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25470-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

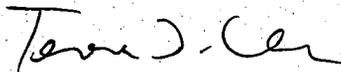
A.N.J.,

Appellant.

APPEAL
FROM THE SUPERIOR COURT OF GRANT COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. When the court reviews the entire record, including the police reports, the trial attorney's statement regarding the Defendant's admission, and the plea statement, are the findings of facts supported in the record?
2. Is the standard of review for a claim of ineffective assistance of counsel that set by the courts or the self-imposed duties of defender organizations?
3. Did counsel actually and substantially assist client in deciding to plead guilty by accurately explaining the consequences of the plea?

IV. STATEMENT OF THE CASE

On July 2, 2004, the twelve year old Respondent A.N.J. was charged with child molestation in the first degree, a class A felony. CP 1; RCW 9A.44.083. On September 21, 2004, A.N.J. pled guilty as charged. CP 3-11; RP September 21, 2004. Under the terms of the plea negotiation, the prosecutor Carole Highland agreed that she would recommend a SSODA and, if A.N.J. successfully completed the terms of the SSODA, she would move to amend the charge to child molestation in the *second* degree, a class B felony. CP 10; RCW 9A.44.086.

A standard range for child molestation in the first degree is 15-36 weeks and the standard range for child molestation in the second degree is "local sanctions" or 0-30 days. RCW 13.40.020(16); RCW 13.40.0357. A SSODA means a *suspended* standard range sentence and treatment. RCW 13.40.160.

A.N.J.'s parents were present in his discussions with his attorney. I RP¹ 65, ln. 17-26; II RP² 54-62. In the Statement on Plea of Guilty, A.N.J. signed directly below these words: "I have read or someone has read to me

¹ I RP refers to the transcript of proceedings for September 2, 2005.

² II RP refers to the transcript of proceedings for March 16, 2006.

everything printed above, and in Attachment 'A', if applicable, and I understand it in full. I have been given a copy of this statement. I have no more questions to ask the judge." CP 11. The attorney Douglas Anderson signed directly below this sentence: "I have read and discussed this statement with the respondent and believe that the respondent is competent and fully understands the statement." CP 11. The pro tem commissioner indicated that he found that the "respondent's lawyer had previously read to him [] the entire statement above and that the respondent understood it in full." CP 11. The commissioner found the plea to be knowingly, intelligently, and voluntarily made with an understanding of the charge and consequences of the plea. CP 11. The statement describes the requirement of sex offender registration at length and with the statutory citation. CP 8.

For the plea, A.N.J. accepted the truth of the police reports. CP 10. Unlike an Alford plea, in this plea, there is no denial of actual guilt. CP 10.

Following the entry of the plea, A.N.J. sought new counsel and filed a motion to withdraw guilty plea, which includes a portion of the police report. CP 12-13, 15-24. New counsel Garth Dano prepared and filed a declaration from the previous attorney Douglas Anderson. CP 34-35. In a statement to police, Mr. Anderson explained the deficiencies and misleading

nature of this declaration. Exh. 3; I RP 15, ln. 25-26; I RP 32. The court explained that it would only consider live testimony subject to cross-examination and not the various declarations written with counsel's footer on each page. I RP 6, ln. 11 and 7, ln. 4-5, 18-20.

The court heard testimony on September 2, 2005 and March 16, 2006. I RP; II RP. Mr. Dano attempted to dissuade Mr. Anderson from testifying with threats of perjury. I RP 9, ln. 11 - 11, ln. 4. Mr. Anderson's only expressed concern was the extent of the waiver of attorney-client privilege. I RP 11, ln. 5-6 and 40, ln. 1-5.

Mr. Anderson testified that A.N.J. and his father told him that the A.N.J. had committed the conduct that was alleged in the police report, but that it was not premeditated, but more "opportunistic" in nature. I RP 48-49; Exh. #3.

