

NO. 39054-0

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

STATE OF WASHINGTON, RESPONDENT

v.

JAMES MATCHETT, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kathryn J. Nelson

No. 06-1-03416-5

No. 07-1-01943-1

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**BRIEF OF RESPONDENT**

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

1. Did the trial court properly deny defendant's CrR 7.8 motion to withdraw his guilty pleas because defendant's pleas were knowing, intelligent and voluntary?
2. Was trial counsel effective where defendant cannot satisfy both prongs of the *Strickland* test?
3. Did the trial court properly allow defendant to proceed pro se at a post judgment CrR 7.8 motion to withdraw his guilty plea where no right to counsel exists?

B. STATEMENT OF THE CASE.

1. Procedure

a. Pierce County Cause No. 06-1-03416-5

The State charged James Lewis Matchette, hereinafter "defendant," with one count of second degree rape on July 25, 2006. CP 188. On December 12, 2006, the State filed a notice of persistent offender. CP 1. The State filed an amended information on December 19, 2006, that charged defendant with second degree rape, unlawful imprisonment, and felony harassment. CP 2-3.

On April 16, 2007, the parties appeared before the Honorable Kathryn J. Nelson, for trial. RP 3<sup>1</sup>. Trial counsel filed a motion to dismiss. CP 23-27. The court denied defendant's motion to dismiss. RP 81. On April 17, 2007, the court granted the State's request for a material witness warrant to secure the presence of the victim, S.S. CP 189-193. A jury was empanelled and six witnesses had testified for the State through April 26, 2007. CP 194; RP 213, 253, 330, 353, 443, 527.

On April 30, 2006, the parties appeared before the court and defendant entered a plea to amended charges resolving the ongoing jury trial. RP 557, 559. The State filed a second amended information on April 30, 2007, charging defendant with harassment, unlawful imprisonment, and unlawful solicitation to possess a controlled substance. CP 43-45; RP 560-561. The parties also filed a stipulation which outlined the crimes to which defendant was entering guilty pleas and the sentencing recommendations for both Pierce County Cause Nos. 06-1-03416-5 and 07-1-01943-1. RP 560; CP 195-96. Defendant then entered a plea of guilt to the second amended information. RP 568-71; CP 46-49, 50-53.

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<sup>1</sup> The verbatim report of proceedings consists of 13 volumes. The hearings on March 23, 2007 and March 27, 2007 shall be referred to by their date followed by RP. Volumes labeled I through XI are consecutively paginated and shall be referred to as RP (Page #).

On June 1, 2007, the court sentenced defendant to the agreed exceptional sentence of 60 months each on the harassment and unlawful imprisonment counts to run consecutive with the unlawful solicitation of a controlled substance count (12 months) for a total sentence of 132 months. CP 57-69, 70-74. The sentence on the 06-1-03416-5 cause number was ordered to run concurrent with defendant's sentence on 07-1-01943-1. *Id.* The court entered findings of fact and conclusions of law regarding exceptional sentence on June 1, 2007. CP 54-56.

On December 21, 2007, defendant filed a motion to withdraw his guilty plea. CP 78-84. The trial court transferred defendant's motion to this court to be handled as a personal restraint petition. CP 101-02. On October 28, 2008, this court transferred defendant's CrR 7.8 motion back to Superior Court for a hearing on the merits. CP 128-29. Defendant's CrR 7.8 motion to withdraw his guilty plea was held on February 6, 2009. RP 638. The trial court denied defendant's motion to withdraw his guilty plea in a letter ruling on February 18, 2009. CP 137-40. The court entered findings of fact consistent with its order denying defendant's motion to withdraw his guilty plea on March 6, 2009. CP 141-42.

b. Pierce County Cause No. 07-1-01943-1

On April 10, 2007, the State charged defendant with second degree rape or in the alternative third degree rape, second degree robbery, indecent liberties, and unlawful imprisonment. CP 199-201. On April 11, 2007, the State filed a persistent offender notice. CP 202.

On April 30, 2006, the parties appeared before the court and defendant entered a plea to amended charges resolving the ongoing jury trial under Pierce County Cause No. 06-1-03416-5 and this matter, which was still pretrial. RP 557, 559. On this case, the State filed an amended information on April 30, 2007, charging defendant with unlawful imprisonment, second degree theft, and attempted unlawful delivery of a controlled substance. CP 205-06; RP 560-561. The parties also filed a stipulation which outlined the crimes to which defendant was entering guilty pleas and the sentencing recommendations for both Pierce County Cause Nos. 061-103416-5 and 07-1-01943-1. RP 560; CP 203-04. Defendant then entered a plea of guilt to the amended information. RP 572-76; CP 207-11.

