

69725-1

69725-1

COA NO. 69725-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

IAN STRAWN,

Appellant.

REC'D

MAY 12 2014

King County Prosecutor  
Appellate Unit

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard D. Eadie, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant received ineffective assistance of counsel in entering the second guilty plea.

2. The court erred in finding appellant made a knowing, voluntarily and intelligent decision to withdraw his motion to vacate the second plea. CP 134.

3. Appellant's second guilty plea was not knowing, voluntary and intelligent, in violation of due process.

Issues Pertaining to Assignments of Error

1. Where defense counsel erroneously advised appellant that he would save a year by entering into the second plea, did defense counsel render ineffective assistance entitling appellant to withdraw his second plea because he was affirmatively misinformed of a sentencing consequence?

2. Whether appellant's ineffective assistance claim is properly presented on appeal because, at the time he withdrew his motion to vacate his plea, he was represented by the attorney who provided the ineffective assistance and counseled him on withdrawing the motion?

3. Due process requires a guilty plea to be knowing, voluntary, and intelligent. Must appellant be allowed to withdraw his second plea because he was misinformed about the base sentence for count IV, a direct consequence of his plea?

B. STATEMENT OF THE CASE

1. *The First Plea*

The State originally charged Ian Strawn with two counts of attempted first degree robbery (counts I and II), one count of second degree assault (count III), and one count of first degree unlawful possession of a firearm (count IV), with firearm enhancements accompanying counts I, II and III. CP 1-3. The State subsequently amended the information, substituting one count of third degree assault without a firearm enhancement for the previous second degree assault charge under count III. CP 21-23.

Plea negotiations culminated in an agreement on the morning of October 25, 2012. 1RP<sup>1</sup> 2; CP 66, 88-89. Strawn entered an Alford<sup>2</sup> plea to attempted first degree robbery with a three-year firearm enhancement (count I) and first degree unlawful possession of a firearm (count IV).<sup>3</sup> CP 75-87; 1RP 11-13. The plea document set forth a standard range sentence of 96.75 to 128.25 months plus a 36 month firearm enhancement for the attempted first degree robbery count. CP 76. The statutory maximum for

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 10/25/12; 2RP - 11/14/12; 3RP - 11/15/12; 4RP - 2/24/14.

<sup>2</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

<sup>3</sup> In anticipation of the plea, count I was amended to include two named victims instead of one. 1RP 3.

that count, a class B felony, was 10 years. CP 76; 1RP 6. A standard range of 87 to 116 months was set forth for the unlawful possession of firearm count with a statutory maximum of 10 years. CP 76.

On the morning of October 25, a plea colloquy took place. 1RP 4-12. As part of the plea deal, the State recommended a 120-month sentence for the robbery (count I) plus a three-year firearm enhancement for a total of 156 months confinement. CP 79; 1RP 8. The State further recommended that counts I and IV run concurrently. 1RP 8. The defense reserved the right to ask for the low end of the standard range on count I. 1RP 8. The State agreed to dismiss count II (attempted first degree robbery) and count III (third degree assault). 1RP 3; CP 89, 93. The trial court accepted Strawn's Alford plea to attempted first degree robbery with a three-year firearm enhancement (count I) and first degree unlawful possession of a firearm. 1RP 13.

## 2. *The Second Plea*

Approximately an hour after the court accepted the Alford plea, the prosecutor realized a mutual mistake had been made in the plea agreement. CP 175 (FF 2). The statutory maximum for the attempted first degree robbery count, a class B felony, was 120 months. Id. The sentence on that count could not exceed the 120 month statutory maximum as a matter of law, but the parties had erroneously agreed that the State could

recommend a sentence of 156 total months in confinement on that count.

Id.

The parties quickly renegotiated a plea agreement. CP 175 (FF 3). As part of an amended plea agreement, Strawn agreed to plead guilty to attempted first degree robbery with a firearm enhancement, third degree assault, and first degree unlawful possession of a firearm. Id. The original statement of defendant on plea of guilty had not yet been filed, so the statement was changed to reflect an additional charge of third degree assault. Id.

Another plea hearing was hastily arranged. CP 176 (FF 12), 179-81. A colloquy on the amended plea took place later in the morning on October 25, 2012.<sup>4</sup> CP 175 (FF 4). As part of the amended plea agreement, Strawn stipulated there was a legal and factual basis for an exceptional sentence for the third degree assault count to run consecutively to the other two counts, for a total recommended sentence of 156 months. CP 96, 175 (FF 5). The State agreed it could request no more than a 36 month sentence on the third degree assault count, while Strawn could ask for as low as zero months on the third degree assault

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<sup>4</sup> This second colloquy was not recorded or transcribed. The Court of Appeals granted appellant's motion to remand for reconstruction of the record. A hearing was held and the trial court subsequently entered findings of fact as the basis for a reconstructed record. CP 174-81.

count. CP 96, 175 (FF 5). The sentence was also exceptional in that the recommended time of 36 months was below the standard range for the assault offense. CP 175 (FF 5).

The amended statement on plea of guilty listed the standard range sentences for each count, including a range of 87 to 116 months for count IV. CP 100. The plea agreement stated "[a]n essential term of this agreement is the parties' understanding of the standard sentencing range(s)." CP 96. That agreement further stated "[t]he parties agree that neither party will seek an exceptional sentence." CP 96.

