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Division I  
State of Washington

NO. 73111-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

BAZEN S. KASSAHUN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES D. CAYCE

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	6
1. THE TRIAL COURT PROPERLY DENIED KASSAHUN’S MOTION TO DISMISS THE CHARGE OF FELONY DRIVING UNDER THE INFLUENCE .....	6
a. That Kassahun Was Charged With Felony Driving Under The Influence Was Not A Direct Consequence Of His Prior Guilty Pleas To DUI Such That Due Process Required That He Be Warned When He Entered The Pleas.....	7
b. Kassahun Cannot Establish Ineffective Assistance Of Counsel Relating To Immigration Advice At His Predicate Guilty Pleas To Misdemeanor DUI .....	12
D. <u>CONCLUSION</u> .....	18

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Boykin v. Alabama, 395 U.S. 238,  
89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)..... 9

Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364  
(4th Cir.), cert. denied, 414 U.S. 1005,  
94 S. Ct. 362, 38 L. Ed. 2d 241 (1973)..... 9

McMann v. Richardson, 397 U.S. 759,  
90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)..... 13

Padilla v. Kentucky, 559 U.S. 356,  
130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)..... 12, 13, 16

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 13, 17

Washington State:

DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122,  
372 P.2d 193 (1962)..... 17

In re Ness, 70 Wn. App. 817,  
855 P.2d 1191 (1993)..... 10

In re Riley, 122 Wn.2d 772,  
863 P.2d 554 (1993)..... 13

In re Yung-Cheng Tsai, 183 Wn.2d 91,  
351 P.3d 138 (2015)..... 13, 17

State v. Barton, 93 Wn.2d 301,  
609 P.2d 1353 (1980)..... 9

State v. Burke, 163 Wn.2d 204,  
181 P.3d 1 (2008)..... 15

<u>State v. Chambers</u> , 157 Wn. App. 465, 237 P.3d 352 (2010), <u>rev. denied</u> , 170 Wn.2d 1031 (2011).....	8
<u>State v. Chervenell</u> , 28 Wn. App. 805, 626 P.2d 530 (1981), <u>rev'd on other grounds</u> , 99 Wn.2d 309, 662 P.2d 836 (1983).....	11
<u>State v. Cienfuegos</u> , 144 Wn.2d 222, 25 P.3d 1011 (2001).....	13
<u>State v. Davis</u> , 29 Wn. App. 691, 630 P.2d 938 (1981).....	11
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003).....	8
<u>State v. Heaps</u> , 36 Wn. App. 718, 677 P.2d 1141 (1984).....	11
<u>State v. Holsworth</u> , 93 Wn.2d 148, 607 P.2d 845 (1980).....	10, 11
<u>State v. Jacobson</u> , 33 Wn. App. 529, 656 P.2d 1103 (1982).....	11
<u>State v. Johnson</u> , 38 Wn. App. 113, 684 P.2d 775 (1984).....	11
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	14
<u>State v. LaBeur</u> , 33 Wn. App. 762, 657 P.2d 802 (1983).....	11
<u>State v. Logan</u> , 102 Wn. App. 907, 10 P.3d 504 (2000).....	17
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	15
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	15

<u>State v. Olivas</u> , 122 Wn.2d 73, 856 P.2d 1076 (1993).....	9
<u>State v. Ross</u> , 129 Wn.2d 279, 916 P.2d 405 (1996).....	9
<u>State v. Roswell</u> , 165 Wn.2d 186, 196 P.3d 705 (2008).....	8
<u>State v. Sandoval</u> , 171 Wn.2d 163, 249 P.3d 1015 (2011).....	12, 13, 14, 15, 16, 17
<u>State v. Serr</u> , 35 Wn. App. 5, 664 P.2d 1301 (1983).....	11
<u>State v. Ward</u> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	9

Constitutional Provisions

Federal:

U.S. CONST. amend. VI.....	1, 12, 13
----------------------------	-----------

Washington State:

