

**NO. 40262-9-II**

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

STATE OF WASHINGTON, RESPONDENT

v.

LARRY D. STOVALL, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frederick w. Fleming

No. 08-1-05203-8

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**Brief of Respondent**

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

1. Whether the defendant has demonstrated deficiency of counsel at sentencing, and prejudice thereby?
2. Whether the prosecuting attorney breached the terms of the plea agreement where he made same recommendation set out in the Statement of Defendant on Plea of Guilty?
3. Whether the issue of forfeiture of the defendant's property is ripe for review?
4. Whether the defendant may argue deficiency of counsel in trial preparation where he was *pro se* at the time?
5. Whether the defendant demonstrates deficiency of either of his attorneys in trial preparation, or prejudice thereby?

B. STATEMENT OF THE CASE.

1. Procedure

On November 3, 2008, the Pierce County Prosecuting Attorney (State) charged Larry Stovall, the defendant, with one count of Unlawful Delivery of a Controlled Substance (UDCS) cocaine, and one count of Unlawful Possession of a Controlled Substance with Intent to Deliver (UPCSWID) cocaine. CP 1-2. On February 5, 2009, the State amended the

Information to add a bus stop sentencing enhancement to the UDCS count, under RCW 9.94A.533(6) and RCW 69.50.435(1)(h). CP 59.

During the period while trial was pending, the defendant moved to proceed *pro se*. CP 61-63. The trial court granted his motion. CP 78. The court also permitted the defendant's first attorney, Ming Che, to withdraw and appointed attorney Shane Silverthorn as stand-by counsel. CP 200. The defendant filed a motion to suppress evidence and his statements. CP 85-87.

The matter was assigned to Hon. Frederick Fleming for trial. CP 201<sup>1</sup>. The court held a hearing under CrR 3.5. CP 210. Before the suppression hearing, the defendant permitted Mr. Silverthorn to represent him. CP 212-213. On May 12, 2009, the defendant entered a guilty plea to the Amended Information. CP 7-15. The trial court twice ordered that the defendant be screened for the Drug Offender Sentence Alternative (DOSA). CP 5, 16.

On December 31, 2009, the trial court imposed a standard range sentence of 60 months, plus the 24 month enhancement, a total of 84 months. CP 28. The defendant filed a timely notice of appeal on January 27, 2010. CP 40.

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<sup>1</sup> The State has designated several additional filings as Clerk's Papers. CP numbers over 196 are the State's estimated number, based upon the standard system used by the Clerk's Office.

On January 4, 2011, the defendant filed a motion to withdraw his guilty plea, citing CrR 7.8(b). *See* PRP. This motion was transferred to the Court of Appeals as a Personal Restraint Petition (PRP). CP 214-215.

On April 22, 2011, the defendant filed a motion and declaration for the return of his property, citing CrR 2.3(e). CP 216-220. Because the case is pending before the Court of Appeals, the trial court took no action on this motion. *See*, RAP 7.2.

## 2. Facts

On October 31, 2008, Lakewood Police arranged a “controlled buy”<sup>2</sup> of rock cocaine from the defendant<sup>3</sup>. CP 57. For the “controlled buy” police arranged for a cooperating witness, later identified as Belinda Banks, to contact the defendant to buy cocaine from him. CP 57. Police followed the defendant from the scene and arrested him a short time later. *Id.* The defendant had the money and more cocaine with him. *Id.* Additional details of the event will be discussed in the context of the response to the PRP, *infra*.

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<sup>2</sup> The “controlled buy” was described as a purchase by a cooperating witness, using pre-recorded money, closely observed by police, where the drugs were turned over to police at the scene.

<sup>3</sup> Although there was a CrR 3.5 hearing where testimony was taken regarding the incident, that hearing was not transcribed for the VRP. Therefore, the facts will be taken from the Declaration of Probable Cause.

C. ARGUMENT.

ISSUES PERTAINING TO DIRECT APPEAL

1. THE DEFENDANT FAILS TO DEMONSTRATE  
DEFICIENCY OF COUNSEL REGARDING  
SENTENCING, AND PREJUDICE THEREBY.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also, State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *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.").

There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995);

*Thomas*, 109 Wn.2d at 226. 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.

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).

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).

