

NO. 70651-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID JONES, JR.,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A pre-sentencing allegation of ineffective assistance of counsel at the guilty plea stage creates a conflict of interest only when the allegation has sufficient merit to warrant a hearing on a motion to withdraw the plea. In this case, when defense counsel moved to withdraw due to the defendant's desire to raise a claim of ineffective assistance of counsel, the trial court inquired into the basis for the defendant's claim and found insufficient merit to warrant a hearing. Did the trial court properly exercise its discretion in denying the motion to withdraw?

B. STATEMENT OF THE CASE

In January of 2012, Officer Diamond of the Seattle Police Department observed the defendant, David Jones, Jr., make a sale of what appeared to be crack cocaine in downtown Seattle. CP 20. The defendant then gave the money and the remaining cocaine to a female accomplice. CP 20. Jones and the female were arrested, and a search of the female revealed 5.4 grams of crack cocaine and \$324 in cash. CP 20.

The State charged Jones with one count of Violation of the Uniform Controlled Substances Act – Possession of Cocaine with

Intent to Deliver. CP 1. This charge carried a standard sentencing range of 60 to 120 months. 2RP 24; CP 23. Pursuant to plea negotiations, the State amended the charge to Criminal Solicitation to Commit a Violation of the Uniform Controlled Substances Act – Delivery of Cocaine, and Jones pled guilty to the amended charge in July of 2012. CP 7-19.

The plea agreement stated that “[t]he parties agree that neither party will seek an exceptional sentence, and the defendant agrees that he or she will not request a first-time offender waiver, or a drug offender or parenting sentencing alternative” (DOSA). CP 22. This language was underlined by hand on the form, and the form was signed by Jones on the day he entered his plea. CP 22.

During the plea colloquy, the prosecutor asked Jones if he understood that “you have agreed that you will not ask for an exceptional sentence or a DOSA” Jones indicated that he understood. 1RP¹ 8. Moments later in the colloquy, in going over the fact that the sentencing judge could sentence Jones to a DOSA if he qualified, the prosecutor again reiterated that “the parties have

¹ With the addition of the supplemental report of proceedings, the report of proceedings now consists of two volumes. They are referred to in this brief as follows: 1RP – July 25, 2012 (supplemental report of proceedings); and 2RP – June 7, 2013, June 28, 2013, and July 12, 2013 (referred to as “RP” in the Brief of Appellant).

agreed not to recommend a DOSA,” and Jones again indicated that he understood. 1RP 8.

When asked at the end of the prosecutor’s colloquy whether he had any questions before entering his plea, Jones indicated that he did not. 1RP 11. He was later asked again by the judge, and again indicated that he did not have any questions. 1RP 14. The trial court accepted the guilty plea after finding that Jones was making a knowing, voluntary, and intelligent waiver of his rights. 1RP 14. Jones was represented at the plea stage by Miguel Duran of the Northwest Defenders Association (NDA). 1RP 3; CP 7-17, 46.

Jones failed to appear for his scheduled sentencing, and the court issued a bench warrant. CP 45. Jones was apprehended on the warrant approximately ten months later. CP 56. During the interim, Duran withdrew as counsel and left the Northwest Defenders Association. CP 46; 2RP 4. At the new sentencing hearing on June 7, 2013, Jones was represented by Kari Boyum of the Northwest Defenders Association. CP 47; 2RP 1.

At the beginning of the sentencing hearing, Boyum moved to withdraw, stating that Jones was interested in pursuing a motion to withdraw his guilty plea on the basis of ineffective assistance of

counsel by Duran. 2RP 1. Boyum expressed concern that she had a conflict of interest due to Duran being a former colleague. 2RP 4.

When the trial court asked what the basis was for the ineffective assistance claim, Boyum conferred with Jones and stated that the issue was “whether or not Mr. Duran properly advised Mr. Jones as to the nature of the defense’s sentencing recommendation – what the defense was bound to per the plea agreement, and whether or not Mr. Duran basically made that known to Mr. Jones in a way that he understood it.”² 2RP 3. When the court asked Jones directly what his complaint was, Jones stated the following:

Well when I originally, you know, talked to him and then I came in before you, we was, you know, basically talking about the DOSA stuff. And he was like—he told me that the prosecutor wasn’t, you know, in agreement with me having it. So I asked him, you know, what does that mean. And then he was like oh, well, you know, you can’t ask for, you know, treatment, you know, which is like the inpatient one year or whatever. And I was like okay fine. But I was like, you know, I need DOSA, you know what I’m saying? Because I was in DOSA at the time. And before I had – well – well I mean I don’t even know what I could say or can’t say. I don’t – this is just it. It’s just confusing.

