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

97492-6

THE STATE OF WASHINGTON Respondent V. MICHAEL PAUL HAXTON Appellant	No. 79708-5-I MOTION FOR RECONSIDERATION OF DECISION TERMINATING REVIEW

MOTION

I the appellant, Michael Paul Haxton, move for reconsideration of the Unpublished Opinion given on July 1, 2019 by Honorable Judge J. Hazelrigg-Hernandez pursuant to RAP 12.4

Respectfully submitted this 18th of July, 2019

Michael P. Haxton

Decision

On July 1, 2019 The First Division of the Court of Appeals of the State of Washington filed an unpublished opinion that stated "he [Haxton] has not presented sufficient evidence that he was actually misinformed about the sentancing consequences. Accordingly, he has not shown deficient performance by Quillian and his claim of ineffective assistance of counsel fails. Because Haxton was not able to show that withdrawal of his guilty plea was necesary to correct a manifest injustice, the trial court did not err in denying his motion." (unpublished opinion, July 1, 2019, pg 10-11, ln 22-4). I ask the Court to review and reconsider these decisions in accordance with RAP 12.4.

Issues Presented for Review

1 The appeals court overlooked the following point of fact when it states "Haxton has not presented any more than a "bare allegation" (unpublished opinion, July 1, 2019, pg 9, ln 20-21).

2 The appeals court missapprehended a point of law when it imposes an incorrect evidenciary burden for deciding whether Mr. Quillian affirm-

atively misinformed me of the sentancing consequences in the context of rendering my plea involuntary.

3 The appeals court misapprehends a point of law when it imposes an incorrect evidenciary burden for deciding whether Mr. Quillian affirmatively misinformed me of the sentencing consequences in the context of any claim under CrR 4.2(f).

4 The appeals court missapprehended a point of fact when it states "Haxton has not proven that he was affirmatively misinformed about the consequences of his guilty plea." (unpublished opinion, July 1, 2019, pg 9, ln 6-7).

5 The appeals court misapprended a point of fact when it states "he[Haxton] has not presented sufficient evidence that he was actually misinformed about the sentencing consequences. (unpublished opinion, July 1, 2019, pg 10, ln 22-23).

Statement of the Case

I rely on the statement of the case in the brief of appellant, adding only that on July 1, 2019 the appeals court denied my motion to reconsider and filed a modified opinion. RAP 12.4(h) allows me to file another motion to reconsider.

I timely filed this motion pursuant to RAP 12.3(b) and GR 3.1 (See enclosed declaration).

Argument

1. In State v. Osborne 102 Wn.2d 87, 97, 684 P.2d 683 (1984) the second division of the Court of Appeals found something more than a defendant's "bare allegation" is required to overcome the highly persuasive evidence of voluntariness. Id. Ballentine's Law Dictionary defines bare as "mere; unaccompanied; naked; nude; nothing more" (Ballentine's Law Dictionary 3rd Edition). In Osborne 102 Wn.2d 87, 97, the defendant's only evidence of involuntariness was the defendant's own affadavit. In my case the appeals court acknowledges "He testified at the hearing on the motion that Mr. Quillian told him he faced a maximum of over 20 years if he went to trial on all 3 counts. The record contained evidence that he had repeated this erroneous maximum range to a competancy evaluator four months prior to the entry of the guilty plea." (unpublished opinion, July 1, 2019, pg 9, ln 7-11). Unlike Osborne my testimony is not bare or unaccompanied. My testimony is corroborated by a

report written by a credible competancy evaluator who regularly informs the court.

2 A plea of guilty is involuntary when the defendant has received affirmative misinformation about the sentencing consequences of the plea see State v. Buckman 190 Wn.2d at 59. In Buckman the Supreme Court concluded Buckman was "plainly misinformed" of sentencing consequences. It also concluded that the defendent was misinformed by the state and the court. However Buckman does not require a defendant to prove they were "plainly misinformed" in order to prove involuntariness. Likewise it does not require the defendent to prove they were misinformed by the State and the court. The appeals court seems to be requiring me to prove these 3 conditions in order to prove involuntariness. This is not the correct standard. The correct standard to decide whether Mr. Quillian affirmatively misinformed me of the sentencing consequences is by preponderance of evidence. The court should wiegh the evidence that mr. Quillian told me I would face 20-22 years in prison if convicted on all charges against any

evidence that he did not tell me that. If the court concludes Mr. Quillian did in fact tell me that, then the court should wiegh that fact against the evidence of voluntariness such as the plea statement and the plea colloquy to determine involuntariness of the plea.