It was clarified that the statutory maximum that the court could impose on the attempted first degree robbery under count I was 10 years, that the statutory maximum for the third degree assault was 5 years, and the statutory maximum for the unlawful possession of firearm count was 10 years. CP 96, 175 (FF 6).

What was most important to Strawn throughout the course of plea negotiations was how much time he would actually serve in confinement. CP 175 (FF 7). Strawn wanted a number in terms of how much confinement time was involved. CP 175-76 (FF 7). The prosecutor told Strawn that the State had made a mistake regarding the statutory maximum on the attempted robbery count. CP 176 (FF 7). The prosecutor said she would have to "eat" her mistake and that Strawn would

save a year. CP 176 (FF 7). The prosecutor explained the amended plea agreement was a benefit to him because the firearm enhancement was not eligible for good time, but the third degree assault was eligible for good time, and in this way he would save a year of confinement. CP 176 (FF 7).

The prosecutor recited the sentence recommendation and asked if Strawn understood the recommendation. CP 176 (FF 8). Strawn said he did. Id. The prosecutor asked Strawn if he wanted to enter into the amended Alford plea to all three counts. Id. Strawn said yes. Id. The court found the amended plea to be knowing, voluntary and intelligent and accepted it. CP 176 (FF 9).

### 3. *Motion to Vacate The Second Plea*

On November 2, 2012, Strawn's attorney filed a motion to vacate the second, amended plea and reinstate the first plea. CP 65-87. In her supporting declaration, defense counsel described the rushed nature of trying to fix the first plea once the prosecutor noticed the mistake. CP 89. Counsel represented that the prosecutor "made a proposal that led me to believe would result in Mr. Strawn serving a year less." CP 89. Counsel further averred that she met with Strawn in the courtroom while waiting for the judge to arrive and "explained to him [the prosecutor's] proposed solution. I told him that in my opinion this would take 12 months off the sentence the State had previously asked for." CP 89.

According to defense counsel, "Mr. Strawn had the reasonable belief, after talking with me and hearing [the prosecutor's] informal remarks, that by agreeing to plead to a previously-dismissed count, he faced a sentence in which he would serve one year less in jail that he would have served under the sentence he thought he could get under the original plea agreement." CP 91. Counsel further stated "[b]ased on his attorney's erroneous advice Mr. Strawn had agreed to a previously-dismissed count when the benefit for him doing so was illusory." CP 91.

In seeking withdrawal of the amended plea, counsel argued it should be vacated because it was not knowing, voluntary and intelligent, in violation of due process. CP 69-71. Counsel advised Strawn that he would save a year by entering into the amended plea when in fact it did not save him a year. CP 70. The prosecutor made the same erroneous representation. CP 70. In so doing, Strawn was affirmatively misadvised about a consequence of the plea. CP 70. As argued by counsel, "there was inadequate time to confirm the State's representations as to the consequences of the second plea. The parties were rushed into court within the hour of the first plea; Mr. Strawn had only a few minutes to confer with his attorney; and his attorney admittedly made a mistake in the calculations." CP 70.

In response, the State maintained it would agree to allow Strawn to withdraw his pleas and set the matter over for trial based on its understanding that Strawn wanted to withdraw both the original and the second, amended plea.<sup>5</sup> CP 115-16. The State posited "[t]he essence of the defendant's motion is that defense counsel provided inaccurate advice to the defendant regarding the plea" and that "the basis for the motion is ineffective assistance of counsel." CP 115.

The State further noted "the defense motion to withdraw the plea is based upon a claim of deficient representation by his attorney. A claim of ineffective assistance of counsel presents the possibility that current counsel has a conflict of interest. See, State v. Young, 62 Wash.App. 895, 802 P.2d 829 (1991); State v. Rosborough, 62 Wash.App. 341, 814 P.2d 679 (1991). Here, defendant's counsel is retained, and presumably the defendant is aware of the admission of deficient performance. The court should confirm the defendant is aware of the claim of ineffective assistance and the possible conflict, but still wishes to continue with his counsel." CP 116.

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<sup>5</sup> Defense counsel initially sent an email to the prosecutor indicating Strawn wanted to withdraw both pleas. CP 115-16, 118. Counsel later explained that Strawn was upset at the time but had changed his mind subsequent to the email being sent. 2RP 33-34.

In reply, defense counsel noted the State did not oppose withdrawal of the second plea and reiterated the original plea terms should be imposed. CP 123-25. Counsel further claimed the ineffective assistance of counsel issue "is not before this Court" and would be moot once the court granted the motion to withdraw the second plea. CP 124.

A hearing was held on the matter, during which the attorneys agreed the second, amended plea was invalid but disagreed about whether the original plea could be reinstated, with the State requesting the opportunity to brief the latter issue. 2RP 2-5, 12-13. The State framed the issues as whether ineffective assistance justified the withdrawal of the amended plea, and if so, whether the remedy was to enforce the first plea. 2RP 7.

