

No. 34628-1-II

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

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**DEREK LAMONT BLANKS,**

**Appellant/Defendant.**

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY                      DEPUTY

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**PIERCE COUNTY SUPERIOR COURT**

**CAUSE NO. 04-1-04442-3**

**THE HONORABLE JAMES R. ORLANDO,**

**Presiding at the Trial Court.**

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**APPELLANT'S REPLY BRIEF**

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**I. SUPPLEMENTAL ASSIGNMENTS OF ERROR**

1. Error is assigned to Findings of Fact and Conclusions of Law Re: Denial of Defendant's Motion to Withdraw Guilty Plea; in particular, to **number 2** of the "Findings of Fact" which states:

The defendant brought the motion to withdraw his plea on two grounds only: (1) the plea was involuntary because he did not know the State was opposed to a SSOSA Sentence, and (2) ineffective assistance of counsel for failure to properly investigate the allegations.

2. Error is assigned to Findings of Fact and Conclusions of Law Re: Denial of Defendant's Motion to Withdraw Guilty Plea; in particular, to **number 4** of the "Findings of Fact" which states:

At the time of the plea, the defendant was represented by attorney Dino Sepe.

3. Error is assigned to Findings of Fact and Conclusions of Law Re: Denial of Defendant's Motion to Withdraw Guilty Plea; in particular to **number 5** of the "Findings of Fact" which states:

During representation of the defendant, Mr. Sepe reviewed all aspects of the case with the defendant very thoroughly, Defendant understood the subject matter, gravity of the circumstances, and his options.

4. Error is assigned to Findings of Fact and Conclusions of Law Re: Denial of Defendant's Motion to Withdraw Guilty Plea; in particular to **number 9** of the "Findings of Fact" which states:

The plea agreement was as follows: the State agreed to file an amended information, charging one count of child molestation in the first degree, dropping the two counts of rape of a child in the first degree. In exchange for the filing of this amended information, the defendant agreed to plead guilty to the amended information. This amendment made the defendant eligible for a SSOSA sentence. If the defendant had been convicted as originally charged, the standard range would have made him ineligible for a SSOSA sentence. The agreement of the parties was that the defendant could ask for a SSOSA sentence if he was found to be amenable to treatment, and the State would recommend the high end of the standard range. This 130 month recommendation was substantially less than the standard range the defendant would have faced if convicted as charged. Given the defendant's criminal history and the multiplier on the current offenses, the standard range if defendant has been convicted as originally charged would have been 240-318 months to life, with the possibility of an exceptional sentence above that based on the multiple offense policy of RCW 9.94A.535. (Emphasis added.)

5. Error is assigned to Findings of Fact and Conclusions of Law Re: Denial of Defendant's Motion to Withdraw Guilty Plea; in particular, to **number 10** of the "Findings of Fact" which states:

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Prior to the defendant entering his guilty plea, the Statement of Defendant on Plea of Guilty was read line-by-line to the defendant by Mr. Sepe. During the reading of the plea form, Mr. Sepe reviewed all aspects of pleading guilty very thoroughly with the defendant. Defendant understood the contents of the Statement of Defendant on Plea of Guilty before signing the form, and before pleading guilty in court.

6. Error is assigned to Finding of Fact and Conclusions of Law Re: Denial of Defendant's Motion to Withdraw Guilty Plea; in particular, to **number 11** of the "Findings of Fact" which states:

The defendant was aware that the State would not be recommending a SSOSA, but rather that the State was opposed to a SSOSA, and would be recommending the high end of the standard range. This was made clear to the defendant by Mr. Sepe prior to the plea, and by the Court at the time of his plea. The defendant signed the statement of defendant on plea of guilty in which the State's opposition to a SSOSA sentence is clearly written.

7. Error is assigned to Findings of Fact and Conclusion of Law Re: Denial of Defendant's Motion to Withdraw Guilty Plea; in particular, to **number 12** of the "Findings of Fact" which states:

At the entry of the guilty plea on May 27, 2005, the court conducted a lengthy and thorough colloquy with the defendant prior to accepting the defendant's guilty plea. The defendant confirmed that he had reviewed the elements of the offenses he

was pleading guilty to and that he understood elements of each charge. The defendant confirmed that he understood the constitutional rights he was giving up by pleading guilty. The defendant confirmed that he had gone over all aspects of pleading guilty and the plea form itself with his attorney.

8. Error is assigned to Findings of Fact and Conclusion of Law Re: Denial of Defendant's Motion to Withdraw Guilty Plea; in particular, to **number 14** of the "Findings of Fact" which states:

At the entry of the guilty plea on May 27, 2005, the defendant expressed no confusion to the court. The defendant understood the amended charge to which he was pleading guilty and understood the elements of the amended charge. Defendant understood the consequences of his plea, and he made a knowing, intelligent, and voluntary plea after full consultation with his attorney and a full review of all evidence against him.