3 In discussing my claim of ineffective assistance of counsel the court states "as noted above, he has not presented sufficient evidence that he was actually misinformed about the sentencing consequences." (unpublished opinion, July 1, 2019, pg 10, ln 22-23). This appears to be referencing discussion of the voluntariness of the plea in which the court states "Haxton has not presented anymore evidence than a "bare allegation" that he was misinformed, which is not sufficient to carry his burden under CrR 4.2(f)." (unpublished opinion, July 1, 2019, pg 9, ln 20-21). The "bare allegation" standard is used in State v. Osborne 102 Wn. 2d 87, 97 on a claim of involuntariness. It does not apply to other claims such as ineffive assistance of counsel. Osborne is not cited here, but the "bare allegation"

standard set forth in Osborne is still being applied to my ineffective assistance of counsel claim. This is not correct. Also the court references CrR 4.2(f). The standard in this rule is manifest injustice. This is not the correct standard to use to decide whether I was actually misinformed by Mr. Quillian. I do not have to meet the high standard of manifest injustice to prove I was actually misinformed. The correct standard to use to decide whether Mr. Quillian affirmatively misinformed me of the sentancing consequences is a preponderance of evidence. If the court decides that Mr. Quillian did in fact misinform me of the sentencing consequences, that fact should then be judged whether it meets the manifest injustice standard.

4 Ballentine's Law Dictionary defines a preponderance of evidence in part as follows: "evidence more convincing as worthy of belief than that which is offered in opposition thereto." (Ballentine's Law Dictionary 3rd Edition). I testified that Mr Quillian told me that if I was convicted of all charged crimes I would be

sentenced to 20-22 years (2RP, pg 27, ln 16-21). The court acknowledges the competancy Assessment in which "the evaluator states that Haxton believed the possible penalty if he was convicted at trial of 3 charges could be around 20 years." (unpublished opinion, July 1, 2019, pg 11, ln 21-22). The competancy evaluator is a highly credible source who regularly informs the court. There is no testimony or evidence that Mr. Quillian did not say this. Even Mr. Quillian is not claiming that he did not say this. Weighing the evidence on each side, it is clearly proven by a preponderance of evidence that Mr. Quillian affirmatively misinformed me of the sentencing consequences.

5 For the foregoing reasons I have presented sufficient evidence that I was actually misinformed of the sentancing consequences.

Conclusion

For the foregoing reasons I ask the court to correct the record and allow me to withdraw my plea.

Dated this 18th of July, 2019
respectfully submitted,
Michael P. Haxton

Declaration

I, Michael Paul Haxton declare that on July 18, 2019 I deposited the foregoing motion for reconsideration of decision to terminate review or a copy thereof in the internal mail system of Coyote Ridge Corrections Center and made arrangements for postage addressed to:

To the Clerk of the Court
Court of Appeals Division I
One Union Square
600 University St.
Seattle, WA 98101

Jon Tunheim
2000 Lakeridge Dr SW
Building 2
olympia, WA 98502

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Connell, WA on July 18, 2019

Michael P. Haxton

michael P. Haxton

FILED
7/1/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MICHAEL PAUL HAXTON, Appellant.	)	No. 79708-5-I DIVISION ONE UNPUBLISHED OPINION FILED: July 1, 2019

HAZELRIGG-HERNANDEZ, J. — Michael P. Haxton pled guilty to one count of attempted rape of a child in the second degree. He seeks reversal, arguing that he should have been allowed to withdraw his guilty plea under CrR 4.2(f) because he was affirmatively misinformed of the maximum sentence that he faced at trial by his assigned counsel. In a statement of additional grounds for review, he argues that counsel was ineffective at the hearing on the motion to withdraw because he failed to introduce certain evidence. Because Haxton has not carried his burden to show manifest injustice resulted from the plea and cannot show prejudice from counsel's performance, we affirm.

FACTS

On September 7, 2016, Michael P. Haxton began communicating with a woman who he believed was the mother of three young children ages 6, 11, and 12. He indicated that he was interested in participating in sexual acts with the

children and described specific acts that he planned to carry out. He said that he wanted to meet the children and that he would bring gifts including candy, nail polish, a stuffed animal, and a ball. Haxton came to the address that the woman had told him was her residence and was placed under arrest. He had candy, nail polish, a stuffed animal, and a ball in his car. Haxton was charged with two counts of attempted rape of a child in the first degree and one count of attempted rape of a child in the second degree.

At the change of plea hearing on June 5, 2017, the court asked Haxton if he had gone over the statement of defendant on plea of guilty, prosecutor's statement of criminal history, and offender score sheet with his attorney, Robert Quillian. Haxton responded that he had. The court informed Haxton that the standard sentencing range would be 58.5 months to 76.5 months to life imprisonment and he indicated he understood. He also indicated the he understood that the other two charges would be dismissed if the plea was accepted. The court clarified that the State was recommending a sentence of 60 months to life imprisonment on the remaining count and Haxton indicated that he understood.

