.

The trial court considered these stipulated facts and concluded that the record contained substantial evidence supporting the imposition of an exceptional sentence based on the aggravating factor alleged by the State. The trial court found that the victim was present at Hutton's sentencing and had asked the trial court to impose an exceptional sentence of 120 months in prison. The trial court rejected Hutton's request for a prison-based drug offender sentencing alternative and imposed an exceptional sentence of 120 months.

Hutton appeals.

ANALYSIS

Exceptional Sentence

Hutton argues that his stipulation is invalid because the trial court misinformed him of the applicable standard of proof and applied an incorrect standard of proof when it considered the facts underlying his exceptional sentence. Because the trial court did not apply an erroneous standard of proof and Hutton's stipulation was not otherwise invalid, we disagree.

Generally, "the State must prove to the trier of fact, beyond a reasonable doubt, facts supporting an exceptional sentence." State v. Pillatos, 159 Wn.2d

456, 466, 150 P.3d 1130 (2007) (citing Blakely v. Washington, 542 U.S. 296, 313, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)).

When determining a sentence other than one above the standard range, the trial court may not consider material facts disputed by the defendant unless an evidentiary hearing is held and the facts are proven by a preponderance of the evidence. RCW 9.94A.530(2). Where the trial court imposes a sentence above the standard range and the defendant waives his or her right to a jury trial, the facts underlying any aggravating factor must be proved "to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts." RCW 9.94A.537(3).

"Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). A guilty plea is not knowing or voluntary if the defendant is given misinformation about the sentencing consequences or is not fully advised of the direct consequences of the guilty plea. In re Pers. Restraint of Fonesca, 132 Wn. App. 464, 468, 132 P.3d 154 (2006); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

"The State bears the burden of establishing a valid waiver [of constitutional rights], and absent a record to the contrary, this court indulges in every reasonable presumption against waiver." State v. Cham, 165 Wn. App. 438, 447, 267 P.3d 528 (2011).

Here, at Hutton's sentencing hearing, the State requested an evidentiary hearing, at which the preponderance of the evidence standard would apply, to establish the facts underlying the alleged aggravating factor. The trial court granted the State's request so that the record could be clarified as to the State's request for an exceptional sentence.

Hutton is correct that the standard of proof at the evidentiary hearing for an exceptional sentence should have been proof beyond a reasonable doubt. RCW 9.94A.537(3). But the trial court did not apply this standard of proof to evidence of the facts underlying the aggravating factor. After the trial court's statement that it would grant an evidentiary hearing, Hutton told the trial court that he did not object to it entering the evidence. He acknowledged that he was stipulating to the facts underlying the aggravating factor, and his defense counsel stated that "an evidentiary hearing would not be necessary."[2] Hutton's stipulation to the underlying facts obviated the need for an evidentiary hearing, and thus the trial court did not apply any erroneous standard of proof to admit evidence of those facts.

Moreover, Hutton's stipulation was knowing, voluntary, and intelligent despite the State's statement that the preponderance of the evidence standard would apply at the evidentiary hearing. The trial court did not agree with the State that the preponderance of the evidence standard would apply at the evidentiary hearing. Further, the record does not indicate that Hutton stipulated to the underlying facts in response to the State's argument. Hutton indicated that he did

[2] Report of Proceedings (RP) (Sept. 30, 2016) at 45.

not want an evidentiary hearing in part so that he could obtain mental health care while incarcerated and to prevent the victim from going through another interview. Finally, the misstatement of the applicable standard of proof did not concern Hutton's sentence, and thus did not misinform Hutton of the sentencing consequences of his stipulation and guilty plea. Thus, the State's argument that the preponderance of the evidence standard would apply at a future evidentiary hearing did not render Hutton's stipulation invalid.

In sum, Hutton is correct that the facts underlying an exceptional sentence must be proven beyond a reasonable doubt. But the trial court did not apply an erroneous preponderance of the evidence standard in this case because of Hutton's stipulation to the facts underlying the aggravating factor. And Hutton's stipulation was not rendered invalid by the State's argument that the preponderance of the evidence standard of proof would apply at a future evidentiary hearing. We conclude that the trial court did not err and that Hutton's stipulation was valid.

Victim Statement

Hutton argues that the trial court's finding that the victim asked for a sentence of 120 months of incarceration at Hutton's sentencing hearing was not supported by the record. Because the victim stated in a letter to the trial court that Hutton should be sentenced to the "maximum term allowed by law"[3] and requested

[3] CP at 163.

at Hutton's sentencing hearing that he should be in jail "for a long time,"[4] we disagree.

