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NO. 35041-6-II
Cowlitz Co. Cause NO. 05-1-00291-1

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

STATE OF WASHINGTON,

Respondent,

v.

LUIS RUEDA-NACASPACA,

Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State charged the defendant on March 15, 2005 with six counts of violation of the uniform controlled substances act with six school zone enhancements. CP 3. On May 10, 2005, the Appellant pled guilty to three counts of violation of the uniform controlled substances act that were amended not to include the school zone enhancements. CP 8. The defendant signed and entered a Statement of Defendant Upon Plea of Guilty on that date. CP 9. A Judgment and Sentence was entered sentencing the defendant to 60 months as well as nine to twelve months of community custody. On May 1, 2006, the appellate court granted the Appellant's Personal Restraint Petition. CP 15. On June 8, 2006, an order modifying the judgment and sentence was entered by the Honorable James Stonier. CP 17.

The Appellant was re-sentenced because a plea agreement had been worked out that sentenced the Appellant to sixty months in prison as well as a range of nine to twelve months of community custody. RP 3. The appellant filed a Personal Restraint Petition arguing that he was sentenced above the statutory maximum for his offenses, which was five years. Id. The Personal Restraint Petition was granted. Id. The State and the Appellant, along with his counsel, came to an agreement to simply strike the community custody from the sentence. RP 3. The re-sentencing

court indicated that the Appellant had a right to make a statement, to which he responded that he did not understand why he was given the twelve months of community service. RP 4-5.

The Appellant further inquired whether he qualified for Sanchez law, See State v. Sanchez, 69 Wn.App. 255, 848 P.2d 208 (2000), because he had behaved himself in jail and was going to school and there was nothing else for him. RP 5. At this point, Appellant's counsel at re-sentencing stated that she had discussed the Sanchez appeal as well as DOSA issues with the Appellant and that to ask for them would be a breach of the plea agreement. Id. She also explained to the Appellant that he had the option of breaching the plea agreement, or the option to accept what the State was proposing. RP 6. Appellant's counsel asked the court to inquire further. Id.

The court asked if the Appellant was seeking to withdraw his guilty plea at this time. Id. The Appellant responded that he just wanted to make sure that there was not going to be an error so that he didn't have to come back. Id. When asked again if he wanted to withdraw his guilty plea, the Appellant responded that he was guilty and all he wanted was to go back to prison. RP 6-7. Finally, the court asked again if the Appellant wanted to be sentenced under the plea agreement and he responded,

“Yes.” RP 8. The Appellant was then sentenced to the 60 months without the community custody. Id.

II. ISSUES PRESENTED

1. **DID THE DEFENDANT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL PROPERLY NOTIFIED HIM OF THE CONSEQUENCES OF HIS PLEA?**
2. **WAS THE DEFENDANT’S PLEA KNOWINGLY AND INTELLIGENTLY MADE WHEN HIS DEFENSE COUNSEL EXPLAINED TO THE DEFENDANT THE CONSEQUENCES RESULTING FROM HIS GUILTY PLEA?**

III. SHORT ANSWER

- 1) Yes.
- 2) Yes.

IV. ANALYSIS

A. STANDARD OF REVIEW

A defendant does not have a constitutional right to withdraw a plea of guilty and to enter a plea of not guilty. State v. Olmsted, 70 Wash.2d 116, 422 P.2d 312 (1966). Such a motion is addressed to the sound discretion of the court. Id. When the trial court has exercised its discretion in this regard, this court on review will set it aside only upon a

clear showing of abuse of discretion on the part of the trial court. State v. Rose, 42 Wash.2d 509, 256 P.2d 493 (1953)

B. THE COURT SHOULD DENY THE DEFENDANT'S MOTION TO WITHDRAW PLEA AS HIS TRIAL COUNSEL INFORMED HIM OF THE DIRECT CONSEQUENCES OF HIS PLEA.

The Defendant correctly lays out the test for determining when defense counsel's performances dips to ineffective assistance of counsel. A defendant must show the trial counsel's performance fell below that required of a reasonably competent defense attorney and then show counsel's conduct caused prejudice. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 686, 80 L.Ed.2d 674 (1984).

In the matter at hand, the deficient performance of counsel is a factual matter for the court to determine. The claim of the Appellant that there was ineffective assistance of counsel is wholly without merit. The Appellant signed a Statement of Defendant on Plea of Guilty indicating that the State, his trial counsel, and himself agreed to a joint sixty month sentence recommendation in exchange for dismissal of three counts and the school bus stop enhancements. CP 9. Had Appellant's trial counsel requested an exceptional or DOSA sentence, he would have breached the plea agreement and left his client exposed to potentially greater

punishment. Thus, trial counsel's actions were appropriate in not asking for a reduction in time, and not ineffective assistance.

Further, Appellant's brief lacks any claim whatsoever that he did not agree to the sixty-month sentence recommendation or that he did not understand the contents of the agreement. On the contrary, Appellant asks there to be a presumption that merely because the defendant asked for less time upon re-sentencing that he must not have understood the initial plea agreement and thus there was ineffective assistance of counsel. This, however, is not how an ineffective assistance of counsel claim must be examined. Courts engage in a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322 (1995). In the present case, there is nothing indicating ineffective assistance of the trial counsel and the court should not presume this absence a showing by Appellant of anything indicating such.

