

original

NO. 34628-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

DEREK LAMONT BLANKS, APPELLANT

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DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 04-1-04442-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant knowingly, intelligently, and voluntarily plead guilty to child molestation in the first degree?
2. Did defendant receive effective assistance from his attorneys Dino Sepe, Lisa Contris, and Lori Smith?
3. Did the court properly deny defendant's motion to withdraw his guilty plea?

B. STATEMENT OF THE CASE.

1. Procedure

On September 17, 2004, the Pierce County Prosecutor's Office filed an information in Cause No. 04-1-04442-3, charging appellant, DEREK LAMONT BLANKS, hereinafter "defendant," with two counts of child rape in the first degree. CP 1-3. The State later amended this information, ultimately charging defendant with one count of child molestation in the first degree. CP 4.

a. Preparation for Trial.

After defendant was arraigned, the court appointed Dino Sepe to represent him. RP 58-61.¹ Mr. Sepe initially explored the possibility of asking the State to agree to a special sex offender sentencing alternative (“SSOSA”) for defendant. RP 61. The State, however, refused to agree to a SSOSA in this case, so Mr. Sepe prepared for trial. RP 61. After Mr. Sepe had prepared for trial for six months, defendant told Mr. Sepe that he wanted to request a SSOSA. RP 61. Mr. Sepe explained to defendant that SSOSA was an alternate sentence and that defendant would have to plead guilty in order to request it. RP 61-63, 65-68. After this explanation, Mr. Sepe was sure that defendant understood SSOSA and that defendant wanted to pursue a SSOSA. RP 61-63, 65-68.

Mr. Sepe knew that the minimum sentence for two counts of child rape in the first degree was more than eleven years, which made defendant ineligible for SSOSA. RP 61. Mr. Sepe thus asked the State to reduce the charges so that defendant would be SSOSA eligible. RP 61. Although the State had originally denied Mr. Sepe’s request to agree to a SSOSA, the State did agree to reduce the charges in order to allow defendant to request a SSOSA. RP 61. The State specifically said, however, that it would

¹ The transcript of the proceedings in this case is contained in two volumes that are not paginated consecutively. Citations to the volume beginning on May 27, 2005 (plea hearing and hearing on motion to withdraw), are preceded by “RP” (i.e. “RP 1”). Citations to the volume beginning on March 24, 2006 (sentencing hearing), are preceded by “RP(2)” (i.e. “RP(2) 1”).

oppose defendant's request for SSOSA. RP 61; CP 6-19. The State then filed an amended information dismissing the child rape charges and charging defendant with child molestation in the first degree. RP 61; CP 4. This amendment reduced defendant's potential maximum sentence from 318 months to 130 months. RP 75.

Mr. Sepe explained to defendant that the State reduced the charges so that defendant could plead guilty and ask the court for a SSOSA. RP 86-88. He said that defendant would have to petition the court to receive a SSOSA because the State would not recommend or support a SSOSA. RP 86-88, 94-95. When Mr. Sepe said that defendant would have to request the SSOSA, defendant asked, "Do you think we have a chance?" RP 95. This question indicated to Mr. Sepe that defendant knew that the SSOSA was not guaranteed or supported by the State. RP 95.

b. Plea Hearing.

Defendant's plea hearing was held before the Honorable James R. Orlando on the afternoon of May 27, 2005. RP 1, 4; CP 6-19. Prior to that day, Mr. Sepe thoroughly reviewed the "Statement of Defendant on Plea of Guilty" ("plea agreement"). RP 61-63, 65-68, 86-88, 90-95; CP 6-19, 144-149 (FF² 10). He was careful to read each line of the plea agreement to the defendant and ensure that defendant understood those paragraphs. RP 90-91. Mr. Sepe explained the rights that defendant

waived by pleading guilty. RP 91-95. Throughout this review and throughout the time Mr. Sepe represented defendant, defendant seemed intelligent and seemed to understand the explanations. RP 91-92.

On the morning of May 27, 2005, Mr. Sepe reviewed the plea agreement with defendant again. RP 63. He explained “in great detail” that the state was not going to support the SSOSA recommendation. RP 78. He explained that the defense would have to petition the court for a SSOSA or defendant would not get a SSOSA. RP 95. After speaking with defendant, Mr. Sepe felt that defendant understood the plea and that defendant knew the state would oppose the SSOSA. RP 95. Defendant had no questions for Mr. Sepe after this explanation. RP 91-93.

Mr. Sepe was not able to represent defendant during the plea hearing that afternoon because he was in trial in another court at that time. RP 73-74. Mr. Sepe instead arranged for Lisa Contris to represent defendant at the plea hearing. RP 73-74. Mr. Sepe explained the circumstances of the plea hearing to Ms. Contris, including the fact that the State would oppose SSOSA and that the defense would have to request SSOSA. RP 74. At a later hearing, Ms. Contris testified that she did not remember that specific plea hearing. RP 54. She does, however, meet with her clients before they plead, and she does not go into court if the client has questions about the case or the plea. RP 54-55. Defendant

² Findings of Fact will be referred to as “FF” throughout this brief.

testified that he felt comfortable enough with Ms. Contris's representation to ask her questions, but he did not have any questions to ask her about his plea. RP 27, 34-36.

