

**FILED**

OCT 15 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 302831-III

IN THE COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

---

THE STATE OF WASHINGTON

Respondent

v.

CHRISTOPHER RANDALL BORING

Appellant

---

AMENDED BRIEF OF RESPONDENT

---

Mathew J. Enzler  
Deputy Prosecuting Attorney  
Attorney for Respondent

Stevens County Prosecutor's Office  
215 S. Oak Street  
Colville, WA  
(509) 684-7500

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## I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant's trial counsel was ineffective, and improperly advised him in his plea, resulting in a misunderstanding of potential sentencing consequences he would face following a plea of guilty. This inadequacy is of constitutional magnitude, requiring the court to vacate Appellant's plea of guilty.
2. Trial Judge should have sentenced the Appellant to either the First Time Offender Sentencing Alternative, or the Parenting Sentencing Alternative, failure to do so is an error of law requiring re-sentencing.

## II. ISSUES PRESENTED

1. Whether Appellant has presented evidence sufficient to support a finding of ineffective assistance of counsel.
2. Is the Appellant entitled, as a matter of law, to a sentencing alternative (First Time Offender Waiver, or Parenting Sentencing Alternative), requiring re-sentencing

## III. STATEMENT OF THE CASE

The State accepts the Appellant's Statement of the Case.

#### IV. ARGUMENT

##### A. WHETHER SUFFICIENT EVIDENCE EXISTS TO SUPPORT A FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL, AS ALLEGED BY APPELLANT.

The State generally accepts the appellant's summary of law in this area, and summarizes as follows: "To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice." State v. McNeal, 145 Wash.2d 352, 362, 37 P.3d 280 (2002) (citing State v. Rosborough, 62 Wash.App. 341, 348, 814 P.2d 679 (1991)). "To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness." McNeal, 145 Wash.2d at 362, 37 P.3d 280 (citing Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different." McNeal, 145 Wash.2d at 362, 37 P.3d 280 (citing State v. Early, 70 Wash.App. 452, 460, 853 P.2d 964 (1993)). Ineffective assistance of counsel is a constitutional violation. See State v. Soonalole, 99 Wash.App. 207, 215, 992 P.2d 541 (ineffective assistance of counsel is issue of constitutional magnitude), *review denied*, 141 Wash.2d 1028, 11 P.3d 827 (2000).

Competency of counsel is determined based upon the entire record below. State v. White, 81 Wash.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wash.2d 293, 456 P.2d 344 (1969)). **Courts engage in a strong**

**presumption counsel's representation was effective.** *State v. Brett*, 126 Wash.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wash.2d at 226, 743 P.2d 816. **Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record.** *State v. Crane*, 116 Wash.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); *State v. Blight*, 89 Wash.2d 38, 45–46, 569 P.2d 1129 (1977). *Accord State v. Stockton*, 97 Wash.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the brief but not included in the record cannot be considered on appeal). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal. See Washington State Bar Ass'n, *Appellate Practice Desk Book* § 32.2(3)(c), at 32–6 (2d ed. 1993) (citing *State v. Byrd*, 30 Wash.App. 794, 800, 638 P.2d 601 (1981)).

In the present case, the Appellant essentially argues he was misadvised of the potential consequences of his plea. At issue would be the Transcript of Proceedings, (RP 7/22/11), and the Statement of Defendant on Plea of Guilty (CP 065-073 7/22/11.) In the beginning of a colloquy with Mr. Boring, the Trial Court Judge comments to the Appellant regarding the document known as the Statement of Defendant on Plea of Guilty, stating: “As you can see it’s designed

to do a couple of things uh, explain your rights to you, which you give up when you plead guilty and then also to make sure you understand the consequences of pleading guilty.” 7/22/11 RP at 10. He goes on to explain, “Now the penalty here we already talked about this a little bit but would be 2 to 6 months on Count One and 6 to 12. That’s the Standard Range we call it and those would run concurrently but there’s a unique feature that there are some aggravating factors that this is a uh large scale economic offense, major economic offense it’s called so that means that uh in this instance uh the court could uh theoretically uh enter a sentence up to the statutory maximum. Now these are class B felonies. .... So that would be then ten (10) years uh or one hundred twenty (120) months. You understand that?” 7/22/11 RP at 10. Mr. Boring responded “Yes, your honor.” 7/22/11 RP at 10. later in the hearing, following numerous other warnings and inquiries, the court inquired of the appellant: “You feel like you of course had the benefit of counsel and you’ve been able to think about which way to turn and this is what you want to do then?” *id* at 14. To which the Appellant answered “Yes your honor.” *Id.* The court then went on to accept the plea, giving a fairly thorough reading of the charge, including the aggravating circumstances, to which the Appellant entered pleas of guilty, *id* at 14-15.