Haxton then entered an Alford[1] plea of guilty to count 3, attempted rape of a child in the second degree. The court asked if he was making the plea freely and voluntarily and Haxton responded that he was. The court noted that he had the assistance of counsel and had made a free and voluntary plea of guilty to count 3, then found Haxton guilty as charged. The State then moved to dismiss the other

[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

two counts and the court granted the motion. The statement of defendant on plea of guilty to sex offense, which included the standard sentence range of 58.5 to 76.5 months to life for count three and the prosecutor's sentence recommendation of 60 months to life, was signed by Haxton and filed the same day. The prosecutor's statement of criminal history and attached offender score sheet, also signed by Haxton and filed the same day, showed an offender score of 0 and circled the corresponding handwritten sentence range of "58.5–76.5."

On July 17, 2017, Haxton filed a pro se motion to withdraw his plea with no attached briefing. Quillian withdrew as Haxton's counsel on July 31, 2017. His second attorney, A. Christian Cabrera, filed a motion to withdraw the guilty plea and supporting memorandum on October 17, 2017. This motion argued that Haxton should be allowed to withdraw his plea of guilty because it was necessary to correct a manifest injustice. Specifically, Haxton claimed that he had been denied effective assistance of counsel because his first attorney, Quillian, failed to give him adequate legal advice, failed to inform him of the sentence he faced at trial, failed to properly investigate his case, and coerced him into pleading guilty. Therefore, Haxton argued that he did not enter the guilty plea knowingly, voluntarily, and intelligently and he should be permitted to withdraw the plea.

Haxton filed another pro se motion to withdraw the plea on October 25, 2017, on the grounds that he had received ineffective assistance of counsel and the plea was not voluntary because Quillian had subjected him to extreme levels of duress. In an attached handwritten affidavit, Haxton stated that Quillian had miscalculated his offender score and told him that he would be sentenced to 20 to

22 years in prison if he was convicted on all counts. Haxton also alleged that Quillian refused to investigate the "mechanism that was created within the Net Nanny operation that allows officers to systematically frame certain individuals." Haxton alleged that Quillian failed to investigate his reports of "tampering with multiple pieces of evidence in an obvious manner, obvious instances of perjury, and the introduction of fraudulent document [sic] in court." Haxton claimed that Quillian "constantly laughed at [him] for [his] fantasies in practically every meeting [they] ever had," subjected him to a competency evaluation "to intimidate [him] and to damage [his] credibility," and lied to him repeatedly. In a subsequent letter to the court, Haxton alleged that the motion filed by Cabrera was insufficient and did not accurately reflect his arguments as to why the court should permit the plea to be withdrawn. Cabrera was permitted to withdraw as Haxton's counsel after advising the court of a breakdown in communication.

On December 18, 2017, the court held a hearing on the motion at which Haxton was represented by his third attorney, Kevin Griffin. Griffin asked the court to find that a manifest injustice occurred or resulted when Haxton entered a plea of guilty because he had not received effective assistance of counsel and the plea was not made voluntarily. Haxton testified that the prospect of facing over 20 years in prison if he was convicted of all three counts at trial was "a big factor" in his decision to plead guilty. He testified that he would have felt differently about the plea offer if he had known he was actually facing 10 to 13.5 years if convicted of all three counts at trial "because of the fact that it's an indeterminate sentence and that if [he] did not pass the indeterminate sentencing review once with the State's

deal, it would be ten years, which is . . . in the range of the sentence if [he] had gone to trial." He also testified that he did not feel that his plea was voluntary because he felt that he had no other option but to plead guilty. Haxton testified that he had never seen the written plea offer before but he "knew what the plea deal was."

Haxton said that he asked Quillian to hire an investigator to examine a discrepancy between the advertisement in the discovery packet and the one to which he had responded. He felt that this was crucial to his defense strategy. However, Haxton said that Quillian refused to hire an investigator, claiming that there was not time to conduct the investigation before the deadline to accept the plea offer. He testified that Quillian told him that the State could withdraw the plea offer if Haxton asked for substitute counsel.

The trial court denied Haxton's motion to withdraw his guilty plea. The court noted that "[i]t would have been nice to have Mr. Quillian's testimony here today, but the Court was left with only Mr. Haxton." In its verbal ruling, the court noted:

> The Court is skeptical that Mr. Quillian would have missed the range having been provided with the plea offer by the State. I am not prepared to make a finding that he did not. I am not prepared to make a finding whether he did or he didn't make that representation. I think there are reasons to question both the recollection and the motivations of Mr. Haxton in his testimony today but not sufficient to disregard everything Mr. Haxton said. Mr. Haxton has testified about other aspects in a way that does not indicate this is a fabrication, but even without making a finding as to whether Mr. Quillian did or didn't make that representation, the Court concludes that there has been an insufficient showing that Mr. Haxton would not have pled guilty if he had been told 13 years instead of 20. Again, that is based both on the Court's evaluation of Exhibit 2, the testimony from Mr. Haxton, as well as the delta between 13 years and 60 months, all in the context of course of whether or not the bar of manifest injustice has been reached.