During the plea hearing, Ms. Contris and defendant were both present in the courtroom. RP 1. The judge held a colloquy to determine that defendant understood which rights he was waiving, that the statements in his plea agreement were accurate, and that he was pleading guilty knowingly, intelligently, and voluntarily. RP 1-4. The court also asked defendant if he understood the State's sentencing recommendation of 130 months; defendant said that he did. RP 3. Neither Ms. Contris nor defendant requested SSOSA at that time. RP 1-4. The court accepted the plea and found defendant guilty. RP 4; CP 6-19. It ordered that a presentence report be prepared for defendant's sentencing hearing. RP 4.

c. Motion to Withdraw Plea.

Sometime near Memorial Day (May 30) 2005, defendant called Mr. Sepe and said that he wanted to withdraw his plea because his paperwork looked different than the paperwork of inmates that had received SSOSA.³ RP 27-29. On October 21, 2005, the court held a hearing to determine whether defendant could withdraw his guilty plea. RP 14. Defendant changed counsel twice between the day he called Mr.

³ Mr. Sepe later testified that plea paperwork looks the same whether a person receives a SSOSA or not. RP 61-62.

Sepe and the day of the motion hearing. RP 9-13. He was ultimately represented at the hearing by Lori Smith. RP 14.

Ms. Smith based the motion to withdraw the guilty plea on two grounds. First, she alleged that defendant did not understand that the State was going to oppose SSOSA. RP 14-18, 131-133, 136-138; CP 144-149 (FF 2). Second, she alleged that Mr. Sepe was ineffective because he failed to investigate witnesses that defendant had mentioned before he pleaded guilty. RP 14-18, 131-133, 136-138; CP 144-149 (FF 2).

Defendant called Mr. Sepe, Ms. Contris, and Glen Glover (a DAC investigator) at the hearing to testify to the events that occurred between defendant's arraignment and defendant's decision to withdraw his plea. RP 6-142. Defendant also testified, claiming that, although he knew at his plea hearing that the State was going to oppose his SSOSA request, he did not know what the word "oppose" meant. RP 25. Defendant also said that he initialed the factual statement of his plea agreement in order "to get the SSOSA," not because it was a true statement. RP 40-42.

The court denied defendant's motion, found defendant not credible, and entered findings of fact and conclusions of law. RP 142; CP 144-49 (attached hereto as "Appendix A"). The court noted that defendant "probably disqualified himself from a SSOSA when he said his factual statement was a lie." RP 142. It also found that defendant "stopped the SSOSA evaluation process himself, after he pleaded guilty." CP 144-149 (FF 15).

d. Sentencing Hearing.

Defendant's sentencing hearing was originally scheduled for March 10, 2006. RP 147-48. At that hearing, Ms. Smith informed the court that she wanted to challenge the calculation of defendant's offender score. RP 14. The court postponed the sentencing hearing for two weeks so that Ms. Smith could research and brief that issue. RP 148. At the March 24, 2006, sentencing hearing, Ms. Smith argued that defendant's score should be reduced from six to four based on a same course of conduct analysis. RP(2) 3-10. The court agreed that two of defendant's past crimes were the same course of conduct, and it reduced defendant's offender score from six to five. RP(2) 11-12; CP 104-118. This reduction changed defendant's standard sentence range from 98-130 months to 77-102 months. RP 11-12; CP 104-118. Defendant did not object to this adjustment of his offender score. RP(2) 3-19.

The State recommended that the court sentence defendant to the high end of his standard sentence range. RP 12-13. Ms. Smith requested the middle of the range, and defendant did not object to this recommendation. RP(2) 13-14. The court adopted Ms. Smith's recommendation and sentenced defendant to 90 months imprisonment with credit for 554 days served. RP 16; CP 104-118. The court also ordered defendant to pay monetary costs. RP 16-17; CP 104-118. From this entry of judgment and sentence, defendant has filed a timely notice of appeal. CP122-137.

2. Facts

Between April 1, 2004 and May 19, 2004, defendant had sexual contact with A.R., who was less than 12 years old at the time and who was at least 36 months younger than defendant. CP 4, 6-19. Defendant was not married to A.R. when he had sexual conduct with A.R. CP 4, 6-19.