On June 1, 2007, the Court Sentenced defendant to the agreed exceptional sentence of 60 months each on the harassment and unlawful imprisonment counts to run consecutive with the unlawful solicitation of a controlled substance count (12 months) for a total sentence of 132 months.

CP 215-27. The sentence on the 07-1-01943-1 cause number was ordered to run concurrent with defendant's sentence on the 06-1-03416-5 cause number. *Id.* The court entered findings of fact and conclusions of law regarding exceptional sentence on June 1, 2007. CP 212-214.

On December 21, 2007, defendant filed a motion to withdraw his guilty plea. CP 228-234. The trial court transferred defendant's motion to this court to be handled as a personal restraint petition. CP 235-36. On October 28, 2008, this court transferred defendant's CrR 7.8 motion back to Superior Court for a hearing on the merits. CP 128-29. Defendant's CrR 7.8 motion to withdraw his guilty plea was held on February 6, 2009. RP 638. The trial court denied defendant's motion to withdraw his guilty plea in a letter ruling on February 18, 2009. CP 237-240. The court entered findings of fact consistent with its order denying defendant's motion to withdraw his guilty plea on March 6, 2009. CP 141-42.

## 2. Facts

The parties appeared for trial on April 16, 2007, on Pierce County Cause No. 06-1-03416-5. RP 3. The court heard motions in limine and denied defendant's motion to dismiss. RP 3-81. After opening statements, the State began its case in chief. RP 117. After six witnesses had testified for the State, defendant believed the State's case was going

so poorly that he contacted trial attorney over the weekend and asked him to negotiate a resolution for both the case on which he was currently on trial and defendant's second case, Cause No. 07-1-01943-1. RP 657-58, 664. Defendant told trial counsel that because defendant was doing so well in trial "it might motivate [the prosecutor] to up the ante which, in fact, [the prosecutor] did up the ante." RP 664. When trial counsel spoke with the prosecutor; the prosecutor "made a better offer than he had before, recognizing that [the prosecutor's] trial effort was a bit compromised." RP 664.

On April 30, 2006, the parties appeared before Judge Nelson and advised her that a plea agreement had been reached that encompassed both the ongoing trial and defendant's other case, Cause No. 07-1-01943-1. RP 559. The State filed an amended information on each cause number, the stipulation to the plea agreement, and defendant's statements of defendant on plea of guilty to the two amended informations. CP 43-45, 205-06; RP 560-63. Trial counsel advised the court that he reviewed the terms of the plea agreement with his client. RP 560-66. Trial counsel then advised the court:

Further, I want the Court to know I have assured Mr. Matchette – handing that forward – I have assured him that he is not entering a plea to any offense that classified under 9.94A.030 as a violent offense. These are all nonviolent crimes. I wave warranted that to him....

I will tell the Court that this has been a very thorough and borderline heated discussion at times. I was in my den Saturday morning when Mr. Matchette called...and requested that I do this. He and I have spoken about this for hours dating back months. I will tell you, he is ...an exceptionally intelligent and articulate man. He understands what he's doing here. He is waiving fundamental rights knowingly, intelligently, and voluntarily, and I encourage the Court to accept his plea.

RP 566. Later, trial counsel advised the court:

By the way, Mr. Matchette just reminded me, I have assured him none of these are sex offenses, and I have assured him that none of these are DV [domestic violence] offenses. This is of great significance to him because he's much more familiar than I with classification issues at the Department of Corrections. I stand by the record. I am positive when I say these are not sex, not violent, not DV. And [the prosecutor's] nodding in affirmation.

RP 567-68. The court then engaged defendant in a plea colloquy. RP 569. During the colloquy, defendant assured the court that he had heard his attorney's representations to the court and that he was in agreement with his attorney's representations. RP 569-70. Defendant also advised the court that he did not have any questions regarding his pleas. RP 570. Defendant further advised the court that no one made any threats or promises to defendant to get him to enter pleas of guilt to the amended charges. RP 571, 574. The court accepted his pleas finding them knowingly, voluntarily, and intelligently made. RP 571-72, 576.

On June 1, 2007, the court sentenced defendant consistent with the plea agreement. CP 57-69, 70-74, 215-227.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CrR 7.8 MOTIONS TO WITHDRAW HIS PLEAS BECAUSE DEFENDANT'S PLEAS WERE KNOWING, INTELLIGENT, AND VOLUNTARY.

a. Defendant was advised of all direct consequences of his pleas.

When a defendant appeals a trial court's denial of a defendant's post-judgment CrR 7.8 motion to withdraw his guilty plea, the sole order on appeal is the trial court's denial of that motion. *State v. Larranaga*, 126 Wn. App. 505, 509, 108 P.3d 833 (2005). A trial court's ruling on a CrR 7.8 motion is reviewed for an abuse of discretion. *State v. Forest*, 125 Wn. App. 702, 706, 105 P.3d 1045 (2005).