During Mr. Anderson's representation, A.N.J.'s father called counsel weekly on his son's behalf, because the court had ordered A.N.J. to keep in weekly contact with his attorney. I RP 41. Eventually the father began to inquire about any plea bargain offers. I RP 41. When the State made an offer, Mr. Anderson communicated to his client that the offer was not bad and that A.N.J. was likely to be found amenable to treatment so as to receive

a SSODA. IRP 46, ln. 17-21. Mr. Anderson was also aware of the potential of a second charge involving another victim. I RP 49, ln. 20-22. Before a plea was reached, Mr. Anderson reviewed the State's evidence (I RP 21, ln. 15-16), and he attempted unsuccessfully to contact defense witnesses (I RP 16-17). He never ended up interviewing the State's witnesses or hiring any investigator, because a plea deal had been negotiated. I RP 38, 47, ln. 24-28..

Mr. Anderson testified that Mr. Dano prepared a declaration for him to sign and that Mr. Dano had added the handwritten addendum. I RP 24, 37. Mr. Anderson signed the statement having no doubt that Mr. Dano would accurately reflect their conversation. I RP 48. Unfortunately, the declaration turned out to be an inaccurate and misleading synopsis. I RP 29, 45.

Mr. Anderson recalls at least two office visits with A.N.J. specifically in preparation for the plea. I RP 41, ln. 18-19. A few days before the plea hearing, Mr. Anderson spent well over half an hour going over the plea statement with A.N.J.. I RP 41-42. While counsel did not read it aloud word for word, he paraphrased the language of every paragraph for his client to assure his comprehension. I RP 42, ln. 21-28; Exh. #3. He explained the elements of the crime, the State's offer, the punishment options, sex offender registration, school notification, the firearm consequence, etc.. I RP 43-44.

He made sure that the client's decision to plead guilty was a voluntary one. IRP 44, ln. 24 - 45, ln. 5. Mr. Anderson testified he had no concern about his client's mental acuity. I RP 36, ln. 24-26. He was satisfied that his client understood the nature of the charge and the consequences of his plea. I RP 46, ln. 1-8. With that taken care of, on the actual day of the plea hearing, counsel did not repeat the process, but only spent about five minutes with him before the hearing to explain the court's colloquy procedure. I RP 41, ln. 18-21 and 42, ln. 7-11. The declaration prepared by Mr. Dano mistakenly suggests that those five minutes were the extent of the client's plea hearing preparation. CP 35.

The parents asked Mr. Anderson about the possibility of having the offense removed from his record. I RP 29, 44. He answered that a conviction for a sex offense could never be sealed. I RP 29, 44. However, there might be a possibility of eventually removing the registration requirement. I RP 29.

A.N.J.'s mother testified that her son met with Mr. Anderson at least five times. I RP 65, ln. 17-23. She believes she attended four of those meetings. I RP 65, 24-25. She initially testified that she was not present with her son and counsel for plea discussions between August 2, 2004 and

September 21, 2004, but that her husband took her son to the meetings. I RP 58, ln. 26-28. After some prodding, she admitted that she had been at one meeting soon before the plea hearing, which lasted approximately 5-10 minutes, and that she gave counsel names of potential witnesses. I RP 59-60. She said that she did not review the plea form. I RP 59, ln. 26-28. But she remembered the attorney explaining the consequences regarding firearms, sex offender registration, not attending school with the victim, and no contact with small children. I RP 62, 64. The mother testified that she asked counsel “when it would be off [A.N.J.’s] record,” and counsel responded that “he hadn’t had time to look into that.” I RP 62, ln. 25-28, and 63, ln. 9-16. She admitted and demonstrated that she did not understand the legal terms “seal,” “information,” and “complaint.” I RP 65, ln. 27 through 66, ln. 7; I RP 70, ln. 21-28; I RP 73. She testified that she believed her son innocent and yet thought it best for him to plead guilty to child molestation. I RP 71-72.

A.N.J.’s father testified that his memory of events was “all such a blur” and “there was so much, and things were going so fast” that he did not ask about any details. II RP 57, ln. 17; II RP 64, ln. 3-4. He said that his son maintained his denial as told to the detective. II RP 56. He said that counsel recommended a guilty plea and explained that a SSODA would consist of

counseling in Wenatchee. II RP 59, 61. He testified that when A.N.J.'s mother inquired when the conviction would "come off his records," counsel responded, "the laws change all the time. I'll have to check into it and get back to you." II RP 60. The father testified that he permitted his son to plead guilty, because he was "scared to death that [A.N.J.] could end up in juvenile hall," because he believed the conviction would be removed from A.N.J.'s record, and for the sake of "neighborhood unity." II RP 62.