9. Error is assigned to Findings of Fact and Conclusion of Law Re: Denial of Defendant's Motion to Withdraw Guilty Plea; in particular, to **number 16** of the "Findings of Fact" which states:

The defendant testified during the hearing to withdraw his guilty plea. The defendant's testimony was inconsistent on many key issues. The defendant's testimony was not accurate and not credible.

10. Error is assigned to Findings of Fact and Conclusion of Law Re:

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Denial of Defendant's Motion to Withdraw Guilty Plea; in particular, to **numbers 18, 19, 20, and 21** of the "Findings of Fact" which state:

- 18) The defendant plead guilty voluntarily.
- 19) The defendant plead guilty knowingly.
- 20) The defendant plead guilty intelligently.
- 21) The defendant was aware of the State's recommendation when he entered the plea.

## **II. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR**

1. Whether substantial evidence exists to support the factual finding that Mr. Blanks' motion to withdraw his guilty plea was based solely on the grounds (1) that he didn't know the State was opposed to a SSOSA sentence, and (2) that his trial counsel was ineffective for failing to properly investigate the case, where the record shows that Mr. Blanks' motion was also based on ineffective assistance of counsel during the plea process? (Supplemental Assignment of Error Number One).

2. Whether substantial evidence exists to support the factual finding that Mr. Sepe represented Mr. Blanks at the time of the plea, where attorney Lisa Contris in fact represented Mr. Blanks at the time of the plea, and Mr. Sepe was not present? (Supplemental Assignment of Error Number Two).

3. Whether substantial evidence exists to support the factual findings that Mr. Sepe thoroughly reviewed all aspects of the case with Mr. Blanks, that Mr. Blanks fully understood all aspects of his case including the State's sentencing recommendation, that the trial court advised Mr. Blanks that the State would not recommend a SSOSA sentence, and that Mr. Blanks agreed that the State would not recommend a SSOSA sentence? (Supplemental Assignments of Error Number Three through Ten).

### **III. SUPPLEMENTAL STATEMENT OF THE CASE**

Mr. Blanks Opening Brief was filed on September 26, 2006. The Findings of Fact and Conclusions of Law Re: Denial of Defendant's Motion to Withdraw Guilty Plea was belatedly filed on December 1,

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2006. Following the imposition of sanctions by this Court for failure to file a timely response brief the State filed its Responsive Brief on December 21, 2006. The aforementioned findings and conclusions are the subject of Appellant's Reply Brief.

#### **IV. ARGUMENT**

##### **THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT FACTUAL FINDINGS NUMBERED 2, 4, 5, 9, 10, 11, 12, 14, 16, 18, 19, 20, AND 21.**

The purpose of findings of fact and conclusions of law is to aid an appellate Court's review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trial court's findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.3d 806 (1988).

Mr. Blanks assigns error to all of the above mentioned factual

findings which will be addressed in pertinent part:

1. There is not substantial evidence to support finding of fact number 2.

Finding of fact number 2 states:

The defendant brought the motion to withdraw his plea on two grounds only: (1) the plea was involuntary because he did not know the State was opposed to a SSOSA Sentence, and (2) ineffective assistance of counsel for failure to properly investigate the allegations.

CP 144-149.

The lower court record repeatedly contradicts this finding. In trial counsel Robert Quillian's 'Motion and Declaration for Evidentiary Hearing,' and attached 'Sworn Declaration of Derek L. Blanks', challenges are also made to the guilty plea on the basis that prior counsel's representation lacked "meaningful communication" and was ineffective "both with regard to pre-trial preparation *and the plea of guilty itself.*" (Emphasis added.) Mr. Blanks declared that he "never felt like he received an substantive assistance from Mr. Sepe...." CP 37-39; 25-36; pages 2; 1-2.

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In attorney Lori Smith's 'Declaration of Counsel and Defendant's Memorandum in Support of Motion to Withdraw Plea' counsel asserts that Dino Sepe did not adequately assist Mr. Blanks in his plea agreement or in understanding the guilty plea. Nor was Mr. Blanks comfortable with the idea, or even aware that he could ask stand-in-counsel Lisa Contris about the plea. Furthermore, Mr. Blanks wished to withdraw his guilty plea on the grounds that he believed there was a mutual mistake or a lack of meeting of the minds as to the plea agreement, because he was never told, and did not understand, about the State's opposition to SSOSA and the importance of such opposition. CP 56-57, pages 1-9.

Additionally, Mr. Blanks' testimony at the motion to withdraw plea hearing shows that Mr. Blanks' motion was based on ineffective assistance of counsel not only for "failure to properly investigate the allegations" but also for failure of both his trial counsel, Dino Sepe, and stand-in-counsel, Lisa Contris, to properly assist him in understanding his guilty plea, and all legal ramifications thereof. RP 1

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18-31.