The court entered written findings of fact and conclusions of law, including the following:

> 16. The defendant has alleged that Mr. Quillian may have provided him with an incorrect possible sentence range if convicted as originally charged. The court makes no finding that Mr. Quillian did, or did not, provide incorrect information. The court is skeptical that Mr. Quillian would have misrepresented the range given the plea offer documentation he possessed at the time.
> 17. Based on the court's observations of the content and demeanor of the defendant while testifying, there are reasons to question his recollection and motivations.
> . . .
> 19. The gap between the sentence range that the defendant stated Mr. Quillian provided him and the actual sentence range is not large enough to demonstrate that the defendant would not have entered the guilty plea.
> 20. There has been an insufficient showing that the defendant would not have entered the guilty plea with the accurate information, assuming, without deciding, that the information was incorrect.

Haxton was sentenced to an indeterminate sentence of 60 months to life imprisonment. He timely appealed.

DISCUSSION

Haxton contends that the court erred in denying his motion to withdraw his guilty plea because he received ineffective assistance of counsel from Quillian and his plea was not voluntary. In a statement of additional grounds for review, he also contends that he was denied effective assistance of counsel when Griffin failed to introduce certain evidence at the hearing on the motion. Because he cannot show a manifest injustice resulted from his plea of guilty or prejudice from Griffin's performance, we affirm.

I. Motion to Withdraw Plea of Guilty

"Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent." State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). A defendant who enters a guilty plea waives a number of important constitutional rights in doing so, such as the right to a jury trial, the right to confront accusers, and the privilege against self-incrimination. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (citing Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). A trial court shall not accept a plea of guilty that is not made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. CrR 4.2(d).

Motions to withdraw a guilty plea are usually reviewed for abuse of discretion. State v. A.N.J., 168 Wn.2d 91, 106, 225 P.3d 956 (2010). However, when the motion is based on ineffective assistance of counsel stemming from claimed constitutional error, we review the denial de novo. Id. at 109; State v. Buckman, 190 Wn.2d 51, 57, 409 P.3d 193 (2018).

Trial courts must allow a defendant to withdraw a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). "A 'manifest injustice' is 'an injustice that is obvious, directly observable, overt, and not obscure.'" State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). The Washington Supreme Court has found that a manifest injustice results where a defendant was denied effective counsel, the plea was not ratified by the defendant, the plea was involuntary, or the plea agreement was not kept by the prosecution.

State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996) (citing Saas, 118 Wn.2d at 42). A defendant who seeks to withdraw a plea of guilty plea bears the burden to meet the "demanding standard" imposed by CrR 4.2(f). Saas, 118 Wn.2d at 42 (citing Taylor, 83 Wn.2d at 596).

A: Voluntariness

Haxton contends that his plea of guilty was invalid because it was based on affirmative misinformation that he received from Quillian about the consequences he faced at trial. A plea is knowing and voluntary only when the defendant understands the consequences of pleading guilty, including possible sentencing consequences. Buckman, 190 Wn.2d at 59. A defendant's signature on a plea statement is strong prima facie evidence of a plea's voluntariness. Branch, 129 Wn.2d at 642, 642 n.2. "When [a] judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable." Id. at 642 n.2 (quoting State v. Perez, 33 Wn. App. 258, 262, 654 P.2d 708 (1982)). Something more than a defendant's "bare allegation" is required to overcome this highly persuasive evidence of voluntariness. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

A plea of guilty is involuntary when the defendant has received affirmative misinformation about the sentencing consequences of the plea. See Buckman, 190 Wn.2d at 59. In State v. Buckman, the Supreme Court concluded that the defendant's guilty plea was involuntary because he was misinformed by defense counsel, the prosecutor, and the judge that he was facing life imprisonment if he

lost at trial when the actual maximum sentence he faced was 114 months imprisonment. Id. at 58. The State listed the erroneous maximum sentence on the plea statement and the court informed the defendant of the incorrect maximum during the plea colloquy. Id. at 57. The Supreme Court found that Buckman was "plainly misinformed" about the maximum sentence he faced at trial. Id. at 59.