A.N.J. did not testify. I RP 75.

The court denied the motion to withdraw the plea. CP 213-17.

V. ARGUMENT

In the "Introduction" to the Appellant's Brief, this case is framed as one of "many other unfortunate cases" in a "regime without the effective assistance of counsel." A.N.J. cites in a footnote to articles published by the Washington State Bar Association's 2004 article, the American Civil Liberties Union article, and *The Seattle Times*. This is inadmissible argument and should be stricken.

The State urges the Court to strike all reference to the settled lawsuit *Best, et al. v. Grant County*, Kittitas County Superior Court, No. 04-2-00189-0. There is no final judicial decision in that matter. The settlement is

inadmissible under ER 408, as well as ER 402.

The State further urges the Court to strike all reference to the three defense articles mentioned in Appellant's footnote 7, characterizing the *Best* case and the public defender system in Grant County. These articles are highly prejudicial and unreliable documents. They are not proper documents for review. They are not part of the record in a direct appeal (RAP 9.1), and yet are offered for an evidentiary purpose, i.e. to discredit Douglas Anderson's testimony. There is no declaration made by the authors under penalty of perjury. They are not admissible under any rule of evidence. See ER 803.

Moreover, the reports are unreliable. *The Seattle Times* article, a so-called "investigative report," ignores the actual court records and relies instead upon coached stories of disgruntled convicts.

The *Times* report is unabashedly biased, apparently prepared in close contact with the *Best* plaintiffs even before the case had been filed. When Prosecutor John Knodell confronted the reporters with the innumerable glaring factual errors, willful errors because the journalists had full access to prosecutors' files and had conducted an extensive interview with Mr. Knodell, one of the journalists responded, "investigative journalism is not

supposed to be fair and accurate.”

The State urges the Court to understand that every appeal or petition that references this article and its progeny is relying upon pure prejudice. Unless the Court makes a conscious note of A.N.J.’s intent to prejudice, the noise will overcome the truth.

A.N.J. is arguing that actions conform with character. Such an argument is legally impermissible. First, A.N.J. argues that the public defenders of Grant County have a particular character. Second, he is arguing that trial counsel Douglas Anderson’s character should be equated with a group. There is no evidence that trial counsel has a character of providing ineffective assistance of counsel. Mr. Anderson has never been found to have provided ineffective assistance of counsel. However, even if he had been so found multiple times, under ER 404, the Court would not be able to consider that fact in the context of a specific claim.³ The pure prejudice of the argument undermines the State’s right to a fair hearing on the actual case in controversy.

The sole purpose of such reference is attrition: to wear down the

³ Under ER 402, 403, and 404, the court should also strike any discussion regarding how Mr. Anderson investigated other cases not before this court. This discussion is irrelevant and highly prejudicial.

Court's opinion of Grant County public defense by repeated, unfounded accusations. After wave upon wave of accusations, the truth disappears, swallowed by the noise.

This tactic has been tried, unsuccessfully, in several unrelated personal restraint petitions regarding Grant County convictions. The Court's definitive disapproval of this practice would efficiently put an end to this tactic.

A. THE TRIAL COURT'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

As A.N.J. acknowledges, the standard of review for findings of evidence is deferential. Brief of Appellant at 17. Factual findings will be upheld if they are supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). The mere presence of conflicting evidence in the record is not enough to overturn the court's findings. In re Diamondstone, 153 Wn.2d 430, 438, 105 P.3d 1, cert. denied, 126 S. Ct. 93 (2005).

A.N.J. challenges the findings, claiming that certain findings are "wholly lacking in evidentiary support." Brief of Appellant at 17. This hyperbolic argument is only sustained by disregarding those parts of the

record, which are inconvenient to the claim.