With regard to the problem with the amended plea, defense counsel explained to the court "I know that I affirmatively represented to Mr. Strawn based on what turned out to be my misinterpretation of what [the prosecutor] said that he would be, quote, saving a year, because he would be getting that -- if Your Honor imposed the sentence that the State was seeking and impose consecutive time of up to three years on the Assault III, that he could at least get good time on that. He would be, quote, saving a year. That was based on something [the prosecutor] told me that I interpreted it as strictly, yes, saving a year, saving a year. Off

what, I don't know. I didn't have time to think about it. I told this to Mr. Strawn, 'you are saving a year, it is worth adding this count.' It is not going, to have you maxed out on points it doesn't matter. He had time to think about it. I thought that we were done. He said, 'wait, I think that I pled to something extra and it doesn't necessarily save me anything.' That is why we are seeking to withdraw the second plea because it was based on my erroneous advice to him. I would argue [the prosecutor's] erroneous advice to him as well. She did say to him in front of me, 'yes, we are willing to eat that year.'" 2RP 15-16.

The defense requested enforcement of the first plea, with Strawn being given a lawful sentence not to exceed the 10 year statutory maximum for count I. 2RP 20-21, 23. The trial court initially believed it had no authority to sentence Strawn on the first plea within the statutory maximum for count I, taking into account the standard range and the three year mandatory firearm enhancement. 2RP 16-20, 23, 26-29. The State pointed out a statutory provision authorized reduction of the standard range to accommodate the firearm enhancement when their combination would otherwise exceed the statutory maximum. 2RP 29-30.

The court then asked what was illegal about the first plea. 2RP 30. The State cited the mistake about the standard range Strawn faced under the first plea. 2RP 30. Defense counsel argued the State had conceded the

court could do what the defense asked it to do in sentencing Strawn under the first plea to a 10 year statutory maximum under count I. 2RP 31. The State said it was not a concession so much as a legal requirement. 2RP 32. Defense counsel cited the relevant statute, RCW 9.94A.533(3)(g). 2RP 32. The court appeared to agree that a lawful sentence under the first plea would be to impose a 120 month sentence, with the standard range reduced because of the imposition of the firearm enhancement. 2RP 32.

The court said it would allow the State to brief whether the first plea was enforceable. 2RP 36. The State had no objection to both pleas being withdrawn and the case starting from square one. 2RP 38.

A discussion began about setting up a briefing schedule when Strawn interjected "I want to get out of here. This is a circus to me, Your Honor. I feel like I was manipulated by counsel for the first week. We have taken three weeks." 2RP 39. The court told Strawn that he had a lawyer to talk for him and he had to go through his lawyer. 2RP 39. Defense counsel asked for some time to talk with her client in private. 2RP 40. The court granted the request. 2RP 40. Following a court recess, defense counsel announced, "I thank the court for giving us some time for me to meet with my client. Mr. Strawn has indicated that he is prepared to go forward with his, withdraw his motion to vacate plea 2 and just stick

with plea 2. We would ask that Mr. Strawn would be sentenced today, Your Honor." 2RP 45.

The court indicated the sentencing hearing could take place the next day, November 15. 2RP 49. The court said it would not sentence on a plea if there was any question about its voluntariness. 2RP 49. The State responded, "we have to confirm that the defendant agrees he is consulting, he is satisfied with the consultation with his attorney. My understanding, it is again a strategic decision that I think he has decided as to why he is choosing to withdraw his motion now. I think we need to confirm that on the record." 2RP 49-50. The court replied he had an obligation to ensure the plea was voluntary and he would not sentence on an involuntary plea. 2RP 50. The court then heard from defense witnesses from out of town that wished to speak on the matter of sentencing but would not be available the following day. 2RP 50-59.

At the outset of the November 15 sentencing hearing, the State wanted to confirm that Strawn, having had a day to think about it, still wished to withdraw his motion to vacate the second plea. 3RP 2-3. Defense counsel responded, "I believe that Mr. Strawn and I have fully discussed his options in this regard, Your Honor. The defense does wish to withdraw its motion to vacate the second plea." 3RP 3. In response to the court, Strawn agreed he had enough time to talk with his lawyer about

withdrawing the motion, and had no questions about the second plea. 3RP 4. The court entered the following written order: "The defendant's motion to withdraw 'Defendant's Motion to Clarify Plea and Vacate Order Entered Pursuant to an Improper Second Plea Agreement' is granted. The court finds that the defendant is making a knowingly, intelligent and voluntary decision to proceed in withdrawing this motion and proceeding to sentencing." CP 134.

#### 4. *Sentencing*

At the sentencing hearing, the State recited the standard range sentences for each count, including a range of 87 to 116 months for count IV. 3RP 6-8. The State asked the defense to acknowledge agreement with the State's calculations. 3RP 8. The defense did. 3RP 8.

The court imposed a sentence of 84 months on count I, 36 months on count III, and 116 months on count IV. CP 129; 3RP 33. Counts I and IV were concurrent, but consecutive to count III. CP 129. A 36 month firearm enhancement was also imposed to run consecutive to the other base terms. CP 129. Strawn appeals. CP 137-46.

C. ARGUMENT

1. THE SECOND PLEA IS INVALID DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL: STRAWN WAS AFFIRMATIVELY MISINFORMED ABOUT A SENTENCING CONSEQUENCE OF HIS PLEA AND HE RELIED ON THAT MISINFORMATION IN ENTERING THE PLEA.