Here, Haxton has not proven that he was affirmatively misinformed about the consequences of his guilty plea. He testified at the hearing on the motion that Quillian told him he faced a maximum sentence of over 20 years if he went to trial on all three counts. The record contained evidence that he had repeated this erroneous maximum range to a competency evaluator four months prior to the entry of the guilty plea. However, unlike Buckman, Haxton was not "plainly misinformed" of the maximum sentence he faced at trial by the court or the State. The plea statement that he signed did not include the maximum sentence if convicted on all three counts, but listed the correct sentencing range of 58.5 to 76.5 months under the amended information. Haxton specifically indicated to the court during the plea colloquy that he understood the sentencing range to be 58.5 to 76.5 months for the proposed resolution. The trial court was not convinced that Quillian had affirmatively misinformed Haxton of the sentencing consequences and noted that it had reason to question the credibility of Haxton's testimony. Haxton has not presented any more evidence than a "bare allegation" that he was misinformed, which is not sufficient to carry his burden under CrR 4.2(f).

B. Ineffective Assistance of Quillian

Haxton also argues that the affirmative misrepresentations about the consequences of his guilty plea constituted ineffective assistance of counsel such that a manifest injustice resulted. The test for ineffective assistance of counsel during the plea process is the same as that detailed in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In re Cross, 180 Wn.2d 664, 705, 327 P.3d 660 (2014), abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018). A defendant must show both deficient performance by counsel and resulting prejudice in order to prevail on a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 687. When alleging ineffective assistance of counsel "[i]n the context of a guilty plea, the defendant must show that counsel failed to substantially assist him in deciding whether to plead guilty and that but for counsel's failure to properly advise him, he would not have pleaded guilty." Cross, 180 Wn.2d at 705–06 (citing State v. McCollum, 88 Wn. App 977, 982, 947 P.2d 1235 (1997)). "Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." A.N.J., 168 Wn.2d at 111. Representation by counsel is presumed effective. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Here, Haxton alleges that he was denied effective assistance of counsel because Quillian affirmatively misinformed him of the sentencing range he faced if convicted at trial. However, as noted above, he has not presented sufficient evidence that he was actually misinformed about the sentencing consequences.

Accordingly, he has not shown deficient performance by Quillian and his claim of ineffective assistance of counsel fails. Because Haxton was not able to show that withdrawal of his guilty plea was necessary to correct a manifest injustice, the trial court did not err in denying his motion.

II. Ineffective Assistance of Griffin

In a statement of additional grounds, Haxton contends that his third defense attorney, Griffin, provided ineffective assistance by failing to introduce certain items at the evidentiary hearing on the motion to withdraw the plea. Specifically, Haxton contends that Griffin should have entered the report of his first competency evaluation and the transcript of a jail call between Haxton and his mother as exhibits in support of his motion.

As noted above, an appellant must show that counsel's performance was deficient and that he was prejudiced by this deficient performance. Strickland, 466 U.S. at 687. Again, there is a strong presumption that counsel's performance was not deficient. McFarland, 127 Wn.2d at 336. An appellant can rebut this presumption if there was no conceivable trial tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

A. Competency Evaluation

Haxton first contends that Griffin should have introduced the report of his first competency evaluation to support his motion to withdraw the plea. In this report, the evaluator states that Haxton believed the possible penalty if he was convicted at trial of all three charges could be around 20 years. The report was created and filed with the court on February 15, 2017. Haxton entered the guilty

plea on June 5, 2017. The written motion to withdraw the plea submitted by Cabrera stated the defendant relied on the court file in support of the motion.

Because the report was in the file and the motion stated that it relied on the file for support, the court was free to consider the contents of the competency evaluation. Griffin's failure to specifically draw the court's attention to this document does not appear to rise to the level of deficient performance. Furthermore, Haxton cannot show that he was prejudiced by this decision. It seems unlikely that the court would have been swayed by evidence that Haxton had stated the erroneous sentencing range to the evaluator four months before he entered the guilty plea. This evidence does not provide proof that he was affirmatively misinformed of the accurate sentencing range. Therefore, Haxton's claim of ineffective assistance of counsel on this basis fails.

B. Call Transcript

Haxton also contends that Griffin was ineffective in failing to introduce the transcript of a recorded jail call between Haxton and his mother. The transcript of this call is not part of the record on review. Haxton states in his statement of additional grounds for review that he told his mother during this call that if he lost at trial he would be sentenced to 20 to 22 years. He says this call occurred before he entered the plea of guilty but does not give a specific date.

Similarly, Haxton cannot show that he was prejudiced by counsel's failure to offer this evidence as an exhibit in support of the motion to withdraw the plea. This transcript would not have proven that Quillian affirmatively misinformed Haxton of the correct sentencing range. The court would still have been left with

Haxton's bare allegations that he had been misinformed. Accordingly, Haxton's second ineffective assistance claim also fails.

We affirm.

WE CONCUR:

NO. 51791-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HAXTON,

Appellant.

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

The Honorable Erik D. Price, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the appellant's motion to withdraw his guilty plea. CP 97-101.