The trial court properly denied defendant's CrR 7.8 motion to withdraw his guilty plea because that plea was made knowingly, intelligently, and voluntarily. Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *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). A guilty plea is not knowingly made when it is based on misinformation of

sentencing consequences. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). A defendant need not be informed of all possible consequences of his plea, but he must be informed of all direct consequences. *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)). A direct consequence of a plea is one that has a “definite, immediate and largely automatic effect on the range of the defendant’s punishment.” *In re the Pers. Restraint of Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009) citing *State v. Ross*, 129 Wn.2d at 284.

In *Bradley*, Anthony Bradley pled guilty to simple possession of cocaine and possession with intent to deliver on the same day. 165 Wn.2d 934, 937. Later it was discovered that Bradley’s offender score for the simple possession conviction was miscalculated. *Bradley*, at 938. Bradley filed a personal restraint petition to withdraw both pleas because they were a “package deal.” *Id.* at 938. Because the length of a sentence is a direct consequence of a plea, the court found defendant’s plea involuntary. *Id.* at 941. The court allowed Bradley to withdraw his pleas on both cases. *Id.* at 944.

In *State v. Stowe*, 71 Wn. App. 182, 183-84, 858 P.2d 267 (1993), Heath Stowe was charged with second degree assault for an incident involving his seven week old son, Nicholas. Stowe told his attorney that

he did not want to plead guilty and that he had not caused Nicholas' injuries. *Stowe*, at 184. Stowe told his attorney that he did not want to enter into any kind of a plea agreement unless he was assured that he could continue his career in the military. *Id.*

Stowe's attorney checked with the military liaison personnel stationed at the courthouse to determine if an *Alford* plea would allow Stowe to stay in the military. *Id.* at 185. This liaison opined that Stowe could remain in the military and the Army would just tack on the jail time to Stowe's Army time. *Id.* Stowe's attorney passed this information on to Stowe, who then entered an *Alford* plea to the charges. Immediately after Stowe entered his plea, the Army discharged him.

Stowe filed a motion to set aside his plea, which the trial court denied. *Id.* at 186. Stowe appealed and the Court of Appeals reversed holding that trial counsel was deficient because he made an affirmative misrepresentation regarding a collateral consequence of defendant's plea. *Id.* at 187. Trial counsel knew Stowe's primary reason for not accepting the prosecutor's plea bargain was his desire to continue a military career. *Id.* at 188. The court noted that only when Stowe's attorney led him to believe that he could remain in the military if he entered an *Alford* plea did Stowe seriously consider the prosecutor's plea bargain. *Id.*

In *In re the Pers. Restraint of Isadore*, 151 Wn.2d 294, 296, 88 P.3d 390 (2004), Roy Isadore entered a plea of guilt to second degree burglary and third degree assault. Neither the prosecutor nor Isadore's defense attorney knew there was mandatory community placement following Isadore's incarceration. *Isadore*, at 297. At the plea hearing, the prosecutor advised the court that community placement did not apply in Isadore's case. *Id.* After Isadore was sentenced, the Department of Corrections notified the court that Isadore's sentence should have included community custody. *Id.*

Isadore filed a personal restraint petition asserting that his plea was involuntary because he was not advised that he would have to do community placement after his term of incarceration. *Id.* The Supreme Court granted his petition because Isadore was not advised of a direct consequence of his plea: mandatory community custody.

In *State v. Mendoza*, 157 Wn.2d 582, 141 P.3d. 49 (2006), Hector Mendoza pled guilty to third degree child molestation. At the time Mendoza entered his plea, all parties believed his offender score was 7 with a standard range of 51 to 60 months. However, at the sentencing hearing, the State explained that Mendoza's offender score had been miscalculated and that it was a 6 with a standard range of 41 to 54 months. *Id.* at 584-85. Mendoza did not object to the new standard range or

offender score and did not move to withdraw his plea. *Id.* at 585. Later, Mendoza attempted to withdraw his plea, but the court denied his motion. The court sentenced Mendoza to 52 months.

On appeal, Mendoza asserted his plea was not voluntary; however the Supreme Court disagreed, finding that Mendoza waived his right to challenge the plea because he was advised of the less onerous offender score and standard range prior to sentencing.

In *State v. Walsh*, 143 Wn.2d 1, 4, 17 P.3d 591 (2001), Timothy Walsh was charged with first degree kidnapping, first degree rape, and second degree assault. Walsh agreed to plead guilty to second degree rape and the State would recommend the low end of the standard range, which the parties believe was 86 months. After Walsh pled guilty, the community custody officer discovered that Walsh's standard range was 95 to 125. The prosecutor asked for the low end of the standard range, 95 months. On appeal, the Supreme Court found that Walsh's plea was not voluntary because there was a misunderstanding about Walsh's standard range sentence. *Id.* at 8.