First, he challenges the finding (FF#10) that A.N.J. “accepted the State’s version of the facts.” Brief of Appellant at 17. A.N.J. argues that in withdrawing his plea, he did not reassert this. However, the motion to withdraw is not the entirety of the record. In fact, an obvious place to start is with the most noteworthy document in this case, the Statement on Plea of Guilty. The finding is supported in the Statement in which A.N.J. stated that he “agree[s] that the judge may review the police reports and/or statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” CP 10. A.N.J. did not assert new facts for his plea. He did not deny guilt, as one does in an Alford plea. He accepted the State’s version of events. Additionally, Mr. Anderson testified that A.N.J. admitted to him the truth of the State’s allegations.⁴ I RP 48-49; Exh. #3. There is substantial evidence in support of the finding.

Second, A.N.J. challenges the finding (also FF#10) that A.N.J. “initiated contact” with the victim. Brief of Appellant at 17-18. Again,

⁴ A.N.J.’s counsel appears to argue that when A.N.J. confessed the truth of the allegations to Mr. Anderson, he was actually only reasserting the denial he made to police. This is an unreasonable interpretation of Mr. Anderson’s statement that A.N.J. admitted the “conduct alleged.” The State’s allegation is not A.N.J.’s denial. The State’s allegation is not that the victim molested himself with A.N.J.’s hand.

A.N.J. ignores the relevant record, i.e. the plea itself as well as A.N.J.'s confession to Mr. Anderson. In the plea, A.N.J. accepted the truth of the police reports, which include inter alia the victim's transcribed statement. CP 241-270. In pages 8-12 of the transcribed statement, the five year old child victim describes in detail how A.N.J. initiated contact in the fort, touching the victim and his four year old sister in the groin area both under and over their clothes. A.N.J. gave a markedly different statement to police. By telling his parents that another person had invented a game called Icky Poke You, A.N.J. attempted to shift the blame. However, the victim never spoke of such a game, and the victim claimed that no one else had ever touched him in this manner. A.N.J. told police that the children had asked him to play the game and made him touch them. When the detective told A.N.J. that he did not believe him, A.N.J. flushed, covered his face with his hands, and began to cry. Before pleading guilty, A.N.J. and his father admitted the truth of the victim's allegation to his first attorney. Exh.#3. Despite the actual allegation and A.N.J.'s confession to counsel, the only statement A.N.J. acknowledges on appeal is his initial denial to police.

By rejecting the record, A.N.J. rejects the standard of review. This Court must view the entire record. There is substantial evidence that the

contact was indeed initiated by A.N.J. when the court considers the victim's statement, A.N.J.'s later acknowledgment to Mr. Anderson, and in his decision to plead guilty and accept the truth of the police reports.

Third, A.N.J. challenges the finding (also FF#10) that A.N.J. possessed the requisite intent. The court is again directed to the police report, plea, and confession to counsel.

Fourth, A.N.J. challenges the finding (FF#16) that his plea was voluntary, knowing, and competent. The Commissioner made this finding at the plea hearing. CP 11. It is substantially supported in the record by the Statement (CP 3-11), in which A.N.J. signed his name directly under the language stating that he made his plea "freely," absent any threats or promises, and after having read (or been read) the entirety of the plea statement and understanding it in full. CP 11. The document contains the defense attorney's signed statement that he had read and discussed the statement with A.N.J. and believed him to be competent and to "fully understand" the statement. CP 11. The Commissioner's certificate specifically indicates that counsel read the entire statement to A.N.J. who understood it in full. This is substantial evidence in support of the finding.

In the subsequent motion to withdraw plea, A.N.J.'s current counsel

would argue that A.N.J. could not have made a voluntary plea, because he had not read the statement word for word and because he believed that the conviction would eventually be removed from his record. Mr. Anderson has responded that he explained “each paragraph” to the client, but did not read the paragraphs “word for word as it is written in language most children have difficulty understanding.”⁵ Exh. #3. A.N.J. himself has never testified or presented affidavits in this case, so we may not know directly what he believed. The only testifying witnesses to the plea discussion were Mr. Anderson and A.N.J.’s parents. Mr. Anderson denies such a misrepresentation. Exh. #3. Both parents admit confusion with legal terms and admit that Mr. Anderson never definitively represented that the charge would be removed. I RP 62, ln. 25-28, and 63, ln. 9-16; II RP 60.

There is substantial evidence on the record, that is the plea document and defense counsel’s testimony, for the voluntary, knowing, and competent nature of A.N.J.’s plea.

B. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL ON HIS PLEA.

