

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2008 NOV -3 P 2:06

BY RONALD R. CARPENTER

CLERK

Supreme Court No. 81498-8

Court of Appeals No. 35947-2-II

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

vs.

Patrick Drum

Appellant/Petitioner

Jefferson County Superior Court Cause No. 04-1-00110-8

The Honorable Judge Craddock Verser

PETITIONER'S SUPPLEMENTAL BRIEF

Manek R. Mistry

Jodi R. Backlund

Attorneys for Appellant/Petitioner

BACKLUND & MISTRY

203 Fourth Avenue East, Suite 404

Olympia, WA 98501

(360) 352-5316

FAX: (866) 499-7475

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS and Prior Proceedings..... 1

ARGUMENT 3

I. The judiciary is not bound by stipulations to legal conclusions.3

II. Mr. Drum’s Drug Court Contract is equivalent to a guilty plea....6

CONCLUSION 8

APPENDIX: Court of Appeals Decision

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Boykin v. Alabama</i> , 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969).....	6
<i>Brookhart v. Janis</i> , 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966).....	6, 7

WASHINGTON CASES

<i>Abad v. Cozza</i> , 128 Wn.2d 575, 911 P.2d 376 (1996).....	7
<i>Barnett v. Hicks</i> , 119 Wn.2d 151, 829 P.2d 1087 (1992).....	3
<i>In re Pers. Restraint of Cadwallader</i> , 155 Wn.2d 867, 123 P.3d 456 (2005).....	3, 4, 5
<i>In re Pers. Restraint of Isadore</i> , 151 Wn.2d 294, 88 P.3d 390 (2004).....	7, 8
<i>State v. Barton</i> , 93 Wn.2d 301, 609 P.2d 1353 (1980).....	7
<i>State v. Cantu</i> , 156 Wn.2d 819, 132 P.3d 725 (2006).....	6
<i>State v. Deal</i> , 128 Wn.2d 693, 911 P.2d 996 (1996).....	6
<i>State v. DiLuzio</i> , 121 Wn. App. 822, 90 P.3d 1141 (2004).....	3
<i>State v. Drum</i> , 143 Wn. App. 608, 181 P.3d 18 (2008).....	3, 4, 6
<i>State v. Knapstad</i> , 107 Wn.2d 346, 729 P.2d 48 (1986).....	4
<i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002).....	3
<i>State v. Schelin</i> , 147 Wn.2d 562, 55 P.3d 632 (2002).....	6
<i>State v. Sullivan</i> , 143 Wn.2d 162, 9 P.3d 1012 (2001).....	3
<i>State v. Turley</i> , 149 Wn.2d 395, 69 P.3d 338 (2003).....	7

WASHINGTON STATUTES

RCW 10.05.020 4, 5
RCW 2.28.170 4, 5

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Patrick Drum entered a residence without permission while high on inhalants, and was charged with Residential Burglary. CP 1. Almost every time he appeared in court on the case, he asserted that he did not have the intent to commit a crime inside the house. RP 4-5, 11-12, 15-16, 20-22.

Mr. Drum signed a Drug Court Contract. It included his agreement that if he were terminated from drug court, his guilt would be determined based solely on the police reports. CP 22-23. The contract also included a stipulation that the facts contained in the reports were “sufficient for the Court to find the defendant guilty...” CP 22-23. Mr. Drum waived several rights in this agreement, including his right to raise certain challenges to his case, to a speedy and public jury trial, to confront witnesses, to present a defense, and to testify. CP 22-23. The court briefly reviewed the contract with him before accepting it. RP 31-32. Neither the contract nor the court informed Mr. Drum of his standard range or of other direct consequences that would flow from conviction if he were terminated from drug court. CP 22-23, RP 31-32.

Mr. Drum remained in custody, while waiting for a treatment bed date. RP 33. When he didn't receive one after over a month, he asked to be

released from drug court.¹ RP 33, 36, 41. The court held a hearing to determine Mr. Drum's guilt, and invited argument on the legal sufficiency of the stipulated facts. RP 69. Mr. Drum argued that there was no evidence in the police report indicating that he intended to commit a crime against persons or property within the residence. He also argued that he was too intoxicated (from using inhalants) to intend to commit a crime.² RP 68-72.

The judge found Mr. Drum guilty, inferring intent from the unlawful entry: "I will infer the intent to commit a crime when you entered there, because there's no other reason for you to be in there." RP 69-70. At subsequent hearings, the judge reiterated that he inferred intent from proof that Mr. Drum entered the house unlawfully, and because there was no other explanation for his entry. RP 93-95, 99-100.

In his appeal, Mr. Drum argued that the stipulated facts were legally insufficient for conviction, and that the court's use of a presumption as the sole basis for finding intent violated due process. He

¹ The contract provided for Mr. Drum to opt out of Drug Court after two weeks, and this was after that time period had elapsed. CP 22-23.

² After the judge announced he would find Mr. Drum guilty, Mr. Drum told the judge he was very intoxicated and had entered the residence to ask if he could use the telephone. RP 70, 72.

also argued that the Drug Court Contract was equivalent to a guilty plea. Division II of the Court of Appeals issued a part-published Opinion affirming Mr. Drum's judgment and sentence. The court held that Mr. Drum's Drug Court Contract waived his right to challenge the legal sufficiency of his conviction, yet was not equivalent to a guilty plea. *See State v. Drum*, 143 Wn. App. 608, 181 P.3d 18 (2008).