Finally, in *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996), Donald Ross pled guilty to three counts of second degree child rape, but was not advised of mandatory community custody prior. The court held that community custody is a direct consequence of a guilty plea. A direct

consequence is one that is “a direct, immediate and largely automatic effect on the range of the defendant’s punishment.” *Ross*, at 284, *citing State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

Here, defendant was aware of all sentencing consequences as outlined in the plea agreement. Indeed, defendant does not allege that he was misinformed as to any of the sentencing consequences that flowed from his guilty pleas. Instead, defendant asserts that his plea is involuntary because of the potential sentencing consequences he would have faced had he been convicted as charged at trial. Because a sentencing consequence to a plea he did not enter is not a direct consequence of his plea, the trial court properly denied defendant’s motion to withdraw his guilty pleas.

Defendant relies upon *Bradley, Isadore, Mendoza, Ross, Walsh*, and *Stowe* to support his position that not understanding the sentencing consequences of a crime to which he did not plead guilty is a sufficient basis to withdraw his plea to the crimes he did plead guilty. Defendant’s reliance on these cases is misplaced because, as discussed above, all of these cases deal with the consequences of the plea the defendant actually entered into. Here, defendant is claiming the guilty plea was not voluntary *because of a consequence to a plea he did not enter*. None of the cases defendant cites support such a proposition.

- b. Prior to entering his plea, defendant knew there was some uncertainty as to whether his federal bank robbery conviction was a strike offense.

The underlying premise of defendant's argument, that his attorney misadvised him that his federal bank robbery conviction was a strike offense, is unsupported by the record. The record shows that prior to trial defendant knew there was some uncertainty as to whether his federal bank robbery conviction was a strike offense. RP 603, 681-82, 741-42, 743, 744-45. Defendant also knew that his status as a persistent offender was a sentencing issue that would not arise unless he was convicted of a strike offense. *See* RP 659-60, 674; CP 1. Defendant's plea to non-strike offenses successfully eliminated any risk that defendant would be convicted of a third strike on either of his 06 or 07 cause numbers.

Before the State filed the persistent offender notice in the 06 cause number, trial counsel told defendant that his federal bank robbery conviction was not a strike offense. RP 603, 681-82, 744. After the State filed the persistent offender notice in the 06 case, defendant and his trial counsel again discussed the implications of defendant's federal bank robbery conviction. RP 658-59. Defendant asked his trial counsel to get the persistent offender notice "unfiled." RP 659. Trial counsel explained to defendant that he could not have the document "unfiled," but that the

effect of the persistent offender notice would not be realized “until [defendant] had been convicted of this case, if he ever was.” RP 659. Trial counsel told defendant that the court would hear argument on defendant’s persistent offender status only if defendant was being sentenced on a strike offense. RP 659-60.

After the State filed the persistent offender notice, trial counsel told defendant that he believed defendant’s federal bank robbery was a strike offense, but that he would not research the issue because defendant wanted to go to trial and did not want to negotiate a resolution to the case. “[Mr. Matchette] did not want to negotiate, and I told him that as long as he wanted to just go to trial and not negotiate, that [whether the federal bank robbery was a strike offense] was a moot issue. RP 660, 674.

Thus, it is clear that prior to entering his guilty pleas in these cases, defendant was aware that there was some uncertainty as to whether his federal bank robbery conviction was properly considered a strike offense. Defendant was also aware that the court would only hear arguments on his persistent offender status if defendant was convicted of a strike offense under either the 06 or 07 cases. Therefore, when defendant entered his guilty pleas he did so knowing that issue was unresolved.

- c. A Federal bank robbery conviction can count as a strike offense when it is factually comparable to a second degree robbery.

Finally, defendant overstates the holding in *State v. Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005), when he asserts that no federal bank robbery conviction can ever be counted as a strike offense under Washington law. Instead, *Lavery* holds that a federal bank robbery conviction is not legally comparable to a Washington second degree robbery conviction. 154 Wn.2d 249, 256. It also holds that, under the facts of Lavery's case, there was insufficient evidence to prove that Lavery's federal bank robbery was factually comparable to a second degree robbery. *Id.* at 258.

In 1998, Leonard Lavery was convicted of second degree robbery for robbing a convenience store in Washington. *Id.* at 252-53. At sentencing, the State asserted that Lavery's 1991 federal bank robbery conviction was comparable to a second degree robbery in Washington, and that conviction was counted as a prior "strike" under the Persistent Offender Accountability Act (POAA). *Id.* at 252. Lavery challenged this finding on appeal and later in a personal restraint petition. Ultimately, the Washington Supreme Court held that a federal bank robbery is not legally comparable to second degree robbery because, under Washington law, second degree robbery is a specific intent crime whereas federal bank

robbery is a general intent crime. *Id.* at 256. The court noted that even though a crime is not legally comparable, it may still count as a strike offense if the trial court finds the underlying facts of a defendant's case are factually comparable to a strike offense under Washington law. *Id.* at 257.