A.N.J.’s main claim is the trial court erred in failing to permit him to

⁵ Note that this interpretation of the document is exactly as the defense “expert” recommends. II RP 46, ln. 11-13.

withdraw his plea, because he claims that he did not receive effective assistance of counsel when deciding to plead guilty.

1. Standard of Review.

In order to show ineffective assistance of counsel, A.N.J. has the burden of showing both(1) that his attorney's performance was deficient and (2) that this deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls below an objective standard of reasonableness. State v. Horton, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). But the courts begin with a strong presumption that a counsel's conduct fell within the wide range of reasonable professional assistance. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). To satisfy the prejudice prong of the ineffective assistance of counsel claim, A.N.J. must show that counsel's performance was so inadequate that there is a reasonable probability that the result would have differed, thereby undermining our confidence in the outcome. Strickland, 466 U.S. at 694.

In the context of a guilty plea, the defendant must show that (1) his counsel failed to “actually and substantially [assist] his client in deciding

whether to plead guilty,” State v. McCollum, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997), quoting State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984), and (2) but for counsel’s failure to adequately advise him, he would not have pled guilty. McCollum, 88 Wn. App. at 982, citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). See also State v. Holley, 75 Wn. App. 191, 197, 876 P.2d 973 (1994) citing State v. Malik, 37 Wn. App. 414, 416, 680 P.2d 770 (1984).

2. Professional or Ethical Standards Are Irrelevant Under This Standard.

A.N.J. does not agree that prejudice is defined as stated in McCollum. Instead, he argues that “prejudice is presumed from some breaches of [relevant professional and ethical] standards, such as the ethical rules relating to conflicts of interest.” Brief of Appellant at 20. This is incorrect.

A.N.J. cites In re Davis, 152 Wn.2d 647, 674, 101 P.3d 1, 17 (2004) (footnote omitted), In re Stenson, 142 Wn.2d 710, 722, 16 P.3d 1, 9 (2001), In re Pirtle, 136 Wn.2d 467, 474-75, 965 P.2d 593, 599 (1998), and State v. Jensen, 125 Wn.App. 319, 330-31, 104 P.3d 717, 723 (2005) in support of his argument. First, these cases are inapposite. They do not regard a guilty plea, but jury convictions, the first three resulting in death penalties. Second, the cases do not say what A.N.J. claims they do. The latter three cases regard a

conflict of interest only. None of the four cases suggest an extension of presumed prejudice to any other breach of “relevant professional and ethical standards.”

In Davis, the court refused to adopt the per se rule urged by the dissent to find counsel always ineffective for failing to object to the defendant’s appearance in shackles before a jury. The court was satisfied with the existing presumptive prejudice rule which finds a 6th Amendment violation where there is a *complete denial* of counsel or where there are *comparable circumstances*. The court lists four comparable circumstances: denial of counsel at a critical stage, a complete failure to challenge the prosecutor’s case with “meaningful adversarial testing,” circumstances that would prohibit any counsel from performing competently, and an actual conflict of interest. This finite and specific list nowhere states that any breach of “relevant professional and ethical standards,” *other than* the enumerated circumstance of actual conflict, results in presumptive prejudice.

Accordingly, all argument regarding trial counsel’s alleged failure to prepare for trial are contrary to law and in conflict with the correct standard of review.

3. Analysis

First, A.N.J. claims that his counsel's performance in speaking with him in the presence of his parents was deficient.⁶ This is not a cognizable claim. It does not speak to the standard of whether counsel "actually and substantially assisted a client in deciding to plead guilty."

There is no evidence on the record that A.N.J. was coerced into a plea by his parents. There is no evidence on the record that A.N.J.'s professed wishes have changed due to an opportunity to speak independently of his parents. A.N.J. has never testified.

Second, A.N.J. claims that his counsel's performance was deficient, because his counsel failed to do any independent investigation of the case -- beyond reviewing the State's evidence, questioning his client, and attempting to contact possible defense witnesses (II RP 12, ln. 1-7). His third claim, similarly, regards trial preparation. He claims that his counsel's performance was deficient, because counsel failed to consult an expert.