The condition that Appellant alleges he was not advised of by his trial counsel is found on page 5 of the Defendant’s Statement on Plea of Guilty, 065-073 CP at 5, stating “The judge may also impose an exceptional sentence above

the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proved beyond a reasonable doubt to a unanimous jury, to a judge if I waive jury, or by stipulated facts. In the last page of the Statement of Defendant on Plea of guilty, the defendant stipulated to certain facts, by stating: "Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea." 065-073 CP at 9.

After the oral colloquy, and reviewing the written Statement of Defendant on Plea of Guilty, the court entered a factual finding "The Defendant had previously read the entire statement above and that the defendant understood it in full.... I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The Defendant is guilty as charged." 065-073 CP at 9.

The facts as they are contained in the record do not support Appellant's claim, for the first time on appeal, that he was not advised of the consequences of his plea. In fact, the records, both written and oral, create a strong showing that the defendant was in fact advised that his pleas of guilty could result in a sentence of up to ten years per count. Appellant has not met the burden of proof

sufficient to overcome the strong presumption of effective representation provided by law.

B. IS THE DEFENDANT ENTITLED, AS A MATTER OF LAW, TO A STATUTORY SENTENCING ALTERNATIVE?

Sentencing alternatives are a statutory creation. Appellant, by way of additional grounds, has requested this Court review whether or not he is entitled to either the First Time Offender Option, or the Parenting Sentencing Alternative.

The First Time Offender option is found in RCW 9.94A.650, which provides:

(1) This section applies to offenders who have never been previously convicted of a felony in this state, federal court, or another state, and who have never participated in a program of deferred prosecution for a felony, and who are convicted of a felony that is not:

(a) Classified as a violent offense or a sex offense under this chapter;

(b) Manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in Schedule I or II that is a narcotic drug or flunitrazepam classified in Schedule IV;

(c) Manufacture, delivery, or possession with intent to deliver a methamphetamine, its salts, isomers, and salts of its isomers as defined in RCW 69.50.206(d)(2);

(d) The selling for profit of any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana; or

(e) Felony driving while under the influence of intoxicating liquor or any drug or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug.

(2) **In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that**

**the offender refrain from committing new offenses.**

**(3) The court may impose up to six months of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed one year.**

(4) As a condition of community custody, in addition to any conditions authorized in RCW 9.94A.703, the court may order the offender to pay all court-ordered legal financial obligations and/or perform community restitution work.

A sentencing court can only impose a sentence authorized by the legislature. *In re Postsentence Review of Leach*, 161 Wash.2d 180, 184, 163 P.3d 782 (2007). The Sentencing Reform Act of 1981(SRA) generally restricts a court's sentencing authority by establishing specific sentencing ranges for most offenders, thereby favoring a policy of uniformity over individual rehabilitation. See *State v. Welty*, 44 Wash.App. 281, 283–84, 726 P.2d 472 (1986). But RCW 9.94A.650 gives a sentencing court the ability to waive the standard range sentence for some nonviolent offenders convicted of a felony for the first time. Under the first-time offender option, the focus remains on the policy goal of rehabilitation and the court retains broad discretion to tailor sentences to the individual defendant. *Welty*, 44 Wash.App. at 283–84, 726 P.2d 472.

[A] defendant 'can challenge the procedure by which a sentence within the standard range was imposed.' See *State v. Watkins*, 86 Wash.App. 852, 854, 939 P.2d 1243 (1997) (citing *State v. Ammons*, 105 Wash.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986))). Even though a first-time offender's sentence is generally not appealable, this limitation does not preclude appellate review of whether the sentencing court had legal

authority to impose a first-time offender waiver under RCW 9.94A.650. State v. Stately, 152 Wash.App. 604, 607, 216 P.3d 1102 (2009), *review denied*, 168 Wash.2d 1015, 227 P.3d 852 (2010). On the contrary, where a trial court refused to exercise discretion at sentencing because it erroneously believed it lacked authority, RCW 9.94A.585(1) does not bar a defendant's appeal of a standard range sentence. State v. McGill, 112 Wash.App. 95, 99–100, 47 P.3d 173 (2002). And a trial court's failure to consider an available alternative sentence is reversible error. State v. Grayson, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005) (citing State v. Garcia–Martinez, 88 Wash.App. 322, 330, 944 P.2d 1104 (1997) (failure to consider exceptional sentence downward)). Under the RCW 9.94A.585(1) first-time offender option, the trial court has broad discretion to waive a standard range sentence, including refusing to grant the option. State v. Johnson, 97 Wash.App. 679, 682, 988 P.2d 460 (1999) (citations omitted).

**Where the record is clear that the trial court would impose the same sentence on remand, even taking into consideration alternatives or law it erroneously ignored originally, remand is not required.** *See, e.g., McGill*, 112 Wash.App. at 100, 47 P.3d 173 (citing State v. Pryor, 115 Wash.2d 445, 456, 799 P.2d 244 (1990)). In contrast, where the record is uncertain and it is possible that the superior court might have imposed a different sentence under a correct reading of the law, remand is proper. In re Pers. Restraint of Mulholland, 161 Wash.2d 322, 334, 166 P.3d 677 (2007) (citations omitted).