The Supreme Court reviewed the facts in Lavery's federal bank robbery conviction that Lavery either admitted or stipulated to, or were proved to the finder of fact beyond a reasonable doubt, and found that there were insufficient facts to establish the specific intent necessary to find Lavery's federal bank robbery factually comparable to a strike offense in Washington. *Id.*

Thus, contrary to defendant's assertion in the present case, *Lavery* does not announce a bright line rule in which no federal bank robbery conviction can ever be comparable to a Washington second degree robbery conviction. Instead, *Lavery* holds that while federal bank robbery convictions can never be legally comparable, they may be factually comparable. Factual comparability is determined on a case by case basis.

Here, defendant pled to non-strike offenses so the issue of defendant's federal bank robbery conviction's factual comparability did not arise. Because defendant pled guilty to non-strike offenses, there is no record of whether defendant's federal bank robbery conviction was

factually comparable to a second degree robbery. Defendant's assertion that his federal bank robbery conviction could not be a strike offense under *Lavery* is at best speculative (because no factual comparison was done) and at worst erroneous (because *Lavery* does allow for factual comparability).

This court should find that the court properly denied defendant's CrR 7.8 motion to withdraw his guilty plea because defendant was properly advised of the direct consequences of his plea

2. TRIAL COUNSEL WAS EFFECTIVE WHERE DEFENDANT CANNOT SATISFY BOTH PRONGS OF THE *STRICKLAND* TEST.

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 proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution 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, 3582, 91 L. Ed. 2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First, a defendant must establish that defense counsel's representation fell below an objective standard of reasonableness. Second, a defendant must show that defense counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687; *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the "heavy burden of showing that his attorney 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting *Strickland v. Washington*, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney's conduct failed to meet an objective standard of reasonableness. *State v. Huddleston*, 80 Wn. App. 916, 912 P.2d 1068 (1996). There is a strong presumption that counsel's representation was reasonable and, taking into consideration the entire

record, that counsel made all significant decisions in the exercise of reasonable professional judgment. *State v. McFarland*, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. *State v. Hendrickson*, 129 Wn.2d at 77-78. The decision of when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objection had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. *McFarland*, 127 Wn.2d at 337; *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction,

the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

In the present case, defendant asserts that his trial counsel was ineffective for allegedly advising him that defendant’s federal bank robbery conviction is a strike offense under Washington law. Defendant’s argument fails because both trial counsel and defendant testified that defendant advised trial counsel that he wanted to go to trial and did not want to negotiate a resolution to the case. RP 657, 660, 661, 663, 674, 675, 695, 745, 746, 747. Because the Persistent Offender Accountability Act is a sentencing issue that would only become relevant if defendant was convicted of a strike offense, trial counsel focused his energies on preparing for trial rather than researching an issue that may or may not arise, depending upon whether defendant was convicted as charged or not. RP 660, 674. When in the middle of trial, defendant unexpectedly contacted trial counsel and directed him to negotiate a plea, the plea

negotiated was for offenses that were not strike offenses, not domestic violence, and not sex offenses. RP 566, 567-68.

In *State v. Crawford*, 159 Wn.2d 86, 89, 147 P.3d 1288 (2006), Darnell Crawford was charged with first degree robbery and second degree assault for stealing some electronics from a store and then showing a handgun to a store employee who tried to stop him. Initially, the State and defense counsel were unaware that Crawford had a Kentucky conviction for first degree sex abuse. *Id.* at 91. However, the State became aware of the Kentucky conviction prior to Crawford's trial and provided defense counsel with notice of that conviction. *Id.* Neither the State nor defense investigated the Kentucky conviction. *Id.* During plea negotiations the State offered to recommend a low end standard range sentence if Crawford pled guilty as charged. *Id.* Defendant rejected the offer and the case proceeded to trial where Crawford was convicted of first degree robbery and second degree assault.

After trial, the State researched Crawford's convictions and determined that his Kentucky conviction was comparable to Washington's first degree child molestation. The State then notified defense counsel that Crawford had two prior strikes, including the Kentucky conviction, and Crawford was subject to a mandatory minimum sentence under the POAA. *Id.* at 91.

On appeal, Crawford asserted that his trial counsel provided ineffective assistance of counsel for failing to investigate Crawford's prior

convictions. *Crawford*, at 92. The Supreme Court disagreed and found that Crawford could not satisfy both prongs of the *Strickland* test. *Id.* at 102. The court found that Crawford's attorney was deficient for failing to investigate Crawford's prior convictions, but that Crawford suffered no prejudice. *Id.* at 102-03.

