

No. 64810-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN ALEXANDER,

Appellant.

2010 SEP 15 PM 4:55
COURT OF APPEALS
STATE OF WASHINGTON
FILED
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Cheryl Carey

APPELLANT'S OPENING BRIEF

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WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENT OF ERROR

At sentencing following the trial court's entry of Mr. Alexander's plea of guilty, the court erred by failing to inquire into factual claims made by the defendant that he was provided ineffective assistance of counsel in connection with the entry of his plea of guilty.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

At his sentencing hearing, after Mr. Alexander's standard range was determined to be 15-20 months and after the prosecutor recommended, and the court imposed, 20 months, Mr. Alexander argued to the trial court that his defense counsel had informed him that the prosecutor would recommend that he receive the low end of the standard range.

Did the trial court err in imposing sentence without conducting an adequate inquiry into the defendant's factual contentions that his attorney had misadvised him?

C. STATEMENT OF THE CASE

According to the State's allegations, Mr. Alexander was subject to an order prohibiting contact with Jennifer Kasama, issued May 13, 2005 by the King County Superior Court. CP 2. He

was charged by information with two counts: second degree assault and violation of the protection order, acts allegedly committed on July 30, 2009. CP 1-6.

Mr. Alexander entered a guilty plea to the court order violation, charged per RCW 26.50.110(1)(4), and (5), on November 30, 2009, based on an agreed offender score of 4 and a resultant standard range of 22-29 months, and an agreed recommendation by the State of 22 months, the low end of the standard range. CP 7-29. The trial court dismissed the charge of second degree assault at the State's request. 11/30/09RP at 6. The defendant's offender score was agreed except for the disputed question whether he was on community custody at the time of the offense. CP 7.

At sentencing, it was determined that Mr. Alexander was not subject to an additional community custody point, and that his offender score was therefore 3, with a standard range of 15-20 months incarceration. 12/4/09RP at 14-15. Mr. Alexander was sentenced a term of 20 months incarceration, representing the "high end" of the 15-20 month standard range. CP 30-38.

Mr. Alexander appeals. CP 39. It is his contention that the trial court was required to inquire into his factual assertion and determine if new counsel should be appointed.

D. ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO INQUIRE INTO MR. ALEXANDER'S CLAIM THAT HIS ATTORNEY MISADVISED HIM.

At his sentencing hearing, after Mr. Alexander's standard range was determined to be 15-20 months and after the prosecutor recommended, and the court imposed, 20 months, Mr. Alexander argued to the trial court that his defense counsel had informed him that under the plea deal, the prosecutor would recommend that he receive the low end of the standard range. 12/4/09RP at 24.

Mr. Alexander contends that the trial court erred in imposing sentence without conducting an adequate inquiry into the defendant's factual contention, at sentencing, that his attorney had misadvised him with regard to the State's recommendation. He contends his attorney was deficient.

The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of trial. U.S. Const. amend. 6; Const. art. 1, §§ 3, 22; State v.

Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984). To obtain relief based on ineffective assistance of counsel, an accused person must establish that (1) his counsel's performance was deficient and (2) his counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687; Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000).

Under the first prong of the Strickland test, counsel's performance is deficient where it "[falls] below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 229-30. Counsel in a criminal case must (1) discuss plea negotiations with her client and (2) provide her client with sufficient information to make an informed decision on whether or not to plead guilty. Personal Restraint of McCready, 100 Wn. App. 259, 263, 996 P.2d 658 (2000).

It is true that as a rule, a defendant's wholly conclusory claim of ineffective assistance or breakdown in communications is insufficient to require the appointment of substitute criminal trial

counsel. State v. Rosborough, 62 Wn. App. 341, 346-47, 814 P.2d 679 (1991).

However, the trial court is required to conduct a thorough examination of factual circumstances raised by the defendant to determine whether new counsel should be appointed. State v. Dougherty, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982); Rosborough, 62 Wn. App. at 346-47.

This rule has been applied where defendants made factual allegations including: a breach of the attorney-client relationship by passing confidential information to the prosecutor, Dougherty, 33 Wn. App. at 467-68; failing to call certain witnesses, Rosborough, 62 Wn. App. at 347; State v. Allen, 57 Wn. App. 134, 141, 787 P.2d 566 (1990); or failing to investigate viable defenses. State v. Garcia, 57 Wn. App. 927, 933, 791 P.2d 244 (1990).

Mr. Alexander contends that the trial court in this case failed in its duty to conduct a thorough examination to determine whether substitute counsel should be appointed. In his complaints to the trial court, Mr. Alexander noted that counsel had informed him that he would receive the “low end” of the standard range, whether or

not his ultimate offender score did or did not contain the additional point for being on community custody. 12/4/09RP at 24.

Mr. Alexander contends that genuine factual issues were raised by his contentions. He contends that where the record raises significant factual issues, as here, it was an abuse of discretion by the trial court to not, sua sponte, appoint new counsel without conducting an even minimal examination into the defendant's concerns. State v. Young, 62 Wn. App. 895, 907-08, 802 P.2d 829 (1991).

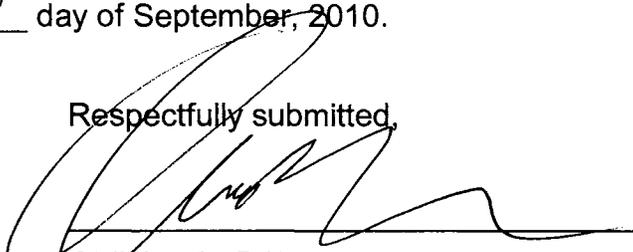
Mr. Alexander contends that this Court should remand to determine whether he was misadvised in connection with the entry of his plea of guilty.

E. CONCLUSION

For the reasons stated, Mr. Alexander submits this Court must remand for a hearing to determine if his counsel provided ineffective assistance of counsel in connection with his entry of his plea of guilty.

DATED this 15 day of September, 2010.

Respectfully submitted,



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Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64810-1-I
v.)	
)	
JUSTIN ALEXANDER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT (WITH CORRECTED TABLES)** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> JUSTIN ALEXANDER (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	() () (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF SEPTEMBER, 2010.

X _____ 

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