2. The trial court erred in finding appellant's challenge to his guilty plea was limited to a claim of ineffective assistance of counsel. CP 100 (Conclusion of Law 3).

3. The trial court erred in finding appellant claimed his attorney "may" have misinformed him about the standard ranges he faced if convicted of all charged crimes. CP 100 (Conclusion of Law 16).

4. The trial court erred in concluding a seven-year difference between the actual standard range if convicted on all charged offenses and the standard range appellant was told by his counsel he would face if convicted of all charged offenses is not "large enough" to warrant a finding the plea would not have been entered had appellant known the correct standard ranges. CP 101 (Conclusions of Law 19 & 20).

Issues Pertaining to Assignments of Error

Due process requires a guilty plea to be knowing, voluntary, and intelligent. Leading up to entry of a guilty to only one of the three charged offenses, defense counsel led appellant to erroneously believe he faced 20+ years to life if convicted of all three charges, when in fact he faced only 10+ years to life. Based the erroneous prospect of 20+ years to life, appellant

accepted the State's offer to plead to one of the charged offense, for which he faced approximately 5+ years to life. Prior to sentencing, appellant moved to withdraw his plea.

1. Did the trial court erred in finding appellant's motion to withdraw his guilty plea was based only on a claim of ineffective assistance of counsel, when appellant also sought to withdraw his plea because it was not a knowing, voluntary and intelligently entered plea as a result misinformation about the potential sentencing consequences of a trial?

2. Where appellant's uncontroverted testimony was that appellant was affirmatively misinformed by counsel that he faced 20+ years to life in prison if convicted at trial and never learned of the error before accepting the plea offer, did the trial court err in finding appellant merely "may" have been misinformed by counsel?

3. Did the trial court err in concluding a seven-year difference in sentencing consequences is not significant enough to impact a defendant's decision whether to accept a plea offer to one charge or take all three charges to trial?

B. STATEMENT OF THE CASE

In September 2016, the Thurston County Prosecutor charged appellant Michael Haxton with two counts of attempted first degree child rape and one count of attempted second degree child rape. CP 5-6. The charges were filed after Haxton showed up at a residence he thought was the home of a mother with children aged 6, 11, and 12, with whom he had allegedly arranged to engage in sex acts with her children but turned out to be a law enforcement sting operation. CP 3-4.

On June 5, 2017, Haxton, in consultation with his attorney, Robert Quillian, pled guilty to attempted second degree rape of a child and the other two charges were dismissed on the prosecution's motion. CP 17-28 (Statement of Defendant on Plea of guilty); CP 48-56 (verbatim report of proceeding for June 5, 2017, attached to a subsequently filed motion to with draw guilty plea, CP 43-56).

On July 17, 2017, prior to sentencing, Haxton filed a pro se motion to withdraw his plea. CP 38. As a result, on July 31, 2017, Quillian withdrew as Haxton's counsel. CP 39.

On October 17, 2017, Haxton's new counsel, Arnaldo Cabrera, filed a motion to withdraw Haxton's guilty plea. CP 43-56. The motion argues Haxton received ineffective assistance of counsel from Quillian based on Quillian's failure to properly investigate, hiding evidence from

Haxton, providing incorrect legal advice and subjecting Haxton to "extreme duress." CP 45. Cabera was allowed to withdraw as Haxton's counsel on November 20, 2017, due to a breakdown in communications. 1RP[1] 5-8.

A hearing on the motion filed by Cabera was heard December 18, 2017, before the Honorable Erik D Price, Judge. 2RP 1. Haxton was represented at the hearing by attorney Kevin Griffin. 2RP 2. The only evidence presented was the testimony of Haxton, and two exhibits, Haxton's written statement on plea of guilty (Ex. 1), and the prosecution's written plea offer to Quillian, Haxton's initial attorney (Ex. 2).

Haxton testified Quillian did no investigation into his case. 2RP 8-25. Haxton confirmed, however, that they had discussed the potential sentencing consequences, and Quillian informed him that if he took all three charges to trial and was convicted, he was facing a sentence of 20 to 22 years because he would have an offender score of "9," three points for each conviction. 2RP 26-28. Haxton said the prospect of a 20+ year prison terms "was a big factor in my decision" to plead guilty. 2RP 30.

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[1] There were three volumes of verbatim report of proceeding prepared for this appeal and will be referenced as follows: 1RP – 1/20/17; 2RP – 12/18/17; and 3RP – 1/8/18 (sentencing). As previously noted, there is also a report of proceeding for the June 5, 2017 plea hearing, referenced herein as CP 48-56.

Haxton denied Quillian ever informed him that because his alleged crimes were "attempts," he would only face 75% of the standard range for the completed crime. 2RP 28.