Defense counsel induced Strawn to enter into the second plea agreement by misinforming him that he would save a year if he did so. That was ineffective assistance of counsel. Strawn could not save a year. Strawn was affirmatively misadvised about a consequence of the plea. He relied on that misinformation in entering the plea. Strawn is entitled to withdraw his second plea in its entirety.

Strawn has not waived the issue for appeal. His ineffective assistance claim can be raised for the first time on appeal. Further, his withdrawal of the motion to vacate below cannot operate as a waiver of his ineffective assistance claim because his attorney had a conflict of interest at the time it was made.

- a. Strawn Was Wrongly Informed That He Would Save a Year By Entering Into The Amended Plea.

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3. A guilty plea is otherwise invalid. Boykin v. Alabama,

395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). This standard is reflected in CrR 4.2(d), "which mandates that the trial court 'shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). "Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). "An involuntary plea produces a manifest injustice." Isadore, 151 Wn.2d at 298.

Ineffective assistance of counsel at the plea stage likewise constitutes a manifest injustice. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). While the trial judge's decision on whether to allow a defendant to withdraw a guilty plea is generally reviewed for abuse of discretion, ineffective assistance claims present mixed questions of law and fact reviewed de novo. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109

Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. The right to effective assistance of counsel extends to the entry of a guilty plea and attendant plea-bargaining process. Missouri v. Frye, \_\_U.S.\_\_, 132 S. Ct. 1399, 1405, 182 L. Ed. 2d 379 (2012); Lafler v. Cooper, \_\_U.S.\_\_, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 225-26. Prejudice is a reasonable probability that the result would have been different but for counsel's deficient performance. Id. at 226.

Affirmative misrepresentation of a collateral consequence of a guilty plea can be grounds for plea withdrawal if the defendant "materially relied on that misinformation when deciding to plead guilty." In re Pers. Restraint of Reise, 146 Wn. App. 772, 787, 192 P.3d 949 (2008) (citing State v. Conley, 121 Wn. App. 280, 285, 87 P.3d 1221 (2004); State v. Stowe, 71 Wn. App. 182, 187-89, 858 P.2d 267 (1993)). Earned early release, or "good time," is a collateral consequence of a plea. Reise, 146 Wn. App. at 788.

Defense counsel advised Strawn that he would save a year by entering into the amended plea. CP 70, 89, 91; 2RP 15-16. That was deficient performance. Strawn did not save a year. There was no way Strawn could save a year.

The prosecutor confirmed rather than dispelled the faulty advice in telling Strawn that the State had made a mistake regarding the statutory maximum on the attempted robbery count. CP 176 (FF 7). The prosecutor said she would have to "eat" her mistake and that Strawn would save a year. Id. The prosecutor explained the amended plea agreement was a benefit to him because the firearm enhancement was not eligible for good time, but the third degree assault was eligible for good time, and in this way he would save a year of confinement. Id.

As a violent offense, third degree assault is eligible for good time credit at a rate of one-third of the aggregate sentence, meaning Strawn could earn a year off the 36 month sentence for third degree assault. RCW 9.94A.729(3)(d). Firearm enhancements are not eligible for any good time credits. RCW 9.94A.729(2).

Contrary to the State's explanation and defense counsel's erroneous advice, Strawn could not save a year of confinement under the amended plea. He could only save a year based on good time if the three year firearm enhancement, which is not subject to good time, was swapped out

for the third degree assault, which is subject to good time. That did not happen. The firearm enhancement remained in place as part of the second plea. The third degree assault offense was simply added. There is no quid pro quo here. The second plea could not save Strawn a year in comparison with the original plea.

In fact, it is mathematically impossible for Strawn to save a year based on good time under any sentencing permutation in comparing the original plea recommendation with the amended plea terms. Under the first plea, Strawn was at most eligible for 40 months of good time for attempted first degree robbery under count I if the court imposed a top of the standard range sentence of 120 months. RCW 9.94A.729(3)(d). Under the amended plea, Strawn was only eligible for at most 28 months of good time if the court imposed the maximum 84 month base sentence for count I. The amount of good time for the first degree unlawful possession of firearm offense under count IV remained the same because both pleas envisioned the same standard range for that count. Thus, Strawn was misadvised that he could save a year by entering into the amended plea no matter how the plea terms are looked at.

Strawn establishes prejudice by showing a reasonable probability that, but for counsel's error, he would not have pleaded guilty. Reise, 146 Wn. App. at 788. A "reasonable probability" exists if a decision to reject

the plea bargain would have been rational under the circumstances. State v. Sandoval, 171 Wn.2d 163, 175, 249 P.3d 1015 (2011).

What was most important to Strawn throughout the course of plea negotiations was how much time he would actually serve in confinement. CP 175 (FF 7). Strawn wanted a number in terms of how much confinement time was involved. CP 175-76 (FF 7). The number seized upon was the one year he would supposedly save by entering the amended plea. CP 176 (FF 7, 11); 2RP 15-16; 4RP 24. That was the reason he entered into the amended plea. That was the supposed benefit, which turned out to be illusory. The fact that Strawn moved to withdraw the plea as soon as he discovered his attorney's advice was erroneous about saving a year further supports the conclusion of prejudice.

