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Nos. 62144-1-I (lead case)

~~61869-5-I~~

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TUROMNE WASHINGTON

Appellant.

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

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

The Honorable Charles Mertel

REPLY BRIEF OF APPELLANT JOSEPH OLIVE

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A. ARGUMENT IN REPLY

1. THERE IS A REASONABLE PROBABILITY THAT BUT FOR COUNSEL'S BAD ADVICE, THE OUTCOME OF PLEA BARGAINING WOULD HAVE BEEN DIFFERENT.

"It has long been recognized that the [Sixth Amendment] right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). An accused person has the constitutional right to the effective assistance of counsel at all critical stages of the prosecution, which includes plea bargaining. Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Because Olive's trial counsel, Stacy MacDonald, failed to apprise herself of the correct seriousness level and standard range of the charged offense, she misadvised Olive regarding the penalty he faced if convicted as charged and failed to vigorously pursue plea negotiations. CP 104, 113-14; RP 952.

The State concedes that MacDonald "performed deficiently by failing to advise [Olive] as to the correct standard range for the charges."¹ Br. Resp. at 16. But the State claims that Olive has

¹ The State has appropriately abandoned the trial prosecutor's contention that counsel's competent performance during trial vitiates Olive's ineffective assistance of counsel claim. See RP 977-78. As noted in the Brief of Appellant, the trial prosecutor's arguments on this point are not supported by case law. Br.

failed to show prejudice, asserting Olive must show that “but for” his attorney’s erroneous advice, the result would have been different.

Br. Resp. at 18. The thrust of the State’s argument is that the analysis should turn on whether a plea offer was actually conveyed.

Br. Resp. at 21-22.

The State mistakes the inquiry. In the context of plea negotiations, the defendant must show only a reasonable probability that “but for counsel’s bad advice the outcome of plea bargaining would have been different.” Perez v. Rosario, 459 F.3d 943, 958 (9th Cir. 2006) (emphasis added); see also Nunes v. Mueller, 350 F.3d 1045, 1054 n. 6 (9th Cir. 2003) (recognizing “Strickland’s^[2] discouragement of ‘mechanical rules’ that distract from an inquiry into the fundamental fairness of the proceeding”); and United States v. Gordon, 156 F.3d 376, 380 (2nd Cir. 1998).

In Gordon, the Second Circuit approved a grant of habeas relief to a petitioner whose trial lawyer grossly misadvised him about the sentencing consequences of a conviction and a possible

App. at 12; see also United States v. Blaylock, 20 F.3d 1458, 1466 (9th Cir. 1994) (“squarely reject[ing] the argument that a defendant can suffer no prejudice by standing a fair trial,” and noting, “the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial.”) (quoting United States v. Day, 969 F.2d 39, 44 (3rd Cir. 1992)).

² Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

guilty plea. 156 F.3d at 380. Similar to this case, the government contended on appeal that Gordon had failed to establish prejudice because the government had made no formal plea offer. Id.

Rejecting this argument, the Second Circuit observed:

[T]he district court noted that whether the government had made a formal plea offer was irrelevant because Gordon was nonetheless prejudiced because he did not have accurate information upon which to make his decision to pursue further plea negotiations or go to trial. We agree with this conclusion.

Id.

In Nunes, also a habeas corpus proceeding, the State contended that because a defendant has no constitutional right to a plea bargain, he was not deprived of any substantive or procedural right when, as a consequence of counsel's incorrect advice, Nunes did not plead guilty. Id. The Court disagreed. The Court reasoned that counsel's duty to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution" ensures "that the ultimate authority remains with the defendant 'to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'" Id. at 1053 (quoting Strickland, 466 U.S. at 694 and

Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)). Thus, the Court concluded that the right lost by Nunes “was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law.” Id. at 1053.

In this case, MacDonald submitted a declaration in which she avowed that the supervisor of the King County Prosecutor’s sexual assault told her the State would consider dismissing one of the charged counts if both Olive and his co-defendant pleaded guilty. CP 104, 113-14; RP 952. The trial prosecutor did not expressly disagree with counsel’s recollection, nor did he indicate that the State was unwilling to plea-bargain. He maintained, instead, “Any discussions we had about resolving the cases were non-binding, speculative, and informal.”