ARGUMENT

I. THE JUDICIARY IS NOT BOUND BY STIPULATIONS TO LEGAL CONCLUSIONS.

Litigants may not bind the judicial branch to a particular interpretation of the law. *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992). Among other things, this rule prevents the executive branch from encroaching on the judicial or legislative branch by entering stipulations that circumvent the law. *See, e.g., State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002); *State v. DiLuzio*, 121 Wn. App. 822, 825, 90 P.3d 1141 (2004). Under this rule, an accused person's agreement to a legal conclusion cannot constitute a waiver. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 875, 123 P.3d 456 (2005).

Whether or not a particular set of facts is sufficient to sustain a conviction is a matter of law. *See, e.g., State v. Sullivan*, 143 Wn.2d 162, 172 n. 32, 19 P.3d 1012 (2001) (*citing State v. Knapstad*, 107 Wn.2d 346,

729 P.2d 48 (1986)). The trial court recognized this by inviting argument on whether or not the stipulated facts were legally sufficient to prove the charged crime. RP 68-73. Mr. Drum argued they were not; the trial court held that they were. RP 68-70. Despite this, Division II refused to review the issue: “[B]ecause Drum stipulated to the sufficiency of the facts in his drug court contract, we cannot now review the issues related to the sufficiency of the evidence...”³ *Drum*, at 615.

The Court of Appeals’ decision violates the rule that the judiciary cannot be bound by stipulations to legal conclusions. *Cadwallader*. In addition, Division II’s analogy to the stipulations required under the deferred prosecution statute is inappropriate.

First, deferred prosecution is not available to a person who “[s]incerely believes that he or she is innocent of the charges...” RCW 10.05.020(3). By contrast, drug court has no such limitation, and is instead available to any offender who “would benefit from substance abuse treatment.” RCW 2.28.170(3)(b)(i). Because of this, entry into a deferred prosecution requires an admission of guilt; entry into drug court

³ Division II quoted Mr. Drum’s statements out of context, suggesting he “recognized” that he could not “protest his innocence;” the court claimed to “agree with Drum that his attempt to litigate guilt comes too late.” *Drum*, at 617. But Mr. Drum made this argument at sentencing, after the court had already found him guilty of Residential Burglary. RP 70-72.

does not. And, as noted above, Mr. Drum steadfastly maintained he did not have the requisite intent for burglary. CP 1-2; RP 4-5, 11-12, 15-16, 20-22.

Second, petitioners for deferred prosecution must acknowledge under oath that their “wrongful conduct” is the result of addiction or mental health problems. RCW 10.05.020(1). Drug court applicants are not statutorily required to make sworn acknowledgments of any sort. RCW 2.28.170.

Third, a petitioner for a deferred prosecution is required by statute to stipulate to the admissibility and sufficiency of the police reports; this statutory requirement is consistent with the exclusion of those who sincerely believe they are innocent.⁴ RCW 10.05.020(3). The legislature has not imposed a similar requirement for drug court participants. RCW 2.28.170. The stipulation here, in addition to violating the rule against stipulations to matters of law, was not based on a statutory requirement. Mr. Drum was not compelled by the legislature to acknowledge guilt, to make sworn declarations regarding his “wrongful conduct,” or to enter any stipulations. Thus Mr. Drum’s stipulation was not comparable to a stipulation entered pursuant to RCW 10.05.020.

⁴ It is not clear that the stipulation to sufficiency required by RCW 10.05.020(3) would survive scrutiny under *Cadwallader, supra*.

The Court of Appeals never reached Mr. Drum's sufficiency of the evidence argument.⁵ *Drum*, at 615. Accordingly, Mr. Drum's case should be remanded to the Court of Appeals for consideration of that issue pursuant to RAP 13.7(b).

II. MR. DRUM'S DRUG COURT CONTRACT IS EQUIVALENT TO A GUILTY PLEA.

An abbreviated proceeding for determining guilt may be equivalent to a guilty plea. *Brookhart v. Janis*, 384 U.S. 1, 7, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966). Under such circumstances, the abbreviated proceeding is constitutional only if it comports with the protections required for guilty plea hearings. *Brookhart, supra*. Specifically, there must be affirmative evidence that the accused agreed to the abbreviated proceeding intelligently and voluntarily, with an understanding of the full consequences of the agreement. *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969); *see also State v. Barton*, 93 Wn.2d 301,

⁵ Where the facts are undisputed, the sufficiency of the evidence is reviewed *de novo*. *See, e.g., State v. Schelin*, 147 Wn.2d 562, 566, 55 P.3d 632 (2002). In this case, the only evidence presented by the state to establish Residential Burglary was that Mr. Drum unlawfully entered a residence; from this, the trial judge presumed that Mr. Drum intended to commit a crime. RP 69-70. The use of this presumption as the "sole and sufficient" basis for conviction violated Mr. Drum's constitutional right to due process, whether the presumption is characterized as mandatory or permissive. *See State v. Cantu*, 156 Wn.2d 819, 826-828, 132 P.3d 725 (2006) (*citing State v. Deal*, 128 Wn.2d 693, 911 P.2d 996 (1996)). In the absence of the presumption, the evidence was insufficient as a matter of law. *Cantu, supra*. The Court of Appeals should have reached the issue, reversed the conviction, and dismissed the case. *Cantu, supra*.

