

FILED
COURT OF APPEALS
BY _____

10 MAY 27 PM 12:41

STATE OF WASHINGTON

BY
CLERK

No. 39293-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Theresa Hutton,

Appellant.

Lewis County Superior Court Cause No. 08-1-00491-5

The Honorable Judge Nelson Hunt

Appellant's Reply Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 339-4870
FAX: (866) 499-7475

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 4

I. The prosecutor committed misconduct by making an improper contingent plea offer that restricted defense counsel’s investigation and prevented defense counsel from providing constitutionally adequate assistance..... 4

II. The prosecutor committed misconduct in closing argument..... 9

III. The trial judge erroneously admitted irrelevant and prejudicial evidence. 9

IV. The trial court violated Ms. Hutton’s right to confront witnesses by restricting cross-examination of K.’s counselor. 9

V. Ms. Hutton was denied the effective assistance of counsel..... 9

VI. The trial judge violated Ms. Hutton’s Sixth and Fourteenth Amendment right to confront witnesses by failing to place C. under oath prior to her testimony. . 10

VII. The exceptional sentence was imposed in violation of Ms. Hutton’s Sixth and Fourteenth Amendment rights to a jury trial and to due process..... 10

VIII. Cumulative error requires reversal. 10

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Cullen v. United States</i> , 194 F.3d 401 (2 nd Cir. 1999)	4
<i>Dando v. Yukins</i> , 461 F.3d 791 (6 th Cir. 2006)	5, 6
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 4	
<i>McMann v. Richardson</i> , 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).....	4
<i>Moore v. Bryant</i> , 348 F.3d 238 (7 th Cir. 2003)	5, 6, 7, 8, 9
<i>Pham v. United States</i> , 317 F.3d 178 (2 nd Cir. 2003)	6
<i>United States v. Blaylock</i> , 20 F.3d 1458 (9 th Cir. 1994)	4, 6

WASHINGTON CASES

<i>In re Brett</i> , 142 Wn.2d 868, 16 P.3d 601 (2001)	5, 6, 7, 8
<i>In re McCready</i> , 100 Wn.App. 259, 996 P.2d 658 (2000)	5
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010)	4, 5, 7, 8, 9
<i>State v. Burri</i> , 87 Wn.2d 175, 550 P.2d 507 (1976)	7, 8
<i>State v. Hofstetter</i> , 75 Wn.App. 390, 878 P.2d 474 (1994)	7
<i>State v. James</i> , 48 Wn.App. 353, 739 P.2d 1161 (1987)	6
<i>State v. Stough</i> , 96 Wn.App. 480, 980 P.2d 298 (1999)	5, 6, 8
<i>State v. Zhao</i> , 157 Wn.2d 188, 137 P.3d 835 (2006)	7

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 4, 10
U.S. Const. Amend. XIV 10

OTHER AUTHORITIES

*ABA Standards for Criminal Justice: Prosecution Function and Defense
Function* 7
CrR 4.7 7

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT BY MAKING AN IMPROPER CONTINGENT PLEA OFFER THAT RESTRICTED DEFENSE COUNSEL'S INVESTIGATION AND PREVENTED DEFENSE COUNSEL FROM PROVIDING CONSTITUTIONALLY ADEQUATE ASSISTANCE.

An accused person is entitled to due process of law and to the effective assistance of counsel. U.S. Const. Amend. VI;¹ U.S. Const. Amend. XIV; *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The right to counsel includes the right to effective assistance during the plea stage; this right survives a conviction following a fair trial. *United States v. Blaylock*, 20 F.3d 1458, 1466-1467 (9th Cir. 1994).