Following entry of his guilty plea to the one charge, Haxton learned from subsequent counsel, Cabera, that if convicted of all three charges his offender score would be "6 "instead of "9", and that his standard range for each offense would be only 75% of the standard range for the completed crime, which works out to "a little over ten years to 13-and-a-half years." 2RP 29. When asked if knowing the correct sentence faced if convicted would have made a difference in his decision-making, Haxton agreed it would given the "risk of serving 10 to 13-and-a-half years . . . seemed considerably less than" the 20+ years he had erroneously been led to believe. 2RP 30-31.

In response, the prosecution submitted a copy of the plea offer it claimed it provided Quillian, which sets forth the proper offender score and standard ranges for Haxton's alleged offenses. 2RP 61-63. Haxton then retook the witness stand and testified he had never seen the plea offer prior to entry of his plea. 2RP 65-66.

In its oral ruling denying the motion to withdraw guilty plea, the court noted it would have liked to have heard from Quillian at the hearing. 2RP 68. The court, after reviewing the substance of Haxton's claims,

identified two central themes, which were whether Quillian was ineffective for failing to investigate the case, and secondly whether Quillian mis-advised Haxton about the potential standard range sentences. 2RP 72.

With regard to the lack of investigation, the court noted there was no basis to determine what if anything a more thorough investigation would have done for the defense, and therefore Haxton could not show prejudice, even if Quillian's performance was deficient. 2RP 73-74.

With regard to the mis-advisement on possible punishment, the court's oral ruling focused on whether it could find Haxton would not have pled guilty had he known the risk of trial was only 13+ years instead of 20+ years. 2RP 76-77. It then gave the following ruling.

> The Court is skeptical that Mr. Quillian would have missed the range having been provided with the plea offer by the State. I am not prepared to make a finding that he did not. I am not prepared to make a finding whether he did or he didn't make that representation. I think there are reasons to question both the recollection and the motivations of Mr. Haxton in his testimony today but not sufficient to disregard everything Mr. Haxton said. Mr. Haxton has testified about other aspects in a way that does not indicate this is a fabrication, but even without making a finding as to whether Mr. Quillian did or didn't make that representation, the Court concludes that there has been an insufficient showing that Mr. Haxton would not have pled guilty if he had been told 13 years instead of 20. Again, that is based both on the Court's evaluation of Exhibit 2, the testimony of Mr. Haxton, as well as the delta between 13 years and 60 months, all in the context of course of

whether or not the bar of manifest injustice has been reached.

2RP 77-78. A written order was entered, followed by written findings of fact and conclusions of law. CP 97-101.

C. ARGUMENT

HAXTON'S GUILTY PLEA WAS INVALID BECAUSE IT WAS BASED ON AFFIRMATIVE MISINFORMATION ABOUT THE CONSEQUENCES FACED.

Due process requires a guilty plea to be knowing, voluntary, and intelligent. Haxton entered his Alford plea under the false impression that if he exercised his constitutional right trial and lost, he faced 20+ years in prison. Haxton, however, was only facing 10+ years if convicted as charged. Because Haxton was affirmatively misinformed about the consequences of pleading guilty his plea was not knowing, voluntary and intelligent and the trial court erred in denying his presentence motion to withdraw his plea.

Due Process requires a guilty plea be knowing, voluntary, and intelligent. State v. Buckman, 190 Wn.2d 51, 409 P.3d 193, 198 (2018); State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). It is well established that a defendant "must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea." State v. A.N.J., 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). This standard is

reflected in CrR 4.2(d), which provides the trial court "shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea."

Consequences of pleading guilty include waiving numerous important constitutional rights intended to safeguard individuals against government overreach. These include the right to trial, right to confront accusers and the right to present a defense. State v. MacDonald, 183 Wn2d 1, 8, 346 P.3d 748 (2015); U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 21 & 22. Whether to waive these rights in favor of a government offer to compromise is a significant decision with lasting consequences.

Before a decision to accept a government's offer to compromise can be made intelligently, a defendant must be aware of the potential risks of acceptance and nonacceptance. A.N.J., 168 Wn.2d at 113-14. Some aspects of the risk should be easy to quantify and compare, such as the sentencing consequences a trial might produce weighed against the sentencing consequences the government's compromise offer provides. No doubt the relative difference between the consequences is a significant and weighty factor in the decision. See Buckman, 409 P.3d at 198 (defendant pleaded guilty to avoid life sentence).

If a defendant concludes the benefits of a government plea offer do not sufficiently outweigh the risks of trial, that defendant will decide not to waive constitutional rights and instead go to trial. On the other hand, if the defendant concludes the benefits of plea offer outweigh the risks of trial, that defendant will waive their rights and accept the offer.

