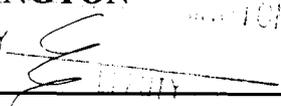


No. 34557-9--II

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

FILED
COURT OF APPEALS
06 OCT -9 AM 11:13
BY 

STATE OF WASHINGTON,

Respondent,

v.

HARRY NATHAN CARRIER,

Appellant/Defendant.

PIERCE COUNTY SUPERIOR COURT

CAUSE NO. 04-1-03722-2

THE HONORABLE JOHN A. MCCARTHY,

Presiding at the Trial Court.

APPELLANT'S OPENING BRIEF

**Sheri L. Arnold
Attorney for Appellant
WSBA No. 18760**

**P. O. Box 7718
Tacoma, Washington 98417
email: slarnold2002@yahoo.com
(253)759-5940**

TABLE OF CONTENTS

Page(s)

I. ASSIGNMENTS OF ERROR.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1-2

III. STATEMENT OF THE CASE.....2-9

 1. Procedural History.....2-5

 2. Motion to Withdraw Guilty Pleas.....5-8

 3. Sentencing Hearing.....8-9

IV. ARGUMENT.....9-23

 A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING MR. CARRIER’S MOTION TO WITHDRAW HIS GUILTY PLEAS BECAUSE MR. CARRIER DID NOT UNDERSTAND AND WAS NOT ADEQUATELY ADVISED OF DIRECT SENTENCING CONSEQUENCES.....9-12

 1. Mr. Carrier did not enter his plea of guilty knowingly, voluntarily, and intelligently because he did not understand his correct standard range for Count IV.....12-15

TABLE OF CONTENTS (continued)

	<u>Page(s)</u>
2. <u>Mr. Carrier did not enter his plea of guilty knowingly, voluntarily, and intelligently because he did not understand that a life sentence without the possibility of parole would inevitably be imposed as the result of his guilty plea to Count I.....</u>	15-18
B. MR. CARRIER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO ADEQUATELY ADVISE HIM THAT COUNT I CARRIED A MANDATORY SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE.....	18-23
V. CONCLUSION.....	23,24

TABLE OF AUTHORITIES

Washington Cases

	<u>Page(s)</u>
<i>In re Isadore</i> , 151 Wn.2d 294,88 P.3d 390 (2004).....	12
<i>State v. Bailey</i> , 52 Wash.App.42,757 P.2d 541 (1988), aff'd, 114 Wash.2d 340(1990).....	9,18
<i>State v. Barton</i> , 93 Wn.2d 301,609 P.2d 1353 (1980).....	11
<i>State v. Delgado</i> , 109 Wn.App.61,33 P.3d 753.....	21
<i>State v. Delgado</i> , 148 Wn.2d 723,63 P.3d 792(2003).....	21
<i>State v. Garcia</i> , 57 Wn.App. 927,791 P.2d 244 (1990).....	19
<i>State v. McCollum</i> , 88 Wn.App. 977,947 P.2d 1235(1997).....	20
<i>State v. Mendoza</i> , No. 77587-7, Wash.Supreme Ct. (8-17-06).....	12,13
<i>State v. Miller</i> , 110 Wn.2d 528,756 P2d. 122 (1988).....	11,12
<i>State v. Moon</i> , 108 Wn.App. 59,29 P.3d 734(2001).....	12
<i>State v. Morley</i> , 134 Wash.2d 588,952 P.2d 167 (1998).....	20,21
<i>State v. Murphy</i> , 119 Wn.App. 805,81 P.3d 122 (2002).....	12
<i>State v. Ortega</i> , 120 Wn.APP.165,84 P.3d 935 (2004).....	21
<i>State v. Ross</i> , 129Wn.2d 279,916 P.2d 405 (1996).....	10
<i>State v. Stockwell</i> , 129 Wash.App.230,118 P.3d 395 (2005).....	9
<i>State v. Stowe</i> , 71 Wn.App. 182,858 P.2d 267 (1993).....	19,20

TABLE OF AUTHORITIES (continued)