An appellate court may reverse an exceptional sentence if "the reasons supplied by the sentencing court are not supported by the record which was before the judge." RCW 9.94A.585(4)(a). The reviewing court analyzes whether the reasons given by the sentencing judge are supported by evidence in the record under a clearly erroneous standard. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005) (quoting State v. Ha'mim, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)).

Here, the trial court found that "[t]he victim . . . was present for this sentencing and asked the court to impose an exceptional sentence of 120 months in prison."[5] In a letter to the trial court, the victim asked the trial court "to sentence Michael Hutton for [her] protection and for his own to the maximum term allowed by law."[6] At Hutton's sentencing hearing, the victim stated that "[she] would like to see him go to jail for a long time."[7]

When considered together, the victim's statements to the trial court supported its finding that she requested an exceptional sentence of 120 months in prison. As discussed above, the statutory maximum for Hutton's offenses, including the aggravating factor, was 120 months. The victim requested that the "maximum term allowed by law" be imposed in her letter to the trial court prior to sentencing, and reiterated that Hutton should be incarcerated "for a long time" at his hearing. We conclude that the fact that the victim did not specify the exact

[4] RP (Sept. 30, 2016) at 49.
[5] CP at 138.
[6] CP at 163.
[7] RP (Sept. 30, 2016) at 49.

length of time of incarceration does not render the trial court's finding clearly erroneous, and thus the record supports the trial court's finding.

Statement of Additional Grounds

In a statement of additional grounds for review, Hutton argues that his first public defender did not advise him of communications regarding a plea deal before his case was transferred to another public defender. Hutton also argues that he had multiple public defenders assigned to his case, and that the public defender who represented him at sentencing had only been his counsel for eight days.

"In the plea bargaining context, effective assistance of counsel means that counsel actually and substantially assisted his client in deciding whether to plead guilty." State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901 (1981). "Without specific allegations which would, if believed, demonstrate resulting prejudice, the plea is not vitiated nor is a hearing on the plea's voluntariness warranted." Cameron, 30 Wn. App. at 232 (noting that counsel is not ineffective based on alleged infrequency and brevity of meetings with defendant).

Here, Hutton has not demonstrated that his counsel below was ineffective. His allegation that his first public defender did not inform him of discussions regarding a plea agreement prior to transferring his case, taken as true, does not demonstrate that he suffered resultant prejudice. For example, Hutton has not argued that these discussions resulted in a longer sentence or that he would not have otherwise pleaded guilty if the discussions had not occurred.

Similarly, Hutton's contentions that he had at least four different public defenders and that his counsel at sentencing had only been assigned to his case

for eight days do not demonstrate that he received ineffective assistance of counsel. Hutton has not argued that any of the public defenders assigned to his case harmed his plea agreement negotiations or that he would not have pleaded guilty absent their work on his case.

In addition, Hutton has not demonstrated that he was prejudiced by his counsel's performance at his sentencing hearing. In fact, the trial court was willing to continue his case prior to holding an evidentiary hearing to allow his counsel to have sufficient time to respond to the State's request. This continuance was rendered unnecessary when Hutton, against the advice of his counsel, stipulated to the facts underlying the aggravating factor. Thus, the length of time that Hutton's counsel at sentencing represented him was reduced by Hutton's own actions, and Hutton has not otherwise argued that his counsel's performance was ineffective.

Therefore, we conclude that Hutton's arguments in his statement of additional grounds for review do not merit reversing his exceptional sentence.

Affirmed.

Trickey, J

WE CONCUR:

APPENDIX B

FILED
3/26/2018
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. MICHAEL WILLIAM HUTTON, Appellant.	)	No. 75918-3-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Michael William Hutton, has filed a motion for reconsideration. The court has taken the matter under consideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Trickey, ACJ

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75918-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Dennis McCurdy, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[dennis.mccurdy@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: April 23, 2018
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

April 23, 2018 - 4:35 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	75918-3
Appellate Court Case Title:	State of Washington, Respondent v. Michael William Hutton, Appellant
Superior Court Case Number:	16-1-04379-4

The following documents have been uploaded:

- 759183_Petition_for_Review_20180423163351D1953391_8376.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.042318-9.pdf

A copy of the uploaded files will be sent to:

- dennis.mccurdy@kingcounty.gov
- greg@washapp.org
- maureen@washapp.org
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Marla Leslie Zink - Email: marla@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180423163351D1953391