How each defendant weighs the risks depends on the specific circumstances of each defendant. For example, defendant "A" may determine that if the sentence contemplated by the government's compromise offer is 25% or less of the sentence that could result following conviction at trial, the government's offer should be accepted. Defendant "B," however, might require the sentence in the compromise offer be no greater that 20% of the potential sentence resulting from a trial conviction. Thus, if conviction at trial would result in a 20-year sentence, defendant "A" would accept the government's offer of five years or less in prison in exchange for waiving various constitutional rights, whereas defendant "B" would not accept anything greater that a four-year prison sentence to accept the offer.

Here, Haxton was misled into believing he faced 20+ years in prison if convicted at trial, when he faced only 10+ years instead. As Haxton noted at the withdrawal hearing, a 10+ years sentence is significantly less risk than a 20+ years sentence, significant enough it

would have made a difference in his decision whether to accept the government's compromise offer or go to trial. 2RP 30-31. And the trial court acknowledged Haxton's claim in its written and oral rulings but concluded Haxton had failed to prove it sufficiently to constitute a manifest injustice. CP 100-01 (Conclusions of Law 2, 17-20); 2RP 77-78.

Affirmative misinformation about even just collateral consequences of a guilty plea can render a guilty plea unknowing and involuntary. A.N.J., 168 Wn.2d at 116; State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993). In A.N.J., a juvenile defendant pleaded guilty to a sex offense after being wrongly advised it could be purged from his record once he became an adult. 168 Wn.2d at 116. The Washington Supreme Court concluded such affirmative misinformation warranted allowing withdrawal of the guilty plea, even though it pertained to a collateral rather than a direct consequence. 168 Wn.2d at 117.

Similarly, in Stowe, it was reversible error not to allow withdrawal of a guilty plea when it was based on an affirmative misrepresentation by trial counsel regarding a collateral consequence, namely, whether pleading guilty would affect Stowe's military career. 71 Wn. App. at 188–89. This Court stated that although "defense counsel does not have an obligation to inform his client of all possible collateral consequences of a guilty plea," the question is "not whether counsel failed to inform defendant of collateral

consequences, but rather whether counsel's performance fell below the objective standard of reasonableness when he affirmatively misinformed Stowe of the collateral consequences of a guilty plea." 71 Wn. App. at 187. "'[D]ifferent considerations may arise when counsel affirmatively misinforms the defendant of the collateral consequences of a guilty plea.'" 71 Wn. App. at 187 (quoting In re Pers. Restraint of Peters, 50 Wn. App. 702, 707 n .3, 750 P.2d 643 (1988)).

This Court found Stowe's counsel's performance deficient because counsel (1) knew Stowe wanted to continue his military career, (2) affirmatively misinformed Stowe he could maintain his military career despite the plea, and (3) failed to conduct any research before inaccurately advising Stowe. 71 Wn. App. at 188. Because Stowe had specifically asked about his ability to continue his military career and relied on his attorney's misinformation in deciding to plead guilty, this Court concluded Stowe was prejudiced by his attorney's deficient performance. 71 Wn. App. at 188–89.

The situation here is similar to that in A.N.J. and Stowe. Defense counsel led Haxton to believe pleading guilty would avoid the prospect of a 20+ year prison term, when in fact Haxton only faced a 10+ year prison term if convicted on all three charges, a difference in consequences that would have changed Haxton's decision on whether to plead or go to trial. 2RP 29-31.

Unfortunately, the trial court conducted a subjective inquiry into whether Haxton would have pleaded guilty had he know the correct sentencing risks of a trial on all three charges versus a plea to only one. Instead of an objective inquiry into whether such a difference could have led a rational person not to plead guilty, the court supplanted its personal belief that the difference was not enough to have changed Haxton's plea, despite no evidence contradicting Haxton's claim that it would have. CP 100-01 (Conclusions of Law 2, 17-20); 2RP 29-31, 77-78. In other words, the trial court denied Haxton's motion to withdraw his guilty plea because it found he failed to prove actual prejudice. This was not the correct standard.

When a defendant challenges the constitutionality of his guilty plea prior to sentencing, "[t]he defendant need not establish a causal link between the misinformation and his decision to plead guilty." State v. Weyrich, 163 Wash. 2d 554, 557, 182 P.3d 965 (2008). Thus, Haxton was not required to show he would have gone to trial had he know the correct potential sentencing consequences, which is the standard the trial court erroneously applied. Instead, upon showing his plea was entered in the context of incorrect information about the potential sentencing consequences, he was entitled to withdraw the plea. Id.

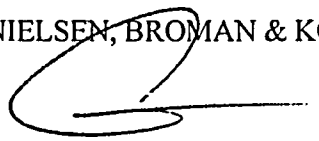
D. CONCLUSION

For the foregoing reasons, this Court should permit Haxton to withdraw his guilty plea.

DATED this 19th day of April 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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