	<u>Page(s)</u>
<u>Washington Cases (continued)</u>	
<i>State v. Swindell</i> , 22 Wn. App. 626,590, P.2d 1292(1979).....	10,11
<i>State v. Taylor</i> , 83 Wn.2d 594,521 P.2d 699 (1974).....	10
<i>State v. Varga</i> , 151 Wash.2d 179,86 P.3d 139 (2004).....	22,23
<i>State v. Wakefield</i> , 130 Wn.2d 464,925 P.2d 183 (1996).....	10
<i>State v. Walsh</i> , 143 Wn.2d 1,17 P.3d 591 (2001).....	11,12,13
<i>State v. Zumwalt</i> , 97 Wn.App. 124,901 P.2d 319 (1995).....	10
<i>Wood v. Morris</i> , 87 Wn.2d 501,554 P.2d 1032 (1976).....	11

Washington Statutes

RCW 9.68A.040(1)(b).....	3
RCW 9.68A.070.....	3
RCW 9.94A.030.....	3
RCW 9.94A.570.....	20
RCW 9.95.240.....	22
RCW 9A.44.070(1).....	9
RCW 9A.44.073.....	3
RCW 9A.44.083.....	3

TABLE OF AUTHORITIES (continued)

	<u>Page(s)</u>
<u>Washington Statutes(continued)</u>	
RCW 9A.68.A.050(1).....	3
RCW 10.94A.728(1)(2)(3)(4)(6)(8)(9).....	20
<u>Washington Court Rules</u>	
CrR 4.2(d).....	11
CrR 4.2 (f).....	9
<u>Federal Cases</u>	
<i>Hill v. Lockhart</i> , 474 U.S. 52,106 S.Ct. 366 (1985).....	19
<i>Strickland v. Washington</i> , 466 W.S. 668,80 L.Ed.2d 674, 104 S.Ct. 2025, <i>rehearing</i> denied, 467 U.S. 1267 (1984).....	19
<u>Constitutional Provisions</u>	
Washington Constitution Art.1 section 22.....	18,19
United States Constitution Amend. 14.....	18,19

I. ASSIGNMENTS OF ERROR

1. Mr. Carrier's guilty plea to the crime of dealing in depictions of minor engaged in sexually explicit conduct is invalid because Mr. Carrier was not properly advised of and did not understand the length or effects of his disputed standard range sentence.

2. Mr. Carrier's guilty plea to the crime of child molestation in the first degree is invalid because Mr. Carrier was not properly advised of and did not understand that a life without the possibility of parole sentence was mandatory in his case.

3. Mr. Carrier was denied the effective assistance of counsel by counsel's failure to advise Mr. Carrier that a life without the possibility of parole sentence was mandatory if he plead guilty to Count I, because he would be considered a persistent offender.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is Mr. Carrier's guilty plea to Count IV valid where his standard range was disputed prior to entering the plea, and where he did not understand the length or effects of his sentence? (Assignment

of Error Number One.)

2. Is Mr. Carrier's guilty plea to count I valid where he was not advised and did not understand that the trial court was required to classify him as a persistent offender and, consequently, sentence him to a life sentence without the possibility of parole? (Assignment of Error Number Two.)

3. Was Mr. Carrier denied the effective assistance of counsel where counsel's only opposition to a determination that Mr. Carrier was persistent offender was entirely without legal merit, where counsel misrepresented to Mr. Carrier that a standard range sentence was possible, and where counsel failed to advise Mr. Carrier that the Court was required to impose a life without the possibility of parole sentence upon finding that he was a persistent offender? (Assignment of Error Number Three.)

III. STATEMENT OF THE CASE

1. Procedural History

On July 30, 2004, appellant/defendant, Harry Nathan Carrier,

was charged by Information with one count of Rape of a Child in the First Degree, one count of Child Molestation in the First Degree, one count of Sexual Exploitation of a Minor, one count of Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct, and one count of Possession of Depictions of Minor Engaged in Sexually Explicit Conduct.¹ The acts constituting the offenses were alleged to have occurred between June 1, 2004 and July 30, 2004. The minor was alleged to be Mr. Carrier's eleven (11) year old great-niece, A.G.. CP 1-5. On October 7, 2004, the State file a persistent offender notice pursuant to RCW 9.94A.570 and RCW 9.94A.030(32)(b)(i). The prior most serious offenses alleged included a 1981 Washington conviction for Indecent Liberties and a 1992 conviction for Rape in the Third Degree. CP 6-7.