Such is the case here.

In the present case, a sentencing hearing was held on August 22, 2011. Numerous people spoke at this hearing. The State made a lengthy statement regarding charging decisions, and the recommendation, and specifically addressed the issue of the first time offender waiver (8/22/11 RP at 36-37). Defendant's Counsel addressed the issue of the first time offender waiver in his sentencing argument (8/22/11 RP at 79-81). And the court considered, and weighed the arguments, laying out his reasoning of why the first time offender waiver was not appropriate (8/22/11 RP at 102-103). The Court correctly found that there could be an argument for the First Time Offender Waiver, however, the court would not accept it, stating: "There's a request or there could theoretically and again Mr Kidd, I'm sure looked at this and decided no that's not going to apply but at least it would have been available and that would have been the first time offender option and there I would have said no if it was presented because in a sense you are a many time offender." 8/22/11 RP at 102.

Clearly, the court knew that as a matter of law the First Time Offender Waiver was available to him, however, it was not an appropriate sentence. The Court clearly did consider the option. To any extent the court did not consider the option, it is clear the court would not have sentenced the Appellant to the First Time Offender Waiver, had it been presented and further argued. Given this factual basis, in the record, the Court of Appeals should deny defendant's request for remand for further consideration of the First Time Offender Waiver.

With respect to the Parenting Sentencing Alternative, the State argued at the time of sentencing, as it will here, the Appellant does not qualify for this alternative. Alternatively, if the court finds as a matter of law the Appellant did qualify for this alternative, it is clear from the record as a whole the court would have denied this option.

Per RCW 9.94A.655, an offender is eligible for the parenting sentencing alternative if:

(a) **The high end of the standard sentence range for the current offense is greater than one year;**

(b) The offender has no prior or current conviction for a felony that is a sex offense or a violent offense;

(c) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(d) The offender signs any release of information waivers required to allow information regarding current or prior child welfare cases to be shared with the department and the court; and

(e) The offender has physical custody of his or her minor child or is a legal guardian or custodian with physical custody of a child under the age of eighteen at the time of the current offense.

--RCW 9.94A.655(1)

Here, the Standard Range for each of these offenses were less than one year. One of them, Count Two, had a standard range of up to twelve months, but not twelve months and one year. This Standard Range then does not meet the statutory requirement for eligibility for the Parenting Sentencing Alternative.

To any extent that the Parenting Sentencing Alternative may apply in this situation, it remains clear from the court's ruling that this alternative would

not have been ordered by the Sentencing Court. The Court stated, as a small part of its ruling:

“So, the word remorseless came up here and I think during that period you were completely oblivious to the pain and the heartache you were causing. And you were remorseless, you were relentless in what you did here to this corporation but more importantly the people that worked there, that family is the way that they think of themselves. So, I ---after I add this up my initial inclination was ten years in prison but then I have to remember that you stepped forward, all the evidence is against you but nonetheless you have stepped forward and you pled guilty and you’ve taken responsibility and I need to give you some credit for that and you do have a family. And you have these children that I’m sure look up to you. And I’m sure you love them dearly and after I factor all of that together the sentence is six years in prison. And I --- that’s as low as I can go. And again, my first inclination was ten, because of the impact on the community here. So, it will be six years in prison....”

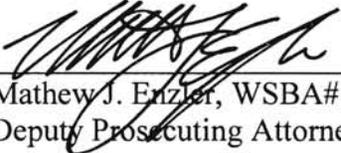
---8/22/11 RP at 106-107.

In conclusion, the Appellant was not entitled to consideration of the Parenting Sentencing Alternative as a matter of law. To the extent the State is incorrect as to this plain reading of the statute, the record is clear that the court would not have imposed this sentencing alternative had further evidence and argument been given regarding this alternative. As such, the court should deny the Appellant’s request to have this matter remanded to the Trial Court for further consideration of the Parenting Sentencing Alternative.

V. CONCLUSION

Based upon the legal arguments and facts above, the State requests that the Pleas of Guilty, and Sentences entered be affirmed in this case.

Dated this 12<sup>th</sup> day of October, 2012.

  
\_\_\_\_\_  
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Stevens County Prosecuting Attorney's Office  
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## CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the Amended Brief of Respondent (pages 3, 4 & 5 corrected to reflect corrected CP reference) to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201 and to, Tanesha La'Trelle Canzater, Attorney at Law, P.O. Box 29737, Bellingham, WA 98228-1737, and to Christopher Randall Boring, DOC #351876, Airway Heights Correctional Center, P.O. Box 1899, Airway Heights, WA 99001-1899, on October 12, 2012.



Michele Lembcke, Legal Assistant  
to Mathew J.ENZLER