

NO. 64810-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN ALEXANDER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. ISSUE PRESENTED.....	1
B. STATEMENT OF THE CASE.....	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	5
C. ARGUMENT.....	8
THE COURT SHOULD NOT REMAND THIS CASE TO THE TRIAL COURT FOR FURTHER FACT-FINDING REGARDING CLAIMS MADE BY THE APPELLANT THAT HIS COUNSEL MISADVISED HIM OF THE STATE'S SENTENCING RECOMMENDATION PURSUANT TO HIS GUILTY PLEA, BECAUSE THE RECORD IS ADEQUATE FOR THE COURT TO DENY ANY IMPLIED MOTION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL...8	
D. CONCLUSION.....	18

TABLE OF AUTHORITIES

Page

Table of Cases

WASHINGTON CASES

State v. Dougherty,.....9-10
33 Wn. App. 466, 655 P.2d 1187 (1982)
review denied,
In Re Dougherty, 99 Wn.2d 1023 (1983)

State v. Garcia,..... 16
57 Wn. App. 927, 791 P.2d 244 (1990)
review denied,
115 Wn.2d 1010, 797 P.2d 511 (1990).

State v. Rosborough,.....9-11
62 Wn. App. 341, 814 P.2d 679 (1991)
review denied,
118 Wn.2d 1003, 822 P.2d 287 (1991)

State v. Thomas, 12
109 Wn.2d 222, 743 P.2d 816 (1987)

State v. Young,.....11-12
60 Wn. App. 95, 802 P.2d 829 (1991)
remanded in part on other grounds,
117 Wn.2d 1002, 812 P.2d 100 (1991),
Opinion Modified on Reconsideration on Other Grounds,
62 Wn. App. 895, 817 P.2d 412 (1991)

FEDERAL CASES

Strickland v. Washington, 12-13
466 U.S. 668, 104 S. Ct. 2052 (1984),
rehearing denied,
467 U.S. 1267, 104 S. Ct. 3562 (1984).

Rules, Statutes, and Regulations

Washington State

RCW 9.94A.030(53)(a)(viii),.....17

RCW 9.94A.660(1)(a),(c).....17

RCW Chapter 10.99.....7

RCW Chapter 26.50.....7

A. ISSUE PRESENTED

Should this case be remanded to the trial court for further fact-finding regarding claims made by the appellant that his counsel misadvised him of the State's sentencing recommendation pursuant to his guilty plea?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On August 3, 2009, Justin Alexander (appellant) was charged by information with one count of Assault in the Second Degree--Domestic Violence and one count of Domestic Violence Felony Violation of a Court Order. CP 1-2. The case was sent to the Honorable Judge Cheryl Carey for trial on November 30, 2009, RP 3. At that point, the State and the appellant reached a plea agreement, pursuant to which the appellant agreed to plead guilty as charged to count one (Domestic Violence Felony Violation of a Court Order), and the State agreed to dismiss count two (Assault in the Second Degree--Domestic Violence), RP 3, CP 25.

The prosecutor, the appellant, and the appellant's attorney all signed the "State of Defendant on Plea of Guilty to Felony Non-Sex Offense", CP 7-18, and the "Felony Plea Agreement", CP 25. Both of these documents reference the State's understanding of the

appellant's sentencing score as a "4" (leading to a standard sentencing range of 22 to 29 months) but note that the appellant was contesting one of these "points" added based on the State's belief that he was on community custody at the time of the crime. CP 8-9, 25-28.

The Statement of Defendant on Plea of Guilty also notes that "[t]he prosecuting attorney will make the following recommendation to the judge: 22 months incarceration . . ." and that "[t]he prosecutor will make the recommendation stated in the plea Agreement and State's Sentence Recommendation, which are incorporated by reference," CP 11. The thereby incorporated State's Sentence Recommendation also contains the 22-month recommendation, CP 29.

A thorough plea colloquy was conducted by the prosecutor with the permission of the court, RP 3-9. During the colloquy, the appellant acknowledged that the State's understanding of his standard range was 22 to 29 months, RP 4-5, and that his only dispute was over whether he was on community custody at the time of the crime, RP 5.