⁶ Note the inconsistency/hypocrisy of A.N.J.'s argument as compared against I RP 9, ln. 1-8 (arguing that the parents should not be excluded from the courtroom as witnesses, but should be "there for" the juvenile) and I RP 67, ln. 15 (parent expressing that the second attorney represents the family as well as A.N.J.). The inclusion of the parents in discussions with the attorney appears to have continued in this second representation. Indeed, Mr. Dano took statements from the parents, but not A.N.J., although only A.N.J. could have expressed whether any of these claims would have affected his decision to plead guilty.

Again, neither are cognizable claims. They do not speak to the proper standard. All the bar or defense standards in the world do not amount to a relevant standard in Sixth Amendment law until adopted by the courts. They have not been adopted by the courts. The only standard in this case is whether the attorney actually and substantially assist client in deciding to plead guilty and whether, but for counsel's failure to assist in this decision, the defendant would not have pleaded guilty.

There is no evidence on the record that the evidence has changed between the time of plea and the present date.⁷ The victim has not recanted. The only people present during the offense had already been interviewed by a disinterested person. (The police have no interest in inventing cases.) There is no claim of police misconduct. Because the evidence has not changed, there can be no claim that but for X, A.N.J. would not have pleaded guilty. There is no newly discovered evidence of X. Nor, significantly, has A.N.J. ever taken the stand to represent this necessary element – that any of these issues would have affected his decision to plead guilty.

It is improper to assume, without evidence, that A.N.J.'s decision to plead guilty was solely based on the strength of the State's case. There are

⁷ Apparently, the defense witnesses would only state that at one time they saw the victim's brother break wind on the victim's face. This does not exonerate A.N.J..

many reasons why a person may plead guilty in a knowing, intelligent, and voluntary way regardless of the strength of the State's case. Just as an example, an accused who knows he is guilty may choose to plead guilty regardless of the strength of the State's case, because it is the honest thing to do, because he does not want to further burden the victim with a trial, because he does not look forward to the detailed and emotional accusations of a trial, because it heals families and the community, and because it provides him with an opportunity for desired treatment. A.N.J. has never expressed on the record that anything his counsel did or did not do would have affected his decision to plead guilty.

Defenders may impose upon themselves extra duties, e.g. a duty to investigate despite the client's admissions and expressed desire for a speedy resolution by way of guilty plea. However, this self-imposed duty does not enter into the court's analysis. For that analysis, the standard only requires that a plea be knowing, intelligent, and voluntary and that an attorney sufficiently assist toward that end. Defenders' self-imposed duties do not supercede the client's right to decide to plead guilty (RPC 1.2(a)) and his constitutional right to speedy trial. A client who wishes to plead guilty before the attorney has had an opportunity to fully investigate, has a right to. So

integral is this right to dignity and autonomy that it supercedes the right to effective assistance of counsel. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (giving the right to self-representation, which waives claims regarding effective assistance).

A.N.J. relies in no small part on his “expert” who opined on how the court should rule. This very premise, opining *in testimony* on how the court should rule, is ethically offensive. Coming as an affidavit or declaration or “expert” testimony, rather than as an amicus brief, such “evidence” is thuggery, an attempt to intimidate the courts. There is no expert in 6th Amendment law more persuasive or informed than the appellate courts. The witness is demonstrably biased, not persuasive, testifying almost four times more frequently in support of criminal defendants. II RP 34, ln. 9-11. The court noted that the witness’ reliance on a television show “casts aspersions on his opinion.” II RP 7, ln. 14-15. Despite being a practicing attorney and having testified in a court on approximately nineteen occasions (II RP 33, ln 9 and 34, ln 9-11), the witness would not follow the rules of examination. He had to be admonished for interrupting the judge and deliberately going beyond the prosecutor’s question in order to more zealously defend A.N.J.’s position. II RP 36, ln 28 - 37, ln.10. On at least two occasions, the

prosecutor had to prevent the witness from strong-arming the examination by lapsing into the narrative. II RP 37, 40.