In the present case, defendant's attorney was effective. Unlike *Crawford* where the defendant had no idea he was facing a potential life sentence until after the trial, here defendant and his attorney were both aware that defendant had a federal bank robbery conviction and that the conviction may be a strike offense. Defendant advised the court that initially his trial counsel advised him that the federal bank robbery conviction was not a strike offense. RP 603, 606. After the persistent offender notice was filed, trial counsel and defendant had numerous conversations regarding defendant's federal bank robbery conviction and defendant's potential status as a persistent offender.

At the hearing on defendant's motion to withdraw his guilty plea, trial counsel testified that prior to defendant's jury trial he and defendant discussed possible resolutions to the 06-1-03416-5 case. RP 654. Initially, defendant wanted to go to trial and did not want to resolve the case. RP 654. At some point, however, he authorized his trial counsel to offer to settle the case for a plea to a class "C" nonviolent felony like harassment or third degree assault. RP 654-55. The penalty for these crimes would have a maximum penalty of five years in prison and neither

were subject to indeterminate sentencing. RP 655. Trial counsel testified that his offer to plea to two class C felonies was not well received. RP 655, 684. The State counter offered with a plea bargain that would result in 10 to 15 years in prison. RP 655. During this time the State advised trial counsel that defendant was the suspect in an investigation for a second rape case involving a different victim that was alleged to have occurred a couple of months after the 06-1-013416-5 incident. RP 656. Eventually, defendant told trial counsel, “in no uncertain terms that he was not going to take the offer of the State, and he was very emphatic about that, and that was the end of it.” RP 657. Defendant also testified that he was adamant that he would not accept a plea deal. RP 745. Defendant consistently maintained his innocence and wanted a trial. RP 747.

Prior to trial, trial counsel and defendant discussed his persistent offender status. RP 658-59. When the State filed a persistent offender notice in defendant’s 06-1-013416-5 case defendant wanted trial counsel to “get the document unfiled.” RP 659. Trial counsel explained to defendant that “the effect of [the persistent offender notice] wouldn’t come into effect until he had been convicted of this case, if he ever was, and only then would the Court hear motions about that if we were to proceed to sentencing.” RP 659-60.

Trial counsel testified that he believed the federal bank robbery was a strike offense. “I told him I believed the federal bank robbery was a strike offense, that I couldn’t imagine to the contrary, and I will admit in

open court, that was wrong. But I also told him I wasn't going to research it because he wanted to go to trial. He did not want to negotiate, and I told him that as long as he wanted to just go to trial and not negotiate, that was a moot issue." RP 660.

After the trial on the 06-103416-5 case had commenced, defendant called trial counsel on a Saturday and advised him to negotiate the case. RP 657. Trial counsel said he was stunned that defendant wanted to resolve the case. RP 657. Both trial counsel and defendant believed the trial was going very well for the defense. RP 657-58. It was because the trial was going so well for him that defendant believed that the State, understanding its vulnerability, would be willing to negotiate a deal that would be beneficial to defendant.

...[Mr. Matchette] understood that, weighing the risks involved, he wanted to pursue pleading, and further thought that because we were doing that well in trial, it might motivate [the prosecutor] to up the ante which, in fact, [the prosecutor] did up the ante. I had [the prosecutor's] cell number at the time, so I called him that day, and he made a better offer than he had before, recognizing that his trial effort was a bit compromised...

RP 664.

Thus, unlike *Crawford*, in the present case trial counsel was aware of defendant's criminal history and the risk it could present to defendant if the court found that defendant was a persistent offender. Trial counsel was also aware that defendant faced an indeterminate life sentence if convicted of any of the four sex offenses with which defendant was

charged regardless of defendant's status as a persistent offender. RP 652, 653, 668, 673, 688. Unlike *Crawford*, trial counsel properly discussed these risks with defendant. RP 668, 673, 688. Despite these risks, defendant refused to negotiate a plea agreement and insisted on going to trial. Unlike *Crawford*, trial counsel was effective because defendant knew he faced the potential of a life sentence both when he initially insisted on going to trial and also when during trial he unexpectedly directed his attorney to negotiate a plea.

Defendant argues that trial counsel should have researched whether defendant's federal bank robbery was comparable to a second degree robbery under Washington law. However, as trial counsel properly noted, defendant status as a persistent offender would only become relevant if defendant was convicted of a strike offense. Because defendant insisted on a trial, trial counsel could best serve his client by preparing for trial so defendant was not convicted of a strike offense. This trial strategy was successful. Trial counsel was so effective at trial that the State was willing to negotiate a plea agreement in which defendant would avoid not only a strike offense, but also an indeterminate sentence. Defendant's claim that trial counsel was deficient is without merit.