The appellant also acknowledged that the State would recommend 22 months and certain other terms including

"recoupment" at sentencing, RP 6. His only question related to the meaning of "recoupment" which was explained to him by the prosecutor, after which he stated that he did understand, Id. He acknowledged that "[o]ther than the plea negotiations," nobody had "made any threats or promises to get" him to plead guilty, and he affirmed that he had no other "questions about entering the plea" to ask the Court or his attorney, RP 8-9.

The appellant then indicated his plea of "Guilty" to Count Two, Domestic Violence Felony Violation of a Court Order, RP 9. His attorney indicated that, other than the question about "recoupment", she had previously answered the appellant's questions, Id.

After conducting a short colloquy of its own, the Court accepted the appellant's plea of Guilty to Count Two, Domestic Violence Felony Violation of a Court Order, RP 10-12. During the Court's colloquy, the appellant again reiterated that he did not have any questions for the Court or for his attorney, RP 11.

The appellant was sentenced on Count Two before Judge Carey on December 4, 2009, CP 30-38, RP 14-29. Pursuant to the plea agreement, Count One was dismissed, CP 31, RP 14. At the sentencing hearing, the prosecutor conceded that the appellant had

been correct about the community custody point and that "[h]e was not on community custody according to DOC," RP 14. Thus, the prosecutor agreed with the appellant that his "offender score is a three" and "his standard range is thus 15 to 20 months," RP 14-15.

The prosecutor went on to state that her "recommendation . . . was originally for a low end sentence when we understood the range to be 22 to 29" but that as she "indicated to Ms. Redford [the appellant's trial attorney], with a range of 15 to 20 we would be recommending high end." RP 15. She went on to recommend the stated 20-month sentence. Id. At that point, neither the appellant nor his attorney objected. RP 15-16.

The appellant's attorney argued for a "DOSAs" (Drug Offender Sentencing Alternative), RP 16-17. When given an opportunity to allocute, the appellant reiterated his attorney's argument for a "DOSAs", blaming his criminal behavior on drugs and alcohol, RP 18-19. He did not ask for a low end sentence or object to the prosecutor's recommendation during his allocution. In fact, he specifically stated that what worried him "the most is not -- not -- not going to prison for longer time but not getting out and being able to stay straight . . . ," RP 19.

After hearing further argument from the appellant's attorney and the prosecutor, RP 19-23, the Court imposed a sentence of 20 months, RP 23. It was only at that point that the appellant protested, stating:

What is this, when I signed the deal, you agreed that whether it was 22 to 29 months or 15 to 20, I was going to get the minimum. I was going to get the minimum. You said -- the agreement was that I was, whatever it was, you were going to agree to the minimum.

RP 24. The prosecutor responded that she had indicated to defense counsel

that if they were correct that he was not on community custody at the time of the offence that I would recommend the high end of 15 to 20 or if I was correct I would recommend the low end of 22 to 29.

Id. The appellant then claimed that his lawyer had explained to him "three or four times that either way I was going to get the minimum," Id. The Court's response is unfortunately inaudible. Id.

This appeal follows.

2. SUBSTANTIVE FACTS

For purposes of sentencing, the appellant stipulated to "[t]he facts set forth in the certification(s) for determination of probable cause and the prosecutor's summary," as "real and material facts," CP 25. According to the Certification for Determination of Probable

Cause, on July 30, 2009, officers were called to the home of Jennifer Kasama, who had stated that her ex-boyfriend (the appellant) had just pointed a gun at her and tried to run her over in a car. CP 4. She also stated that there was a no contact order between them. Id.

Officer Kordel, who verified the validity of the no contact order, was dispatched to Kasama's home, where he was met by Kasama and her two roommates (Corrie Gibbens and Brandon Howatson). Id. Kasama told Officer Kordel that she had resumed a dating relationship with the appellant about a month previously and had been letting him stay overnight, CP 4-5. On this day, he had come to her work place, accused her of drug use, and become angry when she said did not want to talk about anything because she needed to work. CP 4. When she got home, she told her roommates not to let him inside. Id. However, when he called her wanting to pick up personal belongings, she said he could do that but reiterated that she did not want to talk. CP 5.

Kasama continued that the appellant walked in, angry and wanting to talk. Id. She told him to leave, and he eventually did so with a handful of personal belongings. Id. She then heard a loud noise and, with her two roommates, walked outside, where they saw a garbage can knocked over. Id. Alexander and Howatson got into

an argument, during which the appellant pulled a rifle (apparently from his vehicle) and pointed it at Kasama from 5 to 6 feet away, saying he had come to shoot her in the face, Id.

