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NO. 34322-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE WILLIAM HARFORD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
GRAYS HARBOR COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-00623-9

BRIEF OF APPELLANT

ROGER A. HUNKO, WSBA# 9295
Attorney for Appellant
The Law Office of Wecker-Hunko-Bougher
569 Division Street, Suite E
Port Orchard, WA 98366
(360) 876-1001

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I. ASSIGNMENT OF ERROR

- A. THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. WAS THE APPELLANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO OBJECT TO THE STATE'S USE OF CRIMINAL HISTORY WHICH WAS "WASHED OUT" INCLUDING A 1991 CONVICTION FOR UNLAWFUL IMPRISONMENT AND A 1993 CONVICTION FOR DRIVING UNDER THE INFLUENCE?
- B. WAS THE APPELLANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO MOVE TO WITHDRAW THE APPELLANT'S GUILTY PLEA ON THE BASIS OF MUTUAL MISTAKE AND DETRIMENTAL RELIANCE, WHERE THE APPELLANT, BELIEVING HIS OFFENDER SCORE WAS A MAXIMUM OF "6" RATHER THAN THE MUCH HIGHER OFFENDER SCORE OF "9" THAT HE ULTIMATELY RECEIVED, ACCEPTED THE STATE'S PROPOSED PLEA OFFER AND WAIVED HIS RIGHT TO JURY TRIAL, AND WHERE APPELLANT WAS NOT AWARE THAT DRIVING UNDER THE INFLUENCE WAS COUNTED IN THE OFFENDER SCORE FOR THE CRIME OF ATTEMPTING TO ELUDE A PURSUING POLICE OFFICER?

III. STATEMENT OF THE CASE

Jesse William Harford was charged by information filed in the Superior Court for Grays Harbor County with one count of Attempting to Elude a Pursuing Police Vehicle in violation of RCW 46.61.024 on November 29, 2004. CP 1. In addition, Harford was arraigned and counsel appointed for him on the same day. CP 5. The defendant entered an Alford¹ plea of guilty on July 25, 2005. CP 44. At the time Harford entered the guilty

¹ *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed. 2d 162 (1972) held that an individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

plea the state and petitioner stipulated to a criminal history consisting of the following charges: Felony charges of Rape 3rd degree 1991, Unlawful Imprisonment 1991, Theft 1st degree 1999, Burglary 2nd degree 1999, Failure to Register 1999 and one gross misdemeanor Driving Under the Influence (DUI) 1993. The offender score stipulated to was "6" and the standard range was stated at 12+ to 14 months. CP 45. The state agreed to recommend 12+ 1 day to be served concurrent with a Thurston County charge. In addition the state agreed not to file an Assault 2nd or 3rd degree charge out of this incident. CP 45

Harford was sentenced on December 5, 2005. CP 58. At sentencing the state declared that there were three more convictions since sentencing, two felonies and a DUI. RP 9. The state stated that there were two DUIs that counted in this case, and the offender score was now "9" with a range of 22-29 months. RP 9. There was discussion between the two counsels as to whether the offender score was 8 or 9 and the court recessed so the two could figure it out. RP 10. After recess the state confirmed the offender score was 9 and the range was 22 to 29 months and recommended a sentence of 25 months to be served concurrently with the Thurston County sentence of 29 months. RP 10. Defense counsel agreed with the offender score and stated that the defendant was confused because DUIs are not counted in Thurston County, but are counted here. Defense counsel also agreed with the recommendation of 25 months to run concurrently with Thurston County. RP 11. The Court gave Harford an opportunity to speak on his own behalf, and he stated that he felt he had learned a lesson and 29 months was a lot of time, and he would take advantage of the time to better himself. RP 13-14 The Court stated that the defendant had had a lot of

chances to get it up to 9 and that he was not a fan of guys getting two for one. RP 14. The court then sentenced Harford to 22 months to run consecutive to the Thurston County charge. The court then stated: “as far as I’m concerned, when you sit here and look at all the consideration and time frames and time involved and failures to appear and the rest of it with the score, go do some extra time.” RP 14-15

Harford filed a Motion to Withdraw the Guilty Plea on December 28, 2005. CP 61 The Court denied the motion on March 22, 2006. CP 70 In addition, the Notice of Appeal was filed on December 28, 2005.