CONST. art. I, § 22 .....	12
---------------------------	----

Statutes

Washington State:

LAWS OF 2006, ch. 73, § 1 (eff. July 1, 2007).....	8
RCW 46.61.502 .....	7, 8

Rules and Regulations

Washington State:

RAP 2.5..... 14

A. ISSUES

1. Elevation of Driving Under the Influence (DUI) from a gross misdemeanor to a felony requires proof that the defendant was convicted of four predicate DUIs within 10 years. Due process requires that a defendant be advised of only the direct, not indirect, consequences of entering a guilty plea. When pleading guilty to the predicate misdemeanor DUIs, Kassahun was not advised that if he continued to drive while intoxicated and was repeatedly apprehended and prosecuted he might at some point face a felony charge. Felony DUI did not even exist as a crime when Kassahun pled guilty to two predicate DUIs. Since the felony DUI charge was not a direct result of the guilty pleas to misdemeanor DUI, did the trial court properly deny Kassahun's motion to dismiss the felony charge that alleged the predicate convictions were constitutionally invalid?

2. The Sixth Amendment right to counsel requires that appropriate immigration advice be given to a noncitizen defendant at the entry of a guilty plea. At his motion to dismiss the felony DUI charge, Kassahun admitted that there were no deportation consequences associated with his pleading guilty to the predicate gross misdemeanor DUIs. Without authority, Kassahun argues that at the time of his guilty pleas to the predicate DUIs, he was entitled to receive advice relating to potential immigration consequences that might result if he continued to be charged

and convicted of DUI and one day sustained a felony conviction. Felony DUI did not even exist as a crime when Kassahun pled guilty to two predicate DUIs. Did the trial court properly deny Kassahun's motion to dismiss the felony DUI charge that alleged the predicate convictions were constitutionally invalid?

B. STATEMENT OF THE CASE

Before being charged with Felony Driving Under the Influence (DUI), Bazen Kassahun had four prior convictions for gross misdemeanor DUI. Two of the convictions resulted from guilty pleas; the two other convictions resulted from a revoked deferred prosecution.

On February 27, 2006, Kassahun entered guilty pleas to driving under the influence in two separate cases: King County District Court Cause Nos. C552177 and C553364 (incident dates of January 15, 2005, and February 4, 2005, respectively). CP 108-11, 112-15. The statement of defendant on plea of guilty in each case included an admonition relating to potential immigration consequences:

6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

...

(f) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from

admission to the United States, or denial of naturalization pursuant to the laws of the United States.

CP 109, 113.

On July 21, 2007, Kassahun entered a deferred prosecution covering two other driving under the influence cases in King County District Court Cause Nos. C00535049 and C00553004 (incident dates of October 13, 2004, and October 11, 2004, respectively). CP 119-21. In entering the deferred prosecution, Kassahun waived his right to trial by jury and stipulated that if the agreement were revoked the trial court would determine his guilt based on the police reports. Id. The deferred prosecution was, in fact, revoked, and Kassahun was found guilty of driving under the influence and sentenced under the separate causes. CP 131-32, 149-50.

On February 20, 2014, Normandy Park police officer S. Hayes observed a vehicle driven by Kassahun swerving and crossing the double yellow line while traveling approximately 75 miles per hour in a 45 mile-per-hour zone. CP 5. The officer stopped the car and smelled the odor of intoxicants coming from Kassahun. CP 6. Hayes also saw in plain view a baggie that he believed contained either crack cocaine or methamphetamine. Id. Kassahun tried to conceal the baggie by shoving it down between the driver's seat and center console. Id. Then, despite

being ordered by Hayes to show his hands, Kassahun kept his right hand concealed under the seat and appeared to be reaching for something. Id. Concerned for his safety, Hayes tried to remove Kassahun from the car, but Kassahun struggled and attempted to hit Hayes with his elbows. Id. After his arrest, Kassahun refused to take a breathalyzer. Id. During the encounter he gave Hayes a false name. Id. In a subsequent search of Kassahun's car officers found crack cocaine and a .38 caliber revolver. CP 9.