304, 609 P.2d 1353 (1980). For guilty pleas, this includes an understanding of the direct consequences of conviction, such as the statutory maximum, the standard range, financial obligations, and any post-release supervision. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004).

A guilty plea is involuntary if the state fails to inform an accused person of the direct consequences of conviction. *State v. Turley*, 149 Wn.2d 395, 398-399, 69 P.3d 338 (2003). This is so because knowledge of direct consequences is a prerequisite to an intelligent and voluntary decision to plead guilty. *Isadore*, at 301. Thus an abbreviated hearing equivalent to a guilty plea must include a record establishing that the accused person knew the direct consequences of conviction prior to submitting to the abbreviated hearing.⁶ *Brookhart, supra*.

In this case, the record does not affirmatively establish that Mr. Drum knew his standard range, the scope of financial penalties, the term of community custody, or any other direct consequences of a finding of

⁶ The Supreme Court has previously held that a deferred prosecution is not tantamount to a guilty plea. *Abad v. Cozza*, 128 Wn.2d 575, 579, 911 P.2d 376 (1996). The issue has not been reexamined since the deferred prosecution statute was amended to require a stipulation to sufficiency. 1996 c. 24, section 1 (effective June, 1996). No published case has ever addressed the validity of a deferred prosecution entered without understanding of the direct sentencing consequences of conviction (upon revocation of the deferred prosecution).

guilt. Because the record does not establish that Mr. Drum knowingly, intelligently, and voluntarily agreed to his conviction, the judgment and sentence must be vacated and the case remanded to the trial court.

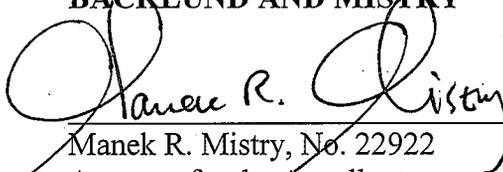
Isadore, supra.

CONCLUSION

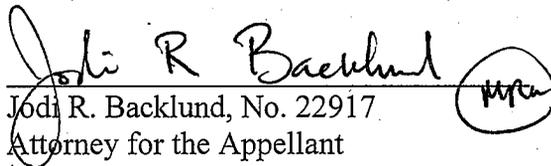
For the foregoing reasons, Mr. Drum's conviction must be vacated and the case dismissed with prejudice. In the alternative, the conviction must be reversed and the case remanded to the trial court.

Respectfully submitted November 3, 2008.

BACKLUND AND MISTRY


Manek R. Mistry, No. 22922

Attorney for the Appellant


Jodi R. Backlund, No. 22917

Attorney for the Appellant

APPENDIX

FILED
COURT OF APPEALS
DIVISION II

08 MAR 25 AM 9:17
STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK BOYD DRUM a/k/a TIM JONES,

Appellant.

In re Personal Restraint Petition of:

PATRICK BOYD DRUM a/k/a TIM JONES,

Petitioner.

No. 35947-2-II
(Consolidated)

No. 34377-1-II

PART PUBLISHED OPINION

ARMSTRONG, J.—Patrick B. Drum appeals his conviction of residential burglary, arguing that the findings of fact and evidence were insufficient to support his conviction and that the drug court contract he entered into and then terminated violated his right to due process. He raises additional issues in his statement of additional grounds and in the personal restraint petition consolidated with his appeal. Finding no error, we affirm his conviction and deny his personal restraint petition.

FACTS

On the afternoon of September 28, 2004, Drum entered a Port Townsend residence. When the homeowner saw him, she called 911 and fled to a neighbor's house. The neighbor saw

Drum come out of the residence and start toward the back door of another home before the police arrived and arrested him.

At his preliminary court appearance, Drum stated that he did not intend to commit a crime but was highly intoxicated when he entered the residence. At his arraignment, Drum asked the court to either dismiss or reduce the residential burglary charge because there was no evidence he intended to commit a crime within the residence, but the court found probable cause to support the charge. Defense counsel later informed the court that while there was a significant question whether Drum intended to commit a crime within the home, Drum wanted to go through drug court and get treatment. On October 29, 2004, Drum filed a drug court contract, which included the following provisions:

16. That it is the Judge's decision to determine when the defendant has earned the ability to graduate from the Program and to determine when termination from the Program will occur.

17. That if the defendant chooses to leave the Program within the first two weeks after signing the Drug Court Contract, withdrawal will be allowed, this contract will be declared null and void, and the defendant will assume prosecution under the pending charge(s) as if this contract had never been agreed to. The defendant agrees that this ability to withdraw from the terms of this contract will cease after the period of two weeks following the effective date of this contract and thereafter the defendant shall remain in the Program until graduation unless his/her participation is terminated by the Court. The defendant further agrees that the ability to withdraw from the terms of this contract will cease within the first two weeks, if he/she has committed a willful violation of this contract for which, in the judgment of the Court, he/she may be terminated from the program.