IV. ARGUMENT

A. THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL’S FAILURE TO OBJECT TO STATE’S USE OF CRIMINAL HISTORY WHICH WAS WASHED OUT.

Jesse Harford entered into a plea agreement on July 25, 2005. CP 45 The plea agreement he signed listed a criminal history which included an Unlawful Imprisonment conviction from 1991, (a class C felony), and a DUI conviction from 1993 (a serious traffic conviction). CP 45 There were no convictions between 1993 and 1999, a period of six years. The offender score cited in the plea agreement was 6. In addition, the state would recommend a sentence of 12 months plus 1 day to be served concurrent with a Thurston county charge. CP 45 At sentencing, three new convictions were added bringing the offender score to 9.

Harford asserts that his trial counsel should have challenged the inclusion of the 1991 and 1993 convictions in the offender score. Under RCW 9.94A.525(2):

Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction. Serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

Because Harford spent at least 5 years in the community without any convictions, after the 1991 and 1993 convictions, those two convictions washed out and should not have been used to calculate the offender score. At the time he entered the plea agreement, the offender score should have been 4, rather than 6. In addition, at sentencing with the addition of three new convictions, the offender score would have been 7, rather than the 9 used in sentencing him.

The Sixth Amendment to the United States Constitution guarantees to indigent defendants the assistance of counsel in criminal cases. The Washington State Constitution also confers a right to counsel. Wash. Const. Art. 1, §22. “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendant’s the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Effective assistance of counsel is a constitutionally protected right. U.S. Const. amend. VI; Wash. Const. Art. I. §22.

The standard for reviewing the effectiveness of counsel is set forth in *Strickland*. In reviewing a claim of ineffective assistance of counsel, a defendant must show that (1)

defense counsel's performance fell below an objective standard of reasonableness, and (2) that this deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). The first prong of the *Strickland* test is met if counsel's performance falls below an objective standard of reasonableness in light of all circumstances. *Thomas*, 109 Wn.2d at 226. The prejudice to the defendant required by the second prong of the test is present "if there is a reasonable probability that , except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also, *State v. Klinger*, 96 Wn.App. 926, 980 P.2d 282 (1999). A reviewing court indulges in a strong presumption that counsel's representation falls within the wide range of proper assistance. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). In order to overcome this presumption, the Appellant must show that counsel had no legitimate strategic or tactical rationale for his or her conduct. *McFarland*, 127 Wn.2d at 336.

In the case at bar, counsel failed to challenge whether any of the convictions presented by the state had washed out. There is no indication on any of the record that there were any intervening misdemeanor charges that would have prevented a washout. In fact, on the plea agreement just below the criminal history, the form indicates that an asterisk (*) indicates the conviction does not wash out due to intervening misdemeanor history. CP 45 However, none of the convictions is identified with an asterisk. Therefore, when counsel noticed that there was no criminal history between 1993 and 1999, counsel should have questioned whether the convictions should be included in the criminal history.

Because a higher offender score results from including the washed out convictions, there is no legitimate strategic or tactical rationale for failing to challenge the inclusion of the two convictions.

Moreover, Harford was clearly prejudiced by the higher offender score. Not only was the sentence range higher than it would have been. The court clearly based its decision to sentence Harford to 22 months to run consecutive to the Thurston County sentence rather than concurrent based on the offender score of 9. The court stated, “you’ve had a lot of chances to get it up to 9.” In addition, the court stated: “as far as I’m concerned, when you sit here and look at all the consideration and time frames and time involved and failures to appear and the rest of it *with the score*, go do some extra time.” RP 14-15

Therefore, the case should be remanded to the trial court for re-sentencing in accordance with the correct offender score.

B. THE APPELLANT WAS DENIED HIS CONSTITUTIONAL EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL’S FAILURE TO MOVE FOR WITHDRAWAL OF THE GUILTY PLEA BASED ON APPELLANT’S DETRIMENTAL RELIANCE ON THE OFFENDER SCORE REPRESENTED IN THE PLEA AGREEMENT, AND COUNSEL’S INABILITY TO EXPLAIN THE EFFECT OF A DUI ON THE OFFENDER SCORE.

