

No. 41894-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Cheney Salazar,**

Appellant.

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Grays Harbor County Superior Court Cause No. 10-1-00201-7

The Honorable Judge Gordon Godfrey

**Appellant's Reply Brief**

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## ARGUMENT

### **I. MR. SALAZAR HAD THE RIGHT TO APPOINTMENT OF NEW COUNSEL PENDING SENTENCING.**

Respondent does not address Mr. Salazar's right to counsel claim.

*See* Brief of Respondent, *generally*. The absence of argument on this point may be treated as a concession. *See In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). The record establishes that Mr. Salazar was denied his right to counsel at a critical stage. *See* Opening Brief, pp. 10-14. His Judgment and Sentence must be vacated, and his case remanded to the trial court for the appointment of new counsel. *State v. Chavez*, \_\_\_ Wash.App. \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2011).

### **II. THE TRIAL JUDGE SHOULD HAVE APPLIED *A.N.J.* AND *PADILLA* TO EVALUATE THE MERITS OF MR. SALAZAR'S MOTION/REQUEST.**

Mr. Salazar's request for the appointment of new counsel should not have prompted the judge to examine the merits of Mr. Salazar's claim. *See* CrR 4.2; *Chavez, supra*; Appellant's Opening Brief, pp. 10-14. When the trial judge erroneously delved into the merits of Mr. Salazar's ineffective assistance claim, he compounded his error by failing to apply the constitutionally mandated standards set forth in *A.N.J.* and *Padilla*. *State v. A.N.J.*, 168 Wash.2d 91, 113, 225 P.3d 956 (2010); *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

Under those cases, an attorney provides ineffective assistance by failing to advise the accused person of *any* clear consequence, whether it can be characterized as direct or collateral. *See, e.g., State v. Martinez*, 161 Wash.App. 436, 439, 253 P.3d 445 (2011). Thus, contrary to Respondent's assertion, an offender may be permitted to withdraw a guilty plea even if aware of all direct consequences of the plea. Brief of Respondent, p. 3.

Here, Mr. Salazar claimed he was unaware that new convictions would be counted in his offender score. RP (2/14/11) 3-5. As Respondent notes, this rule "is a statement of the law that will apply regardless of any agreement of the parties." Brief of Respondent, p. 4. In other words, the rule is a clear consequence of his plea, much like the immigration consequences at issue in *Martinez* and *Padilla*, or the effect of a guilty plea on the juvenile's permanent record in *A.N.J.* Accordingly, Mr. Salazar's ineffective assistance claim had merit under *A.N.J.* and *Padilla*. Under these circumstances, ignorance of the law *is* an excuse, Judge Godfrey's statement to the contrary notwithstanding. *See* RP (2/14/11) 5.

Mr. Salazar also claimed that he was misinformed about the prosecutor's recommendation. RP (2/14/11) 4-5. The prosecutor's planned recommendation is a clear consequence of a plea; this is so even if the offender violates the terms of the plea agreement. Respondent

appears to suggest that Mr. Salazar's misunderstanding regarding the prosecutor's recommendation became irrelevant upon his breach; however, Respondent cites no authority for this implied argument. Brief of Respondent, pp. 5-6. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007).

For all these reasons, Mr. Salazar's Judgment and Sentence must be vacated, and his case remanded to the trial court. Upon remand, he must be appointed new counsel, and he is entitled to seek withdrawal of his plea under CrR 4.2.

### **III. THE CONTEMPT SANCTIONS WERE UNLAWFULLY IMPOSED.**

Judge Godfrey improperly relied on his inherent contempt power, without finding that the statutory procedures and remedies were inadequate. *See* Opening Brief, pp. 17-20; *see also In re Dependency of A.K.*, 162 Wash.2d 632, 645-647, 174 P.3d 11 (2007); RCW 7.21.010 *et seq.* Respondent's failure to address this argument can be taken as a concession. *Pullman*, at 212 n.4.

Judge Godfrey also failed to follow the procedural requirements of RCW 7.21.050(1). Specifically, he (a) waited to impose sanctions until the following day (for the remedial sanction) and the following week (for

the punitive sanction);<sup>1</sup>(b) failed to certify that he saw or heard the contempt;<sup>2</sup> (c) failed to give Mr. Salazar an opportunity to speak in mitigation.<sup>3</sup>

The failure to comply with the statute requires reversal of the sanctions imposed. *See, e.g., State v. Jordan*, 146 Wash. App. 395, 403 n.6, 190 P.3d 516 (2008). Respondent claims—without citation to the record—that Judge Godfrey “certified orally at the time of the conduct and subsequently in the written contempt order that he had seen and heard the conduct...” Brief of Respondent, p. 7. This is incorrect.