In the present case, a review of the entire record shows that defense counsel was far from deficient. Although it is not transcribed for this appeal, the record reflects that counsel pursued a CrR 3.5 hearing to challenge the admission of the defendant's statements. *See*, CP 210; 5/12/2009 RP 13, 12/18/2009 RP 4. Over the course of several sentencing hearings, defense counsel argued tirelessly for the court to grant the defendant a Drug Offender Sentencing Alternative (DOSA) under RCW 9.94A.660, 664. 9/18/2009 RP 8, 9-10, 17-18. At one point, defense counsel's advocacy had convinced the prosecuting attorney to agree to the DOSA recommendation. 9/18/2009 RP 5.

At another hearing, December 18, 2009, despite the defendant's accusations of misconduct, the prosecutor still agreed to a DOSA. Defense counsel continued to advocate for the defendant and a DOSA. Defense counsel pointed out that the defendant had finally been evaluated as having drug dependency and DOC had added beds to the DOSA program. *Id.*, at 7-8.

On December 31, 2009, despite the defendant alienating the prosecutor, and the defendant having filed complaints against his attorney with the Bar Association, defense counsel continued to advocate for the defendant and DOSA. 12/31/2009 RP 10-13. Defense counsel in this case was effective and dedicated to advocating for the defendant.

2. THE STATE DID NOT BREACH ITS AGREEMENT TO RECOMMEND A SENTENCE AT THE LOW END OF THE STANDARD RANGE.

A plea agreement is a contract between the State and the defendant. *State v. Sledge*, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). The State must adhere to the terms of the agreement by recommending the agreed-upon sentence. *Sledge*, 133 Wn.2d at 839, 947 P.2d 1199. The prosecutor is obliged to act in good faith, participate in the sentencing proceedings, answer the court's questions candidly in accordance with the duty of candor towards the tribunal and, consistent with RCW 9.94A.460, not hold back relevant information regarding the plea agreement. *State v.*

*Talley*, 134 Wn.2d 176, 183, 949 P.2d 358 (1998); *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781 (1999). The defendant is entitled to have the State make the bargained-for sentencing recommendation or charging decision. See, *State v. Barber*, 170 Wn. 2d 854, 859, 248 P. 3d 494 (2011). The Court of Appeals reviews a prosecutor's actions and comments objectively from the sentencing record as a whole to determine whether the plea agreement was breached. *Jerde*, 93 Wn. App. at 780, 970 P.2d 781.

In the present case, at the time of the plea, the State agreed to recommend the low end of the standard range, 84 months in prison (60 months, plus 24 months for the sentence enhancement). CP 10. The defendant acknowledged this in his colloquy with the court, on the record. 5/12/2009 RP 8-9.

The sentencing proceeding was set over a number of times in order to obtain the drug dependence evaluation necessary for the DOSA. CP 5,16. At one point, the prosecutor became sympathetic to the defendant's DOSA request and agreed with it. 9/18/2009 RP 5, 12/4/2009 RP 5. However, by the time the prosecutor had gathered the defendant's criminal history and the defendant had demonstrated a questionable amenability to treatment, the prosecutor ultimately recommended the low end of the standard range, as originally promised. 12/31/2009 RP 8-9. Nothing in this record shows that the prosecutor breached the plea agreement. In fact, the

trial court specifically commented that the prosecutor had made the sentencing recommendation that he had agreed to at the time of the plea. 12/31/2009 RP 19.

3. THE ISSUE OF FORFEITURE OF PROPERTY IS NOT RIPE FOR REVIEW.

“Three requirements compose a claim fit for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *First United Methodist Church v. Hearings Examiner*, 129 Wn.2d 238, 255–256, 916 P.2d 374 (1996). In this case, the forfeiture issue is not final; legal issues have not been argued; and factual issues have not been determined.

After a trial is over and property is no longer needed as evidence, the defendant may request return of that property, unless it has been forfeited or is contraband. CrR 2.3(e). The State may only confiscate property by using proper statutory forfeiture procedures; not merely because the item is derivative contraband. *See, State v. Alaway*, 64 Wn. App. 796, 799, 828 P. 2d 591 (1992). A motion for return of property under CrR 2.3(e) generally requires an evidentiary hearing. *See, State v. Pelkey*, 58 Wn. App. 610, 614, 794 P. 2d 1286 (1990).