C. ARGUMENT.

1. DEFENDANT'S PLEA WAS KNOWING, INTELLIGENT, AND VOLUNTARY AND HE WAIVED HIS RIGHT TO CHALLENGE HIS PLEA BASED ON A MISCALCULATED OFFENDER SCORE.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. U.S. Const. amend. XIV; Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); In re Pers. Restraint of Stoudmire, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001); Wood v. Morris, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976). Whether a plea is knowing, voluntary, and intelligent is determined from a totality of the circumstances. Wood, 87 Wn.2d at 506; State v. Branch, 129 Wn.2d 635, 919 P.2d 1228, (1996). If a defendant has received the information and pleads guilty pursuant to a plea agreement, there is a presumption that the plea is knowing, voluntary, and intelligent. In re Personal Restraint of Ness, 70 Wn. App. 817, 821, 855 P.2d 1191, review denied, 123 Wn.2d 1009, 869 P.2d 1085 (1994). "A defendant's signature on the plea form is

strong evidence of a plea's voluntariness." State v. Branch, 129 Wn.2d at 642; State v. Stephan, 35 Wn. App. 889, 893, 671 P.2d 780 (1983) (quoting State v. Perez, 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982) (citing In re Keene, 95 Wn.2d 203, 206-207, 622 P.2d 13 (1981))). If the trial court orally inquires into a matter that is on that plea form, the presumption that the defendant understands this matter becomes "well nigh irrefutable." Branch, 129 Wn.2d at 642 n.2; State v. Stephan, 35 Wn. App. at 893. After a defendant has orally confirmed statements in this written plea form, that defendant "will not now be heard to deny these facts." In re Keene, 95 Wn.2d 203, 207, 622 P.2d 13 (1981).

For a court to conclude that a guilty plea is made knowingly, voluntarily, and intelligently, it must have facts sufficient to satisfy three tests. First, the defendant must understand "the direct consequences of [the] guilty plea," and the record of the plea hearing "must show on its face that the plea was entered voluntarily and intelligently." Wood v. Morris, 87 Wn.2d 501; State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (citing State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). The defendant must "understand the sentencing consequences" of his plea. State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988); State v. Turley, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003). He must also understand that he is waiving certain constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. at 243.

Second, a defendant must “be informed of the requisite elements of the crime charged, [and]... understand that his conduct satisfies those elements.” In re Pers. Restraint of Hews, 99 Wn.2d 80, 87, 88, 660 P.2d 263 (1983); McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); See also United States v. Johnson, 612 F.2d 305, 309 (7th Cir. 1980). Third, the court must be “satisfied that there is a factual basis for the plea.” CrR 4.2(d).

Thus, the trial court properly accepted defendant’s guilty plea because (1) defendant understood the direct consequences of his plea, (2) defendant understood the requisite elements of assault in the second degree and robbery, and (3) the court had a factual basis on which to find defendant guilty of assault in the second degree and robbery.

a. Defendant knowingly, intelligently, and voluntarily pleaded guilty to child molestation in the first degree.

The record shows that defendant pleaded guilty knowingly, intelligently, and voluntarily. RP 3, 4; CP 6-19 (pg 7, 8), 144-149 (FF15, 18-20). Mr. Sepe and the court both felt that defendant read and understood the plea agreement he signed. CP 6-19 (pg 7, 8). Defendant was a 34 years old when he pleaded guilty and had a high school education, and the court specifically found that defendant was intelligent. RP 19; CP 6-19, 144-149 (FF 13). Mr. Sepe reviewed the plea agreement with him line-by-line until defendant understood it. RP 2, 3, 20, 41-44,

67-68, 90-93; CP 144-149 (FF 5, 10). The following statement appears just above defendant's signature on the plea agreement:

My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

CP 6-19.

Defendant understood the direct consequences of pleading guilty to child molestation in the first degree. CP 144-149 (FF 12, 14). He knew he would have to register as a sex offender and that he would be on community custody if he was ever released from prison. RP 2, 3, 20; CP 6-19, 144-149 (FF10). The court told him that child molestation is a strike offense. RP 3; CP 6-19. Defendant knew that the range at the time he pleaded was 98 months to 130 months. CP 6-19. He knew which constitutional rights he was waiving. CP 6-19.

Specifically, defendant understood what it meant to plead guilty in order to be eligible for a sex offender sentencing alternative ("SSOSA"). The plea agreement itself explained what a SSOSA entailed. CP 10. Mr. Sepe explained SSOSA to defendant, and he felt that defendant understood SSOSA. RP 86-87. Defendant understood these explanations. RP 67-68, CP 144-149 (FF 5).

Defendant also knew that it was his responsibility to request a SSOSA. Mr. Sepe reviewed the process of requesting a SSOSA "in great

detail” with defendant. RP 2, 3, 20, 41-44, 78, 86-87; CP 144-149 (FF 5, 10). Mr. Sepe explained that the State was against SSOSA and that defendant would have to request SSOSA or he would not get it. RP 67-68, 88, 95; CP 144-149 (FF 11, 21). Defendant knew that the State was recommending a sentence of 130 months and that the State was opposing SSOSA. RP 3; CP 6-19, 144-149 (FF 3, 11). Although defendant testified that he did not know what “opposed” meant, the court found that this testimony was not credible. CP 144-149 (FF 16). That defendant understood the word “oppose” is supported by the fact that defendant signed the plea agreement saying he understood the contents of the plea agreement. CP 6-19. Defendant understood that a SSOSA was not a “done deal,” and he asked whether Mr. Sepe thought that defendant had “a chance” of convincing the court to grant the SSOSA request. RP 67-68, 95, CP 144-149 (FF 11, 21). Even though he had the opportunity to ask Mr. Sepe and Ms. Contris questions before pleading guilty, defendant did not do so. RP 34-36, 55, 74-75.