Kassahun was charged with:

Count 1: Felony Driving Under the Influence

Count 2: Unlawful Possession of a Firearm in the Second Degree

Count 3: Violation of the Uniform Controlled Substances Act

Count 4: Driving While License Suspended/Revoked in the First Degree

Count 5: Violation of Ignition Interlock

Count 6: Making a False or Misleading Statement to a Public Servant

Count 7: Resisting Arrest

CP 173-74.

Kassahun pled guilty to the felonies charged in count 2 (CP 176-189) and count 3 (CP 23-36), and to the non-felonies charged in counts 4-7. CP 51-59.

Regarding count 1, Felony Driving Under the Influence, Kassahun filed a pretrial motion to dismiss. In support of his motion, Kassahun filed a declaration in which he swore under penalty of perjury, regarding his four prior DUI convictions, that: "In none of those offenses was I advised of possible immigration consequences of a criminal conviction or that a conviction could be used to enhance the penalty for a DUI offense to a felony." CP 17. In arguing the motion to dismiss, when asked by the trial court about immigration consequences of DUI, Kassahun's attorney admitted that DUI is not a deportable offense:

... your Honor, typically a first offense or subsequent DUI offense is not a deportable offense. But, again, because of the elevation to a felony, that changes the punishment, the penalty, and as a result can result in a deportable offense, your Honor.

1RP<sup>1</sup> 11.

The trial court denied Kassahun's motion to dismiss the charge of Felony Driving Under the Influence. 1RP 15. After his motion was denied, Kassahun waived his right to trial by jury on that charge and submitted his case to the trial court based on a stipulated record. CP 60-62. The trial court found Kassahun guilty of Felony Driving Under the Influence. 2RP 6.

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<sup>1</sup> The verbatim report of trial court proceedings consists of three volumes, which will be referred to in this brief as follows: 1RP (10/21/14); 2RP (10/22/14); 3RP (1/20/15).

Kassahun was sentenced to 60 months in prison on count 1, 60 months in prison on count 2, and 24 months in prison on count 3, with the sentences to run concurrently. CP 209. He also received lesser sentences on the four non-felonies, counts 4-7, which were ordered to run concurrently with counts 1-3. CP 215-17.

By stipulating to the trial court's use of the record in determining his guilt on the charge of Felony Driving Under the Influence, Kassahun reserved the right to appeal the court's denial of his motion to dismiss that charge.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED KASSAHUN'S MOTION TO DISMISS THE CHARGE OF FELONY DRIVING UNDER THE INFLUENCE.

Kassahun claims that the trial court erred by denying his motion to dismiss the felony charge of driving under the influence, because he was never warned when pleading guilty to his prior misdemeanor DUI convictions that those offenses might later be predicates to a felony charge. He also claims that his lawyer should have informed him of potential immigration consequences of one day being convicted of a felony DUI before he pled guilty to each misdemeanor DUI.

Both Kassahun arguments lack merit. First, due process requires only that a defendant be warned of the direct consequences of a plea; that

a defendant might one day be charged with a felony is not a direct consequence of pleading guilty to a predicate offense. Second, a lawyer need advise a client only as to the immigration consequences of the pending case.

- a. That Kassahun Was Charged With Felony Driving Under The Influence Was Not A Direct Consequence Of His Prior Guilty Pleas To DUI Such That Due Process Required That He Be Warned When He Entered The Pleas.

A driver who has been convicted four times in a ten year period with driving under the influence, a gross misdemeanor, may be charged with a felony. RCW 46.61.502, Driving Under the Influence, provides in pertinent part:

- (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
  - (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
  - (b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or
  - (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or
  - (d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

....

(5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

(6) It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if:

(a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055;

....

RCW.46.61.502(6), which elevates a gross misdemeanor to a felony, took effect on July 1, 2007.<sup>2</sup> State v. Chambers, 157 Wn. App. 465, 467, n.1, 237 P.3d 352 (2010), rev. denied, 170 Wn.2d 1031 (2011).