The standards set forth in A.N.J.'s argument do not represent the values of the entire legal community or even the majority of the legal community. Under such "standards," notwithstanding the client's own expressed desire to plead guilty, the client's best interest is always to seek a dismissal or acquittal at any cost. Such a standard does not take into account the client's interest in taking responsibility for his actions; his interest in reconciling with the victim, his own family, and the community; or his desire to make amends. Yet these are genuine client interests and goals. A plea should be the client's decision. RPC 1.2(a). Despite defenders' self-imposed duties, the Sixth Amendment has not been interpreted to limit the client's autonomy on this question. Mr. Anderson arranged for the plea hearing in deference to his client's wishes. He was not required to persuade A.N.J. to go to trial by a demonstration of trial preparation.

When the trial court noted that the best interests of the client may include rehabilitation rather than attacking an innocent victim and perpetuating the offender's initial lie, not only did the "expert" fail to acknowledge this as a legitimate client interest, but he also misstated the law.

II RP 43. He testified that the juvenile justice Act has been amended “to say the sole purpose of juvenile justice is punishment.” II RP 43. This is not what the statute reads. While “the juvenile justice system’s new focus [is] on punishment,” State v. Schaaf, 109 Wn.2d 1, 8, 743 P.2d 240 (1987), RCW 13.40.010 also includes goals of rehabilitation. And, as the statute itself states, all of the eleven purposes are held to be “equally important purposes of this chapter.” RCW 13.40.010(2).

A.N.J. claims that because under the county contract, the public defender paid for expenses for investigators and expert witnesses, that the attorney suffered from an actual conflict of interest. Brief of Appellant at 28. This is not the standard. To prevail on this claim, A.N.J. must show that counsel *actively* represented conflicting interests and that an *actual* conflict of interest *adversely affected* his lawyer’s performance. Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Burger v. Kemp, 483 U.S. 776, 783, 107 S.Ct. 3114, 97 L.Ed.2d 683 (1987); Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). There is no showing that A.N.J.’s decision to plead guilty was in any influenced by the absence of an investigator or expert witness. Mr. Anderson testified that he did not do any further investigation, *because* a plea deal had

been reached. The client wanted to plead guilty. Moreover, counsel explained that expert witness services *would not* come out of his budget, because, in cases when he assessed the services to be necessary, he would petition the court for payment. II RP 18. This procedure is no different than it is now, under the new defender contract.

A.N.J. claims that there are ten items or issues that an investigator or expert could have pursued, e.g. the police report did not yet include an interview with the first adult to whom the victim disclosed, an expert in interview technique could have studied the detective's manner of questioning, and the investigator might be curious why it took 28 days after the initial disclosure before a victim interview was scheduled with police. Brief of Appellant at 29, citing CP 39. Identifying *possible* lines of query does not meet the standard. A.N.J. must demonstrate (1) that these lines of investigation have led to actual exculpatory evidence and (2) that this evidence would have dissuaded A.N.J. from pleading guilty. Neither factor is met.

And finally, A.N.J. claims that his counsel misrepresented the consequences of a plea. Brief of Appellant at 29. A.N.J. claims (but has not testified) that Mr. Anderson told him the conviction "would come off" his

record between the ages of 18 and 21. Brief of Appellant at 29. Mr. Anderson denies this. And both parents admit confusion with legal terms and admit that Mr. Anderson never definitively represented that the charge would be removed. I RP 62, ln. 25-28, and 63, ln. 9-16; II RP 60. There is insufficient evidence for this claim.

The court's assessment was that A.N.J. was not motivated to withdraw the plea based on any misrepresentation of counsel regarding sealing of the conviction. Rather, the impetus for the motion came after his mother learned about collateral consequences to the plea, namely that the school would closely supervise his contact with other children. CP 213-17.

To the extent that A.N.J. argues that his counsel was ineffective for negotiating a plea deal, thereby waiving his right to trial and to appeal, there was a legitimate trial strategy for making such a deal. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel). Because A.N.J. admitted guilt to his counsel, his counsel could not put him on the stand to claim otherwise. A.N.J. was facing a charge of first degree child molestation, a class A felony. If found guilty at trial, A.N.J. was looking at 15-36 weeks (~4-9 months) incarceration. By pleading guilty,

A.N.J. received the significant benefit of the SSODA option and may receive a reduction to second degree child molestation, a class B felony. His suspended sentence would be reduced to 0-30 days and would only be imposed if SSODA treatment failed. In other words, if A.N.J. complies with the court's orders, he may never serve a single day's incarceration. This is an even more significant benefit, when one considers that A.N.J.'s father was "scared [] to death" by the prospect of A.N.J. "end[ing] up in juvenile hall." II RP 62. It appears that the plea also prevented the charging of another case against a second victim. II RP 25-26. The plea was a legitimate trial strategy. Where waiver of the trial right was necessary for the reduction of the charge, negotiation is within trial counsel's tactical discretion.