Defendant understood the elements of child molestation in the first degree. A person commits child molestation in the first degree if he

has... sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083(1). On defendant’s plea agreement, the elements of child molestation in the first degree are listed as follows: “In Pierce County,

WA did unlawfully, being at least 36 months older, have sexual conduct with a person less than 12 years old and not married to that person.” CP 6-19. Moreover, defendant received a copy of the information charging him with child molestation in the first degree, which lists these elements exactly. CP 4, 6-19. The court later found that defendant knew the elements of child molestation in the first degree. CP 144-149 (FF 12, 14).

The court had a factual basis on which to accept defendant’s plea. Paragraph 11 of defendant’s plea agreement states, “During a period between April 1, 2004 and May, 19, 2004, I had sexual contact with A.R. who was less than 12 years old at the time. I was at least 36 years older and not married to her. This occurred in Pierce County WA.” CP 6-19. Defendant’s handwritten initials appear next to this statement on the plea agreement, and defendant agreed that the statement was true and accurate when the court read the statement to him. RP 3, CP 6-19.

Defendant’s guilty plea was thus knowing, intelligent, and voluntary because defendant knew the consequences of the plea, defendant knew the elements of the crime of child molestation in the first degree, and the court had a factual basis on which to accept the plea.

- b. Defendant waived his right to challenge the validity of his plea based on a miscalculation of his offender score because he failed to move to withdraw his plea based on those grounds.

If a defendant pleads guilty based on a miscalculated offender score, that person may move to withdraw the plea as involuntary. State v. Mendoza, 157 Wn.2d 582, 592, 141 P.3d 49 (2006). If the defendant is clearly informed of the miscalculation before he is sentenced, then “the defendant waives the right to challenge the voluntariness of the plea.” Id.

Defendant in the present case was clearly informed of the offender score miscalculation before he was sentenced. On March 10, 2006, defendant’s attorney Ms. Smith informed the court that she believed that defendant’s offender score had been miscalculated. RP 147-148. Defendant was present in court that day. RP 147-148. Moreover, defendant was present on March 24, 2006, when Ms. Smith argued that defendant’s offender score was lower than originally calculated. RP(2) 3. Ms. Smith provided briefing for her argument to recalculate the offender score. CP 91-100. Defendant thus had at least two weeks to research, brief, and argue this issue before defendant was ultimately sentenced on March 24, 2006, using the recalculated score. RP 11-12, 16.

Despite this notice, defendant never moved to withdraw his plea based on the miscalculation of his offender score. Defendant clearly knew that he could make such a motion because he had made one that was heard

on August 26, 2005. RP 6-142. He did seek and receive the relief he sought for the offender score miscalculation: the score was recalculated and he was sentenced using a range of 77-102 months instead of a range of 98-130 months. RP(2) 3-19. At no point did defendant seek a different type of relief for the miscalculation or say that he wanted to withdraw his plea based on the miscalculation. After defendant received the recalculation he requested, he was sentenced by the court and thus lost his right to challenge the plea based on the offender score miscalculation. RP(2) 16; see Mendoza 157 Wn.2d at 592.

The facts of the present case are very similar to the facts in State v. Mendoza, 157 Wn.2d 582, in which a defendant waived his right to contest his guilty plea because he failed to move to withdraw his plea before he was sentenced. Mendoza pleaded guilty to child molestation in the third degree believing that his offender score was 7 when it was actually 6. Id. at 584. Mendoza learned of this miscalculation at the sentencing proceedings. Id. at 584-85. While Mendoza did move to withdraw his plea on grounds of ineffective assistance of counsel, he did not move to withdraw his plea based on the miscalculated offender score. Id. at 585-86. The court sentenced Mendoza using the recalculated offender score, and Mendoza never objected to being sentenced under the recalculated score. Id. at 585-86, 592. The Washington Supreme Court held that Mendoza waived his right to relief based on the offender score miscalculation and could not raise that issue on appeal. Id. at 592.

In this case, defendant pleaded guilty to child molestation in the first degree believing that his offender score was 6 when it was actually 5. RP(2) 12; CP 91-100. He learned of this miscalculation two weeks before he was sentenced. RP 147-148; RP(2) 3-19. While defendant did move to withdraw his plea on grounds that that he did not know the State would oppose SSOSA and that his counsel was ineffective, he did not move to withdraw his plea based on the miscalculated offender score. CP 144-149. The court sentenced defendant using the recalculated offender score, and defendant never objected to being sentenced under the recalculated score. RP 147-148; RP(2) 3-19. Defendant clearly waived his right to challenge his plea based on the offender score miscalculation because he had even more notice that Mendoza and the facts in the cases are otherwise identical.

2. ALL THREE OF DEFENDANT'S ATTORNEYS PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceedings has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. Id. “The essence of an ineffective-assistance claim is that counsel’s

unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule

forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. Id. An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

a. Dino Sepe provided effective assistance of counsel.