On June 13, 2005, an Amended Information was filed. The Amended Information substituted the crime of Child Molestation in the

1

RCW 9A.44.073, 9A.44.083, 9.68A.040(1)(b), 9A.68.A.050(1), 9.68A.070, and 9.94A.030.

First Degree for the original charge of Rape of a Child in the First Degree, as alleged in count one. CP 8-10. On the same date Mr. Carrier entered guilty pleas to counts IV and V, Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct and Possession of Depictions of Minor Engaged in Sexually Explicit Conduct. CP 11-20; RP 1 65-71.

On June 15, 2005, during the State's case in chief, Mr. Carrier also entered a guilty plea to one count of Child Molestation in the First Degree. CP 21-33; RP 3 230-238. Counts II and III, Child Molestation in the First Degree and Sexual Exploitation of a Minor, were dismissed without prejudice. CP 34-36; 42-44; RP 3 239.

On September 20, 2005, Mr. Carrier filed a letter addressed to Judge McCarthy in which he stated that he intended to move to withdraw his guilty pleas. CP 37-38. On December 30, 2005, newly appointed counsel, Robert M. Quillian, filed a Motion to Withdraw Pleas of Guilty, with the attached declaration of Mr. Carrier. CP 39-41. A hearing on Mr. Carrier's Motion to Withdraw his guilty pleas was

held on February 10, 2006. RP 5 3-70.²

Following the denial of Mr. Carrier's Motion to Withdraw his guilty pleas the court imposed sentence on February 10, 2006. RP 5 71-98. Mr. Carrier was sentenced as follows: life without the possibility of parole on Count I, sixty (60) months on Count IV, and twelve (12) months on Count V, with all sentences to be served concurrently. CP 45-56; RP 5 97. A timely Notice of Appeal was filed on March 10, 2006. CP 60-61.

2. Motion to Withdraw Guilty Pleas

In his declaration in support of motion to withdraw guilty pleas Mr. Carrier stated that he did not understand and was not properly advised of the direct consequences of his guilty pleas. Specifically, Mr. Carrier declared that, with respect to his June 13, 2005 guilty pleas, he was advised that Count IV (Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct) and Count V (Possession of

2

The VRPs for proceedings held on September 30, 2005 and February 10, 2006 are unnumbered. For purpose of appellant's opening brief the unnumbered VRPs are, therefore, designated as follows: 09-30-05 = RP 4, 02-10-06 = RP 5.

Depictions of Minors Engaged in Sexually Explicit Conduct) *both* carried a sentence of 0-12 months in jail. Additionally, he was not told that pleading guilty to Counts IV and V would result in adding points to his offender score.

Mr. Carrier's declaration further asserted that, with regard to his June 15, 2005 guilty plea to count one (Child Molestation in the First Degree) he was not advised and did not comprehend that a guilty plea would subject him to a life without the possibility of parole sentence. Had he understood this consequence Mr. Carrier would have continued with the trial. CP 39-41.

At the hearing on Mr. Carrier's motion to withdraw his guilty pleas Mr. Carrier and his previous attorney, Raymond Thoenig, testified.

Mr. Carrier testified consistent with the statements made in his declaration. Additionally, Mr. Carrier testified that his understanding, when he entered his guilty pleas, was that his 1981 prior conviction for indecent liberties could not count as a strike offense because the

sentence was deferred and was no longer on his record. He also believed that a prior *Alford* plea conviction could not count as a strike offense. Although he had seen paperwork concerning his *possible* “persistent offender” status he simply did not understand and was not fully advised as to the meaning and application of the strikes law(s). RP 5 11-22. Moreover, at the plea hearing, the hearing devise he wore was not clearly picking up the judge’s voice. RP 5 19.