Kasama continued that the appellant eventually put the rifle back in his car and backed into the street, Id. At the base of the driveway, where Kasama was now standing, he lunged the car directly at her, Id. She had to jump away to avoid being hit. Id.

Gibbens and Howatson confirmed what Kasama had told Officer Kordel. Id. Upon his arrest at his residence, the appellant confirmed that he was at Kasama's home but denied pointing a rifle at her or lunging at her with his car. Id.

At the time, the appellant had two prior convictions for violating court orders. CP 6.

In his Statement on Plea of Guilty, the appellant admitted the following facts regarding what he did to make him guilty of the crime:

On or about July 30, 2009, I knowingly & wilfully violated the terms of a no contact order prohibiting me from having contact with Jennifer Kasama issued on May 13, 2005 by having contact with Ms. Kasama and driving in a manner that was reckless and created a substantial risk of death or serious physical injury to Ms. Kasama. This occurred in King County, WA. The order was entered on 5/14/2005 by King County Superior Court pursuant RCW chapters 10.99 and 26.50.

CP 16. During his plea colloquy, the appellant orally adopted this statement as his own and acknowledged that it is true. RP 7-8.

C. **ARGUMENT**

THE COURT SHOULD NOT REMAND THIS CASE TO THE TRIAL COURT FOR FURTHER FACT-FINDING REGARDING CLAIMS MADE BY THE APPELLANT THAT HIS COUNSEL MISADVISED HIM OF THE STATE'S SENTENCING RECOMMENDATION PURSUANT TO HIS GUILTY PLEA, BECAUSE THE RECORD IS ADEQUATE FOR THE COURT TO DENY ANY IMPLIED MOTION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL.

It should first be noted that no explicit motion based on ineffective assistance of counsel was made below. The appellant instead argues that the trial court should have, on its own, conducted a further examination upon his bare assertion that he was misadvised of the State's sentencing recommendation at his guilty plea, Brief of Appellant at 3.

The appellant concedes that

as a rule, a defendant's wholly conclusory claim of ineffective assistance or breakdown in communications is insufficient to require the appointment of substitute criminal trial counsel.

Brief of Appellant at 4-5. However, he argues that whenever such a claim is made, the trial court must "conduct a thorough examination of factual circumstances raised by the defendant to

determine whether new counsel should be appointed," Id. at 5 (emphasis in original).

In support, the appellant cites State v. Dougherty, 33 Wn. App. 466, 655 P.2d 1187 (1982), review denied, In Re Dougherty, 99 Wn.2d 1023 (1983), and State v. Rosborough, 62 Wn. App. 341, 814 P.2d 679 (1991), review denied, 118 Wn.2d 1003, 822 P.2d 287 (1991), Brief of Appellant at 5. Neither of these cases supports the appellant's argument in this case.

In Dougherty, the Court of Appeals holds that the trial court failed adequately to inquire into the defendant's waiver of his right to counsel and to inform him of the dangers of self-representation, 33 Wn. App. at 469. Thus, the Court remands "(1) for a determination of whether Mr. Dougherty should be allowed to proceed pro se, and (2) for a new trial." Id. at 472.

In the section of Dougherty cited by the appellant, the Court is addressing the defendant's further contention that "he was denied meaningful access to the courts by the State's failure to provide him with sufficient legal materials to prepare his defense," Id. at 469. While he was given standby counsel, he argues that this "did not provide him with meaningful access because he distrusted his attorney" based on "his perception of his attorney's role as a

pipeline of confidential information to the prosecutor's office." Id. at 471. He therefore "contends the county has a duty to maintain an adequate law library for use by pro se defendants." Id.

In response, the Court states that "[t]he problem faced by a defendant who distrusts his attorney is solved by the trial court's inquiry into the defendant's subjective reasons for his distrust" and that if the distrust is substantiated, the solution "is the appointment of different counsel, not the installation of law libraries in the county jails," Id. at 471-472. This statement is arguably dicta in that it is unrelated to the case holding as stated above. In any case, it is remote from the issue at hand in this case, where the appellant does not allege a general distrust but a specific misrepresentation constituting, he argues, ineffective assistance of counsel.