Counsel's erroneous advice during the plea process constituted ineffective assistance. Strawn is entitled to withdraw his second, amended plea as to all counts because that plea is indivisible. A plea agreement is indivisible when the defendant pleads guilty to multiple charges in a single proceeding and the pleas are described in the same agreement. State v. Turley, 149 Wn.2d 395, 400, 402, 69 P.3d 338 (2003).

Strawn does not seek withdrawal of the original plea. The effect of withdrawing the amended plea is a reversion back to the original plea. See In re Pers. Restraint of Hoisington, 99 Wn. App. 423, 425, 434-35, 993

P.2d 296 (2000) (allowing defendant to disregard amended plea and seek specific enforcement of first plea due to ineffectiveness of counsel, unless the State proves on remand that such a remedy is unjust). Under that original plea, Strawn is entitled to be lawfully sentenced regardless of whether the State recommended a sentence beyond the statutory maximum for count I.

b. Strawn Has Not Waived The Ineffective Assistance Claim For Appeal.

The State might argue Strawn waived the ability to raise the ineffective assistance of counsel issue as a basis to withdraw the second plea on appeal because he withdrew the motion to vacate the second plea and proceeded to sentencing. That argument fails.

"A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 117 (2009). Even if the withdrawal of the motion to vacate the second plea encompasses a withdrawal of an ineffective assistance claim, such a waiver is invalid because the waiver took place under the auspices of the attorney who provided the ineffective assistance and with whom Strawn consulted before entering the waiver.

Waiver of a constitutional right is reviewed de novo. State v. Stone, 165 Wn. App. 796, 815, 268 P.3d 226 (2012). A plea withdrawal hearing is a critical stage at which the right to assistance of counsel attaches. State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996). This is consistent with the recognition that the right to counsel extends to those stages in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected. State v. Heddrick, 166 Wn.2d 898, 910, 215 P.3d 201 (2009).

Strawn's attorney, however, labored under a conflict of interest. Under the Rules of Professional Conduct, a lawyer generally cannot represent a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer. RPC 1.7(a)(2). Consistent with that mandate, counsel cannot ethically argue her own ineffectiveness. See Garland v. State, 283 Ga. 201, 203, 657 S.E.2d 842 (Ga. 2008) ("a lawyer may not ethically present a claim that he/she provided a client with ineffective assistance of counsel") (quoting Hood v. State, 282 Ga. 462, 463, 651 S.E.2d 88 (Ga. 2007)). "A per se conflict of interest arises when attorneys argue motions in which they allege their own ineffectiveness." People v. Keener, 275 Ill.App.3d 1, 4, 211 Ill. Dec. 391, 655 N.E.2d 294 (Ill. App. Ct. 1995). Arguing one's own

incompetence creates an actual conflict of interest. United States v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996).

The inherent conflict stems from competing interests: "On the one hand, it is his duty as a member of the bar to argue in behalf of the defendant as vigorously as possible. On the other hand, he has his own self-interest to consider: that is, his reputation as an attorney." Shelton v. United States, 323 A.2d 717, 718 (D.C. 1974). "Not only does such a conflict harm the interests of the client, who is entitled to the assistance of a zealous advocate, . . . but the integrity of the entire judicial process is drawn into question." Murphy v. People, 863 P.2d 301, 304 (Colo. 1993) (counsel arguing his own ineffectiveness clearly causes an impermissible conflict of interest).<sup>6</sup>

Strawn's counsel had a conflict of interest. As set forth in section C. 1. a., supra, she provided ineffective assistance of counsel in connection with the second plea. She could not ethically argue her own ineffectiveness as a basis to withdraw the second plea, although the State

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<sup>6</sup> See also Commonwealth v. Fox, 476 Pa. 475, 478, 383 A.2d 199 (Pa. 1978) ("it is unrealistic to expect trial counsel to argue his own ineffectiveness" and it cannot be assumed counsel will provide the zealous advocacy to which his client is entitled); State v. Marlow, 163 Ariz. 65, 68, 786 P.2d 395, 398 (Ariz. 1989) (improper for appellate counsel to argue his own ineffectiveness at trial because the "standard for determining whether counsel was reasonably effective is 'an objective' standard which we feel can best be developed by someone other than the person responsible for the conduct.").

correctly recognized the factual basis for withdrawing the plea set forth the substance of an ineffective assistance claim. But instead of removing herself from the case, she continued to represent Strawn and ultimately counseled him in connection with his decision to waive the motion to vacate the second plea. 2RP 45; 3RP 3-4.

The Sixth Amendment right to effective assistance of counsel guarantees the right to counsel free from conflicts of interest. State v. Regan, 143 Wn. App. 419, 425-26, 177 P.3d 783, review denied, 165 Wn.2d 1012, 198 P.3d 512 (2008). Whether to waive an important right at a critical stage of a proceeding, such as by withdrawing a motion to vacate an invalid guilty plea based on ineffective assistance of counsel, requires the guiding hand of conflict-free counsel.