...
19. If the defendant is terminated from the Program, the defendant agrees and stipulates that the Court will determine the issue of guilt on the pending charge(s) solely upon the enforcement/investigative agency reports or declarations, witness statements, field test results, lab test results, or other expert testing or examinations such as fingerprint or handwriting comparisons, which constitutes the basis for the prosecution of the pending charge(s). The defendant further agrees and stipulates that the facts presented by such reports, declarations, statements and/or expert examinations are sufficient for the Court to find the defendant guilty of the pending charge(s).

20. Defendant waives the right to challenge the legality of any investigative or custodial detention, or the legality of any search or seizure, or the sufficiency of Miranda warnings or voluntariness of any statement made, pertaining to any evidence which forms part of the basis for the prosecution of the pending charge(s).

....
Defendant acknowledges an understanding of, and agrees to waive the following rights:

1. The right to a speedy trial;
2. The right to a public trial by an impartial jury in the county where the crime is alleged to have been committed;
3. The right to hear and question any witness testifying against the defendant;
4. The right at trial to have witnesses testify for the defense, and for such witnesses to be made to appear at no expense to the defendant; and
5. The right to testify at trial.

Clerk's Papers (CP) at 21-24.

Drum signed his name below an additional paragraph stating, "My attorney has explained to me, and we have fully discussed all of the above paragraphs. I understand them all and wish to enter into this Drug Court Contract. I have no further questions to ask the Judge." CP at 24.

Before accepting the contract, the trial court discussed it with Drum:

THE COURT: . . . I've got here a Drug Court Contract, Mr. Drum. Did you review that thoroughly with [defense counsel]?

MR. DRUM: Yes, I did.

THE COURT: Do you understand what you're getting into?

MR. DRUM: Yes, I do.

THE COURT: This is not an easy way to get out of a felony conviction. It requires a lot of effort on your part, and you'll be under the scrutiny of the court for the next at least two years, do you understand that?

MR. DRUM: Yes, I do.

THE COURT: And that jail time will be imposed if you violate the conditions of your agreement with the court, and sometimes you end up getting more jail time in Drug Court than you would by pleading guilty, just because you can't stay straight, you know that?

MR. DRUM: Yes, I do.

Report of Proceedings (RP) at 31-32.

Forty-two days later, on December 10, 2004, Drum asked to be released from the drug court contract, explaining only, "I think it's a good program, but I just don't think it's for me." RP at 36. When the trial court asked defense counsel whether he had talked to Drum about his decision, Drum interjected that he was not going to change his mind.

After initially setting Drum's case on the jury trial track, the court realized its error and set the matter for a bench trial. Over the State's objection, the court invited argument at the trial, and defense counsel asserted that Drum was guilty of first degree criminal trespass at most because his extreme intoxication negated the inference that he entered the residence with the intent to commit a crime against persons or property therein.

The trial court did not find that the police report adequately set forth the elements of intoxication. While the report said the arresting officer "'immediately smelled the strong odor of what appeared to be spray paint'" emanating from Drum, there was "not much discussion about Mr. Drum being intoxicated. Although we believe that he probably was under the influence of having huffed spray paint." RP at 69. The court then stated that it would infer Drum's intent to commit a crime by his entry into the residence because there was no other reason for him to be there. After Drum acknowledged that it was too late for him to explain that he was in the residence because he wanted to use the telephone, the court replied that there was no such explanation in the police report. The court found that the police report established beyond a reasonable doubt that Drum was guilty of residential burglary. The matter proceeded to sentencing where Drum explained:

I was very intoxicated this day, and I was asking this lady to use the phone. I'm not going to say that my record doesn't show cases where I've entered people's houses high on intoxicants. I've definitely got to quit doing that stuff, 'cause it puts my mind in a state where I just have no respect for property or things. But, at the time when she confronted me, my intent was to ask if I could use the phone,

'cause I was high and lost. It's too late for that. I just--I don't know if there's an appeal on this, because I decided to go to Drug Court. That's kind of my fault. That's the only thing I'd like to say. I think it's too late for an argument, but I think it was just a Criminal Trespass.

RP at 72. The court imposed a mid-range sentence of 13 months. The court subsequently entered findings of fact and conclusions of law, which included: "Defendant entered with intent to comitt [sic] a crime in the residence." Personal Restraint Petition (PRP) at 2; RP at 69.

Drum filed a personal restraint petition within one year of his conviction, alleging in part that he had been denied his right to appeal. The State conceded that issue, and we ordered that a direct appeal be initiated and that counsel be appointed. We consolidated the appeal with Drum's petition. Drum raises additional issues in a pro se statement of additional grounds.