A statute that involves a deprivation of liberty must be strictly construed. *In re Detention of Hawkins*, 169 Wash.2d 796, 801, 238 P.3d 1175 (2010). In interpreting a statute, the court’s duty is to “discern and implement the legislature’s intent.” *State v. Williams*, 171 Wash.2d 474, 477, 251 P.3d 877 (2011). The court’s inquiry “always begins with the plain language of the statute.” *State v. Christensen*, 153 Wash.2d 186, 194-195, 102 P.3d 789 (2004). Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *State v.*

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<sup>1</sup> See RP (2/14/11) 7-9; RP (2/15/11) 11-15; CP 46-47, 48.

<sup>2</sup> RP (2/14/11) 7-9; CP 46-47, 48.

<sup>3</sup> RP (2/14/11) 7-9; RP (2/15/11) 11-15; RP (2/22/11) 6-8.

*Engel*, 166 Wash.2d 572, 578, 210 P.3d 1007 (2009)<sup>4</sup> A court “will not engage in judicial interpretation of an unambiguous statute.” *State v. Davis*, 160 Wash.App. 471, 477, 248 P.3d 121 (2011).<sup>5</sup> Where a statute fails to define a term, rules of statutory construction require that the term be given its plain and ordinary meaning, derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wash.2d 214, 225, 137 P.3d 844 (2006).

The word “certify” means “to attest as certain; give reliable information of; confirm... to testify to or vouch for in writing... to guarantee; endorse reliably... to give assurance; testify; vouch for the validity of something.” *Dictionary.com*, Random House (2011). A legal dictionary provides the following definition: “1. To authenticate or verify in writing. 2. To attest as being true or as meeting certain criteria...” *Black’s Law Dictionary*, 9<sup>th</sup> Ed. (2009).

The import of these definitions is that a certification requires something formal – something more than mere implication or passing

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<sup>4</sup>See also *State v. Punsalan*, 156 Wash.2d 875, 879, 133 P.3d 934 (2006) (“Plain language does not require construction.”)

<sup>5</sup> A statute is ambiguous when the language is susceptible to multiple interpretations. *Id.*

reference. But the record is devoid of anything explicitly attesting that the judge personally observed the contumacious conduct.

The closest that the judge came to even mentioning that he personally saw the conduct was when he said “I just watched the little walk over here and the demeanor and the rest of the gig going on. We don't do that in my courtroom.” RP (2/14/11) 7. But this statement—“I just watched the little walk”—refers to Mr. Salazar’s actions immediately *before* the conduct that resulted in the finding of contempt. RP (2/14/11) 7-8. The judge gave Mr. Salazar an opportunity to conduct himself with decorum, and Mr. Salazar—in Judge Godfrey’s opinion—did not. RP (2/14/11) 7-8. It was this *second* problem that gave rise to the contempt sanction. Thus even if the statement (“I just watched...”) qualified as a certification, it was not a certification that the judge personally observed the contumacious conduct that resulted in the sanction.

Respondent also contends that the word “proceeding” should be read broadly, to encompass all the proceedings, including hearings held the following day and the following week. Brief of Respondent, pp. 7-8. But such an interpretation violates the requirement that the contempt statute be strictly construed. *Hawkins, supra*. Furthermore, RCW 7.21.050 is geared toward providing immediate penalties to address problems that threaten to disrupt court; the court must impose the sanction

“immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the authority and dignity of the court.” RCW 7.21.050(1).

Finally, the imposition of both a remedial sanction and a punitive sanction violated the terms of the statute. RCW 7.21.050. Respondent does not address this problem, except to assert that the court’s directive (that Mr. Salazar was not to receive credit for time served during the week between the alleged contempt and the final hearing on the issue) “was actually unnecessary because [Mr. Salazar] was in custody on [another matter.]” Brief of Respondent, p. 8. Respondent does not cite to the record for this assertion; nor does the record support this claim.

Furthermore, the jail and DOC may have interpreted the court’s order to mean that Mr. Salazar was not to receive credit against his Clallam County sentence. In any event, the court’s order was in excess of the authority granted by the statute, regardless of whether or not it had any practical effect.

Finally, Respondent does not address the court’s failure to provide an opportunity to speak in mitigation of the contempt. Brief of Respondent, pp. 6-9. It is possible that Respondent believes that the court’s repeated directive that Mr. Salazar apologize qualified as such an

opportunity; however, nothing in the record shows that the court invited Mr. Salazar to speak in mitigation without making an apology.

The judge failed to follow the required procedure. Accordingly, the contempt orders must be vacated. *Jordan, supra*. Mr. Salazar must be granted credit for time served. *Id.*

### **CONCLUSION**

The judgment and sentence must be vacated and the case remanded for appointment of new counsel. The contempt orders must be vacated, and Mr. Salazar must be credited with the time he spent in custody.

Respectfully submitted on October 10, 2011.

### **BACKLUND AND MISTRY**



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CERTIFICATE OF MAILING

I certify that on today's date I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Cheney Salazar, DOC #302484  
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And to:

Grays Harbor Prosecuting Attorney  
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Montesano, WA 98563

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 October 10, 2011.



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# BACKLUND & MISTRY

**October 10, 2011 - 12:43 PM**

## Transmittal Letter

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