Mr. Sepe's performance was not deficient. When defendant asked Mr. Sepe about a SSOSA, Mr. Sepe convinced the State to reduce charges so that defendant would be eligible for SSOSA. RP 75; CP 4, 144-149 (FF 9). In addition to reducing the seriousness of the offenses with which defendant was charged, this reduction reduced defendant's potential maximum sentence from 318 months to only 130 months. RP 75; CP 4, 144-149 (FF 9). As soon as defendant's charges were reduced, Mr. Sepe arranged for a SSOSA evaluator to meet with defendant. RP 23, 64. This

evaluator spoke to defendant on May 20, 2005, and only stopped evaluating defendant because defendant stopped the evaluation process. RP 64; CP 144-149 (FF 15). Such evaluations do not have to occur before a person pleads guilty, so Mr. Sepe's decision to immediately schedule the meeting with the evaluator demonstrates how diligently he pursued the SSOSA evaluation. RP 64.

Mr. Sepe also thoroughly reviewed the plea agreement and all aspects of the case with defendant. RP 2, 3, 20, 41-44, 90-93; CP 144-149 (FF 5). He reviewed the agreement with defendant before the plea hearing was scheduled and again on the morning of the plea hearing. RP 63. He reviewed all the attachments that might appear on the pleading. RP 63. Mr. Sepe was extremely careful to take his time when he reviewed the plea agreement because he wanted to be certain that defendant did not have any questions about the plea. RP 67-68, 74-75.

Mr. Sepe specifically explained to defendant that it was defendant's obligation to request SSOSA. He explained "in great detail" that the State would not support a SSOSA recommendation. RP 78, 88. Mr. Sepe told defendant that it was his obligation to request the SSOSA or he would not get it. RP 66, 95. Defendant indicated that he knew SSOSA was not certain when he asked whether Mr. Sepe thought they had a chance of convincing Judge Orlando to grant the SSOSA request. RP 95. By the time defendant went into the plea hearing, Mr. Sepe was certain that defendant understood that the State would oppose the SSOSA and the

defense would have to petition the court to grant it. RP 68. Mr. Sepe then explained this situation thoroughly to Lisa Contris, who represented defendant at the plea hearing. RP 74.

Even if Mr. Sepe's performance was deficient, defendant was not prejudiced by Mr. Sepe's performance as counsel. Defendant benefited from Mr. Sepe's SSOSA negotiations, which reduced the seriousness of defendant's charges, reduced the possible range of defendant's sentence, and made defendant eligible for SSOSA. RP 75; CP 4, 144-149 (FF 9). Mr. Sepe's actions did not preclude defendant from requesting a SSOSA after the plea hearing because SSOSAs can be requested as late as the sentencing hearing. RP 64, 68. In fact, in Mr. Sepe's experience, defendant's typically request SSOSA at sentencing, not at the plea hearing. RP 64, 68.

Most importantly, defendant disqualified himself from SSOSA after the plea hearing occurred, so Mr. Sepe could not have done anything to ensure that defendant would receive SSOSA. Although defendant spoke to an evaluator before his plea, he stopped the SSOSA evaluation by moving to withdraw his plea only two days after he pleaded guilty. RP 24, 29, 77, 147-48; CP 144-149 (FF 15). At the withdrawal hearing, defendant told the court that he lied at his plea hearing. RP 41. Judge Orlando said that defendant "probably disqualified himself from a SSOSA when he said his factual statement was a lie." RP 142. At the March 10, 2006, hearing, defense counsel Lori Smith acknowledged that "it didn't

seem too likely that this court would have granted the SSOSA anyway.”

RP 148. Ms. Smith also spoke to defendant about the possibility of requesting SSOSA, and they decided that they should not even request it.

RP 148. Because defendant disqualified himself from SSOSA and decided that he did not want to seek SSOSA, Mr. Sepe’s actions had no effect on whether defendant received SSOSA.

Mr. Sepe effectively assisted defendant in his defense because Mr. Sepe’s performance was neither deficient nor prejudicial.

b. Lisa Contris provided effective counsel.

Ms. Contris’s performance was not deficient. Before she represented defendant at his plea hearing, Mr. Sepe briefed her about the case. RP 74. Ms. Contris did not remember defendant’s plea specifically, but testified that she will not go into a plea hearing if she thinks that the client has questions about the case. RP 55. While defendant admitted that he was comfortable asking Ms. Contris questions, he testified that he did not have any questions about his case before or during the plea hearing. RP 27, 34-36, 74-75. He admitted that he did not ask Ms. Contris any questions about his case before he pleaded guilty. RP 27.

Ms. Contris did not fail to complete any tasks that necessarily had to be completed at the plea hearing. She did not have to request SSOSA at the time of the plea hearing because such requests are typically made at the sentencing hearing. RP 68. She was also not obligated to make sure

that the SSOSA evaluation was completed before the plea hearing because a SSOSA evaluation can be conducted after the defendant has pleaded guilty. RP 64.