Proof of the prior offenses is an essential element of the felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Under RCW 46.61.502(6), the predicate DUI convictions do not merely increase the sentence, they actually alter the crime that may be charged. Chambers, 157 Wn. App. 475 (citing Roswell, 165 Wn.2d at 192). Therefore, the existence of the prior convictions must be determined by the factfinder, but the legal validity of the convictions is a matter of law to be determined by the trial court. Chambers, 157 Wn. App. at 481. Questions of law are reviewed de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Kassahun claims that his prior DUI convictions cannot be used as predicate offenses to elevate the current DUI to a felony. He argues that

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<sup>2</sup> LAWS OF 2006, ch. 73, § 1 (eff. July 1, 2007).

the State was not entitled to rely on the convictions because at the time of his pleas to the gross misdemeanor DUIs due process required that he be advised that multiple DUIs could one day result in a felony charge. His argument is without merit.

Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980) (citing Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). A defendant need not be informed of all possible consequences of a plea but rather only direct consequences. Barton, 93 Wn.2d at 305. A direct consequence is one that has “a definite, immediate and largely automatic effect on the range of the defendant’s punishment’.” Barton, 93 Wn.2d at 305 (quoting Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir.), cert. denied, 414 U.S. 1005, 94 S. Ct. 362, 38 L. Ed. 2d 241 (1973)). For a consequence of a defendant’s plea to be direct “the effect on the range of the defendant’s punishment must be immediate.” State v. Ross, 129 Wn.2d 279, 285, 916 P.2d 405 (1996) (quoting State v. Ward, 123 Wn.2d 488, 512, 869 P.2d 1062 (1994)). Collateral consequences are those where any effect on punishment flows not from the guilty plea itself but from additional proceedings. State v. Olivas, 122 Wn.2d 73, 96, 856 P.2d 1076 (1993) (mandatory DNA testing); Barton, 93 Wn.2d at 305 (discretionary habitual

criminal proceeding); In re Ness, 70 Wn. App. 817, 823, 855 P.2d 1191 (1993) (federal sentence restricting possession of firearms).

Here, that Kassahun might someday face a felony DUI charge if he racked up four misdemeanor DUI convictions in 10 years was not a direct consequence of either of his two guilty pleas to DUI. It cannot be said that his ultimately facing a felony was “a definite, immediate and largely automatic” result of those guilty pleas. Intervening between each of his predicate convictions and the subsequent felony DUI charge was his own repetitive criminal behavior and successful law enforcement investigations and prosecutions. Kassahun offers no apposite authority to support his bold assertion that a felony DUI charge and subsequent punishment is a direct consequence of the predicate DUI convictions. Moreover, felony DUI, which took effect in 2007, did not exist as a crime in 2006 when Kassahun entered his guilty pleas to two predicate DUIs.

Additionally, Kassahun, both at the trial court and on appeal, fails to acknowledge the important procedural distinction between his predicate convictions from the two guilty pleas and the two predicate convictions that resulted from the revocation of his deferred prosecution. In State v. Holsworth, 93 Wn.2d 148, 159, 607 P.2d 845 (1980), the court held that before the State can use a prior conviction based on a guilty plea to support a habitual criminal finding the State must show that the defendant

knowingly and voluntarily pleaded guilty by proving that the defendant was aware of the nature of the offense charged and the consequences of his plea. However, Washington courts have repeatedly held that a bench trial on stipulated facts is functionally and qualitatively different from a guilty plea and, therefore, that a trial court is not required to follow the guilty plea procedure before entering a conviction based on stipulated facts. State v. Jacobson, 33 Wn. App. 529, 656 P.2d 1103 (1982); State v. Davis, 29 Wn. App. 691, 630 P.2d 938 (1981); State v. Chervenell, 28 Wn. App. 805, 626 P.2d 530 (1981), rev'd on other grounds, 99 Wn.2d 309, 662 P.2d 836 (1983). Our courts have also repeatedly declined to extend the holding of Holsworth beyond guilty pleas. State v. Johnson, 38 Wn. App. 113, 116, 684 P.2d 775 (1984), accord State v. Heaps, 36 Wn. App. 718, 677 P.2d 1141 (1984); State v. Serr, 35 Wn. App. 5, 664 P.2d 1301 (1983); State v. LaBeur, 33 Wn. App. 762, 657 P.2d 802 (1983). Thus, the State never had to prove a "knowing plea" as to Kassahun's two predicate convictions from his deferred prosecution.