At sentencing, counsel for Harford explained that Harford was confused over the offender score because Thurston County does not count DUIs , whereas DUIs are counted in Gray’s Harbor. RP 11 Counsel did not seem to be aware that the DUIs are counted, no matter what county in the state, for certain charges, such as the crime Harford pleaded guilty to in this matter. In addition, the Affidavit in Support of Motion of Withdrawal of

Guilty Plea filed by Harford on December 28, 2005 states that counsel informed him at the sentencing hearing that he could not withdraw his guilty plea at that time.

Harford submits that he detrimentally relied on the state's representation of the lower score, as well as counsel's advice concerning the score.

The doctrine of detrimental reliance has previously been applied in cases in which a previously-made offer is revoked by the prosecution. A criminal defendant has no constitutional right to a plea bargain. *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.ed.2d 30 (1977); *State v. Robtoy*, 98 Wn.2d 30, 45, 653 P.2d 284 (1982); *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d 376 (1981). The State can revoke a plea proposal offered to a criminal defendant until such time as the defendant enters a plea or has made some act in detrimental reliance upon the offer. *Wheeler*, at 803, 631 P.2d 376; *State v. Marler*, 32 Wn. App. 503, 507, 648 P.2d 903, review denied, 98 Wn.2d 1007 (1982).

The doctrine of detrimental reliance is based on the theory of unilateral contracts, which are accepted by the defendant, either by performance (pleading guilty) or detrimental reliance on the offer. *Wheeler*, 95 Wn.2d at 803, 631 P.2d 376.

In this case, the Appellant was initially offered a plea bargain stating an offender score of 6 with a range of 12 months plus 1 day to 15 months. The state recommended a sentence of 12+ 1 to run concurrent with a Thurston County sentence which was pending. The defendant did accept that offer by pleading guilty and giving up his right to a trial by jury. At his change of plea hearing, the appellant made an Alford plea, stating that he believed he had a defense but was giving up the right to that defense, and taking advantage of the state's offer. RP 5 In the Statement of Defendant on Plea of Guilty, the appellant

wrote, "I believe I am innocent, but after reviewing the police reports and speaking with my attorney, I want to take advantage of the state's offer." CP 44 Therefore, Harford accepted the State's offer by pleading guilty, and should be permitted to require specific performance.

In addition, a guilty plea is valid only if the defendant understands the sentencing consequences of the agreement. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). When a defendant enters a plea agreement based on misinformation affecting the sentencing consequences and the defendant later becomes aware of this misinformation, he or she may choose to either withdraw the plea or demand specific performance of the agreement. *Id.*

Here, Harford did not realize at the time he pleaded guilty that the previous DUI was being computed into his offender score, which is evident from his confusion at the sentencing hearing. Nor did appellant realize that the pending DUI could be used in calculating his offender score at sentencing. Therefore, Harford should be entitled to choose to withdraw the plea or demand specific performance of the agreement.

VI. CONCLUSION

For the foregoing reasons Harford respectfully requests this court to remand this matter to the trial court for Harford's choice of whether to withdraw his guilty plea or seek specific performance in light of the fact that his plea was obtained on a mistake affecting his sentencing range, which rendered his plea involuntary..

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Respectfully Submitted this 1st day of February, 2007.



Roger A. Hunko, WSBA# 9295
Attorney for Appellant

CERTIFICATE OF SERVICE

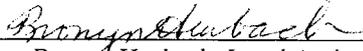
I certify that on the 1st day of February, 2007, I caused a true and correct copy of this Opening Brief to be served on the following in the manner indicated below:

Office of the Prosecuting Attorney
Grays Harbor County Superior Court
102 W Broadway Avenue, Room 102
Montesano, Washington 98563

U.S. Mail
 Hand Delivery

Mr. Jesse William Harford
DOC# 981458
SCCC, 191 Constantine Way
Aberdeen, Washington 98520

U.S. Mail
 Hand Delivery

By: 
Bronyn Heubach, Legal Assistant


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