Moreover, Ms. Contris may have reasonably concluded that the best trial strategy was to postpone the SSOSA request until the sentencing hearing. A court must review a defendant's criminal history before it can decide whether a defendant is qualified for SSOSA. See RCW 9.94A.670(2)(b). Ms. Contris testified that she usually waits until sentencing to stipulate to a defendant's criminal history. RP 4. She may have thought it was best to wait until the court had the opportunity to review defendant's criminal history before he requested SSOSA. She may also have thought it prudent to wait until the court had conducted a presentence investigation before she sought a SSOSA. A presentence investigation might show that defendant was amenable to treatment, which would be strong evidence to support defendant's SSOSA request. Because the court did not order a presentence investigation until the plea hearing was over, Ms. Contris may have thought it was best for defendant to postpone his SSOSA request until after the report was finished. RP 4.

Even if Ms. Contris's performance was deficient, defendant was not prejudiced by Ms. Contris's performance as counsel. Her actions did not disqualify defendant from a SSOSA. Such requests usually occur at sentencing, and defendant could still request SSOSA after he had pleaded

guilty. RP 68. Ms. Contris's actions did not foreclose the possibility that defendant could make the request at a later time.

Had Ms. Contris requested SSOSA, defendant's own actions after the plea hearing would have disqualified him from receiving a SSOSA. Although defendant spoke to an evaluator before his plea, he stopped the SSOSA evaluation when he moved to withdraw his plea only two days after he pleaded guilty. RP 24, 29, 77, 147-48; CP 144-149 (FF 15). Ms. Contris's actions had no effect on defendant's decision to withdraw the plea; he made that decision only because he mistakenly thought his plea paperwork was incorrect. RP 27-29, 61-62. Judge Orlando said that defendant "probably disqualified himself from a SSOSA when he said his factual statement [at the plea hearing] was a lie" at his withdrawal hearing. RP 41, 142. At the March 10, 2006, hearing, defense counsel Lori Smith acknowledged that "it didn't seem too likely that this court would have granted the SSOSA anyway." RP 148. Ms. Smith also spoke to defendant about the possibility of requesting SSOSA, and they decided that they should not even request it. RP 148. Even if Ms. Contris had requested a SSOSA, defendant would not have received a SSOSA because he disqualified himself from SSOSA and because he ultimately decided that he did not want to seek a SSOSA.

Ms. Contris effectively assisted defendant in his defense because her performance was neither deficient nor prejudicial.

c. Lori Smith provided effective counsel.

Ms. Smith's performance was not deficient. She reviewed defendant's offender score and concluded that it had been miscalculated. RP 147-148. She then had two weeks to research and brief the offender score issue. RP 147-48; CP 91-100. At the sentencing hearing of March 10, 2006, Ms. Smith successfully argued that defendant's offender score had been miscalculated. RP(2) 4-10. She then sought a reasonable form of relief: she asked the court to sentence defendant using the lower offender score. RP(2) 10-12.

There is no evidence in the record that defendant was confused about this process, nor is there evidence that Ms. Smith failed to advise him regarding the offender score miscalculation. In fact, defendant was present at the March 10, 2006 hearing when Ms. Smith announced that the offender score had been miscalculated. RP 147-148. He was also present on March 24, 2006, when Ms. Smith argued the motion to recalculate the score, when the court changed the score from six to five, and when the court sentenced defendant under the newly calculated score. RP 14-48; RP(2) 3-19.

Even if Ms. Smith's performance was deficient, defendant was not prejudiced by Ms. Smith's performance as counsel. Ms. Smith's efforts reduced his offender score by one, which in turn **reduced** the range of his sentence by 21 years. RP(2) 3-19.

Ms. Smith effectively assisted defendant in his defense because her performance was neither deficient nor prejudicial.

3. THE COURT PROPERLY DENIED
DEFENDANT'S MOTION TO WITHDRAW HIS
PLEA BECAUSE DEFENDANT WAS WELL-
INFORMED THAT THE STATE DID NOT
SUPPORT HIS SSOSA REQUEST.

Under CrR 4.2(f), a court must allow a guilty plea to be withdrawn whenever it appears withdrawal is necessary to correct a manifest injustice. This Court has always held that this rule imposes a demanding standard on the defendant to demonstrate a manifest injustice, i.e., "an injustice that is obvious, directly observable, overt, not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974), State v. Branch, 129 Wn.2d 635, 641-642, 919 P.2d 1228 (1996); State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). A showing that the plea was involuntary is sufficient to establish a manifest injustice. Taylor, 83 Wn.2d at 598; State v. Turley, 149 Wn.2d 395, 398-399, 69 P.3d 338 (2003). A guilty plea is considered involuntary if the State fails to inform a defendant of a direct consequence of his plea. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (interpreting CrR 4.2(d)). Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances. Wood v. Morris, 87 Wn.2d 501, 506, 554 P.2d 1032 (1976).

As noted in section one above, when a defendant completes a written plea statement, and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); In re Keene, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980). Furthermore, when a defendant, who has received the information, pleads guilty pursuant to a plea bargain, there is a presumption that the plea is knowing, intelligent and voluntary. In re Ness, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), review denied, 123 Wn.2d 1009, 869 P.2d 1085 (1994). When the judge verifies the various criteria of voluntariness in a colloquy with the defendant, the presumption of voluntariness is “well nigh irrefutable.” State v. Perez, 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982); Branch, 129 Wn.2d at 642. Finally, credibility determinations are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Defendant’s motion to withdraw his guilty plea was based on two grounds: 1) whether Mr. Sepe actively investigated the case, and 2) whether defendant understood that the state was opposed to a SSOSA sentence. CP 144-149 (FF 1). Defendant has not raised the first issue on appeal, so this appeal only addresses the court’s conclusion that defendant understood that the State opposed a SSOSA sentence in his case. See Br. of Appellant at 11-12.