Due process did not require that at the time of the entry of his guilty pleas to two misdemeanor DUI charges that he be warned that if he continued to repeatedly be apprehended while driving under the influence he might one day face a felony charge. His due process claim that he is entitled to reversal of his felony DUI conviction must be rejected.

b. Kassahun Cannot Establish Ineffective Assistance Of Counsel Relating To Immigration Advice At His Predicate Guilty Pleas To Misdemeanor DUI.

Kassahun claims that the trial court erred in denying his motion to dismiss the Felony Driving Under the Influence charge because he had not been advised that multiple DUIs might some day compound into a felony offense with immigration consequences. It is unclear what legal analysis supports his argument. Ordinarily, such a claim would involve an assertion that prior counsel was ineffective. Although he cites cases that deal with ineffective assistance of counsel claims, Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011), Kassahun does not put forth or analyze an ineffective assistance of counsel claim. This is likely because he knows that the claim would fail. Kassahun made no such claim at the trial court and there is no factual record for this Court to address on appeal.<sup>3</sup> See “Defendant’s Motion to Dismiss Felony DUI.” CP 15-18; IRP 3-15.

A criminal defendant’s right to the assistance of counsel derives from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. Under these provisions, a

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<sup>3</sup> The record shows that Kassahun was represented by the same trial attorney, Tim McGarry, in the case at bar and in all four of the predicate DUI offenses. McGarry was present at Kassahun’s two guilty pleas to misdemeanor DUI (CP 111, 115), and at the entry of the deferred prosecution covering the other two DUIs (CP 118).

criminal defense attorney has the constitutional duty to effectively assist his client. In re Yung-Cheng Tsai, 183 Wn.2d 91, 99, 351 P.3d 138 (2015) (citing Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Where a defense attorney makes “errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” the attorney’s performance is constitutionally deficient. Id. at 99 (quoting Strickland, 466 U.S. at 687). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel’s performance was deficient and (2) that the deficient performance prejudiced the defendant. State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001); Strickland, 466 U.S. at 668.

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. In re Pers. Restraint of Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993); McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). Counsel’s faulty advice can render the defendant’s guilty plea involuntary or unintelligent. State v. Sandoval, 171 Wn.2d at 169 (citing McMann, 397 U.S. at 770-71). In Sandoval, our supreme court, applying Padilla v. Kentucky, supra, held that a noncitizen defendant’s right to effective assistance of counsel was denied when the defense attorney erroneously assured the defendant that

the deportation consequences of a guilty plea could be mitigated. Sandoval, 171 Wn.2d at 174. Sandoval held that if the applicable immigration law “is truly clear” that an offense will result in deportation, the defense attorney must tell the defendant that pleading guilty will lead to deportation. Sandoval, 171 Wn.2d at 170. If immigration law does not reveal clearly whether the offense is deportable, competent counsel must inform the defendant that deportation is at least possible, along with exclusion, ineligibility for citizenship, and any other adverse immigration consequences. Id.