Here, the Statement of defendant on plea of guilty reflects that the State would request forfeiture of items seized from the defendant at the time of his arrest. CP 10. At the sentencing, the defendant requested two

of the cell phones back. 12/31/2009 RP 22-23. The trial court denied the defendant's request, pointing out that they were evidence in the case. *Id.* The State argued that the phones were properly subject to forfeiture as having been used in drug trafficking. 12/31/2009 RP 23.

The defendant filed a formal motion for return of property under CrR 2.3(e) after the case was already pending before the Court of Appeals. This issue is not ripe for review. The trial court has not heard or ruled upon this motion. It is unknown whether the trial court had sufficient information regarding the issues of ownership and probable cause to believe that the phones were used to further the drug deal. It is unknown whether the Lakewood Police sought forfeiture under RCW 69.50.505.

The defendant's appeal of this issue is premature. The Court of Appeals should take no action on this issue and permit the issue to be heard and determined in the trial court.

ISSUES REGARDING THE DEFENDANT'S PERSONAL  
RESTRAINT PETITION.

4. THE DEFENDANT DOES NOT SHOW IN A PRP  
DEFICIENCY OF COUNSEL OR PREJUDICE  
THEREBY.

a. The defendant's burden in the PRP.

The defendant's Motion to Withdraw Guilty Plea was transferred to the Court of Appeals as a Personal Restraint Petition (PRP). CP 214-215. A petitioner in a collateral attack asserting a constitutional violation must show actual and substantial prejudice. *In re Personal Restraint of*

*Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). If a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice. *In re Personal Restraint of Crace*, 174 Wn. 2d 835, 847, 280 P. 3d 1102 (2012). If the petitioner fails to make such a showing of prejudice, his petition will be dismissed. *Cook*, at 810.

- b. The defendant's guilty plea waives factual and legal challenges that could have been brought before the plea.

Although, in his PRP, the defendant seems to wish to contest the facts of the case (PRP at 2-4), this is not the basis for withdrawing a guilty plea. Nor is it proper for the defendant to allege facts in his PRP that are not in evidence or in the record. *See, McFarland*, 127 Wn. 2d at 335. A guilty plea, by its nature, admits factual guilt, and thus waives any challenge on that ground. *State v. Knight*, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008). “[A] guilty plea waives or renders irrelevant all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea or to the government's legal power to prosecute regardless of factual guilt.” *In re Pers. Restraint of Bybee*, 142 Wn. App. 260, 268, 175 P.3d 589 (2007); *State v. Wilson*, 162 Wn. App. 409, 415-416, 253 P. 3d 1143 (2011). This Court cannot consider any of the defendant's allegations that are not in the record or supported by evidence.

- c. The defendant does not demonstrate deficiency of counsel, or prejudice, in counsel's trial preparation.

The defendant complains that his assigned trial attorneys failed to adequately prepare for trial; specifically that they failed to interview witnesses William Watson, Anttwain Kelly, Tory Heron, and Belinda Banks. PRP at 5-8. As pointed out *supra*, the defendant must overcome a presumption of effectiveness; trial tactics and strategy cannot be the basis for establishing error. *Strickland*, 466 U.S. at 689–92.

The defendant's PRP criticizes the way the two defense counsel prepared his case. He alleges that Ms. Che failed to interview certain witnesses. PRP at 5-7. The defendant makes the same allegation regarding Mr. Silverthorn. PRP at 7-9. A petitioner must show that he has "competent, admissible evidence" to support his arguments when his petition is based on matters outside the appellate record. *In re Personal Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). The defendant provides none.

Bald assertions and conclusory allegations alone are insufficient to support claims in a PRP. RAP 16.7(a)(2)(i); *Rice*, at 886. Claims as to what others would say must be supported by "their affidavits or other corroborative evidence" consisting of competent and admissible evidence. *Id.*

The defendant asserts of his first attorney, Ms. Che, that no such interviews ever took place “according to witnesses”. PRP at 7. But, the defendant provides no such evidence. There are no affidavits from these, or any, witnesses that they were not interviewed. There is nothing in the record that explains what the witnesses would have testified about; whether they would have testified any differently than the statements they gave to police, or even that their testimony would have assisted the defendant’s case. *See*, PRP Appendix F. Therefore, even if Ms. Che did not interview the witnesses, there is no way of assessing whether the failure to call the witness was harmful or not. The defendant does not show prejudice from the alleged decision.