Undersigned counsel has not found a case that addresses the validity of a waiver in the precise factual scenario presented by Strawn's case, where there is a purported pre-sentence waiver of an ineffective assistance claim related to the plea. But cases addressing waiver of an ineffective assistance claim as part of a guilty plea are instructive.

A number of federal circuits hold waiver of an ineffective assistance claim in a plea agreement is not binding when the defendant's claim of ineffective assistance relates to the negotiation of, and entry into, the plea agreement and waiver. See, e.g., DeRoo v. United States, 223

F.3d 919, 924 (8th Cir. 2000); United States v. Cockerham, 237 F.3d 1179, 1187 (10th Cir. 2001); United States v. Craig, 985 F.2d 175, 178 (4th Cir. 1993); United States v. White, 307 F.3d 336, 343 (5th Cir. 2002). "Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself — the very product of the alleged ineffectiveness. To hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation." Jones v. United States, 167 F.3d 1142, 1145 (7th Cir.1999). "It is altogether inconceivable to hold such a waiver enforceable when it would deprive a defendant of the 'opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation.'" Cockerham, 237 F.3d at 1184 (quoting Jones, 167 F.3d at 1145).

The same basic considerations are at play here. Strawn, through counsel, brought a motion to vacate the second plea. The substantive basis for withdrawal of the plea, as recognized by the State, was ineffective assistance of counsel. During the course of argument on the motion at the November 14 hearing, Strawn expressed frustration at being "manipulated" by counsel and that he wanted "to get out of here," describing the situation as a "circus to me." 2RP 39. In response, the

court directed Strawn to talk with his attorney — the same attorney that provided ineffective assistance of counsel on the second plea and who had a conflict of interest in arguing the motion to vacate that plea. 2RP 39. Strawn consulted with counsel during a recess, and then counsel came back on the record and announced Strawn withdrew his motion and would proceed to sentencing. 2RP 45. The State wanted to make sure Strawn was satisfied with the consultation of his attorney in this regard. 2RP 49-50; 3RP 2-3. Defense counsel responded that she had fully discussed the matter with her client. RP 3. Strawn agreed. 3RP 4.

The withdrawal of that motion was not knowing, voluntary and intelligent because Strawn was saddled with a conflicted attorney that had provided ineffective assistance and he consulted with that attorney in deciding to withdraw the motion raising the substance of an ineffective assistance claim. No amount of consultation with his attorney changes the fact that he received advice from an attorney with a conflict of interest. The conflict of interest taints the waiver. The trial court therefore erred in finding "the defendant is making a knowingly [sic], intelligent and voluntary decision to proceed in withdrawing this motion and proceeding to sentencing." CP 134.

Strawn should not have been put in the position of having to consult with an attorney that had a conflict of interest on whether to

pursue an ineffective assistance claim against her. "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." RPC 1.7 (Comment 10); see also American Bar Association, Standards for Criminal Justice, Prosecution Function and Defense Function std. 4-8.6, 246 (3d ed. 1993) ("If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the defendant and seek to withdraw from representation with an explanation to the court of the reason therefor.").<sup>7</sup>

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<sup>7</sup> Ethics opinions from various states have addressed whether a defendant's attorney labors under a conflict of interest when advising a client to waive an ineffective assistance of counsel claim, with all but one concluding a conflict exists. See, e.g., Ala. State Bar Formal Ethics Op. RO 2011-02 (2011) (concluding "a conflict of interest exists where a lawyer must counsel his client on whether to waive any right to pursue an ineffective assistance of counsel claim against himself"); Fla. Bar Prof'l Ethics Comm., Advisory Op. 12-1 (June 22, 2012) ("A criminal defense lawyer has an unwaivable conflict of interest when advising a client about accepting a plea offer in which the client is required to expressly waive ineffective assistance of counsel"); Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. No. 48 (2011) (a defense attorney may not ethically execute a plea agreement that purports to waive a defendant's claim of ineffective assistance of counsel), Va. State Bar Legal Ethics Op. No. 1857 (2011) ("The client has a constitutional right to the effective assistance of counsel and the defense lawyer's recommendation to bargain that right away prejudices the client."; "Defense counsel undoubtedly has a personal interest in the issue of whether he has been constitutionally

