

Court of Appeals No. 34521-8-II
Mason County Superior Court No. 02-1-00232-3

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

STATE OF WASHINGTON,

Plaintiff/Appellee,

v.

WALTER JESSE BARBEE,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. Barbee's guilty plea violated due process and CrR 4.2(d) because Barbee was not informed that he would be prohibited from earning earned early release credit on the first 20 years of his murder sentence. This error was aggravated when the trial judge and defense counsel expressly assured Barbee at the time of the sentencing hearing that he would earn early release credit.
2. Barbee was deprived of his Sixth Amendment right to effective assistance of counsel when his attorney incorrectly advised him that he would earn early release credit on his entire murder sentence.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Have the federal due process clause and CrR 4.2(d) been violated when a defendant is not advised about a total prohibition on earned early release credit for a significant portion of his sentence?
2. Is a defendant deprived of effective assistance of counsel under the Sixth Amendment when his attorney incorrectly advises him that he will receive earned early release credit on his entire sentence, and he would not have pled guilty had he known the truth?
3. Is the defendant entitled to his choice of remedy for the above violations: specific performance or withdrawal of his plea?

III. STATEMENT OF THE CASE

Towards the end of the trial, the prosecutor approached Mr. Barbee's counsel with a plea offer. RP 1329. On May 27, 2003, Barbee entered a plea of guilty to one count of murder in the first degree with a firearm enhancement. RP 1329-38; CP 33-39 (Statement of Defendant on Plea of Guilty). At the plea hearing, the judge explained that the firearm enhancement would be served without good-time credit. RP 1331. Nobody said anything throughout the hearing about how the sentence for the underlying murder charge would be served.

Mr. Barbee did not admit guilt in the plea form or at the plea hearing. RP 1335; CP 38. Rather, he checked the following box: "Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea." CP 38 at para. 11.

At Barbee's sentencing hearing, the Court imposed 304 months on the murder charge, which was about the middle of the standard range. RP 1370-71. The Court stated explicitly that Barbee would earn 15 percent good-time credit on this 304-month sentence. *Id.* Defense counsel, Robert Quillian, confirmed that understanding. RP 1370. The prosecutor did not object or disagree.

IV. LEGAL ARGUMENT

A. MR. BARBEE IS ENTITLED TO HIS CHOICE OF REMEDY BECAUSE HE WAS MISINFORMED ABOUT THE PENALTIES FOR THE CRIME

“It is a violation of due process to accept the guilty plea without an affirmative showing that the plea was made intelligently and voluntarily.” State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980), citing Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S. Ct. 1709 (1969). See also, State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996). “The record of a plea hearing or clear and convincing evidence must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea.” Barton at 304, citing Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976). “A defendant must understand the sentencing consequences for a guilty plea to be valid.” State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001), citing State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). This principle is codified in CrR 4.2(d).

When Mr. Barbee entered his guilty plea he made no statement admitting guilt. Rather, he checked a box indicating that the court could review “. . . the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” In North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), the U.S. Supreme Court held that a guilty plea may be constitutional even if the defendant does not admit guilt. When this Court adopted Alford in State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976), it

noted the special concerns with such pleas. “When a defendant seeks to plead guilty while protesting his innocence, the trial judge is confronted with a danger signal. It puts him on guard to be extremely careful.” Id. at 373 (citations and internal quotations omitted). “An equivocal plea may be an indication the plea is not voluntarily and intelligently made.” Id. at 373. See also, In re Montoya, 109 Wn.2d 270, 280-81, 744 P.2d 340 (1987).

Under RCW 9.94A.540(2), Barbee could not receive any earned early release credit on the first 20 years of his murder sentence. There is nothing in the record of the plea hearing to indicate that he was informed of this prohibition. In fact, at the time of the sentencing hearing, Barbee was expressly misinformed by both the trial judge and his attorney that he would receive such credit. The Court can infer from this that Barbee was given the same wrong advice prior to his plea.¹

In Walsh, supra, both parties were mistaken about the standard range at the time of the plea. Id. at 4-5. The error was corrected by the time of sentencing, and the defendant raised no objection in the trial court. Id. at 5. Walsh was nevertheless entitled to challenge the voluntariness of his plea agreement either on direct appeal or in a personal restraint petition. Id. at 6-7. In Walsh, the mistake was only that the low end of the standard range was 95 rather than 86 months, and Walsh understood that the trial court was in any event free to impose an exceptional sentence. Id.