Raymond Thoenig testified that he could not recall many specifics concerning his representation of Mr. Carrier. He could not recall Mr. Carrier’s trial, or the witnesses who had testified. Nor did he recall the counts to which Mr. Carrier had pleaded guilty, when he discussed sentencing with Mr. Carrier, or any specific discussions concerning the evidence against Mr. Carrier. He also could not remember how long his discussion with Mr. Carrier was prior to Mr. Carrier entering his guilty plea on June 15th. Mr. Thoenig testified, however, that his practice was to thoroughly advise all clients prior to entry of a guilty plea, and he believed that he had advised Mr. Carrier

as to all aspects of the pleas, including the fact that life without the possibility of parole was a *possible* sentence. His status as a persistent offender was, however, disputed. RP 5 44-59.

No written findings and conclusions were entered concerning Mr. Carrier's hearing on his motion to withdraw his guilty plea.

3. Sentencing Hearing

At the time Mr. Carrier pleaded guilty to Count I his attorney advised the Court that Mr. Carrier's prior convictions would be disputed. RP 3 231. Likewise, the Statement of Defendant on Plea of Guilty noted that Mr. Carrier's sentence was "disputed," and that the "state will argue life without parole." CP 21-33 at P.1. At the sentencing hearing the sole argument in opposition to a life without parole sentence made by defense counsel was that Mr. Carrier's prior 1981 King County conviction for indecent liberties could not count as a prior "strike" offense under a comparability analysis, because the State had not proved that the seven year old victim was not married to

Mr. Carrier. RP 5 79. The trial court rejected this claim.³ No briefing was submitted by defense counsel.

The Court determined that Mr. Carrier's prior Washington conviction for indecent liberties (1981) was comparable to first degree child molestation and a most serious offense pursuant to the persistent offender statute(s), and that the current conviction of first degree child molestation, therefore, mandated a life without the possibility of parole sentence. CP 45-56 at p.5; RP 5 96-97.

IV ARGUMENT

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING MR. CARRIER'S MOTION TO WITHDRAW HIS GUILTY PLEAS BECAUSE MR. CARRIER DID NOT UNDERSTAND AND WAS NOT ADEQUATELY ADVISED OF DIRECT SENTENCING CONSEQUENCES.

Under CrR 4.2(f), the trial court shall allow a defendant to withdraw his plea of guilty whenever it appears that withdrawal is

3

Non-marriage is an implied element under the indecent liberties statute, RCW 9A.44.070(1), which need not be independently proved upon a plea of guilty. *State v. Stockwell*, 129 Wash.App.230,118 P.3d 395 (2005); *State v. Bailey*, 52 Wash.App.42,47,757 P.2d 541 (1988), aff'd, 114 Wash.2d 340(1990).

necessary to correct a manifest injustice, i.e., an injustice that is obvious, directly observable, overt, not obscure. State v. Taylor, 83 Wn.2d 594,598,521 P.2d 699 (1974). In Taylor, the Court set forth four indicia of manifest injustice which would allow withdrawal of a guilty plea: (1) the denial of effective assistance of counsel, 2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea agreement was not honored by the prosecution. Any of the four indicia listed above would independently establish “manifest injustice” and would require a trial court to allow a defendant to withdraw his plea. State v. Taylor, 83 Wn.2d at 597; see also State v. Wakefield, 130 Wn.2d 464,472,925 P.2d 183 (1996).

Due Process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. State v. Ross, 129 Wn.2d 279,284,916 P.2d 405 (1996); see also State v. Zumwalt, 97 Wn.App. 124,901 P.2d 319 (1995). A plea of guilty is not voluntary if it is the product of or induced by coercive threat, fear, persuasion, promise or deception. State v. Swindell, 22 Wn. App. 626,630,590,

P.2d 1292(1979), *affirmed* Wn.93 Wn.2d 192,607 P.2d 852 (1980).

It is the court's duty, before accepting a guilty plea, to ensure on the record that the plea is voluntary. *State v. Walsh*, 143 Wash. 2d 1, 5-6, 17 P.3d 591 (2001). Criminal Rule 4.2(d) provides that the trial court "shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." The court's failure to comply fully with this rule requires that the plea be set aside. *S.M.*, 100 Wn.App.at 413; *Wood v. Morris* 87 Wn. 2d 501,511,554 P.2d 1032 (1976). Moreover, "[a] defendant must understand the sentencing consequences for a guilty plea to be valid." *Walsh*, 143 Wn.2d at 8 (quoting *State v. Miller*, 110 Wn.2d 528,531,756 P.2d 122 (1988)).