The principal issues are whether Drum can challenge the drug contract's provision that the evidence in the police reports is sufficient to convict him of burglary, and whether the drug contract is, nevertheless, unenforceable because it amounts to a guilty plea and the trial court did not fully advise him of the consequences.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Drum raises several issues related to the sufficiency of the evidence supporting his conviction. He claims that the State failed to prove and the trial court failed to find that he intended to commit a crime against people or property within the residence; that the trial court unlawfully used the permissive inference from RCW 9A.52.040 as the sole and sufficient evidence of intent; and that the court thereby found guilt based on a mandatory presumption. He raises these issues without acknowledging the backdrop against which the trial court found him

guilty. Under the drug court contract, Drum stipulated that the evidence was sufficient to find him guilty of the crime charged.

We have examined the sufficiency of the evidence supporting the defendant's conviction where his drug court contract did not contain a sufficiency-of-the-evidence provision. *State v. Colquitt*, 133 Wn. App. 789, 795, 137 P.3d 892 (2006). As support, we cited a Supreme Court opinion discussing deferred prosecution agreements, reasoning that before the statutory prerequisites for such agreements were amended to require a participant to stipulate to the sufficiency of the facts, the court was not foreclosed from examining the sufficiency of the evidence presented in a post-revocation trial. *Colquitt*, 133 Wn. App. at 795 (citing *Abad v. Cozza*, 128 Wn.2d 575, 587-88, 911 P.2d 376 (1996)).

The logical extension of *Colquitt* is that because Drum stipulated to the sufficiency of the facts in his drug court contract, we cannot now review the issues related to the sufficiency of the evidence and the factual findings supporting his conviction. In his reply brief, however, Drum asserts that his stipulation to law is not binding on this court, citing *State v. Vangerpen*, 125 Wn.2d 782, 792, 888 P.2d 1177 (1995), and *Barnett v. Hicks*, 119 Wn.2d 151, 161, 829 P.2d 1087 (1992). In *Vangerpen*, the court determined that the defendant had been convicted of a crime for which he had not been charged, and the issue became what remedy was appropriate. Although the defendant and the State agreed that the Supreme Court should remand for entry of an attempted second degree murder conviction, the court declined to accept their stipulation, reasoning that a stipulation as to issues of law was not binding on the court. *Vangerpen*, 125 Wn.2d at 792. In *Barnett*, the Supreme Court rejected the parties' attempt to stipulate to the nature and scope of review of an arbitrator's decision, finding that litigants cannot stipulate to jurisdiction or create their own boundaries of review. *Barnett*, 119 Wn.2d at 161. As support,

the court cited analogous authority that stipulations of law are not binding on the court. *Barnett*, 119 Wn.2d at 161.

Drum's stipulation to the sufficiency of the evidence is not analogous to the *Vangerpen* and *Barnett* stipulations. Rather, it is similar to stipulations that are now required as part of a deferred prosecution. See RCW 10.05.020(3), (4). Division One has held that courts may apply the principles of chapter 10.05 RCW, which governs deferred prosecutions, to drug court prosecutions. *State v. Melick*, 131 Wn. App. 835, 844-45, 129 P.3d 816, review denied, 158 Wn.2d 1021 (2006); see also *State v. Cassill-Skilton*, 122 Wn. App. 652, 658, 94 P.3d 407 (2004) (Division Two finding that deferred prosecution statutes apply by analogy to drug court proceedings); but see *State v. DiLuzio*, 121 Wn. App. 822, 830, 90 P.3d 1141 (2004) (Division Three concluded that deferred prosecutions and drug court proceedings are not analogous).

Deferred prosecution under chapter 10.05 RCW is designed to encourage treatment of culpable people whose wrongful conduct is caused by a treatable condition, such as alcoholism. *City of Richland v. Michel*, 89 Wn. App. 764, 768, 950 P.2d 10 (1998). Deferred prosecution gives these defendants the opportunity to avoid conviction if they successfully complete treatment. *Michel*, 89 Wn. App. at 769. The petitioner executes a statement acknowledging his or her rights, stipulates to the admissibility and sufficiency of the facts in the police report, and acknowledges that the statement will be entered and used to support a finding of guilt if the deferred prosecution is revoked. RCW 10.05.020(3). The incentive that encourages successful completion of treatment is the possibility that failure will result in prosecution and conviction of the original crime charged. *State v. Shattuck*, 55 Wn. App. 131, 135, 776 P.2d 1001 (1989). The deferred prosecution alternative is "limited to only those who have no reason to argue their innocence." *Shattuck*, 55 Wn. App. at 135. Accordingly, the *Shattuck* court held that an

appellant waived his right to raise defenses to his driving under the influence (DUI) prosecution by stipulating to a deferred prosecution. *Shattuck*, 55 Wn. App. at 133.

RCW 2.28.170(2) enables counties to establish drug courts “to achieve a reduction in recidivism and substance abuse among nonviolent, substance abusing felony and nonfelony offenders . . . by increasing their likelihood for successful rehabilitation through early, continuous, and intense judicially supervised treatment; mandatory periodic drug testing; and the use of appropriate sanctions and other rehabilitation services.” RCW 2.28.170(2). In *Colquitt*, we characterized drug court as a “specialized deferred prosecution wherein the prosecution does not proceed and the information is dismissed upon successful completion.” *Colquitt*, 133 Wn. App. at 793 n.2.