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ineffective, and cannot reasonably be expected to provide his client with an objective evaluation of his representation in an ongoing case."); Advisory Comm. of the S.Ct. of Mo., Formal Op. 126 (May 19, 2009) (impermissible for a lawyer to advise a criminal defendant to relinquish claims of ineffective assistance of counsel by that lawyer; the conflict is unwaivable due to significant risk that the representation of the client would be materially limited by the personal interest of defense counsel); Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2001-6 (Dec. 7, 2001) ("a plea agreement provision that waives appellate or postconviction claims of ineffective assistance of counsel does constitute an attempt to limit the liability of the criminal defense attorney for personal malpractice"; it is unethical for a criminal defense attorney to advise a defendant to enter a plea agreement that waives the defendant's appellate or postconviction claims of ineffective assistance of trial counsel); Ethics Opinion Kentucky Bar Ass'n E-435 (Nov. 7, 2012) (defense counsel has an unwaivable conflict of interest in advising the client regarding a waiver of a claim of ineffective assistance of counsel that would be based on the attorney's own conduct in representing the client); Vt. Bar Ass'n, Advisory Ethics Op. 95-04 (1995) ("an attorney should not recommend to a defendant in a criminal case that the defendant enter into a plea agreement that contains a provision limiting the client's right to assert a claim of ineffective assistance of counsel in a post-conviction proceeding"); N.C. State Bar, RPC 129 (Jan. 15, 1993) (prohibiting plea agreements waiving the client's right to complain about an attorney's incompetent representation or misconduct); Bd of Professional Responsibility, Sup. Ct. Tennessee, Op. 94-A-549 (1994) (neither a criminal defense lawyer nor a prosecutor may make an agreement to waive ineffective assistance of counsel because of rules limiting liability for malpractice); Prof'l Ethics Comm. for the State Bar of Tex. Op. No. 571 (2006) "(if the lawyer has a reasonable basis for concern that he may have rendered ineffective assistance to the defendant, the lawyer's representation of the defendant as to the proposed plea agreement waiver may reasonably appear to be limited by the lawyer's own interest in not being found to have rendered ineffective assistance."); *cf.* Ariz. State Bar Comm. on the Rules of Prof'l Conduct Op. 95-08 (1995) (after noting petition for post-conviction relief cannot be waived as a matter of law under Arizona state courts, opining defense lawyer may advise a client to waive an ineffective assistance claim in federal court because "[t]here is a significant difference between a defendant's claim that a court should revisit his sentence because of ineffective assistance of counsel and a defendant's claim against his

Appointment of alternate counsel is warranted when there is a sufficient factual basis to argue ineffective assistance. State v. Young, 62 Wn. App. 895, 908, 802 P.2d 829, 817 P.2d 412 (1991); State v. Rosborough, 62 Wn. App. 341, 347, 814 P.2d 679, review denied, 118 Wn.2d 1003, 822 P.2d 287 (1991). Defense counsel should have requested to withdraw from the case and have substitute counsel appointed rather than remain as Strawn's attorney.

It is certainly true, as a general rule, that "a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests." Holloway v. Arkansas, 435 U.S. 475, 483 n. 5, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). Such a waiver must be knowing, voluntary, and intelligent. State v. Dhaliwal, 150 Wn.2d 559, 567, 79 P.3d 432 (2003). There is no valid waiver when the court does not adequately inquire into the matter or fails to inform the defendant of the consequences of remaining with his present attorney. Dhaliwal, 150 Wn.2d at 567-68.

The State, in initially responding to the motion to withdraw the second plea, recognized the problem. CP 116. It asked the court to "confirm the defendant is aware of the claim of ineffective assistance and the possible conflict, but still wishes to continue with his counsel." CP 116. That confirmation never took place. The court was certainly on  

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lawyer [for malpractice]").

notice of the ineffective assistance claim at play here. But it never asked whether Strawn wanted to waive the conflict of interest stemming from that claim. Strawn did not waive the conflict of interest, nor did he waive the ineffective assistance claim raised on appeal.

2. THE SECOND PLEA IS INVALID BECAUSE STRAWN WAS MISINFORMED ABOUT THE AMOUNT OF CONFINEMENT TIME HE FACED ON COUNT IV, A DIRECT SENTENCING CONSEQUENCE OF THE PLEA.

Strawn was informed the standard range sentence for the unlawful possession of a firearm offense under count IV was 87-116 months. He was originally sentenced to 116 months on that count. The judgment and sentence was later amended to reduce the sentence on count IV to 84 months. Strawn was not informed as part of his plea that the base sentence for count IV could be less than 87 months. The misinformation renders Strawn's plea involuntary.

- a. Contrary To The Plea Agreement, The Judgment And Sentence Was Amended To Lower The Base Sentence For Count IV.

The terms of the amended plea informed Strawn that the unlawful possession of firearm offense under count IV was subject to a standard sentence of 87 to 116 months for count IV. CP 100. The plea agreement stated "[a]n essential term of this agreement is the parties' understanding of the standard sentencing range(s)." CP 96. Consistent with the plea

agreement, the court imposed a 116-month term of confinement on count IV. CP 129.

After sentencing, a Department of Corrections (DOC) employee notified the prosecutor and defense counsel by email that the judgment and sentence needed to be amended to lower the sentence for count IV to 84 months. CP 148. According to the DOC, this change was needed because firearm enhancements run consecutively to all other sentencing provisions. CP 148 (citing RCW 9.94A.533(3)). Count IV, with a standard range sentence of 116 months, would run over the 10 year statutory maximum once the 36 month firearm enhancement was added. CP 148.

The prosecutor responded that 156 months total confinement was what the court ordered and what was intended. CP 148. The prosecutor agreed to prepare an order that reflected the change so long as it still resulted in a total of 156 months confinement. CP 148. The court subsequently entered an order amending the judgment and sentence to reflect 84 months confinement on count IV with a total confinement period of 156 months. CP 147.

b. The Issue May Be Raised For The First Time On Appeal.

Strawn did not seek to withdraw his plea before the trial court on the ground that he was misadvised about the amount of confinement time he faced on count IV. That is because the judgment and sentence was changed after acceptance of the plea and sentencing took place. CP 147-48. It was afterward that the misinformation about a direct sentencing consequence became apparent, when the judgment and sentence was changed from 116 months to 84 months confinement on count IV. CP 147.