On appeal, the State pins its hopes on the absence of a formal, written plea offer. Br. Resp. at 18-22. The State glosses over the fact that plea negotiations never advanced beyond “speculative and informal” conversations because trial counsel incorrectly believed a plea bargain not worth pursuing. The State essentially asks this Court to assume that had MacDonald and Washington’s counsel, Justin Wolfe, performed effectively, plea

negotiations would have proceeded exactly as they did where counsel, ignorant of the correct sentencing consequences, negligently failed to represent their clients at this critical pre-trial stage.

But this is not the pertinent inquiry where counsel's inexcusable ignorance of the sentencing consequences of the offense is the putative reason no plea offer was formally tendered. Gordon, 156 F.3d at 380; see also United States v. Cronin, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (a trial is unfair where counsel's deficient performance results in the "complete denial of counsel" at a critical stage of the proceedings). Had MacDonald been functioning as the counsel guaranteed by the Sixth Amendment, she would have been aware of the harsh sentencing consequences that would follow convictions for the charged offenses and would have vigorously pursued a beneficial plea bargain. Cf., Nunes, 350 F.3d at 1054 (finding prejudice where petitioner's decision to reject a plea bargain was predicated on counsel's "wrong information and advice"). Both attorneys declared that if they had known their clients' true exposure, they would have striven for a resolution short of trial. CP 96-97. In short, Olive has established that but for his lawyer's deficient

performance, there is a reasonable probability that the outcome of plea bargaining would have been different.

The State's alternative argument is that Olive's declaration is "self-serving" and thus not credible. Br. Resp. at 24-25. The State cites State v. Cox, 109 Wn. App. 937, 38 P.3d 371 (2002), in support of this claim, but Cox presents very different facts and must be distinguished. Unlike Olive, Cox was not surprised by the revelation that he faced a sentence four times as long as the sentence his lawyer told him he would receive. Instead, Cox sought to relieve himself of mandatory community placement after he had already served his prison sentence. 109 Wn. App. at 941-42. This distinction alone is sufficient to establish prejudice:

[T]he fact that there is a great disparity between the actual maximum sentencing exposure under the Sentencing Guidelines and the sentence exposure represented by defendant's attorney provides sufficient objective evidence to establish a reasonable probability that the outcome of the proceedings would differ. . . [S]uch a disparity provides sufficient objective evidence-when combined with a petitioner's statement concerning his intentions-to support a finding of prejudice under Strickland.

Gordon, 156 F.3d at 381.

Moreover, the State's reliance on Cox is misplaced in light of recent Washington Supreme Court decisions disapproving such

post hoc efforts to divine the defendant's motivations for deciding whether to plead guilty or go trial. See State v. Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004) (rejecting test that inquires into materiality of misadvisement in defendant's subjective decision to plead guilty); accord State v. Weyrich, 163 Wn.2d 554, 557, 182 P.2d 965 (2008).

Washington aptly observes the State "could have averred – but did not – that this case was inappropriate for plea bargaining." Washington Reply at 1. Both the fact that a plea was possible but not forthcoming solely as a consequence of counsel's ignorance, and the gross discrepancy between the correct standard range and the four to twelve month sentence MacDonald told Olive he faced if convicted, establish a "reasonable probability" that the outcome of the proceeding would differ. Gordon, 156 F.3d at 381. This Court should conclude Olive has shown he was prejudiced by counsel's deficient performance.

2. THE FAILURE TO GIVE A *PETRICH*
INSTRUCTION DEPRIVED OLIVE HIS RIGHT TO
A UNANIMOUS JURY.

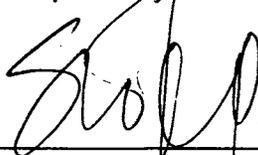
Pursuant to RAP 10.1(g), Olive adopts and incorporates by reference co-appellant Washington's argument 2, Washington Reply at 5-9.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Brief of Appellant, this Court should conclude that Joseph Olive's trial attorney's deficient performance prejudiced him, requiring reversal of his convictions and remand for a new trial.

DATED this 12th day of March, 2010.

Respectfully submitted:



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