Here, as under the deferred prosecution statute, the defendant’s incentive for participating in the program is dismissal of the charges. *See State v. J.V.*, 132 Wn. App. 533, 537, 132 P.3d 1116 (2006). In return, he cannot protest his innocence of those charges, as Drum recognized when he stated during his bench trial that it was “too late” for him to try to explain his presence in a stranger’s residence. RP at 70. In *Melick*, Division One extended the analysis in *Shattuck* to drug court proceedings, holding that the defendant’s stipulation to the use of police reports waived all subsequent factual, legal, or procedural issues he might raise, except for those related to the validity of the stipulation itself. *Melick*, 131 Wn. App. at 844-45.

Drum stipulated not only that the trial court would determine guilt based solely on the police report but also that the evidence in the report was sufficient to find him guilty of residential burglary. And, other than his argument that the contract was equivalent to a guilty plea, Drum makes no challenge to the contract. We agree with Drum that his attempt to litigate

guilt comes too late. By failing to opt out of the contract within two weeks, Drum waived his right to raise any evidentiary issues.

II. DUE PROCESS

Drum argues that his drug court contract was equivalent to a guilty plea and, as such, must meet due process standards. Specifically, he contends that the record must show that he entered the contract intelligently and voluntarily and with full knowledge of its consequences. In his reply brief, Drum lists the consequences of which he remained ignorant as the standard sentence range, the financial penalties, and the term of community custody.

Due process requires the trial court to determine that the defendant is entering his guilty plea intelligently and voluntarily. *State v. Barton*, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980). In addition to these constitutional requirements, CrR 4.2 requires the court to determine that the defendant understands the consequences of his plea. *Barton*, 93 Wn.2d at 304.

In *Colquitt*, we stated that a drug court contract is not equivalent to a guilty plea, citing *Abad* and *State v. Higley*, 78 Wn. App. 172, 902 P.2d 659 (1995). *Colquitt*, 133 Wn. App. at 795. As explained earlier, the defendant in *Colquitt* did not stipulate to the sufficiency of the evidence in his drug court contract, and the deferred prosecution at issue in *Abad* took place before RCW 10.05.020 was amended to require a defendant to so stipulate. *Colquitt*, 133 Wn. App. at 795; *Abad*, 128 Wn.2d at 580. In *Higley*, we explained why agreeing to deferred prosecution is not the same as pleading guilty: to accept deferred prosecution is to leave adjudication by plea or trial to a later time, whereas to plead guilty is to submit to adjudication by plea, provided that the court accepts the plea. *Higley*, 78 Wn. App. at 187-88. Because the defendant in *Higley* did not plead guilty by agreeing to a deferred prosecution, he did not acquire the due process rights of one who does. *Higley*, 78 Wn. App. at 188.

Courts have continued to hold that a deferred prosecution is not akin to a guilty plea despite the amendment of RCW 10.05.020 that requires a defendant to stipulate that the evidence is sufficient to find him guilty. Division Three has explained that deferred prosecution is not tantamount to a guilty plea but is a form of preconviction sentencing or probation. *Michel*, 89 Wn. App. at 769. The petitioner executes a statement that acknowledges his rights, stipulates to the admissibility and sufficiency of the facts in the police report, and provides that the statement will be entered and used to support a finding of guilt if the deferred prosecution is revoked. *Michel*, 89 Wn. App. at 769. Upon completing the deferred prosecution treatment plan, the charge is dismissed. *Michel*, 89 Wn. App. at 769.

The court rejected Michel's contention that the deferred prosecution agreement did not give him fair notice of a possible enhanced sentence, observing that unlike the case with guilty pleas, the deferred prosecution statute does not require written notice of all consequences of the agreement. *Michel*, 89 Wn. App. at 770. It compared CrR 4.2(d) and *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996), which require direct consequences of a guilty plea to be communicated to a defendant before entry of the plea, with RCW 10.05.020, which requires only that the defendant be advised of his rights as an accused and acknowledge the admissibility of the stipulated facts in any subsequent criminal hearing. *Michel*, 89 Wn. App. at 770. It also observed that "[a]s with juvenile diversion agreements, the procedure is designed to be somewhat informal." *Michel*, 89 Wn. App. at 770 (citing *State v. Quiroz*, 107 Wn.2d 791, 799, 733 P.2d 963 (1987)).

We have also held that a deferred prosecution is not equivalent to a guilty plea even though the accused must stipulate to the admissibility and sufficiency of the facts in the police report. *City of Bremerton v. Tucker*, 126 Wn. App. 26, 32, 103 P.3d 1285 (2005). In *Tucker*, we

agreed with *Michel* that the deferred prosecution statute does not require written notice of all consequences of the agreement. *Tucker*, 126 Wn. App. at 33 n.8.¹

Here, as with deferred prosecutions, the drug court contract left adjudication by trial to a later time. Drug court procedures have almost no statutory guidelines and are perhaps even more informal than deferred prosecutions. There are clearly no court rules that govern them in the same manner that CrR 4.2 governs guilty pleas.