In any event, Strawn may raise the issue of the voluntariness of his plea for the first time on appeal under RAP 2.5(a)(3). State v. Walsh, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001). An invalid guilty plea based on misinformation of direct sentencing consequences may also be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). Mendoza, 157 Wn.2d at 589.

This error is also unaffected by the withdrawal of his motion to vacate the second plea because this error did not arise until the subsequent amendment of the judgment and sentence. Strawn did not sign off on the order amending the judgment and sentence and was not present when the judgment and sentence was changed. The order was entered without a hearing.

c. Misinformation About The Sentencing Range On Count IV Renders Strawn's Plea Involuntary.

Again, a guilty plea is invalid as a matter of due process if it was entered into knowingly, voluntarily and intelligently. Boykin, 395 U.S. at 242-44; Ross, 129 Wn.2d at 284; U.S. Const. Amend. XIV, Wash. Const. art. I, § 3. A guilty plea is not knowingly made when it is based on misinformation regarding a direct sentencing consequence. Mendoza, 157 Wn.2d at 584, 590-91. A sentencing consequence is direct when "the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Ross, 129 Wn.2d at 284 (internal quotation marks omitted) (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). The applicable standard range sentence for an offense is a direct consequence of a plea. Mendoza, 157 Wn.2d at 594; Walsh, 143 Wn.2d at 3-4; State v. Kennar, 135 Wn. App. 68, 74-75, 143 P.3d 326 (2006) (citing State v. Paul, 103 Wn. App. 487, 495, 12 P.3d 1036 (2000)).

A guilty plea is deemed involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentence received was more or less onerous than anticipated. Mendoza, 157 Wn.2d at 590-91. In Mendoza, for example, the Supreme Court held the defendant may withdraw a guilty plea based on

involuntariness where the plea is based on misinformation regarding the direct consequences of the plea, including a miscalculated offender score resulting in a lower standard range than anticipated by the parties when negotiating the plea. Id. at 584. "Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." Id. at 591. Misinformation that purports to increase punishment invalidates a plea in the same manner as misinformation that purports to reduce punishment. Id. at 590-91.

The same reasoning applies to Strawn's case. Strawn was informed that the standard range sentence for count IV, the first degree unlawful possession of a firearm offense, was 87-116 months. CP 25. He was originally sentenced to 116 months, the top of the standard range. CP 127, 129. The amendment of the judgment and sentence, in lowering the sentence for count IV to 84 months, established Strawn was misinformed about the applicable sentence for count IV. CP 147. Strawn was never informed before sentencing or at the sentencing hearing that, contrary to his plea, the base sentence for count IV could be less than 87 months.

To prevail, Strawn need not show reliance on the misinformation. "[A] defendant who is misinformed of a direct consequence of pleading guilty is not required to show the information was material to his decision to plead guilty." Mendoza, 157 Wn.2d at 589; see also State v. Weyrich,

163 Wn.2d 556, 557, 182 P.3d 965 (2008) ("The defendant need not establish a causal link between the misinformation and his decision to plead guilty."). "A reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision." Mendoza, 157 Wn.2d at 590 (quoting Isadore, 151 Wn.2d at 302).

An involuntary plea based on misinformation about a direct sentencing consequence results in a manifest injustice. Isadore, 151 Wn.2d at 298; Mendoza, 157 Wn.2d at 584, 590-91. Where a guilty plea is based on misinformation regarding the direct consequences of the plea, the defendant may withdraw the plea based on involuntariness. Mendoza, 157 Wn.2d at 584. Strawn should be allowed to withdraw his plea because the plea agreement misinformed him that he was subject to a standard range sentence of 87-116 months on count IV as a direct consequence of pleading guilty.

It is immaterial that the sentence on count IV runs concurrently with count I and the change from 116 months to 84 months does not affect the total of 156 months confinement he faced. Where a defendant is misinformed of a direct consequence, the plea is still invalid even where the misinformation has no practical effect on the sentence. In re Pers. Restraint of Bradley, 165 Wn.2d 934, 939-41, 205 P.3d 123 (2009) (even

though the defendant's concurrent sentences meant he would never serve the lower standard range about which he was misinformed, the defendant was still not properly advised on the direct consequences of his plea and was entitled to withdraw it); Walsh, 143 Wn.2d at 5, 9-10 (authorizing plea withdrawal based on misinformation about standard range even though defendant received exceptional sentence). Strawn should be allowed to withdraw his amended plea.

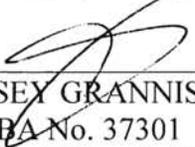
D. CONCLUSION

For the reasons set forth, Strawn requests that this Court remand to allow withdrawal of the amended plea.

DATED this 17<sup>th</sup> day of May 2014

Respectfully Submitted,

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

STATE OF WASHINGTON

Respondent,

v.

IAN STRAWAN,

Appellant.

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COA NO. 69725-1-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12<sup>TH</sup> DAY OF MAY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] IAN STRAWAN  
DOC NO. 883484  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 12<sup>TH</sup> DAY OF MAY 2014.

x Patrick Mayovsky

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STATE OF WASHINGTON  
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