¹ In the personal restraint petition filed simultaneously with this direct appeal, Barbee and his trial counsel expressly state that he was misinformed. The direct appeal, however, is limited to facts that are in the trial court record.

at 4-5. Here, the error was much greater since Mr. Barbee was led to believe that he could earn three more years of good time credit than were actually available.

In State v. Conley, 121 Wn. App. 280, 87 P.3d 1221 (2004), the defendant entered a plea to first-degree assault without being advised that he could not earn early release credit on the first five years of his sentence. Id. at 282-83. The Court of Appeals held that the “the statutory prohibition against earned early release credit for the period of the mandatory minimum sentence” was a direct consequence of the plea because it had a “definite, immediate, and automatic effect on the range of Mr. Conley's sentence.” Id. at 286. “While the early release credits themselves are discretionary with the Department of Corrections and the mere potential to earn them does not constitute a direct consequence of a plea, the total prohibition of earned early release credits during the mandatory minimum sentence period is automatic.” Id. (citation omitted).

The Conley court did not grant relief, however, because Mr. Conley failed to prove that this misinformation was material, that is, that it affected his decision to plead guilty. Id. at 287. That portion of the Conley decisions was effectively overruled by Personal Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004). “We hold that a defendant who is misinformed of a direct consequence of his guilty plea need not make a special showing of materiality in order to be afforded a remedy for an involuntary plea.” Id. at 296.

This hindsight task is one that appellate courts should not undertake. A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision.

Id. at 302.

When a plea agreement is “based on misinformation,” the defendant may choose “specific enforcement of the agreement or withdrawal of the guilty plea” unless the State can demonstrate on remand “compelling reasons” that the defendant’s choice would be unjust.

Walsh, 143 Wn.2d at 8-9. See also, Isadore, 151 Wn.2d at 303. “Where fundamental principles of due process are at stake, the terms of the plea agreement may be enforced, notwithstanding statutory language.” Isadore at 303, citing State v. Miller, 110 Wn.2d at 532.

B. IN THE ALTERNATIVE, MR. BARBEE IS ENTITLED TO RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant has a Sixth Amendment right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant is deprived of effective assistance if he is prejudiced by counsel’s deficient performance. Id.

During plea bargaining, counsel has a duty to assist the defendant "actually and substantially" in determining whether to plead guilty. State v. Osborne, 102 Wash.2d 87, 99, 684 P.2d 683 (1984); State v. Stowe, 71 Wash.App. 182, 186, 858 P.2d 267 (1993). It is counsel's responsibility to aid the defendant in evaluating the evidence against him and in discussing the possible direct consequences of a guilty plea. State v. Holley, 75 Wash.App. 191, 197, 876 P.2d 973 (1994).

State v. S.M., 100 Wn. App. 401, 410-11, 996 P.2d 1111 (2000). To demonstrate constitutionally ineffective assistance of counsel at the plea bargaining stage, the defendant must show that his counsel's performance "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that "there is a reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial." State v. Acevedo, 137 Wn.2d 179, 198-99, 970 P.2d 299 (1999) (citations omitted).

Here, the Court can infer that Barbee's attorney gave him incorrect advice about early release credit prior to entry of the plea since the lawyer expressed his misunderstanding of the law at the later sentencing hearing. The Court can infer that Barbee would have expressed some surprise at this point had he been correctly advised earlier and then heard his lawyer change his mind. In any event, the lawyer's duty to give correct advice certainly extended to the sentencing hearing.

V. CONCLUSION

The Court should remand for Mr. Barbee to elect his choice of remedy.

DATED this 22nd day of December, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing pleading on the following:

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12/22/06
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Rubén García Fernández