² The Honorable Judge Linde presided over both the guilty plea hearing and the sentencing hearing(s).

I mean, you know, he told me something different basically, you know. And so when it all came about I guess is not correct. . . .

2RP 7.

Defense counsel then stepped in and stated, “My understanding is that he thought he could ask for DOSA and the State would oppose DOSA, but he couldn’t ask for treatment being inpatient or something he set up.” The trial court observed that this was not consistent with what it had understood Jones to be saying.

2RP 7. The court asked Jones to clarify, and Jones stated:

As far as like – I was going to ask for like inpatient, you know, like on the streets, you know, check into like inpatient and that kind of treatment. I didn’t know he was talking about the other stuff. And he told me that, you know, we can – he said that we can, you know, talk around it, you know, and things like that. But I guess that wasn’t true. So that’s what he verbally told me.

2RP 7-8. The court denied the motion “provisionally” and continued the sentencing to June 28, 2013, to allow defense counsel to present more information in support of the motion. 2RP 8-9; CP 42.

At the rescheduled sentencing hearing, Boyum renewed the motion to withdraw and filed a “Defense Memorandum on RPC 1.10,” summarizing the facts and arguing that she had a conflict of interest. CP 50-55. In summarizing the statements Jones had made to the trial court, Boyum described them as an

assertion that Jones “believed he could pursue a Drug Offender Sentencing Alternative (DOSA) based upon his conversations with Mr. Duran.” CP 51. At no point did Boyum or Jones represent that Duran had affirmatively told Jones that the plea agreement allowed him to request a DOSA.

After reviewing the cases cited by both the State and the defense, the court found that the facts alleged by Jones did not warrant a hearing on a motion to withdraw his guilty plea or otherwise establish a conflict of interest, and the court denied the motion to withdraw. 2RP 13-17; CP 43-44.³ Sentencing was then continued again to allow the defense to prepare a pre-sentencing report. 2RP 18-19.

Jones was finally sentenced on July 12, 2013. The State’s sentencing recommendation had increased from 52 months to 60 months as a result of Jones’ failure to appear for his original sentencing. 2RP 21-22. This increase was allowed under the terms of the plea agreement, which stated that “[t]he State’s recommendation will increase in severity if the defendant . . . fails to appear for sentencing or violates the conditions of release.” CP 22.

³ The court’s oral ruling was later memorialized in a written order dated July 8, 2013. CP 43-44.

Jones asserted at sentencing that, as a result of the change in the State's recommendation, he was now allowed to change his sentencing recommendation as well, and requested that the court impose a DOSA. 2RP 22-26. The State indicated that it viewed this request as a breach of the plea agreement, but declined to seek any remedy. 2RP 23. The court declined to impose a DOSA, citing Jones' failure to appear for the original sentencing hearing and the fact that he had been on a DOSA when he committed the current offense. 2RP 31-32. The court instead imposed a standard-range sentence of 54 months in prison. 2RP 32; CP 32-36. Jones timely appealed the denial of the motion to withdraw. CP 41.

C. ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW.

Jones contends that the trial court erred in denying defense counsel Kari Boyum's motion to withdraw, under the theory that Boyum had a conflict of interest once Jones challenged the effectiveness of Miguel Duran's prior representation. This claim should be rejected. The trial court's inquiry revealed no factual

basis to support the claim that Duran had rendered ineffective assistance of counsel, and thus there was no conflict of interest requiring Boyum to withdraw.⁴ The trial court therefore properly exercised its discretion in denying Boyum's motion to withdraw. In any event, any error was harmless.

A trial court's denial of a motion to withdraw as counsel or withdraw a guilty plea is reviewed for abuse of discretion.

State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001);

State v. Rosborough, 62 Wn. App. 341, 350, 814 P.2d 679 (1991).