The Appellant must not only establish ineffective assistance of counsel, which they have not done, but must also show that there was prejudice resulting from the ineffective assistance. See State v. Lord, 117 Wa.2d 829, 883-84, 822 P.2d 177 (1991). In this case there is nothing indicating that any prejudice exists. If prejudice is not shown, evaluation of the counsel's performance is unnecessary. State v. Lord, 117 Wash.2d 829, 884 (1991).

Appellant must show that because of any ineffective assistance there was a different outcome. At the re-sentencing hearing, the Appellant's attorney as well as the court explained to the Appellant that under the original plea agreement he was unable to ask for any less time than the sixty months that he agreed to and was sentenced to. After these admonishments, the Appellant was given an opportunity to withdraw his plea and declined, stating that he still wanted to be sentenced under the plea agreement. RP 8. Therefore, it is quite apparent that the results would have been no different despite what happened with the level of trial counsel's effectiveness.

Finally, the remedies for ineffective assistance of counsel are either specific performance or withdrawal of the plea. Here, the Appellant has not asked for either of these remedies. In fact, when given the opportunity, the Appellant specifically declined the option of withdrawing his plea. Even if the court should somehow find that there was ineffective counsel and prejudice, the plea should still stand as it was entered knowingly and intelligently.

The Appellant is attempting to gain the benefit of the plea bargain, dismissal of three counts and the sentence enhancements, without incurring the cost, an agreed sixty-month recommendation. Absent some claim this was not in fact the bargain, this court should not entertain

petitioner's ineffective assistance claims. Dismissal of this claim is especially appropriate given the "strong public interest in enforcing the terms of the plea agreements which are voluntarily entered into." State v. Perkins, 108 Wn.2D 212, 216, 737 P.2d 250 (1987).

C. THE COURT SHOULD DENY THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA AS THE PLEA WAS KNOWINGLY AND INTELLIGENTLY MADE.

Pursuant to Criminal Rule 4.2(d) "[t]he 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." CrR 4.2(d) (2007). Additionally, in accordance with due process a defendant's plea must be made knowingly, intelligently, and voluntarily. See State v. Murillo, 134 Wa.App. 521, 530, 142 P.3d 615 (Div. 3 2006) citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "There is a strong public interest in enforcement of plea agreements that are voluntarily and intelligently made." State v. Walsh, 143 Wa.2d 1, 6, 17 P.3d 591 (2001). When defendant moves to withdraw their guilty plea prior to sentencing, they have the burden to show that a manifest injustice requires the withdrawal. See State v. Saas, 118 Wa.2d 37, 39, 820 P.2d 505 (1991). A manifest

injustice is one that is obvious, directly observable, overt, and not obscure. See State v. Turley, 149 Wa.2d 395, 341, 69 P.3d 338 (2003).

When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2 and acknowledges that he has read it, understands it, and the contents are true, the written statement provides prima facie verification of the plea's voluntariness. See State v. Stephan, 35 Wa.App. 889, 893-94, 671 P.2d 780 (Div. 3 1983). When the court then goes on to inquire orally of the defendant regarding the criteria of voluntariness, "the presumption of voluntariness is well nigh irrefutable." Id. at 894.

In the present case, there is sufficient evidence from the record and extrinsic evidence the Defendant's plea was voluntary and he knew of the consequences of his plea. The defendant entered a statement of defendant on plea of guilty and the court also entered into a colloquy with the defendant. CP 9-11.

In accordance with State v. Stephan and State v. Ross, and using a totality of the circumstances test, the Defendant's plea was voluntary. The Defendant completed a written statement on plea of guilty in compliance with CrR 4.2 and acknowledged that he read it and understood it, thus the written statement provides prima facie verification of the plea's

voluntariness. See State v. Stephan, 35 Wa.App. 889, 893-94, 671 P.2d 780 (Div. 3 1983).

V. CONCLUSION

The court should deny the Appellant's motion to withdraw his plea on the grounds his plea was voluntarily made and his counsel was effective.

Respectfully submitted this 12th day of April, 2007.

Susan I. Baur
Prosecuting Attorney

By: 

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Deputy Prosecuting Attorney
Representing Respondent

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

APR 15 2007
STATE OF WASHINGTON
BY _____

STATE OF WASHINGTON,)	NO. 35041-6II
)	Cowlitz County No.
Respondent,)	05-1-00291-1
)	
vs.)	CERTIFICATE OF
)	MAILING
LUIS RUEDA-NACASPACA,)	
)	
Appellant.)	
_____)	

I, Audrey J. Gilliam, certify and declare:

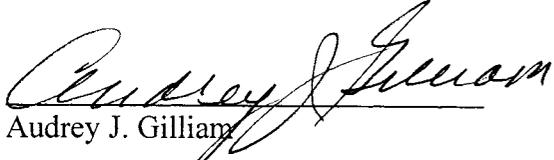
That on the 13 day of April, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Catherine E. Glinski
Attorney at Law
P. O. Box 761
Manchester, WA 98353

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of April, 2007


Audrey J. Gilliam