In the unlikely event that this court finds trial counsel was deficient, defendant's ineffective assistance of counsel claim still fails because he cannot show prejudice. Defendant attempts to distinguish his case from *Crawford* on the prejudice prong. In *Crawford*, the court found

the defendant had failed to establish prejudice because there was no evidence that the State would have offered Crawford a plea agreement involving non strike offense. Here, defendant seems to argue that because defendant was offered nonstrike offenses to plead to, that defendant was prejudiced. Defendant's argument fails because defendant only benefited from the plea agreement negotiated by his trial counsel. Defendant was charged with four strike offenses, the plea agreement negotiated by trial counsel resulted in only nonstrike convictions. Defendant was charged with multiple sex offenses between the two cases each of which that carried indeterminate life sentences; defendant pled to no sex offenses. For classification purposes at the Department of Corrections, defendant did not want to plea to a sex offense, a violent offense, or a domestic violence offense. Trial counsel negotiated a plea in which none of the convictions were sex offenses, violent offenses, or domestic violence offenses. Defendant cannot show prejudice.

Additionally, while defendant's argument assumes that his federal bank robbery conviction cannot be considered a strike offense under *Lavery*, as argued above, this analysis is incorrect. If the court found that defendant's conviction was factually comparable to a second degree robbery, then trial court could have counted it as a strike offense.

3. DEFENDANT WAS NOT ENTITLED TO REPRESENTATION OF COUNSEL AT HIS CrR 7.8 MOTION TO WITHDRAW HIS GUILTY PLEA.

There is no constitutional right to counsel in post-conviction proceedings, other than the first direct appeal of right. *See State v. Winston*, 105 Wn. App. 318, 321, 19 P.3d 495 (2001). A CrR 7.8 motion is a post-conviction motion for which defendant is not entitled to counsel as a matter of right. *State v. Larranaga*, 126 Wn. App. 505, 509 n. 2, 108 P.3d 833 (2005) *citing State v. Forrest*, 125 Wn. App. 702 and *State v. Winston*, 105 Wn. App. 318, 325. Here, defendant's claim that he was denied his right to counsel is without merit and must be dismissed.

In *State v. Robinson*, 153 Wn.2d 689, 691, 107 P.3d 90 (2005), Tony Robinson entered two separate pleas of guilt to one count of kidnapping and one count of delivery of cocaine. He filed a direct appeal on his kidnapping conviction. *Robinson*, at 691. Robinson was represented by counsel during plea bargaining, sentencing, and appeal. *Id.* Prior to the Court of Appeals entering a decision on Robinson's direct appeal, he filed motions pursuant to CrR 7.8 to withdraw his guilty pleas to both his kidnapping conviction and his delivery of cocaine conviction. *Id.* at 691. Robinson filed a motion to be represented by counsel for his motions to withdraw. *Id.* The trial court denied both his motions to withdraw his guilty pleas and his motion for appointment of counsel. *Id.*

Among other issues, Robinson appealed the trial court's denial of his motion for appointment of counsel. *Robinson*, at 691. The Supreme Court affirmed holding that CrR 3.1(b)(2) does not require counsel be provided to all defendants at state expense. *Id.* at 699-700. In reaching this conclusion, the court noted that the right to counsel may attach when making a CrR 7.8 motion after the court determines that the motion establishes grounds for relief. *Id.* at 699. Here the trial court transferred the matter to the Court of Appeals to be considered as a personal restraint petition. CP 101-02. This court found that it was transferred in error and sent back for a hearing on the merits. CP 128-29. This court did not find that defendant's claims had merit. Instead, the court found that the resolution of the issue was factual and not appropriate for the appellate court. CP 128-29. This court stated "[a]s this motion appears to be simply filed in the wrong court, we transfer it rather than dismissing it." CP 128-29. Because this court did not find that petitioner's CrR 7.8 motion had merit, and the trial court denied his motion to withdraw his guilty plea, defendant was not entitled to court appointed counsel.

Defendant relies upon *Tacoma v. Bishop*, 82 Wn. App. 850, 920 P.2d 214 (1993), *State v. Osborne*, 70 Wn. App. 640, 855 P.2d 302 (1993), and *City of Bellevue v. Acrey*, 103 Wn.2d 203, 691 P.2d 957 (1984) to support his argument that he was entitled to counsel during his CrR 7.8 motion. Defendant's reliance on these cases is misplaced as all

three cases deal with defendants who are facing pending charges, rather than pursuing a post judgment motion to withdraw a guilty plea.