A trial court abuses its discretion when it bases its decision on untenable grounds or reasons, or when its decision is manifestly unreasonable. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

When a motion to withdraw or motion for new counsel is made, the trial court should conduct an inquiry to determine the factual basis for the motion. State v. Lopez, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995), disapproved of on other grounds by State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998). The motion should be granted when the defendant shows good cause to warrant

⁴ The State assumes for the sake of argument that Boyum would have had an imputed conflict of interest under RPC 1.10(b) had there been an actual conflict of interest between Jones and Duran.

substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown of communication between attorney and defendant. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). When evaluating whether a defendant has shown good cause, trial courts consider the reasons given for the defendant's dissatisfaction, the trial court's own evaluation of counsel, and the effect of a substitution on the scheduled proceedings. State v. Schaller, 143 Wn. App. 258, 270, 177 P.3d 1139 (2007); Rosborough, 62 Wn. App. at 346.

a. A Meritless Claim Of Ineffective Assistance Does Not Create A Conflict Of Interest.

When a defendant alleges before sentencing that trial counsel was ineffective at the guilty plea stage, that allegation does not automatically create a conflict of interest. Rosborough, 62 Wn. App. at 346. First, the trial court must inquire into the basis for the defendant's claim of ineffective assistance. Lopez, 79 Wn. App. at 767. If the court finds sufficient merit to warrant a hearing on a motion to withdraw the plea, it is at that point that a conflict arises, as the defendant's attorney would become a witness at the hearing. See State v. Harell, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996).

When the trial court inquires into the basis for a defendant's assertion of ineffective assistance and finds no merit in the claim, the court is not required to appoint a new attorney to engage in a baseless hearing. See State v. Davis, 125 Wn. App. 59, 68, 104 P.3d 11 (2004); State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684 (1987). If courts were required to do so, a defendant could force the appointment of new counsel anytime he pleased, just by alleging ineffective assistance of counsel. Stark, 48 Wn. App. at 253.

b. The Trial Court Properly Exercised Its Discretion In Finding That Jones' Claim Of Ineffective Assistance Of Counsel Was Without Merit.

The Sixth Amendment to the United States Constitution and Article 1, Section 22 of the Washington State Constitution guarantee a criminal defendant's right to the effective assistance of counsel. In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). A defendant who claims to have received ineffective assistance of counsel must show that (1) defense counsel's representation was deficient and (2) that the deficient representation prejudiced the defendant. Id. at 672-73 (citing

Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). A claim of ineffective assistance of counsel fails if either prong of the Strickland test is not met. Id. at 673. Here, the facts alleged by Jones as the basis for his claim of ineffective assistance of counsel failed to establish either prong of the test.

- i. Jones did not allege facts establishing deficient performance.

An attorney's representation is deficient if it falls below an objective standard of reasonableness. Davis, 152 Wn.2d at 672-67. The record shows that Jones did not clearly allege to the trial court that he was affirmatively misadvised by Duran, as opposed to simply having suffered a subjective misunderstanding. When the trial court initially asked Boyum what Jones' complaint was with respect to Duran's representation, Boyum conferred with Jones and then stated that the issue was whether Duran had explained the plea agreement to Jones "in [such] a way that [Jones] understood it." 2RP 3.

When the trial court inquired of Jones himself as to what his complaint was, Jones stated that he had talked to Duran about the

possibility of a DOSA, and Duran “told me that the prosecutor wasn’t, you know, in agreement with me having it. So I asked him, you know, what does that mean. And then he was like oh, well, you know, you can’t ask for, you know, treatment” 2RP 7.

Boyum then stepped in and expressed her understanding that Jones had believed he could ask for a DOSA, but the trial court noted that that was not consistent with what Jones had just said. 2RP 7. Indeed, Jones’ account of his conversation with Duran indicated that when talking about a DOSA, Duran had (correctly) communicated that the State did not want Jones to have a DOSA. When Jones asked Duran what that meant, Duran had (correctly) explained that it meant he could not ask for treatment.⁵ 2RP 7.

Boyum subsequently submitted a memorandum in support of her motion to withdraw in which she described the statements Jones had made to the trial court as an assertion that Jones “believed he could pursue a Drug Offender Sentencing Alternative (DOSA) based upon his conversations with Mr. Duran.” CP 51. At no time did Jones or defense counsel explicitly claim that Duran had told Jones that he could ask for a DOSA. Instead, their

⁵ A DOSA in Jones’ case would have involved substance abuse treatment while in prison and additional treatment while on community custody. RCW 9.94A.662.

representations regarding what Duran had told Jones alleged merely a subjective misunderstanding on Jones' part.