Although Drum stipulated to the sufficiency of the evidence, he had the ability to “opt out” of the contract for a jury trial, and when he missed the opt-out deadline, his termination resulted in a bench trial. In rejecting Drum’s argument that his drug court contract was the equivalent to a guilty plea, the trial court stated, “The people who enter Drug Court get a huge benefit, if they follow through. And doing that . . . they give up the right to a jury trial, they give up the right to hear and question witnesses, and they agree to . . . a trial based on the police reports, or the investigative officer’s reports. While they do say there’s sufficient evidence to find guilt, a judge independently reviews the evidence against him--as I did in Mr. Drum’s case--to determine whether there was sufficient evidence for guilt.” RP at 99-100. We reject Drum’s argument that a drug court contract is equivalent to a guilty plea and find no due process violation here.

¹ Similarly, Division One has held that a deferred prosecution is not equivalent to a guilty plea or conviction even when the accused stipulates to the admissibility and sufficiency of the facts in a police report. *City of Kent v. Jenkins*, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000); *but see State v. Wiley*, 26 Wn. App. 422, 425-26, 613 P.2d 549 (1980) (Division One held that stipulated facts trial not akin to guilty plea because court determined guilt or innocence and defendant could offer evidence and present witnesses). Even if *Wiley* is relevant in this context, we see no violation thereof since the trial court considered Drum’s defense and independently determined the issue of guilt.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

III. STATEMENT OF ADDITIONAL GROUNDS

Drum's statement of additional grounds (SAG)² issues include the claim that his stipulation of guilt amounted to a guilty plea that violated due process. We discuss only his three new issues.

Drum appears to argue that his drug court contract should be nullified because drug court hearings at which he requested a second evaluation were not transcribed and thus not reviewable, leaving him only with the recourse to opt out of the program. *See State v. Young*, 70 Wn. App. 528, 529, 856 P.2d 399 (1993) (criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective appellate review of his or her claims). The record shows, however, that Drum stated in court that he wanted out of the program simply because it was not for him. At a subsequent hearing, defense counsel stated that Drum had been incarcerated and unable to participate meaningfully in drug court. There is no evidence to support his assertion that drug court hearings were held but not transcribed.

Drum also argues that the judge exhibited bias during his bench trial. A party claiming judicial bias or prejudice must present evidence of actual or potential bias because we do not presume that the trial court was prejudiced. *State v. Dominguez*, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996). The test is objective: whether a reasonable person with knowledge of the

² RAP 10.10.

relevant facts would question the judge's impartiality. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995).

Drum argues that drug court judges form a team with prosecutors and should not preside over subsequent bench trials. To support this argument, Drum submits that the trial judge's use of the pronoun "we" in the following bench trial statement shows the judge's bias: "Although we believe that he probably was under the influence of having huffed spray paint." RP at 69. The record shows that the defense had earlier asserted that Drum had been "inhaling poppers" and was highly intoxicated before he entered the residence, and the probable cause statement revealed that Drum smelled of spray paint when he was arrested. Neither Drum's allegation nor the trial judge's statement constitutes evidence of actual or potential bias that would lead a reasonable person to question the judge's impartiality.

Drum's third argument is that his trial counsel was ineffective. To support such a charge, a defendant must show that the attorney's performance was deficient and that the deficiency prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). We give considerable deference to counsel's performance; we presume that counsel provided reasonable assistance. *Thomas*, 109 Wn.2d at 226. A defendant establishes prejudice by showing a reasonable probability that, but for counsel's unprofessional errors, the trial result would have differed. *Thomas*, 109 Wn.2d at 226.

Drum asserts that his counsel was ineffective by stating at the bench trial that first degree criminal trespass was the highest offense the evidence supported. Drum now argues that if this was so, there was no reason for counsel to enter him into a contract in which he stipulated that the evidence was sufficient to find him guilty of residential burglary. Drum further contends that he did not realize that he was stipulating to the sufficiency of the evidence for a crime he did not

believe he committed and that his attorney's action in binding him to a "guilty clause" for residential burglary was not effective assistance.

The record shows that Drum tried early and unsuccessfully in the proceedings to dismiss or reduce the residential burglary charge. After the trial court found probable cause to support that charge, Drum decided that he wanted to enter the drug court program. The incentives for entering were considerable: dismissal of the charge and treatment. Drum and his attorney knew he had a potential issue regarding his intent to commit residential burglary but decided to pursue drug court instead of a jury trial. The fact that defense counsel argued for a lesser charge after Drum terminated the drug court contract, at a time when argument should not have been allowed, does not demonstrate ineffective assistance. It shows that after Drum changed his initial course of action, his attorney sought to reduce the charge against him. Given Drum's signature on the drug court contract and his assertion in court that he had gone over the agreement with his attorney, his current contention that he did not realize he was stipulating to the sufficiency of the evidence is not persuasive. It is clear that Drum wanted to participate in the drug court program, and his attorney was not ineffective in achieving Drum's goal.

IV. PERSONAL RESTRAINT PETITION

Drum argues in his personal restraint petition (PRP), as he did in his direct appeal, that entering into a contract that amounted to a guilty plea violated his right to due process, and that he lacked the intent necessary to commit residential burglary. We have addressed these issues and will not do so again here. We do address Drum's ineffective assistance claim, even though he made a similar claim in his appeal, because he filed his PRP before he filed his appeal and because he bases his ineffective assistance claim on different grounds in his PRP.