Defense counsel has a duty to assist a defendant in evaluating a plea offer. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). When a plea offer is made, defense counsel must (1) communicate the offer to the accused,² and (2) “attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that

¹ The Sixth Amendment right to counsel is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

² Failure to do so “constitutes unreasonable conduct under prevailing professional standards.” *Blaylock*, at 1466; see also *Cullen v. United States*, 194 F.3d 401, 404 (2nd Cir. 1999)

analysis,” before advising a client on the plea offer. *Id.*; *Moore v. Bryant*, 348 F.3d 238, 241 (7th Cir. 2003); *In re McCready*, 100 Wn.App. 259, 263, 996 P.2d 658 (2000). The goal is to “equip the client with the tools needed to make a knowing, voluntary and intelligent decision.” *State v. Stough*, 96 Wn.App. 480, 487, 980 P.2d 298 (1999). *See also A.N.J.*, at 111 (“Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial.”)

Constitutionally adequate assistance requires, at a minimum, “a reasonable investigation.” *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Without reasonable investigation, counsel cannot make informed decisions about how best to represent the client. *Id.*, at 873. Counsel may even be required to consult with experts prior to making a recommendation. *See, e.g., Dando v. Yukins*, 461 F.3d 791, 799 (6th Cir. 2006).

As the Washington Supreme Court recently made clear, “a defendant’s counsel cannot properly evaluate the merits of a plea offer without evaluating the State’s evidence.” *A.N.J.*, at 109. Although “[t]he degree and extent of investigation required will vary depending upon the issues and facts of each case,” defense counsel must, “at the very least... reasonably evaluate the evidence against the accused and the likelihood of

a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.” *Id.*, at 111-112.

Ineffective assistance during plea bargaining stage results whenever there is a reasonable probability that the accused person would have taken a different course had counsel provided adequate assistance.³ *Bryant*, at 241; *Yukins*, at 799; *Pham v. United States*, 317 F.3d 178, 182 (2nd Cir. 2003). A significant sentencing disparity is one factor bearing on the issue. *Id.*, at 182.

A defense attorney who receives a plea offer conditioned on forgoing investigation cannot provide effective assistance of counsel. Such an attorney must communicate the offer to her or his client, but cannot make a recommendation to accept or reject the offer, because such a recommendation would necessarily be based on incomplete information. *Blaylock*, at 1466. Without conducting a “reasonable investigation” or “attempt[ing] to learn all of the facts of the case,” counsel cannot even begin to “equip the client with the tools needed to make a knowing, voluntary and intelligent decision.” *Brett*, at 873; *Bryant*, at 241; *Stough*, at 487.

³ Reversal is also required whenever confidence in the outcome is undermined. *State v. James*, 48 Wn.App. 353, 364, 739 P.2d 1161 (1987).

A prosecutor may not restrict defense counsel's access to witnesses, or otherwise interfere with defense counsel's investigation:

A defendant is denied his right to counsel... if the actions of the prosecution deny the defendant's attorney the opportunity to prepare for trial. Such preparation includes the right to make a full investigation of the facts and law applicable to the case.

State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). A prosecutor who engages in such activity commits misconduct. *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* § 3-3.1(d), at 47 (3d ed.1993); CrR 4.7(h)(1); *see also State v. Hofstetter*, 75 Wn.App. 390, 402, 878 P.2d 474 (1994).

In light of the standards for effective assistance in plea bargaining and the prosecutor's duty not to impair defense counsel's investigation, a prosecutor commits misconduct by making a plea offer conditioned on forgoing a reasonable investigation. *Burri, supra; A.N.J., supra; see also State v. Zhao*, 157 Wn.2d 188, 205-206, 137 P.3d 835 (2006) (Sanders, J., concurring). Such an offer is, in essence, contingent on a waiver of the right to due process and the effective assistance of counsel. By making such an offer, the prosecutor places both defense counsel and the accused in an untenable position. Upon receiving the offer, defense counsel is unable to provide proper advice, and thus the client is deprived of the effective assistance of counsel. *Brett, supra; Bryant, supra*. When the

offer is communicated to the client, she or he cannot make a knowing, intelligent, and voluntary decision either to accept the plea offer or to reject it and go to trial. *Id*; *Stough, supra*.