Here, if Kassahun is in fact making an ineffective assistance of counsel claim this Court should decline to hear it. At the trial court Kassahun did not argue ineffective assistance of counsel, perhaps because he was being represented by the same attorney who represented him in all four predicate DUI proceedings. He also failed to provide the trial court with any factual basis on which, had he argued ineffective assistance of counsel, the court could have found either that his representation at the predicate guilty pleas was deficient or that he was prejudiced by the deficient performance. Appellate courts generally will not consider an issue that is raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5. In order to have a claim reviewed for the first time on appeal a defendant must demonstrate that the

error is (1) manifest, and (2) of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Here, although an ineffective assistance of counsel claim is of constitutional dimension, there is no basis to conclude that a "manifest" error was made by the trial court, which requires that the error be "unmistakable, evident or indisputable." State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008).

Moreover, at the trial court Kassahun provided no evidence of what advice had been given him by his attorney in relation to the two guilty pleas. The only evidence proffered was the statement in his declaration, which was conclusory and not specific to advice of counsel: "In none of those offenses was I advised of possible immigration consequences of a criminal conviction...". CP 17. That assertion was refuted by the clear admonition of potential immigration consequences on both guilty plea forms. CP 109, 113. In Sandoval, Sandoval was required to bring a personal restraint petition to meet his burden of proving ineffective assistance of counsel because his counsel's advice did not appear in the trial court record. Sandoval, 171 Wn.2d at 168-69 (citing State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is

through a personal restraint petition, which may be filed concurrently with the direct appeal.”).

If this Court decides to address Kassahun’s claim under ineffective assistance of counsel analysis it should be rejected. Pursuant to Sandoval, in determining whether an attorney’s advice on immigration consequences was ineffective assistance of counsel, “we must first determine whether the relevant immigration law is truly clear about the deportation consequences [of a guilty plea].” Sandoval, 171 Wn.2d at 171. Here, at the trial court, Kassahun admitted that the predicate gross misdemeanor DUIs were not deportable offenses:

... your Honor, typically a first offense or subsequent DUI offense is not a deportable offense. But, again, because of the elevation to a felony, that changes the punishment, the penalty, and as a result can result in a deportable offense, your Honor.

IRP 11. To be clear, Kassahun’s argument is not that there were deportation consequences associated with the misdemeanor DUI charges to which he pleaded guilty, but rather that there might be deportation consequences if he were to continue driving while intoxicated and successfully apprehended and prosecuted four times in a 10 year period.

Thus, under Sandoval and Padilla, Kassahun cannot establish ineffective assistance of counsel associated with the predicate guilty pleas. No case holds that a lawyer must advise his client of potential future

immigration consequences that might apply to some possible future conviction if that client repeatedly engaged in and was convicted for drunk driving. Counsel's duty — difficult enough under complicated, ever-changing immigration laws — is simply to advise his client as to consequences of a plea to the charged offense. When determining whether a defense attorney provided effective assistance, the underlying test is always one of "reasonableness under prevailing professional norms." In re Yung-Cheng Tsai, 183 Wn.2d at 99 (quoting Strickland, 466 U.S. at 688). Moreover, felony DUI based on four predicate convictions in 10 years did not even exist as a crime at the time of Kassahun's two guilty pleas to gross misdemeanor DUIs.

Even now, on appeal, Kassahun cites no authority to establish that his pleading guilty on two occasions to misdemeanor DUI charges exposed him to immigration consequences that, pursuant to Sandoval, would have required legal advice that he did not receive. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). Instead, Kassahun makes the conclusory assertion that "aggravated felonies" have immigration consequences, and concludes:

“plainly then the information provided in conjunction with the change of plea was inadequate.” Brief of Appellant at 9.

Kassahun has failed in his burden to establish ineffective assistance of counsel in connection with his two guilty pleas to the predicate misdemeanor DUI convictions. He has failed to show either deficient performance of counsel or prejudice therefrom. The trial court did not err in denying his motion to dismiss the Felony DUI charge.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Kassahun’s conviction for Felony Driving Under the Influence.

DATED this 21 day of January, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, David Donnan, containing a copy of the BRIEF OF RESPONDENT, in STATE V. BAZEN KASSAHUN, Cause No. 73111-4-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.

  
Done in Seattle, Washington

\_\_\_\_\_  
Date : Jan. 21, 2016