Defendant understood that the State did not support his SSOSA request. The plea agreement states, “Defendant can petition for SSOSA,

State will oppose SSOSA.” CP 6-19. The court also found that it was “made clear to the defendant” that “the State was opposed to a SSOSA.” CP 144-149 (FF 11). While defendant claimed that he did not know what the word “oppose” meant at the time of the plea, the court found that this testimony was “not accurate and not credible.” CP 144-149 (FF 16).

Moreover, even if defendant didn’t know what the word “opposed” meant, he had other information that the State would oppose SSOSA. The state’s recommendation in the plea hearing says that the state will recommend “130 months,” and it does not say that the State will support SSOSA. CP 6-19. At his plea hearing, defendant told the court that he understood that the State’s recommendation was 130 months; no one said that the State would recommend or support SSOSA. RP 2, 3. The court found that “defendant was aware of the State’s recommendation when he entered the plea.” CP 144-149 (FF 21). Mr. Sepe said that he told defendant that the State would not support SSOSA and that the defense had to petition for the sentencing alternative. RP 88, 95. Defendant even demonstrated that he knew the SSOSA was contested when he asked whether he had “a chance” of convincing the judge to grant the SSOSA request. RP 95. Mr. Sepe was convinced that defendant understood that the State was not supporting the SSOSA request, especially because defendant did not ask any questions about the request or the plea. RP 68, 74-75.

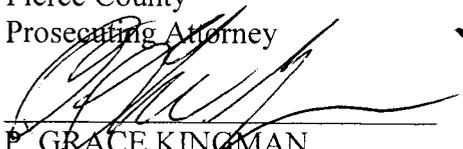
Thus, the trial court properly denied defendant's motion to withdraw his plea because defendant understood that the State did not support his guilty plea.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's sentence.

DATED: DECEMBER 21, 2006

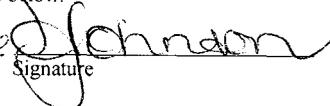
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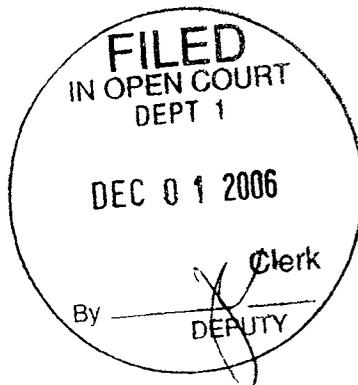
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/21/06 
Date Signature

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STATE OF WASHINGTON
BY  DEPUTY

APPENDIX “A”

Findings of Fact and Conclusions of Law
RE: Denial of Defendant’s Motion to Withdraw Guilty Plea



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-04442-3

vs.

DEREK LAMONT BLANKS,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: DENIAL OF DEFENDANT'S
MOTION TO WITHDRAW GUILTY
PLEA

Defendant.

THIS MATTER having come on before the Honorable James Orlando, Judge of the above entitled court, for the Defendant's Motion to Withdraw his Plea of Guilty on the 13th and 17th days of January, 2006, the defendant having been present and represented by attorney Lori Smith, and the State being represented by Deputy Prosecuting Attorney John Sheeran, and the court having observed the demeanor and heard the testimony of the witnesses, reviewed exhibits admitted into evidence, and having considered the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT:

- 1) That on May 27, 2005 the defendant, Derek Lamont Blanks, pled guilty to an amended information wherein he was charged with one count of Child Molestation in the First Degree.

- 1 2) The defendant brought this motion to withdraw his plea on two grounds only: (1) the plea
2 was involuntary because he did not know the State was opposed to a SSOSA sentence,
3 and (2) ineffective assistance of counsel for failure to properly investigate the allegations.
- 4 3) The defendant speaks, writes, and reads English.
- 5 4) At the time of the plea, the defendant was represented by attorney Dino Sepe.
- 6 5) During representation of the defendant, Mr. Sepe reviewed all aspects of the case with the
7 defendant very thoroughly. Defendant understood the subject matter, gravity of the
8 circumstances, and his options.
- 9 6) Between the time the defendant was arraigned and the date he pleaded guilty, his
10 attorney, Dino Sepe, discussed his case with him extensively. Mr. Sepe is a very
11 experienced public defender who has handled scores of these types of cases, and tried
12 many of them. Mr. Sepe also hired an investigator, Glen Glover, to interview witnesses.
13 Mr. Glover has been an investigator for many years and interviewed hundreds of
14 witnesses.
- 15 7) Once the defendant agreed to a plea Mr. Sepe stopped the investigation.
- 16 8) The investigation conducted by Mr. Sepe and Mr. Glover was appropriate.
- 17 9) The plea agreement was as follows: the State agreed to file an amended information,
18 charging one count of child molestation in the first degree, dropping the two counts of
19 rape of a child in the first degree. In exchange for the filing of this amended information,
20 the defendant agreed to plead guilty to the amended information. This amendment made
21 the defendant eligible for a SSOSA sentence. If the defendant had been convicted as
22 originally charged, the standard range would have made him ineligible for a SSOSA
23 sentence. The agreement of the parties was that the defendant could ask for a SSOSA
24 sentence. The agreement of the parties was that the defendant could ask for a SSOSA
25 sentence.