To obtain relief by means of a PRP, the petitioner must establish constitutional error that caused actual and substantial prejudice to his case, or he must show nonconstitutional error that caused a fundamental defect resulting in a complete miscarriage of justice. *In re Cook*, 114 Wn.2d 802, 810-13, 792 P.2d 506 (1990).

Drum contends that his counsel was ineffective because he (1) did not explain that Drum was agreeing to his guilt with the drug court contract and assured Drum he could argue his innocence at a bench trial; (2) waived the reading of the information during arraignment; and (3) did not file a timely notice of appeal. We remedied the third error. As to the first, Drum attaches a letter from his attorney that apparently responds to the ineffective assistance claim in Drum's PRP. The attorney states that he recalls Drum being concerned that he had district court cases tracking with the residential burglary felony, and he and Drum agreed that petitioning for drug court would give Drum the best chance of getting out of jail as soon as possible. The downside was that he could not argue the defense of voluntary intoxication in front of a jury. But, after the attorney assured Drum that "we would be able to make the same argument in front of a judge," Drum decided to petition for drug court. Supp. to PRP, Attachment I.

Drum's attorney did argue the defense of intoxication during the bench trial, even though the trial court was not obligated to entertain argument under the terms of the drug court contract. That counsel's argument did not prevail does not show that he was ineffective. *See State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982) (trial tactic that made best of bad situation but did not result in acquittal did not constitute ineffective assistance). Moreover, the record shows that the trial court did not depend on Drum's stipulation to find him guilty but independently evaluated the evidence.

Defense counsel did waive the reading of the information, whereupon Drum sought dismissal or reduction of the charge against him. But Drum was fully aware of the charge and thus cannot show prejudice.

Drum also contends that he was entitled to seek relief from the “uncertainty and insecurity revolving around the Drug Court Contract” under the Uniform Declaratory Judgments Act, chapter 7.24 RCW. Pers. Restraint Pet. (PRP) at 6. The Act allows for an interested person to request resolution of any question arising under a contract where an actual dispute exists between parties with opposing and substantial interests and where a judicial determination will be final and conclusive. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 678 n.7, 146 P.3d 893 (2006). Here, Drum voluntarily terminated the drug court contract, was convicted of a criminal offense, and has appealed his conviction. He has no right to seek additional relief under the Uniform Declaratory Judgments Act.

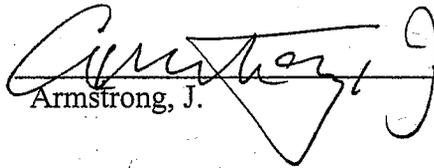
Finally, Drum argues that under the Jefferson County rules for drug court eligibility, his juvenile offense for first degree burglary as well as his current offense for residential burglary made him ineligible for the drug court program. In a supplement to his PRP, Drum contends only that his current offense rendered him ineligible for the drug court program.³

Under RCW 2.28.170, an offender is ineligible for drug court if he has been convicted of either a serious violent offense or a sex offense and is charged with such an offense during which the offender used a firearm or caused substantial or great bodily harm or death to another person. RCW 2.28.170(3)(b). The drug court may adopt local requirements, however, that are more stringent than the minimum. RCW 2.28.170(3)(b).

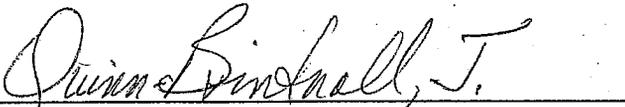
³ Drum’s judgment and sentence does not include a juvenile burglary conviction in the list of prior convictions.

Jefferson County has adopted more stringent standards. The portion of the drug court manual Drum attaches to his PRP supplement states that persons charged with residential burglary committed in an occupied building are not eligible for drug court. The residence Drum entered was occupied. So long as the statutory minimum qualifications in RCW 2.28.170 are satisfied, however, the prosecutor and the court can waive more stringent local eligibility requirements, which obviously occurred in Drum's case. Moreover, the question of eligibility is separate from the validity of the drug court contract Drum entered, and any agreement made to waive the County's eligibility requirements need not affect the validity of the resulting drug court contract.

We affirm Drum's conviction of residential burglary and deny his PRP.


Armstrong, J.

We concur:


Quinn-Brintnall, J.


Van Deren, A.C.J.

CERTIFICATE OF MAILING

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

I certify that I mailed a copy of the Petitioner's Supplemental Brief,
postage pre-paid, to:

2008 NOV -3 P 2: 06
BY RONALD R. CARPENTER

Patrick Drum, DOC #784289
MCC-IMU E136
Washington State Reformatory
P.O. Box 7002
Monroe, WA 98272

CLERK

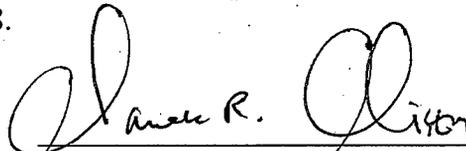
and to:

Jefferson County Prosecutor
P. O. Box 1220
Port Townsend, WA 98368

And that I mailed the original and one copy to the Court of Appeals,
Division II, all on November 3, 2008.

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 November 3,
2008.



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