C. THE TRIAL COURT DETERMINED THE FACTUAL BASIS FOR THE PLEA BY REVIEWING THE POLICE REPORTS.

A.N.J. argues that under State v. S.M., 100 Wn. App. 401, 413-15, 996 P.2d 1111, 1118-19 (2000), a motion to withdraw plea must be granted if the judge at the plea hearing did not specifically orally inquire whether the juvenile defendant understood the elements of the crime. Brief of Appellant at 30. This argument fails as it misrepresents both State v. S.M. and the well-

established law interpreting CrR 4.2(d).⁸

Under CrR 4.2(d), the court must determine inter alia that the defendant understands the nature of the charge. When the court does not comply with the rule, the plea must be set aside. Wood v. Morris, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976).

It is not enough that the defendant understand the elements in a vacuum. The defendant must possess an understanding of the law in relation to the facts. In re Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1981), quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). This is known as the factual basis requirement. However, the judge is not required to conduct a discussion with the defendant. The judge may determine the factual basis *by reviewing whether there is sufficient evidence for the elements.*

To satisfy the CrR 4.2(d) factual basis requirement, there must be sufficient evidence for a jury to conclude that the defendant is guilty and this evidence must be developed on the record at the time the plea is taken; it may not be deferred until sentencing.

State v. S.M., 100 Wn. App. at 414, quoting Keene, 95 Wn.2d at 210.

[T]he factual basis [requirement] may be satisfied by a

⁸ Under JuCR 1.4(b), the Superior Court Criminal Rules apply in juvenile proceedings so long as they are not inconsistent with applicable Juvenile Court Rules and statutes.

recitation of facts the prosecutor would prove at trial. Where the prosecutor's factual statement is orally acknowledged by the defendant or where the court orally interrogates the defendant concerning his conduct, the constitutional requirements are satisfied and both society and the defendant are better served. *Where, however, the court relies only on the written statement of the defendant on the guilty plea form, it must insure the facts admitted amount to the violation charged. Anything less endangers the finality of the plea.*

State v. S.M., 100 Wn. App. at 414, quoting In re Taylor, 31 Wn. App. 254, 259, 640 P.2d 737 (1982) (emphasis added).

In other words, the judge determines, by reading the defendant's statement or police reports (when accepted by the defendant, as here), that the conduct which the defendant admits constitutes the offense charged in the indictment or information. Keene, 95 Wn.2d at 209, quoting McCarthy, 394 U.S. at 467.

In State v. S.M., the defendant did not accept the police reports. Rather, the defendant's statement provided this factual basis for the plea: "[i]n Cowlitz County in the Spring of 1994, I had sexual contact with my Brother who is age 10 in 1994. It happened three times." State v. S.M., 100 Wn. App. at 415. From this statement alone, the court could not have been able to determine that S.M. understood the factual basis. S.M. was pleading guilty to "rape of a child." The crime requires "sexual intercourse," not

“sexual contact.” Therefore, there was no factual basis for the necessary element of penetration.

Those facts are in no way similar to those of the case before us. A.N.J. did not provide a statement. He provided the entire police report. CP 10 (“Instead of making a statement, I agree that the judge may review the police reports [] supplied by the prosecution to establish a factual basis for the plea”). Mr. Anderson handed the police reports to the judge at the plea hearing. RP September 21, 2004 at 2, ln. 13-14. The judge reviewed the reports (RP September 21, 2004 at 2, ln. 17-20) and found that “[t]here is a factual basis for the plea.” CP 11. Because the court “insure[d] the facts admitted amount to the violation charged,” CrR 4.2(d) is satisfied. State v. S.M., 100 Wn. App. at 414.

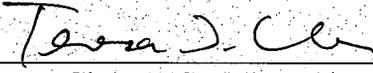
VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: Apr. 5, 2007.

Respectfully submitted:

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