Even if Ms. Che decided not to interview the witnesses, the decision does not necessarily show deficiency of counsel. The duty to investigate ‘does not necessarily require that every conceivable witness be interviewed.’ *In re Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). The decision not to interview certain witnesses can be a legitimate strategy. *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967).

The defendant asserts that his second defense counsel, Mr. Silverthorn, did not interview witnesses Banks and Kelly. PRP at 8. The defendant also asserts that Mr. Silverthorn failed to complete a Memorandum of Law in support of the defendant’s motion to suppress. *Id.* However, at the time of Mr. Silverthorn’s alleged inaction, the defendant was *pro se* (CP 78), and Mr. Silverthorn was only stand-by counsel. CP

200. There is no right to “hybrid representation” such as a *pro se* defendant serving as co-counsel with his attorney. *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991). At the time of the alleged deficient trial preparation, the defendant was responsible, not Mr. Silverthorn.

It is important to recognize that, during much of the time leading to trial, the defendant was acting *pro se*. CP 78, 85-87. If a defendant proceeds *pro se* he cannot thereafter complain of ineffective assistance of counsel. See, *Faretta v. California*, 422 U.S. 806, 835–836 n. 46, 95 S. Ct. 2525, 45 L. Ed2d 562 (1975); see, also, *DeWeese*, 117 Wn. 2d at 379.

Here, the last trial date was May 11, 2009. On April 20, 2009, the defendant was permitted to represent himself. CP 78. Early in the case, the defense listed as its witnesses the persons that the defendant now highlights: Belinda Banks, Antwainn Kelly, Tory Heron, and William Watson. CP 199. Banks, Heron and Watson were arrested on material witness warrant requested by the defense. CP 202, 206, 208. All were in custody; and available for the defendant to interview when the defendant was in charge of his defense, *pro se*. Kelly had been served with a subpoena, and was available as a witness. CP 204. The defendant did not relinquish control of the case to Mr. Silverthorn until May 11, 2009. CP 212. The defendant cannot complain that the assigned attorneys failed to prepare for trial where the defendant himself had undertaken that responsibility.

Here, even if alleged deficiencies in trial preparation can be laid at defense counsels' feet, the Court views their conduct in light of the entire case. *See, Ciskie, supra*. Defense counsel were confronted with a strong case against the defendant. The police reports reflect that at least two police officers observed the "controlled buy". *See, Police reports, PRP Appendix F*. Two witnesses were present during the delivery: Ms. Banks, the purchaser; and Anttwain Kelly, the defendant's companion. *PRP Appendix F*. Both of these persons were subpoenaed to testify. CP 204-205. The pre-recorded buy money and more cocaine were found within the defendant's reach. *PRP Appendix F*. In addition to this evidence, the defendant confessed; he admitted that the cocaine discovered was his, and that he had delivered cocaine to the woman. *PRP Appendix F*.

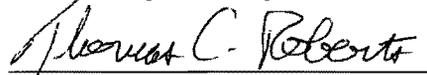
The defendant does not show that his attorneys failed to interview the witnesses; and if they had not, that it made any difference in the result. The defendant does not demonstrate prejudice; that, had the attorneys interviewed the witnesses, he would not have pleaded guilty and would have insisted on going to trial. *See, In re Personal Restraint of Riley*, 122 Wash.2d 772, 780, 863 P.2d 554 (1993). Because the defendant fails to demonstrate ineffective assistance of counsel, his PRP fails.

D. CONCLUSION.

The defendant fails to show deficiency of either of his attorneys in this case. Far from deficient, Mr. Silverthorn's advocacy for the defendant in sentencing was truly commendable. The State made the bargained-for recommendation at sentencing. At most, remand may be required for a limited purpose: for the trial court to determine whether the defendant's two cell phones were properly forfeited. The State respectfully requests that the judgment be affirmed and the PRP be dismissed.

DATED: November 20, 2012.

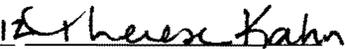
MARK LINDQUIST  
Pierce County  
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WSB # 17442

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.

11.20.12   
Date Signature

# PIERCE COUNTY PROSECUTOR

**November 20, 2012 - 3:57 PM**

## Transmittal Letter

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- Objection to Cost Bill
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- Letter
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Hearing Date(s): \_\_\_\_\_
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- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
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