In Rosborough, the defendant argued that the trial court should have granted his trial court attorney's motion to withdraw before making argument on his motion for a new trial, 62 Wn. App. at 346. This alone distinguishes Rosborough from the case at hand, where neither such motion was made.

Furthermore, the Court of Appeals in Rosborough merely cites the trial court's full "inquiry on the record into the alleged ineffective assistance issue," Id. at 347, as one factor in

distinguishing the case from State v. Young, 60 Wn. App. 95, 802 P.2d 829 (1991), remanded in part on other grounds, 117 Wn.2d 1002, 812 P.2d 100 (1991), Opinion Modified on Reconsideration on Other Grounds, 62 Wn. App. 895, 817 P.2d 412 (1991)(cited in Brief of Appellant at 6), and thereby *denying* the defendant's motion to find the trial court had abused its discretion in denying his trial counsel's motion to withdraw, 62 Wn. App. at 346-348.

Finally, in Young, 62 Wn. App. at 907, it appears that, unlike in the current case, a motion for a new trial was made below based on ineffective assistance of counsel. The Court of Appeals noted that, while it agreed "with the general rule," [that a defendant cannot force appointment of new counsel merely by raising ineffective assistance], it would in this case "reverse and remand for the appointment of new counsel to review the claim of ineffective trial counsel" because "the allegations are based primarily on actions not reflected in the record, such as the failure to call . . . witnesses" who "would apparently testify that J. [victim] had told them that the appellant had not abused her" and because "[a]dditional affidavits filed by Young were not read or considered by the trial court." Id. at 907-908. Thus, the Court held that the record

raise[d] sufficient factual issues . . . to conclude that it was an abuse of discretion not to appoint new counsel to review the facts and argue the motion for a new trial based on the ineffectiveness of trial counsel.

Id. at 908. No such concerns exist here, as will be shown below.

To sustain a claim of ineffective assistance of counsel, a defendant must prove that counsel's representation was "deficient" and that the "deficient" representation "prejudiced the defense." State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987), citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984), rehearing denied 467 U.S. 1267, 104 S. Ct. 3562 (1984).

To satisfy the first deficiency prong, an appellant must show that "counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." Thomas, 109 Wn.2d at 225, quoting Strickland, 466 U.S. at 687. "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Id. at 226.

To satisfy the second prong, an appellant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694.

The reviewing court can consider the prongs in either order and need not reach the issue of deficiency if the defendant was not prejudiced. Id. at 697. Here, however, the record below is sufficient to determine that *neither* prong is met.

With regard to the deficiency prong, the appellant's claim that he was misadvised is belied by the record. Both his signed Statement of Defendant on Plea of Guilty and the (incorporated) State's Sentence Recommendation articulate the 22-month State's recommendation without any mention of a "low-end" recommendation should the appellant indeed have the lower score he (correctly) believed he had. CP 11, 29.

Upon being orally advised of the State's sentencing recommendation at his plea, the appellant acknowledged that the State would recommend 22 months and did not ask for clarification with regard to what the recommendation would be if he had the lower score. RP 6. However, the record shows he understood his ability to ask for clarifications, in that he did successfully ask for clarification as to the meaning of "recoupment". Id.

The appellant also acknowledged that "[o]ther than the plea negotiations," nobody had "made any threats or promises to get" him to plead guilty, and he affirmed that he had no other "questions

about entering the plea" to ask the Court or his attorney, RP 8-9. His attorney indicated that, other than the question about "recoupment", she had previously answered his questions, RP 9. Finally, the appellant indicated upon inquiry by the Court that he had no questions for the Court or for his attorney. RP 11.

Given the appellant's acknowledgment of the 22-month prosecutor recommendation, his repeated failure (upon being given numerous opportunities) to ask about a supposed 15-month recommendation should he be correct as to his sentencing score, and his attorney's representation that she had previously answered his questions, he cannot show his attorney misadvised him.

Furthermore, at his sentencing hearing, the appellant did not object to the prosecutor's recommendation when it was made or during his allocution, RP 15-19, *even though the prosecutor specifically stated that she* "indicated to Ms. Redford [the appellant's trial attorney], with a range of 15 to 20 we would be recommending high end," RP 15.