1 sentence if he was found to be amenable to treatment, and the State would recommend
2 the high end of the standard range. This 130 month recommendation was substantially
3 less than the standard range the defendant would have faced if convicted as charged.
4 Given the defendant's criminal history and the multiplier on the current offenses, the
5 standard range if defendant had been convicted as originally charged would have been
6 240-318 months to life, with the possibility of an exceptional sentence above that based
7 on the multiple offense policy of RCW 9.94A.535.

- 8 10) Prior to the defendant entering his guilty plea, the Statement of Defendant on Plea of
9 Guilty was read line-by-line to the defendant by Mr. Sepe. During the reading of the plea
10 form, Mr. Sepe reviewed all aspects of pleading guilty very thoroughly with the
11 defendant. Defendant understood the contents of the Statement of Defendant on Plea of
12 Guilty before signing the form, and before pleading guilty in court.
- 13 11) The defendant was aware that the State would not be recommending a SSOSA, but rather
14 that the State was opposed to a SSOSA, and would be recommending the high end of the
15 standard range. This was made clear to the defendant by Mr. Sepe prior to the plea, and
16 by the Court at the time of his plea. The defendant signed the statement of defendant on
17 plea of guilty in which the State's opposition to a SSOSA sentence is clearly written.
- 18 12) At the entry of the guilty plea on May 27, 2005, the court conducted a lengthy and
19 thorough colloquy with the defendant prior to accepting the defendant's guilty plea. The
20 defendant confirmed that he had reviewed the elements of the offenses he was pleading
21 guilty to and that he understood elements of each charge. The defendant confirmed that
22 he understood the constitutional rights he was giving up by pleading guilty. The
23 defendant confirmed that no one was forcing him to plead guilty. Finally the defendant
24
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1 confirmed that he had gone over all aspects of pleading guilty and the plea form itself
2 with his attorney.

3 13) The defendant is intelligent, as is evidenced by the 30-40 pages of hand written letters he
4 has filed with the court.

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

10 15) The defendant began the SSOSA evaluation before he entered his guilty plea. The
11 defendant stopped the SSOSA evaluation process himself, after he pleaded guilty.

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

15 17) The testimony of the State's witnesses Mr. Sepe, and Mr. Glover during the hearing to
16 withdraw plea was credible and the court accepts their testimony as true.

17 18) The defendant pleaded guilty voluntarily.

18 19) The defendant pleaded guilty knowingly.

19 20) The defendant pleaded guilty intelligently.

20 21) The defendant was aware of the State's recommendation when he entered the plea.

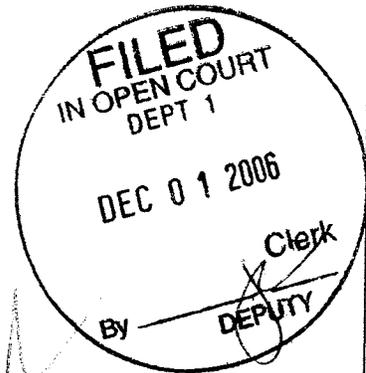
21 22) The defense conducted a thorough and appropriate investigation.
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CONCLUSIONS OF LAW:

- 1) Pursuant to CrR 4.2(f), the defendant must prove a manifest injustice requiring withdrawal of his guilty plea. In this case the defendant has not established any manifest injustice requiring withdrawal of his guilty plea. Defendant pleaded guilty knowingly, intelligently and voluntarily, and therefore, it was a valid guilty plea. In re Pers. Restraint Hemenway, 147 Wn.2d 529, 535; 55 P.3d 615 (2002).
- 2) To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
- 3) Defense counsel's performance was not deficient in that he properly investigated the case, fully informed the defendant of all of the consequences of pleading guilty, and explained to the defendant the State's recommendation.
- 4) The defendant has failed to establish a manifest injustice because he himself stopped the SSOSA evaluation before being sentenced. Because of this he cannot satisfy the prejudice prong of the Strickland test. The defendant's failure to cooperate with the SSOSA evaluation precludes this Court from finding a manifest injustice.
- 5) The defendant's motion to withdraw guilty plea is denied.

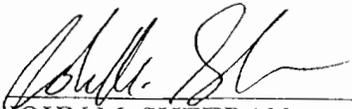
DONE IN OPEN COURT this 1 day of Dec, 2006.

JUDGE JAMES R. ORLANDO



Presented by:

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JOHN M. SHEERAN
Deputy Prosecuting Attorney
WSB # 26050

Approved as to Form with objections noted:

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