The State's claim on appeal that Mr. Blanks' motion to withdraw his guilty plea at the lower court was based solely on the grounds that (1) he didn't know the State was opposed to a SSOSA sentence, and (2) trial counsel was ineffective for failure to properly investigate the allegations is mistaken. Equally erroneous is the State's conclusion that "this appeal only addresses the court's conclusion that defendant understood that the State opposed a SSOSA sentence in his case." See Brief of Respondent at p. 26. Plainly Mr. Blanks' appeal addresses numerous issues pertaining to ineffective assistance of both trial counsel, as well as the issue concerning Mr. Blanks' miscalculated offender score.

2. There is not substantial evidence to support finding of fact number 4.

Finding of fact number 4 states:

At the time of the plea, the defendant was represented by attorney Dino Sepe.

This factual finding is clearly in error. At the time Mr. Blanks

entered his guilty plea he was represented by Lisa Contris. RP 1 1-4. While Mr. Sepe was Mr. Blanks attorney of record, he was, in fact, not present “at the time of the plea.”

3. There is not substantial evidence to support findings of facts numbered 5, 9-12, 14,16, and 18-21.

The above listed factual findings as drafted by the State are highly repetitive and listed in their entirety in Section I of Appellant’s Reply Brief. In essence they state: (1) that Mr. Sepe thoroughly reviewed all aspects of the case with Mr. Blanks, (2) that Mr. Blanks fully understood all aspects of his case, (3) that the trial court “made clear” to Mr. Blanks that the State would not recommend a SSOSA sentence, and (4) that the parties agreed the State would not recommend a SSOSA sentence. Such findings are clearly contradicted by the record.

First, Mr. Sepe did not claim to have thoroughly reviewed “all aspects” of the case with Mr. Blanks as evidenced by his testimony. RP 1 56-110. With respect to the critical plea form(s) Mr. Sepe

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testified that on the morning of the plea he went over “Attachment A” with Mr. Blanks. RP 1 63. Later, Mr. Sepe testified that he went over an “Appendix C” form, but he didn’t have the “Appendix A” form with him. He used another client’s paperwork and appendixes “to go over with Mr. Blanks because a lot of time the State doesn’t get you all the appendixes by the time of the trial - - by the time of the plea.” RP 1 65.

Mr. Sepe testified that he was not at Mr. Blanks’ plea hearing, but he “can only guess” that he was in trial in Department 8 at the time. RP 1 73. He told Lisa Contris, his stand-in-counsel, that Mr. Blanks had already signed the plea form “and there weren’t any questions.” RP 1 74. Mr. Sepe further testified that he has “the most open class A felonies of anyone in the office.” He had “20 open class A felonies,” including two “ag murder(s)” “which would be death penalty” along with a host of other attempted murder, manslaughter, and other “A’s.” RP 100-101. Mr. Sepe, nonetheless, recalled that he discussed both the plea and the State’s sentencing recommendation with Mr. Blanks, and

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his impression was that Mr. Blanks understood everything.

Lisa Contris, on the other hand, did not remember Mr. Blanks, but “apparently” she stepped in for Mr. Sepe to “cover” Mr. Blanks’ guilty plea. RP 1 52-53. She did not recall going over any paperwork or discussing the plea with Mr. Blanks, nor would she have done so since she was just standing in. RP 1 53. In summary, Ms. Contris has little or no recollection of Mr. Blanks or his plea hearing.

Mr. Blanks testified that he did not understand the State’s recommendation. Even assuming that the trial court could reasonably find that Mr. Sepe thoroughly reviewed all aspects of the case with Mr. Blanks, the sole testimony the court had at the hearing on motion to withdraw plea, from which to determine that Mr. Blanks did understand the State’s recommendation, was Mr. Sepe’s “impression” that he did. Contrary to the finding that the lower court “made clear” to Mr. Blanks that the State would not recommend SSOSA *no mention was made concerning SSOSA during the extremely brief plea hearing.* RP 1 1-4. While the record does show that the attorneys were in

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agreement that the State would not recommend a SSOSA sentence, it simply does not show that Mr. Blanks sufficiently understood the nature of a SSOSA sentence or the State's opposition to it.

Finally, the belated Findings of Fact and Conclusions of Law Re: Denial of Defendant's Motion to Withdraw Guilty Plea are not signed by any attorney representing Mr. Blanks or by Mr. Blanks. The record does not show whether such findings and conclusions were entered ex parte or otherwise. In the event the State cannot demonstrate that the findings and conclusions were entered in compliance with all applicable rules and laws this Court should, therefore, strike the Findings and Conclusions from the record on review.

**V. CONCLUSION**

The factual findings are not supported by substantial evidence. Mr. Blanks continue to respectfully requests that this Court reverse and remand for him to withdraw his guilty plea.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of February, 2007.



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**CERTIFICATE OF SERVICE**

The undersigned certifies that on February 5, 2007, she delivered by U.S. Post Office to: the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and to appellant, Derek L. Blanks, DOC # 768939, Airway Heights Corrections Center, Post Office Box 1899, Airway Heights, WA. 99001, true and correct copies of this Reply 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 February 5, 2007.

  
Norma Kinter

CLERK OF SUPERIOR COURT  
COUNTY OF PIERCE  
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STATE DEPUTY  
BY 