A guilty plea is thus involuntary where the defendant did not understand, or was misinformed, of the direct consequences of pleading guilty. *State v. Barton*, 93 Wn.2d 301,305,609 P.2d 1353 (1980). As such, when a defendant does not understand or is

erroneously advised regarding the sentencing, the plea may be considered involuntary and the defendant may elect to withdraw the guilty plea. *State v. Miller*, 110 Wn.2d 528,531,756 P.2d 122 (1988).

As recently stated by our Supreme Court, “[a] knowing, voluntary, and intelligent guilty plea requires a meeting of the minds.” *State v. Mendoza*, No. 77587-7, Wash. Supreme Court (8-17-06) emphasis added.

1. **Mr. Carrier did not enter his plea of guilty knowingly, voluntarily, and intelligently because he did not understand his correct standard range for Count IV.**

Where a defendant is misinformed regarding the standard sentencing range, the plea is involuntary and constitutes a manifest injustice. *State v. Walsh*, 143 Wn.2d 1,6-9,17 P.3d 591 (2001); *State v. Miller*, 110 Wn.2d 528,531-535,756 P.2d. 122 (1988). This is so whether the correct sentencing range is lower or higher than the miscalculated range. *State v. Moon*, 108 Wn.App. 59,63-64,29 P.3d 734(2001); *State v. Murphy*, 119 Wn.App. 805,806,81 P.3d 122 (2002); *In re Isadore*, 151 Wn.2d 294,88 P.3d 390 (2004). *State v.*

Mendoza, Supra. The remedy where a plea agreement is based on misinformation as to the standard sentencing range is the defendant's choice of specific performance of the agreement or withdrawal of the guilty plea unless there are compelling reasons not to allow that remedy. *Id*; *State v. Walsh*, 143 Wn 2d at 8-9.

On June 13, 2005, Mr. Carrier entered guilty pleas to Counts IV and V, dealing in depictions of minor engaged in sexually explicit conduct and possession of depictions of minors engaged in sexually explicit conduct. The plea form listed confusing information as to Mr. Carrier's standard range sentence. In paragraph 6 of page 2 the plea form states that *count number 1* carries a standard range of 60 months, and *count number 2* carries a standard range of 0-12 months. The standard range sentence is not firm, however. As asterisk is written by the 60 months. Below is another asterisk and the work "disputed." For the State's recommendation the word "unknown" is written. CP 11-20.

At the plea hearing no mention was made concerning the effect

the guilty pleas would have on Mr. Carrier's offender score in the event of subsequent conviction(s). The Court was advised that Mr. Carrier's offender score and standard range were disputed, although no legal argument or other attempts were made to clarify Mr. Carrier's correct offender score and standard range. RP 1 66-71,

In his declaration in support of his motion to withdraw his guilty pleas Mr. Carrier stated that he did not correctly understand what his standard range was. Nor did he understand that the two guilty pleas would add points to any subsequent convictions.

At the evidentiary hearing his counsel could not recall the counts to which Mr. Carrier had pleaded guilty. RP 5 44. Moreover, defense counsel was unable to even identify what level of felony count IV was. RP 5 46. Mr. Carrier's defense counsel clearly lacked sufficient familiarity with Mr. Carrier's case, as evidenced by the record. His testimony did not refute that Mr. Carrier was not advised as to the effect of the two guilty pleas on subsequent convictions. The record does support Mr. Carrier's confusion as to his actual offender

score and standard range. Under the circumstances Mr. Carrier's lack of understanding was not only justified, but also predictable, where the standard range was not settled. Because Mr. Carrier did not understand and was not advised of his actual, as opposed to his possible offender score and standard range for Count IV, the guilty plea to Count IV was not made knowingly, voluntarily, and intelligently, and are therefore invalid.

2. **Mr. Carrier did not enter his plea of guilty knowingly, voluntarily, and intelligently because he did not understand that a life sentence without the possibility would inevitably be imposed as the result of his conviction for Count I.**

On June 15, 2005, Mr. Carrier entered a guilty plea to one count of child molestation in the first degree as charged in Count I. On the plea form the maximum penalty listed was "life" but the notation was made that the sentence was disputed. The plea form further states that the prosecuting attorney would "argue life without parole." CP 21-33 at p.1.