It was only after the *Court* imposed the recommended high end sentence that the appellant objected, claiming that his lawyer had explained to him "three or four times that either way I was going to get the minimum," RP 24. Both the timing and wording of

his objection strongly suggest his real complaint was not the prosecutor's recommendation but the court's sentence. But he acknowledged in his plea form that "[t]he judge does not have to follow anyone's recommendation as to sentence" and can impose anything within the standard range without being appealed, CP 11.

Finally, in the appellant's own pro se Notice of Appeal, CP 39-51, he nowhere alludes to his trial counsel having told him the State would recommend a low-end sentence. Instead, he argues:

Counsel misrepresented the plea bargain contract to defendant and lured defendant into such "deal" alluding to the farce that DOSA was available and then in open court recanted [sic].

CP 42. He goes on to argue that "Due process requires the State to adhere to the contract (plea bargain) *as presented to defendant ie DOSA*" (CP 43)(underline in original, italics added). He goes on to argue for an order that a DOSA sentence be imposed, CP 47.

All this provides an ample record for the Court to find that that there was no misrepresentation by trial counsel as to the State's sentencing recommendation and thus that the appellant fails to meet the first "deficiency" prong of the ineffective assistance of counsel test.

With regard to the prejudice prong, regarding guilty pleas,

[t]he defendant must satisfy the court that there is a reasonable probability that, but for counsel's deficient performance, he or she would not have pled guilty and would have insisted on going to trial.

State v. Garcia, 57 Wn. App. 927, 933, 791 P.2d 244 (1990), review denied, 115 Wn.2d 1010, 797 P.2d 511 (1990). The record below is sufficient to determine that the appellant can make no such showing which in and of itself is sufficient for the Court to deny the appellant's motion.

First of all, there is no question that the appellant entered a guilty plea knowing that, if the State's calculation of his offender score were correct, he would be facing a *minimum* of 22 months incarceration, CP 8-9, 25-28, RP 4-5, i.e., two months *longer* than he actually received, CP 33, RP 23. He also knew that, even if he were correct as to his sentencing score, the Court would have total discretion to impose anything within the standard range (i.e. 15-20 months), regardless of what he or the State recommended, CP 11.

Given that the appellant entered his guilty plea despite his undisputed knowledge of these consequences, he cannot show that he would have insisted on going to trial if only he knew that, given his being found correct as to his sentencing score, the State

would recommend the new "high end" of 20 months, two months *lower* than its stated recommendation, CP 11, 29, RP 6.

Furthermore, it is clear from the record that what the appellant really wanted was a DOSA sentence. This is what both he and his attorney argued for at sentencing, RP 16-19. He specifically allocuted that:

what worries me the most is not -- not -- not -- going to prison for longer time but not getting out and being able to stay straight and I think that DOSA would keep -- keep me on that path because that's what I struggle with.

RP 19. He also spends the bulk of his pro se notice of appeal arguing he was wrongfully denied a DOSA sentence, CP 42-47, concluding with a "pray[er] for relief in the form of a review of the judgment and sentence issued on December 4 2009 and that (DOSA) sentencing alternative be imposed." CP 47.

Given his repeatedly articulated desire for a DOSA sentence, he cannot show he would have insisted on a trial. A trial would have risked conviction of Assault in the Second Degree as charged in Count One, CP 1, which, as a statutory violent offense, RCW 9.94A.030(53)(a)(viii), would have rendered him ineligible for a DOSA sentence not only on this case but for any future felony convictions over the next ten years, RCW 9.94A.660(1)(a),(c).

For these reasons, the record is sufficient to show that the appellant cannot show prejudice and thus fails to meet the second "prejudice" prong of the test for ineffective assistance of counsel.

D. **CONCLUSION**

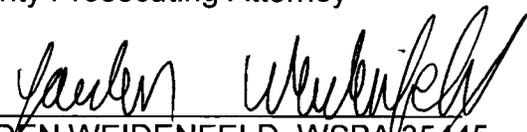
For the above reasons, the appellant's motion to remand for a hearing to determine if his counsel provided ineffective assistance of counsel in connection with his entry of his plea of guilty should be denied.

DATED this 15th day of November, 2010.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver R. Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JUSTIN ALEXANDER, Cause No. 64810-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Betty D. Huddleston
Name
Done in Seattle, Washington

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