Because neither Jones nor Boyum ever asserted to the trial court that Duran had affirmatively misadvised Jones that he could request a DOSA, and given Jones' admission that he remembered Duran telling him that he could not ask for treatment, the trial court did not have good cause to believe that the prong of deficient performance could be established.

- ii. Even if Jones could establish deficient performance, he did not allege facts establishing prejudice.

An attorney's deficient performance prejudices a defendant if there is a reasonable probability that the result would have been different if not for the attorney's errors. Davis, 152 Wn.2d at 672-73. A reasonable probability is one "sufficient to undermine confidence in the outcome." Id. In order to establish prejudice from counsel's deficient performance at the plea stage, a defendant must show a reasonable probability that he otherwise would not have pled guilty and would have insisted on going to trial. In re Pers. Restraint of Riley, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993).

At no point did Jones claim that he would not have pled guilty if not for the alleged error by Duran. Indeed, such a claim would have little credibility. Even if Jones had originally been misinformed that the proposed plea agreement allowed him to request a DOSA, the mistake was cured before Jones formally entered his plea. Not only was the portion of the plea agreement stating that Jones agreed not to request a DOSA underlined by hand to draw attention to it, but twice during the plea colloquy Jones affirmatively indicated that he understood that he was agreeing not to request a DOSA. CP 22; 1RP 8.

Given the lack of any claim that Jones would not have pled guilty but for the alleged deficient representation, and given the evidence that Jones knew he was agreeing not to request a DOSA at the time he entered his guilty plea, there were no facts before the trial court to establish that Jones had been prejudiced by the allegedly deficient representation.

In arguing that the facts alleged to the trial court were sufficient to warrant the appointment of new counsel, Jones relies on a series of cases in which guilty pleas were held to be invalid when the defendant was affirmatively misadvised about a consequence of his plea and the error was not corrected until after

the plea was entered. State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) (allowing withdrawal of plea where defendant was affirmatively misinformed that juvenile sex offense could be removed from his record and error was not discovered until after plea entered); In re Pers. Restraint of Quinn, 154 Wn. App. 816, 226 P.3d 208 (2010) (allowing withdrawal of plea where defendant was affirmatively misinformed about length of mandatory community custody and error was not discovered until after plea entered). Given the factual differences in his own case, Jones' reliance is misplaced.

Tellingly, Jones offers absolutely no authority for the contention that an allegation of erroneous advice by trial counsel (let alone one so nebulous as was made in this case) is sufficient to warrant appointment of new counsel when the alleged misinformation was corrected prior to the entry of the guilty plea.

Because Jones did not allege facts establishing either deficient representation or prejudice, Jones' claim of ineffective assistance of counsel was without merit, and the trial court properly exercised its discretion in finding that there was no conflict of interest and denying defense counsel's motion to withdraw.

c. Any Error Was Harmless.

Even if this Court finds that the trial court abused its discretion in denying the motion to withdraw without additional inquiry, the error does not warrant remand for appointment of new counsel. The denial of a defendant's request for new appointed counsel is harmless unless counsel actually provided ineffective assistance of counsel. Lopez, 79 Wn. App. at 764-67.

The record in this case establishes that Jones did not actually suffer ineffective assistance of counsel. As discussed above, there is no evidence that Duran gave Jones any incorrect information that would constitute deficient performance. Even if there had been deficient performance, Jones did not suffer any prejudice from it, as he was correctly informed of the terms of his plea agreement multiple times immediately prior to the entry of his plea. 1RP 8.

Furthermore, when Jones was finally sentenced, *he did in fact request a DOSA*, and the State sought no remedy for this breach of the plea agreement. 2RP 23-26. Thus, even if Jones had entered his plea still believing that he could request a DOSA despite multiple warnings to the contrary during the plea colloquy, he suffered no prejudice from that erroneous belief, as he ended up

in exactly the same position he would have been in had such a belief been correct.

The absence of any prejudice establishes that Jones did not receive ineffective assistance of counsel, and any error in denying Jones new counsel was therefore harmless.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the trial court's denial of defense counsel's motion to withdraw.

DATED this 10th day of April, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher H. Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. DAVID JONES, JR., Cause No. 70651-9 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 10 day of April, 2014.

A handwritten signature in black ink, appearing to be "Christopher H. Gibson", written over a horizontal line.

Name
Done in Seattle, Washington