Although the Court advised Mr. Carrier that a life without

parole sentence would be requested by the State, the Court also told Mr. Carrier that another possible sentence was one hundred and eight months to one hundred and forty-four months (108-144). RP 3 233.

In his declaration, and at the hearing on Mr. Carrier's motion to withdraw his plea, Mr. Carrier stated that he did not understand that a life without the possibility of parole sentence could actually be imposed. He believed that his sentence would be less severe by entering a guilty plea, and that the trial court had discretion as to his sentence. Had he comprehended the complete consequences he would have continued with the trial, and not pled guilty.

While his counsel testified that he advises all clients of the full consequences of their guilty pleas, and likewise had so advised Mr. Carrier, the record shows that in reality his counsel had little or no recollection of Mr. Carrier's case or of his conversations with Mr. Carrier. More importantly, at no time did Mr. Thoenig advise Mr. Carrier that a life without the possibility of parole was mandatory under the law in his case. Mr. Carrier did not understand that by

pleading guilty to Count I the Court did not have the discretion to avoid imposing a life sentence. Mr. Carrier's guilty plea to Count I was not made knowingly, voluntarily, or intelligently, and is therefore invalid.

Mr. Carrier was advised by both the Court and his counsel that a standard range rather than a life without the possibility of parole sentence was possible. Based on this incorrect advise Mr. Carrier pled guilty to the "most serious offense" of child molestation in the first degree.

At Mr. Carrier's sentencing hearing the sole legal argument asserted by counsel in opposition to a life without the possibility of parole sentence was that Mr. Carrier's prior 1981 indecent liberties conviction was not a strike offense on the basis that no proof was provided that Mr. Carrier was not married to the seven year old victim. Defense counsel argued that the 1981 indecent liberties statute contained an element that the alleged victim was not married to the defendant, and consequently, any comparability analysis should fail.

Counsel provided no legal authority for the argument, and no legal authority exists. To the contrary, Washington appellate courts have held that non-marriage need not be independently proved upon a plea of guilty to the crime of indecent liberties. *State v. Bailey, Supra.*

It must be stressed that the trial court considered, and the defense offered, no other legal theories in opposition to a life without the possibility of parole sentence even though Mr. Carrier's guilty plea to the strike offense was predicated upon the representations that legal authority existed which could preclude the imposition of a life without the possibility of parole sentence. Because Mr. Carrier entered his guilty plea to Count I based on the misrepresentations and his misunderstanding that a standard range sentence was possible his guilty plea is invalid.

B. MR. CARRIER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO ADEQUATELY ADVISE HIM THAT COUNT I CARRIED A MANDATORY SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE.

The Washington State and United States Constitutions

guarantee a criminal defendant the right to effective assistance of counsel. Washington Constitution Art.1 section 22; United States Constitution Amend. 14. To prevail on a claim of ineffective assistance of counsel, the defendant must show: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's deficient performance the result of the proceeding would have been different. *Strickland v. Washington*, 466 W.S. 668,80 L.Ed.2d 674,104 S.Ct. 2025, *rehearing* denied, 467 U.S. 1267 (1984). In 1985, the United States Supreme Court held in *Hill v. Lockhart*, 474 U.S. 52,106 S.Ct. 366 (1985), that the same two part test should be applied in challenges based on ineffective assistance of counsel in the context of guilty plea. *See also State v. Garcia*, 57 Wn.App .927,791 P.2d 244 (1990).

Counsel has an affirmative obligation to assist a defendant “actually an substantially” in determining whether to plead guilty. *State v. Stowe*, 71 Wn.App. 182,186,858 P.2d 267 (1993). When counsel fails to inform the defendant of the applicable law or

affirmatively misrepresents a consequence of a plea that results in prejudice to the defendant, the defendant is denied effective assistance of counsel, which renders the plea involuntary. Stowe, 71 Wn.App. at 188-89. In the context of a guilty plea, the defendant must show that his counsel failed to “actually and substantially [assist] his client in deciding whether to plead guilty,” and that but for counsel’s failure to adequately advise him, he would not have pleaded guilty. State v. McCollum, 88 Wn.App. 977,947 P.2d 1235(1997).

In Mr. Carrier’s case there was simply no realistic possibility under the law that a life sentence without the possibility of parole would not be imposed. In advising Mr. Carrier otherwise counsel’s performance was deficient.

The Persistent Offender Statute does not grant discretion to trial court judges in the sentencing of persistent offenders.⁴ State v. Morley,

4

RCW 9.94A.570 states “Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release or when authorized by RCW 10.94A.728 (1),(2),(3),(4),(6),(8), or (9), or any other form of authorized leave from a correctional facility while not in the

134 Wash.2d 588,952 P.2d 167 (1998). A persistent offender must be sentenced to life without the possibility of parole.

On July 22, 2001, the Legislature amended the definition of “persistent offender” to include a comparability clause. The statute now requires the sex offender to have,

before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection.

RCW 9.94A.030(32)(b)(ii) (Laws of 2001, ch.7. § 2) (emphasis added); *State v. Delgado*, 109 Wn.App.61,67,33 P.3d 753 (amendment took effect July 22, 2001), overruled on other grounds. *State v. Delgado*, 148 Wn.2d 723,63 P.3d 792(2003), *State v. Ortega*, 120 Wn. App.165,84 P.3d 935 (2004).

In the case at bar, the version of the statute in effect was

direct custody of a corrections officer or officers except: (1) in the case of an offender in need of emergency medical treatment; or (2) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree.”

between the dates of June 1, 2004 and July 30, 2004. Clearly, the post July 22, 2001 amendments are applicable. No Washington legal authority exists that would prohibit a court from conducting a comparability analysis at the time Mr. Carrier was sentenced, or that would preclude a determination that the prior crime of indecent liberties is comparable to the current crime of child molestation in the first degree. The crime of indecent liberties was, in fact, replaced with the crime of child molestation by legislative amendment to chapter 9A.44 in 1988. Mr. Carrrier, however, was not advised that the Court had no legal authority to sentence him to any term other than a life term without the possibility of parole. Counsel failed to inform him and affirmatively misrepresented both the applicable law and consequences of Mr. Carrier's guilty plea to Count I.

It bears mentioning that Mr. Carrier's counsel, Raymond Thoenig, testified that he "probably indicated [to Mr. Carrier] that there were -- if I am recalling correctly, that there were some Cruz problems with respect to the prior convictions." RP 5 57. This advice was also

erroneous. Any potential Cruz problems had already been settled by RCW 9.95.240(1) and State v. Varga, 151 Wash.2d 179,86 P.3d 139 (2004). Furthermore, this argument was abandoned by Mr. Carrier's second attorney, Robert Quillian, at Mr. Carrier's sentencing hearing. RP 5 76-77.

The prejudice to Mr. Carrier is clear. But for counsel's failure to properly advise Mr. Carrier, he would not have pled guilty. Based on Mr. Carrier's deprivation of effective assistance of counsel his guilty plea to Count I was invalid.

V. CONCLUSION

Mr. Carrier misunderstood the direct consequences of his guilty pleas to Counts IV and I. His misunderstanding as to his persistent offender status, and the sentencing consequences thereof, are directly attributable to counsel's misrepresentations that, as a matter of law, a standard range sentence could be imposed.

For all of the foregoing reasons and conclusions, Mr. Carrier respectfully requests that this Court reverse the trial court's denial of

Mr. Carrier's motion to withdraw his guilty pleas, and remand his case
for the appropriate remedy.

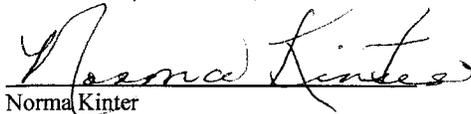
RESPECTFULLY SUBMITTED this 9th day of October,
2006.



Sheri L. Arnold
Sheri L. Arnold
WSBA # 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on October 9, 2006, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by the U.S. Post Office to appellant, Harry Nathan Carrier, DOC # 278123, Washington State Penitentiary, 1313 North 13th Ave. Walla Walla, WA. 99362, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on October 9, 2006.



Norma Kinter
Norma Kinter