In *Osborne*, Arnold Osborne was charged with forgery, possession of stolen property, and theft. 70 Wn. App. 640, 642. The trial court appointed an attorney to represent Osborne, but Osborne ultimately became dissatisfied with his court appointed counsel. *Osborne*, at 642. Osborne discharged his attorney in April, but did not advise the court until several days before the scheduled trial when he asked for a continuance and a new attorney. *Id.* The trial court denied Osborne's requests and advised Osborne that the trial would commence as scheduled and that Osborne would have to represent himself. Osborne was found guilty of multiple felonies and sentenced to 27 months incarceration. *Id.* at 643.

On appeal, Osborne asserted he had been denied his right to counsel. *Id.* The court of appeals agreed and reversed Osborne's convictions because Osborne had never waived his right to counsel. In reaching its decision, the court noted that Osborne was faced with multiple felony and misdemeanor charges on which Osborne could be incarcerated if convicted.

In *City of Tacoma v. Bishop*, 82 Wn. App. 850, 920 P.2d 218 (1996) Joseph Bishop was charged with two counts of indecent liberty for acts he engaged in with his 10 year old niece. *Bishop*, 82 Wn. App. 850, 853. Bishop was arraigned on April 25<sup>th</sup>, the court appointed the Department of Assigned Counsel (DAC) to represent Bishop. *Id.* at 853.

At his arraignment, Bishop was advised that he needed to contact DAC immediately or DAC would withdraw as legal counsel on his case. *Id.* Bishop appeared in court without counsel on June 25<sup>th</sup> and June 29<sup>th</sup> and each time the case was set over for Bishop to contact DAC to represent him on his case. *Id.* When Bishop appeared in court without counsel on October 4<sup>th</sup> the court denied Bishop's request for a continuance and proceeded to trial where he was found guilty as charged. *Id.* at 854.

Bishop appealed to Superior Court where DAC appeared on Bishop's behalf to argue that he was denied his right to counsel at trial. *Id.* Superior Court disagreed and held that Superior Court had properly required Bishop to proceed to trial pro se because Bishop had been dilatory in obtaining counsel. *Id.* The Court of Appeals, however, reversed the Superior Court holding that while Bishop was dilatory, his actions were not so dilatory that he could be found to have waived his right to counsel without first being advised of the consequences of proceeding pro se should he chose to do so. *Id.* at 860-61.

Finally, like *Bishop* and *Osborne*, Maurice Acrey appeared for trial without an attorney. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 206. Acrey made no request for an attorney and the trial court did not ask Acrey if he wanted to have one appointed. *Acrey*, 103 Wn.2d 203, 206. As a result, Acrey proceed to a bench trial without counsel. *Acrey*, at 206. After he was convicted, Acrey appealed to the Superior Court where his conviction was affirmed. *Id.* at 206-7. Acrey appealed to the Court of

Appeals claiming that his right to counsel had been denied. *Id.* at 207.

The court of appeals affirmed, holding that Acrey had waived his right to counsel by appearing for court without an attorney. *Id.* The Supreme Court reversed holding that Acrey had not knowingly, intelligently waived his right to counsel at trial. *Id.* at 212.

The cases on which defendant relies, *Bishop, Osborne, and Acrey* are all inapposite to the issue before this court. As discussed above, *Bishop, Osborne, and Acrey* are cases in which the defendant was charged with a crime and proceeded to trial pro se. The issue in those cases was whether a defendant's conduct has waived or forfeited his right to counsel pretrial. Because *Bishop, Osborne, and Acrey* address a defendant's right to counsel at trial, they do not support defendant's argument that he has a right to counsel at a post judgment CrR 7.8 motion.

Here, defendant filed a post-judgment CrR 7.8 motion more than six months after he was sentenced on Pierce County Cause Nos. 06-1-03416-5 and 07-1-01943-1. Defendant was represented by counsel on both cases. Defendant was represented by counsel during his trial on Cause No. 06-1-03416-5. When defendant decided to plead guilty, he was represented by counsel at the plea hearing for Cause Nos. 06-1-03416-5 and 07-1-01943-1. RP 559. Defendant's attorney filed a notice of intent to withdraw in both cause numbers on October 11, 2007. CP 243, 246.

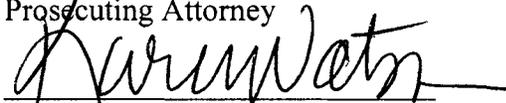
As argued above, defendant did not have a right to counsel at the CrR 7.8 motion. Defendant's claim is without merit and must be dismissed.

D. CONCLUSION.

For the reasons argued above, the State respectfully requests this court affirm the trial court's order denying defendant's motion to withdraw his guilty pleas.

DATED: JANUARY 29, 2010

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



KAREN A. WATSON  
Deputy Prosecuting Attorney  
WSB # 24259

Certificate of Service:

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.

\_\_\_\_\_  
Date                      Signature