Here, the prosecutor offered to recommend 75 days incarceration if Ms. Hutton pled guilty, conditioned on her agreement to forgo a defense interview with K. Motion to Dismiss (Exhibit B) CP 80-82. The prosecutor committed misconduct by making this offer. *Burri, supra*; *Brett, supra*, *Bryant, supra*. The essence of the offer was a requirement that Ms. Hutton forgo the very protections required under *A.N.J., supra*. Ms. Hutton was denied the effective assistance of counsel the moment the offer was conveyed to her attorney. Defense counsel could not make an objective and professional assessment of the case, and thus could not provide proper advice on whether to accept or reject the plea offer. *Id*, at 109-112.

Ms. Hutton was prejudiced by the prosecutor's misconduct. Respondent argues that the prosecutor did not commit misconduct, because the offer was withdrawn before K. was interviewed. Brief of Respondent, p. 14-15. But the misconduct occurred when the offer was made: it was at that point that defense counsel's role was compromised. Ms. Hutton was not able to make an informed decision—either to accept or reject the offer. It is irrelevant that the prosecutor withdrew the offer,

ostensibly for other reasons, one month after it was made. State's Response to Defendant's Motion to Dismiss, CP 61-70.

The prosecutor committed misconduct by making an offer contingent on Ms. Hutton's agreement to forgo a complete investigation. The state's offer denied Ms. Hutton her constitutional right to due process and to the effective assistance of counsel; accordingly, her conviction must be vacated and the case remanded to the trial court. *Bryant, supra*; *A.N.J., supra*.

II. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.

Ms. Hutton rests on the argument set forth in her Opening Brief.

III. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE.

Ms. Hutton rests on the argument set forth in her Opening Brief.

IV. THE TRIAL COURT VIOLATED MS. HUTTON'S RIGHT TO CONFRONT WITNESSES BY RESTRICTING CROSS-EXAMINATION OF K.'S COUNSELOR.

Ms. Hutton rests on the argument set forth in her Opening Brief.

V. MS. HUTTON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Ms. Hutton rests on the argument set forth in her Opening Brief.

VI. THE TRIAL JUDGE VIOLATED MS. HUTTON'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT WITNESSES BY FAILING TO PLACE C. UNDER OATH PRIOR TO HER TESTIMONY.

Ms. Hutton rests on the argument set forth in her Opening Brief.

VII. THE EXCEPTIONAL SENTENCE WAS IMPOSED IN VIOLATION OF MS. HUTTON'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A JURY TRIAL AND TO DUE PROCESS.

Ms. Hutton rests on the argument set forth in her Opening Brief.

VIII. CUMULATIVE ERROR REQUIRES REVERSAL.

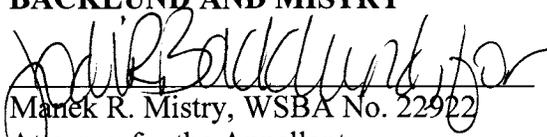
Ms. Hutton rests on the argument set forth in her Opening Brief.

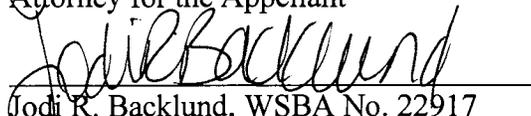
CONCLUSION

As outlined above and in Appellant's Opening Brief, Ms. Hutton's conviction must be reversed and her case remanded for a new trial. In the alternative, her sentence must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted on May 26, 2010.

BACKLUND AND MISTRY


Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant


Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

FILED
COURT OF APPEALS

10 MAY 27 PM 12:41

STATE OF WASHINGTON

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

BY Ca
DEPUTY

Theresa Hutton, DOC #330586
Mission Creek Corrections Center for Women
3420 NE Sand Hill Rd.
Belfair, WA 98528

and to:

Lewis Co. Prosecuting Atty. Office
345 W Main St Fl 2
Chehalis WA 98532-4802

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 26, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 26, 2010.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant