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Washington State
Court of Appeals
Division Two

October 21, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JETHRO NICHLOS WELTER, Appellant.	No. 59830-2-II PART PUBLISHED OPINION

VELJACIC, A.C.J. — Jethro Welter appeals the trial court's denial of his motion to withdraw his guilty plea, arguing that miscalculated offender scores, standard ranges, and statutory maximums in his statement of defendant on plea of guilty rendered his plea involuntary. Welter also argues that the errors were the result of defense counsel's ineffective assistance.

In the published portion of this opinion, we address withdrawal of the guilty plea. We hold that because the errors in Welter's guilty plea did not have a direct consequence on his sentence, the trial court did not err when it denied Welter's motion to withdraw his guilty plea.

In the unpublished portion of this opinion, we address Welter's claims of ineffective assistance of counsel. We conclude Welter's claims fail.

We affirm Welter's conviction.

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

FACTS

I. BACKGROUND

In October 2022, the State charged Welter with one count of murder in the first degree, one count of possession of an explosive device, ten counts of unlawful possession of a firearm in the second degree, one count of possessing a stolen firearm, one count of unlawful possession of a controlled substance with intent to deliver, one count of unlawful disposal of human remains, and one count of tampering with physical evidence. In addition, the State alleged firearm and deadly weapon sentencing enhancements with the murder in the first degree charge and a firearm sentencing enhancement with the unlawful possession of a controlled substance charge.

II. PLEA AGREEMENT

The State interviewed Welter in November and December 2022. In a letter dated February 17, 2023, a deputy prosecuting attorney wrote that Welter's testimony "would be relevant" in the prosecution of Welter's two codefendants and proposed the following plea agreement:

> Mr. Welter will plead as charged to the original information in this case. After he pleads guilty, the State will agree to set over sentencing until after the trials [of Welter's codefendants]. Mr. Welter agrees to testify truthfully in the cases against [his codefendants]. Mr. Welter must remain in communication with the prosecuting attorney's office and the Cowlitz County Sheriff's Office, appear for all requested interviews, and appear at all court dates, including the trial dates in [his codefendants'] cases. Mr. Welter must agree to remain incarcerated while the cases against [his codefendants] are pending unless he can post bail. If he is able to post bail, he must agree to conditions of release, including reporting to offender services.

Clerk's Papers (CP) at 96.

In exchange for Welter's truthful testimony and compliance with the above requirements, the State would "allow [Welter] to withdraw his plea and enter a plea to Manslaughter in the Second Degree with a firearm enhancement, Possession of an Explosive Device, [and] Rendering Criminal Assistance." CP at 96. The State also agreed to make the following recommendations at

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sentencing if Welter complied with the conditions of the plea agreement: 72 months on the manslaughter in the second degree charge, 54 months on the explosive device charge, and 17 months on the rendering criminal assistance charge. However, the parties also agreed that if Welter failed "to comply with these agreed terms, he will not be allowed to withdraw his pleas . . . and the parties will be free to argue for an appropriate sentence within the available sentencing range." CP at 97. Welter, his attorney, and the deputy prosecuting attorney all signed the letter.

On May 15, Welter filed a statement of defendant on plea of guilty. The guilty plea included a table detailing the offender score, standard range sentence, enhancements, community custody, and maximum terms applicable to each crime charged, as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1	15	411 – 548 months	(F)(5 years) (D)(2 years)	36 months	Life / $50K
2	15	129 – 171 months	N/A	18 months	Life / $50K
3 - 12	13	51 – 60 months	N/A	N/A	5 years / $10K
13	13	72 – 96 months	N/A	N/A	10 years / $20K
14	13	60+ - 12[illegible]months	(F)(3 years)	N/A	10 years / $20K
15	N/A	0 – 90 days	N/A	N/A	90 days / $1K

. . . .

16	N/A	0 – 364 days	N/A	N/A	364 days / $5K

CP at 21-22.

At a hearing the same day, the trial court engaged in a colloquy with Welter concerning his guilty plea. During the colloquy, Welter stated that he had read through his guilty plea and that he had the opportunity to review it with his attorney. Defense counsel told the trial court he had the opportunity to advise Welter of the consequences of a guilty plea. Welter acknowledged the

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

offender score and standard range sentence for each count charged. Welter also stated he had no questions about the guilty plea. Welter pleaded guilty as charged.

Following its colloquy with Welter, the trial court found that Welter's guilty plea was being entered into knowingly, intelligently, and voluntarily, that Welter understood the charges and consequences of the plea, and that there was a factual basis for the plea. The trial court accepted Welter's guilty plea and found Welter guilty as charged.

During the same hearing, Welter requested and was granted a reduction in bail. In doing so, the trial court imposed several conditions of release. Relevant here, Welter was required to wear an ankle monitor, stay in Cowlitz County, not possess firearms or dangerous weapons, not commit additional crimes, and stay in contact with his attorney and offender services. The trial court entered a written order reflecting Welter's reduced bail and conditions of release. The trial court also ordered Welter to appear later for sentencing.

III. WELTER FLEES WASHINGTON

Before sentencing, Welter fled Washington. On June 5, a police officer pulled Welter over in Idaho. Welter could not provide any form of identification and admitted he had a knife in the car, so the officer asked Welter to exit the vehicle. When the officer asked Welter his name, Welter responded, "'[Y]ou might as well arrest me. . . I'm a fugitive.'" CP at 50. After he was read his *Miranda*[1] rights, Welter told the officer "he was 'skipping bond' for a Murder charge in Kelso Washington." CP at 50. Welter also told the officer "he was running from going to prison for 53 years as he had pled guilty to Murder, but he was awaiting sentencing." CP at 50. Welter explained to the officer that the court had ordered him to not leave Cowlitz County and to not possess

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

firearms. Welter also told the officer that he had planned to "'lay low' and camp" in Idaho. CP at 50.

The Idaho officer contacted the Cowlitz County Sheriff's Office. The officer learned that Welter was required to wear an ankle monitor and observed Welter was not wearing one. The officer also learned that Welter was prohibited from possessing firearms. When the officer searched Welter's vehicle, he found a firearm and an extended rifle magazine. Idaho police arrested Welter for unlawful possession of a firearm and held Welter in custody until a bond revocation warrant could be secured.

The State filed a motion seeking revocation of Welter's bail and a warrant for his arrest based on Welter's violation of his conditions of release. The trial court issued a warrant for Welter's arrest the same day. Welter subsequently waived extradition, the state of Idaho dismissed the unlawful possession of a firearm charge, and Welter was transported back to Washington.

Welter appeared before the trial court and the State requested that he be held without bail because he did not comply with his conditions of release. The trial court ordered Welter held without bail pending sentencing.

IV. MOTION TO WITHDRAW GUILTY PLEA

At Welter's sentencing hearing on September 15, 2023, defense counsel informed the trial court that some of the offender scores in Welter's guilty plea were inaccurate and asked that sentencing be set over so he could discuss the issue with Welter. The trial court continued the sentencing date.

The offender scores for counts 1-13 in Welter's guilty plea were incorrect. For counts 1 (murder in the first degree) and 2 (possession of an explosive device), the correct offender score was 14, not 15. For counts 3-12 (unlawful possession of a firearm) and 13 (possessing a stolen

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

firearm), the correct offender score was 3, not 13. The corresponding standard sentencing ranges for counts 3-13 were also incorrect. For counts 3-12, the correct standard range was 9-12 months, not 51-60 months. For count 13, the correct standard range was 15-20 months, not 72-96 months. Finally, the statutory maximum for count 2 was incorrect. The correct statutory maximum was 20 years, not life.

At the continued sentencing hearing, defense counsel reiterated to the trial court that there were calculation errors in Welter's guilty plea and stated his intention to file a motion to withdraw the guilty plea. The State responded that the miscalculations pertained mostly to lesser charges and noted that despite the offender score error on the murder in the first degree charge, the standard range sentence was still correct. Accordingly, the State argued that the errors did not "change the amount of time [Welter is] facing" because the lesser charges would run concurrent to the murder in the first degree charge. Rep. of Proc. (RP) at 90. The State, however, did not object to setting the matter over to allow Welter to file a motion to withdraw his guilty plea, and the trial court again continued the hearing.

On October 11, Welter filed a motion to withdraw his guilty plea. Welter argued that he should be allowed to withdraw his guilty plea because (1) it was "rendered by way of ineffective assistance of counsel;" (2) the "prosecuting attorney is not holding up their end of the plea agreement;" and (3) Welter "lacked a competent and full understanding of the nature of the charges and the consequences of his plea by numerous miscalculations of his Offender Score and applicable sentence ranges." CP at 63.

The State objected to Welter's motion, arguing that Welter forfeited any benefit of the plea agreement when he violated its terms. The State also argued that Welter's plea was voluntary because he was advised of the direct consequences of pleading guilty. The State noted that Welter's

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

offender score and standard range sentence for the murder in the first degree charge were correct, as were the applicable sentencing enhancements. Because the sentences on the lesser charges would run concurrent to and be subsumed by the sentence for the murder in the first degree charge, Welter failed to show a manifest injustice.

On October 27, the trial court heard Welter's motion to withdraw his guilty plea. Welter argued that the offender score and sentencing range errors in his guilty plea rendered his plea involuntary. Welter also argued that, despite his failure to comply, the plea agreement should still be enforced because Welter was still willing to testify against his codefendants. Finally, Welter argued that the miscalculations in his guilty plea were evidence that he received ineffective assistance from defense counsel and that he should be allowed to withdraw his guilty plea on that basis as well.

The State responded that Welter's arguments for enforcing the plea agreement were premature: such relief would "require[] a hearing where [the parties] would call witnesses to see whether [Welter] violated that agreement." RP at 107. The State also argued that Welter's plea was voluntary despite the miscalculations in the guilty plea because the controlling offender score and sentence were correctly stated:

> Because [Welter's] sentencing range on the murder is 411 to 548, because he was properly advised of the firearm and deadly weapon enhancements involved, the controlling sentencing range was correct. And Defense has provided no legal authority to the contrary. The legal authority, the precedent this Court is bound by is . . . the *Smith*[2] case, which explains that . . . if something's in error outside the controlling sentencing range, that's not a basis to withdraw plea.

RP at 109.

[2] *State v. Smith*, 137 Wn. App. 431, 153 P.3d 898 (2007).

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

The trial court denied Welter's motion to withdraw his guilty plea, citing *Smith* and its controlling sentence rationale as support.

V. EVIDENTIARY HEARING

The trial court subsequently held an evidentiary hearing to determine whether Welter breached the plea agreement by violating his conditions of release. The parties filed a stipulation with the trial court outlining Welter's violations of his conditions of release, including his leaving the County, his failure to report to offender services or his bail bondsman on June 5, his removal of his ankle monitor, his possession of a firearm, and his commission of a new crime.

At the hearing, Welter urged the trial court to consider whether "these violations of lesser degrees [] breach [] the overall agreement," and argued that his violations were "a mistake," but not one "that devalue[d]" the entire plea agreement because Welter was still willing and able to testify against his codefendants. RP at 135, 138. The State responded that the plea agreement required Welter to testify truthfully in exchange for lesser charges and, regardless, that the State had "substantial evidence, video evidence, that contradict[ed]" Welter's version of events. RP at 140-41.

The trial court orally found by a preponderance of the evidence that Welter breached the plea agreement. The trial court then entered written findings of fact and conclusions of law supporting its oral ruling.[3]

[3] Following the evidentiary hearing, Welter filed a notice of discretionary review. This court converted it to a notice of appeal. Letter, *State v. Welter*, No. 59830-2, at 1 (Wash. Ct. App. Jan. 5, 2024). Welter also filed a motion for reconsideration of the trial court's denial of his motion to withdraw his guilty plea. The trial court denied Welter's motion.

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

VI. SENTENCING

At Welter's sentencing hearing, the State made the following sentencing recommendation: 600 months on the murder in the first degree conviction, 171 months on the possession of explosive device conviction, 9 months on the unlawful possession of a firearm convictions, 15 months on the possession of a stolen firearm conviction, 120 months on the unlawful possession of a controlled substance conviction, 90 days on the unlawful disposal of human remains conviction, with 90 days suspended, and 364 days on the tampering with physical evidence conviction, with 364 days suspended. Welter asked for 411 months on the murder in the first degree conviction.

The trial court sentenced Welter as follows: 555 months on the murder in the first degree conviction,[4] 171 months on the possession of explosive device conviction, 9 months on the unlawful possession of a firearm convictions, 15 months on the possession of a stolen firearm conviction, 120 months on the possession of a controlled substance conviction,[5] 90 days on the unlawful disposal of human remains conviction, and 364 days on the tampering with physical evidence conviction. The trial court ordered that the nine unlawful possession of a firearm convictions be served consecutive to one another but concurrent to the sentences on the other convictions. The trial court ordered 555 months of actual confinement.

Welter appeals the trial court's denial of his motion to withdraw his guilty plea.

[4] The 555 month sentence included 60 months for the firearm sentencing enhancement and 24 months for the deadly weapon sentencing enhancement. RCW 9.94A.533(3)(a), (4)(a).

[5] The 120-month sentence included 36 months for the sentencing enhancements. RCW 69.50.401(2)(b); RCW 9.94A.533(3)(b).

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

ANALYSIS

I. MOTION TO WITHDRAW GUILTY PLEA

A. Legal Principles

"Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent." *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). This standard is reflected in CrR 4.2(d), which states 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." A guilty plea is "involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentencing range is lower or higher than anticipated." *Mendoza*, 157 Wn.2d at 591.

Once the trial court accepts a defendant's guilty plea, it may only be withdrawn "'to correct a manifest injustice.'" *Id.* at 587 (quoting CrR 4.2(f)). The following circumstances amount to a manifest injustice sufficient to withdraw a guilty plea: "the denial of effective counsel, the defendant's failure to ratify the plea, an involuntary plea, and the prosecution's breach of the plea agreement." *Id.*

Our Supreme Court has "repeatedly held that a defendant may challenge the voluntariness of a guilty plea when the defendant was misinformed about sentencing consequences resulting in a more onerous sentence than anticipated." *Id.* "[A] sentencing consequence is direct when 'the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *Id.* at 588 (internal quotation marks omitted) (quoting *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)). For example, "a defendant is entitled to withdraw his plea when the correct standard range is higher than the range stated in the plea agreement." *Mendoza*, 157 Wn.2d at 588.

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

In *Mendoza*, our Supreme Court addressed "whether a defendant is 'misinformed of the direct consequences of a plea' so as to render the plea involuntary when the defendant is told after his plea is entered that he faces a *lower* standard range sentence than indicated in the plea agreement." *Id.* at 590 (emphasis added). The court noted that "[t]he same concerns" that are present when the standard range is higher than anticipated also "arise when . . . the standard range is lower than anticipated." *Id*. The court continued,

> "[R]isk management decisions of a defendant inherent in plea bargaining bear equally in situations where . . . the correct standard range is lower than the mistaken standard range upon which a plea is entered. A defendant may evaluate the risks of trial versus guilty plea far differently if faced with a 12-month plus one day bottom of the standard range, rather than a 120-month bottom of the standard range."

Id. (quoting *State v. Moon*, 108 Wn. App. 59, 64, 29 P.3d 734 (2001) (Brown, J., concurring)).

The *Mendoza* court held that "a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated." 157 Wn.2d at 591. The court, however, also "decline[d] to engage in a subjective inquiry into the defendant's risk calculation and the reasons underlying his or her decision to accept the plea bargain." *Id.* at 590-91; *see also State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008) ("The defendant need not establish a causal link between the misinformation and his decision to plead guilty.").

B. Case Law Subsequent to *Mendoza*

Welter argues that the trial court should have granted his motion to withdraw his guilty plea because the miscalculations in his guilty plea were a manifest injustice that rendered the plea involuntary. Specifically, Welter takes issue with the trial court's application of *State v. Smith*, 137 Wn. App. 431, 153 P.3d 898 (2007), arguing that *Smith* cannot be harmonized with *Mendoza* and *Weyrich*. We disagree.

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

As noted above, in *Mendoza*, our Supreme Court held that "a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated." 157 Wn.2d at 591.

About seven months later, this court decided *Smith*, 137 Wn. App. 431. In *Smith*, the defendant pleaded guilty to one count of forgery (count I) and one count of unlawful possession of payment instruments (count II). *Id.* at 435. However, the standard sentencing range sentence for count II was misstated as 0-12 months in the plea agreement; the correct standard sentencing range was 14-18 months. *Id.* at 438. The standard sentencing range for count I was also 14-18 months and was correctly stated in the plea agreement. *Id.* at 435. The defendant moved to withdraw his guilty plea based on the incorrect standard sentencing range, but the trial court denied the motion, and the defendant appealed. *Id*.

On appeal, the defendant argued "that his plea was involuntary because he pleaded guilty believing that count II carried a lower standard range sentence than it actually did." *Id.* at 436. This court disagreed. *Id.* at 438. Because the corrected standard sentencing range for count II was the same as count I, the defendant "was not misinformed about a direct consequence of his guilty plea because he received the same punishment under the correct sentencing range that he would have received under the erroneous range." *Id*. In other words, the defendant's "controlling sentencing range was 14 to 18 months, a direct consequence of his plea to count I that his plea to count II did not affect." *Id*. As a result, "[t]he trial court did not abuse its discretion in concluding that [the defendant] voluntarily entered into the plea agreement and that the error in the plea agreement did not result in a manifest injustice." *Id*.

About a year after *Smith*, our Supreme Court decided *Weyrich*, 163 Wn.2d 554. There, the defendant pleaded guilty to three counts of theft in the first degree and one count of unlawful check

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

issuance. *Id.* at 556. Both the defendant's statement on plea of guilty and his judgment and sentence incorrectly stated the statutory maximum for theft in the first degree was 5 years, but it was actually 10 years. *Id*. Despite the errors, the defendant "was sentenced on both crimes within the correct standard range." *Id*. Prior to sentencing, the defendant moved to withdraw his guilty plea based on the erroneous statutory maximum in his statement on plea of guilty and judgment and sentence. *Id*. The trial court denied the motion. *Id*.

On appeal, the State conceded the statutory maximum for the theft counts had been miscalculated but argued "that because the trial court sentenced [the defendant] within the correct standard range, the mistaken maximum sentence had no actual bearing on the plea." *Id*. Division One agreed and affirmed the trial court. *Id*.

Our Supreme Court accepted review and rejected the State's argument that because the incorrect statutory maximum "did not actually affect [the defendant's] decision to plead guilty," the defendant's guilty plea was voluntary. *Id.* at 557. The court explained that such an argument "requires the sort of subjective hindsight inquiry into [the defendant's] decision of which *Mendoza* . . . disapprove[d]." *Id.* Moreover, the court explained that "the statutory maximum for a charged crime . . . is a direct consequence of [the defendant's] guilty plea." *Id*. Our Supreme Court has since reiterated this legal principle: "A guilty plea may be considered involuntary when it is based on misinformation regarding a direct consequence of the plea, which includes the statutory maximum." *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 594, 316 P.3d 1007 (2014).

Welter argues that *Smith* is incompatible with *Mendoza* and *Weyrich* because any "misinformation about the potential sentencing consequences of [guilty] pleas is" a sufficient manifest injustice to withdraw the guilty pleas. Br. of Appellant at 22. However, both *Mendoza* and *Weyrich* can be harmonized with *Smith*.

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

In *Mendoza*, the defendant was charged with two crimes but pleaded guilty to a single count of child molestation in the third degree. 157 Wn.2d at 584. Because the defendant pleaded guilty to only one charge, the sentence on that charge was the controlling sentence. As a result, any miscalculations in the plea agreement as to the defendant's offender score, standard range sentence, or statutory maximum would necessarily have a direct consequence on the defendant's sentence. *See id.* at 591 ("[T]he length of the sentence is a direct consequence of pleading guilty," "regardless of whether the actual sentencing range is lower or higher than anticipated."); *see also Weyrich*, 163 Wn.2d at 557 ("A defendant must be informed of the statutory maximum for a charged crime, as this is a direct consequence of his guilty plea."). In other words, because the defendant in *Mendoza* pleaded guilty to a single charge, *any* miscalculation as to the applicable offender score, standard range, or statutory maximum would constitute "a direct consequence of his guilty plea" because it would "represent[] 'a definite, immediate and largely automatic effect on . . . the defendant's punishment.'" *Smith*, 137 Wn. App. at 438 (alteration in original) (quoting *Mendoza*, 157 Wn.2d at 588).

Weyrich and its progeny also reconcile with *Smith*. As noted above, our Supreme Court, in both *Weyrich* and *Stockwell*, explicitly stated that the statutory maximum applicable to a charged crime is a direct consequence of a guilty plea. *Weyrich*, 163 Wn.2d at 557; *Stockwell*, 179 Wn.2d at 596. Neither case cited to or discussed *Smith* and its controlling sentence rationale. So, whether this court's controlling sentence rationale is applicable when the claimed error pertains to a statutory maximum rather than an offender score or standard range is an issue of first impression.

Still, *Weyrich* and *Stockwell* can be harmonized with *Smith*. In *Weyrich*, the statutory maximum error pertained to the controlling sentence in the defendant's guilty plea, so our Supreme Court had no occasion to apply *Smith* and decide whether an erroneous statutory maximum that

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

pertained to a lesser charge would still constitute a direct consequence of a guilty plea. *See Weyrich*, 163 Wn.2d at 556 (defendant charged with three counts of theft in the third degree and one count of unlawful check issuance; erroneous statutory maximum pertained to theft counts). In other words, had the statutory maximum error applied to the lesser charges, it is unclear whether the error would have constituted a direct consequence of the defendant's guilty plea, especially considering *Smith*'s controlling sentence rationale.

Because neither *Weyrich* nor *Stockwell* addressed the issue we are presented with today, we are not bound by either opinion.

> Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court.

Stockwell, 179 Wn.2d at 600 (quoting *ETCO, Inc. v. Dep't of Lab. & Indus.*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992)). Because *Weyrich* and *Stockwell* did not address whether an erroneous statutory maximum pertaining only to a lesser count still constitutes a direct consequence of a guilty plea, they do not control the issue before this court, and our decision to apply *Smith*'s rationale to their broad statements of law does not violate our duty to accept the Supreme Court's rulings. *Stockwell*, 179 Wn.2d at 600.

Mendoza, *Weyrich*, and *Smith* stand for the proposition that unless an offender score, standard sentencing range, or statutory maximum error pertains to the controlling sentence in the guilty plea, the error has no direct consequence on the defendant's sentence and does not constitute a manifest injustice allowing the defendant to withdraw their guilty plea. *Mendoza*, 157 Wn.2d at 591; *Weyrich*, 163 Wn.2d at 557; *Smith*, 137 Wn. App. at 438.

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

C. Welter's Guilty Plea was Voluntary

Welter's guilty plea was voluntary because none of the errors had a direct consequence on his sentence. The miscalculated offender scores and standard sentencing ranges for counts 3-13 did not "represent[] 'a definite, immediate and largely automatic effect on . . . the defendant's punishment" because all sentences for those counts ran concurrent to the sentence imposed on the murder in the first degree conviction (count 1); consequently, they had no direct consequence on Welter's guilty plea and the trial court did not abuse its discretion when it found those errors insufficient to justify granting Welter's motion to withdraw his guilty plea. *Smith*, 137 Wn. App. at 437 (alteration in original) (quoting *Mendoza*, 157 Wn.2d at 588).

Nor did the erroneous statutory maximum on count 2 have a direct consequence on Welter's sentence. As noted above, the statutory maximum for count 2 was incorrectly noted as life, when it was actually 20 years. However, the erroneous statutory maximum did not "represent[] 'a definite, immediate and largely automatic effect on . . . the defendant's punishment" because the sentence imposed on count 2 ran concurrent to the sentence imposed on the first degree murder conviction (count 1), where the maximum sentence in fact was life. *See Smith*, 137 Wn. App. at 437 (alteration in original) (quoting *Mendoza*, 157 Wn.2d at 588). Accordingly, the error had no direct consequence on Welter's guilty plea, and the trial court did not abuse its discretion when it found the error insufficient to justify granting Welter's motion to withdraw his guilty plea. *Smith*, 137 Wn. App. at 437.

Finally, Welter argues that his miscalculated offender score on the murder in the first degree conviction (count 1) rendered his guilty plea involuntary. However, Welter's standard sentencing range for count 1 was the same under both the erroneous and corrected offender score, so the error did not "represent[] 'a definite, immediate and largely automatic effect on . . . the defendant's

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

punishment.'" *Smith*, 137 Wn. App. at 437 (alteration in original) (quoting *Mendoza*, 157 Wn.2d at 588).

Therefore, the error did not constitute a manifest injustice, and the trial court did not abuse its discretion when it denied Welter's motion to withdraw his guilty plea.

CONCLUSION

We affirm Welter's conviction.

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 in accordance with RCW 2.06.040, it is so ordered.

UNPUBLISHED FACTS

Welter claims ineffective assistance of counsel throughout the plea process and the motion to withdraw. We disagree.

Welter's plea agreement stated that "[t]he State makes no recommendation as to this potential sentence at this time but agrees Defendant may later withdraw this plea if terms of other agreements are met." CP at 24 (emphasis omitted). The agreement also stated that "[t]he judge does not have to follow anyone's recommendation as to sentence." CP at 24.

During Welter's plea colloquy, the following exchange took place:

> THE COURT: . . . [T]he Prosecuting Attorney makes the following recommendation: the State makes no recommendation as to this potential sentence at this time, but agrees Defendant may later withdraw this plea if terms of other agreements are met. You understand that's merely a recommendation. The Court does not have to follow that, and can sentence you anywhere, up to the maximum?
> THE DEFENDANT: Yes, I do.

RP at 62-63.

For the current opinion, go to https://www.lexisnexis.com/clients/wareports/.

The statement of defendant on plea of guilty stated that Welter's counsel "explained to [him]" and "fully discussed" the contents of the statement of defendant on plea of guilty and that Welter had no further questions. CP at 32.

At the hearing on the motion to withdraw the guilty plea, Welter's counsel stated that "mistakes [were] made on [the] plea forms" and that they were "wrong on numerous counts." RP at 103. Counsel proceeded to explain that these mistakes were why he moved to withdraw the plea, in part, on the basis of ineffective assistance of counsel.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Welter argues he "was deprived of effective assistance [of counsel], in the entry of [his guilty] pleas and in the motion to withdraw them." Br. of Appellant at 34. Welter argues that "[r]eversal is required on this alternate ground or, at the least, new counsel appointed on remand to ensure Mr. Welter's constitutional rights." Br. of Appellant at 34. We disagree.

A. Legal Principles

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of counsel. *State v. Bertrand*, 3 Wn.3d 116, 128, 546 P.3d 1020 (2024). To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) deficient performance by counsel, and (2) that counsel's deficient performance prejudiced them. *Id.* An ineffective assistance claim fails if either deficient performance or prejudice is not shown. *Id.*

Counsel performs deficiently if, considering all of the circumstances, their performance falls below an objective standard of reasonableness. *Id.* at 129. We begin with a strong presumption that counsel's performance was reasonable, but a defendant can overcome this

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presumption by showing the absence of any legitimate trial tactic or strategy in counsel's performance. *Id.* at 128. To show prejudice, the defendant must demonstrate that "'there is a reasonable probability, that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Id.* at 129 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

"In the context of a guilty plea, a defendant must show that his counsel failed to actually and substantially assist him in deciding whether to plead guilty and that, but for counsel's failure to give adequate advice, he would not have pleaded guilty." *State v. Blanks*, 139 Wn. App. 543, 551, 161 P.3d 455 (2007).

B. Plea Agreement Miscalculations

Welter argues that he received ineffective assistance of counsel when defense counsel "advised [Welter] to enter into a plea agreement riddled with improper advice about sentencing consequences, without checking to see if that advice was correct." Br. of Appellant at 27. Welter contends that defense counsel's failure to advise rendered Welter's guilty plea involuntary. We disagree.

"Counsel has a duty to assist a defendant in evaluating a plea offer." *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010) (citing RPC 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires . . . thoroughness and preparation reasonably necessary for the representation") and RPC 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, *after consultation with the lawyer*, as to a plea.") (emphasis in original)). Defense counsel must assist the defendant "in making an informed decision as to whether to plead guilty or to proceed to trial." *A.N.J.*, 168 Wn.2d at 111.

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"The degree and extent of investigation required will vary depending upon the issues and facts of each case . . . at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." *Id.* at 111-12.

Assuming without deciding that the miscalculations in Welter's plea agreement amounted to deficient performance, Welter's claim fails because he does not show prejudice. Welter does not carry his burden of showing that "but for counsel's failure to give adequate advice, he would not have pleaded guilty." *Blanks*, 139 Wn. App. at 551. Had defense counsel correctly calculated all of Welter's offender scores, standard ranges, and statutory maximums, Welter would still have faced a choice between pleading guilty in exchange for a significantly reduced sentencing recommendations and a trial on the original information. Welter fails to even argue that he would have preferred a trial over the plea agreement. In fact, after he fled to Idaho and was extradited back to Washington, Welter argued for specific performance of the plea agreement (i.e., that he testify in exchange for a guilty plea to reduced charges), even after he learned of the miscalculations in the guilty plea. Therefore, Welter's first ineffective assistance claim fails.

C. Prosecutor's Role

Next, Welter argues that defense counsel performed deficiently because he did not advise Welter that "[t]he *prosecutor* does not control whether guilty pleas are withdrawn" and that such a decision would be left to the trial court's discretion. Br. of Appellant at 28 (emphasis in original); *see also* Br. of Appellant at 29 ("The [plea] agreement did not say the prosecutor would *recommend* withdrawal; it treated withdrawal as guaranteed." (emphasis in original)). We disagree.

Here, the State agreed to "allow [Welter] to withdraw his plea and enter a plea to Manslaughter in the Second Degree with firearm enhancement, Possession of an Explosive

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Device, [and] Rendering Criminal Assistance" in exchange for Welter's testimony against his codefendants. CP at 96. During its colloquy with Welter, the trial court informed Welter that "the Prosecuting attorney makes the following recommendation: the State makes no recommendation as to this potential sentence at this time, but agrees Defendant may later withdraw this plea if terms of other agreements are met." RP at 62-63. The trial court then asked Welter whether he understood that "that's merely a recommendation. The Court does not have to follow that, and can sentence you anywhere, up to the maximum?" RP at 63. Welter responded, "Yes, I do." RP at 63.

Moreover, Welter's guilty plea contained a similar warning: "The State makes no recommendation as to this potential sentence at this time but agrees Defendant may later withdraw this plea if terms of other agreements are met." CP at 24 (emphasis omitted). This paragraph was followed by a warning that "[t]he judge does not have to follow anyone's recommendation as to this sentence." CP at 24. Welter signed the guilty plea, indicating defense counsel had "explained" and "fully discussed" the guilty plea with Welter and that Welter understood the plea agreement and had no questions for the trial court. CP at 32. During his colloquy with the trial court, Welter reiterated that he did not have any questions about the plea. The record clearly shows that Welter was informed that the trial court was not bound to accept the State's recommendation that Welter be allowed to withdraw his guilty pleas. Accordingly, Welter's argument that counsel provided ineffective assistance by not telling him the prosecutor does not control whether his guilty plea can be withdrawn fails.

D. Failure to Withdraw

Welter argues that "[o]nce [defense counsel] determined that he had committed ineffective assistance, he should have withdrawn so another attorney could represent Mr. Welter in investigating, filing, and arguing the motion to withdraw on that issue. Plea counsel's failure to

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withdraw prevented Mr. Welter from having effective assistance for the motion." Br. of Appellant at 30. We disagree.

As a preliminary point, we note that whether defense counsel "failed" to withdraw is questionable. The record shows that Welter never sought substitute counsel nor did he express dissatisfaction with defense counsel's performance. Moreover, it is unclear how defense counsel himself could have "determined that he . . . committed ineffective assistance." Br. of Appellant at 30. For example, while Welter argued in his motion to withdraw his guilty plea that the plea was "rendered by way of ineffective assistance of counsel," and defense counsel stated at the hearing on the motion that "mistakes [were] made," these statements were made *before* the trial court ruled on Welter's motion to withdraw his guilty plea. CP at 63; RP at 103. Thus, it would have been impossible for defense counsel to show that his allegedly deficient performance prejudiced Welter. *See Classen*, 4 Wn. App. 2d at 535 (An ineffective assistance claim fails if either deficient performance or prejudice is not shown.).

Even if we assume that defense counsel "failed" to withdraw, Welter provides no authority suggesting that defense counsel's failure to withdraw amounted to deficient performance. Both the United States Supreme Court and our state Supreme Court have interpreted the Sixth Amendment to grant the right of effective assistance of counsel free of conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). This suggests that defense counsel could perform deficiently if they failed to withdraw after a conflict of interest was brought to their attention. *See State v. Ramos*, 83 Wn. App. 622, 632, 922 P.2d 193 (1996) ("[U]nless an actual conflict exists, there has been no denial of effective assistance of counsel."). Welter's claim, however, does not appear to

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be premised on any conflict of interest with defense counsel, but rather on Welter's dissatisfaction with the trial court's denial of his motion to withdraw his guilty plea.

Also, in *State v. Davis*, this court explained that whether a defendant was "entitled to substitute counsel on his motion [to withdraw his guilty plea] is a discretionary decision for the trial court. [The defendant] cannot force substitute counsel simply by raising an ineffective assistance claim." 125 Wn. App. 59, 68 n.31, 104 P.3d 11 (2004). As noted above, Welter never requested substitute counsel or expressed dissatisfaction with defense counsel's performance; therefore, the trial court never had the opportunity to exercise its discretion and decide whether substitute counsel should be appointed for Welter.

Considering the fact that defense counsel had represented Welter throughout the proceedings and was well acquainted with the facts and circumstances of Welter's case, defense counsel was in a better position to argue Welter's motion to withdraw his guilty plea than a new attorney would have been. In other words, defense counsel's decision to continue representing Welter was a strategic decision that does not support Welter's argument. *See State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) ("Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel."). Because Welter fails to show that defense counsel's failure to withdraw amounted to deficient performance, this ineffective assistance claim fails.

Even if we were to assume without deciding that defense counsel's failure to withdraw was deficient performance, Welter's claim would still fail because he fails to show prejudice. As discussed above, *Smith* can be reconciled with both *Mendoza* and *Weyrich*. Because of this, even

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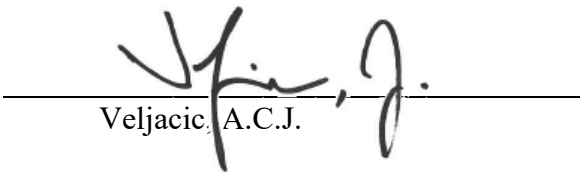
if defense counsel had withdrawn and substitute counsel had been appointed, there is a reasonable probability that the trial court would still have denied Welter's motion to withdraw his guilty plea.

Therefore, Welter's ineffective assistance of counsel claim based on failure to withdraw also fails for lack of prejudice.

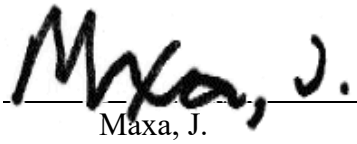
CONCLUSION

We affirm Welter's conviction.



Veljacic, A.C.J.

I concur:



Maxa, J.

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LEE, J. (dissenting) — In light of our Supreme Court precedent, I respectfully disagree with the majority. The erroneous statutory maximum in Jethro Welter's guilty plea statement was a direct consequence of his plea, entitling Welter to withdraw his plea. Thus, I would hold that the trial court erred when it denied Welter's motion to withdraw his guilty plea.

Welter argues that the trial court erred when it denied his motion to withdraw his guilty plea because his plea was not knowing, intelligent, or voluntary. I agree.

Here, Welter's offender score was incorrect for counts 1-13 in Welter's guilty plea statement. And the standard sentencing ranges for counts 3-12 were incorrect. Also, the statutory maximum for count 2 was incorrect.

"Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent." *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). This standard is reflected in CrR 4.2(d), which states 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."

Once the trial court accepts a defendant's guilty plea, it may only be withdrawn "'to correct a manifest injustice.'" *Mendoza*, 157 Wn.2d at 587 (quoting CrR 4.2(f)). An involuntary plea amounts to a manifest injustice sufficient to withdraw a guilty plea. *Id.* at 587.

"[A] guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated. Absent a showing that the defendant was correctly informed of all the direct consequences of his guilty plea, the defendant may move to withdraw the plea." *Id.* at 591.

Here, the sheer number of errors in Welter's offender scores, standard sentencing ranges, and statutory maximum should be sufficient to conclude that Welter did not enter into his guilty

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plea knowingly, intelligently, and voluntarily. However, even if the numerous errors are deemed insufficient to allow Welter to withdraw his plea, the error in the statutory maximum for count 2 is grounds for reversal in this case.

"A defendant must be informed of the statutory maximum for a charged crime, as this is a direct consequence of his guilty plea." *State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008). *See also In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 594, 316 P.3d 1007 (2014) ("A guilty plea may be considered involuntary when it is based on misinformation regarding a direct consequence of the plea, which includes the statutory maximum.").

Here, it is undisputed that the statutory maximum for count 2 (possession of an explosive device) was incorrectly stated on Welter's guilty plea statement. Thus, Welter was misinformed about a direct consequence of his guilty plea, rendering the plea involuntary. *Stockwell*, 179 Wn.2d at 596; *Weyrich*, 163 Wn.2d at 557; *Mendoza*, 157 Wn.2d at 587.

The State argues that because the miscalculated statutory maximum did not affect "Welter's controlling sentencing range on the murder, the miscalculations in his plea were not a direct consequence." Br. of Resp't at 21. To support its argument, the State cites *State v. Smith*, 137 Wn. App. 431, 153 P.3d 898 (2007).

In *Smith*, this court found that a miscalculated standard range did not render the defendant's guilty plea involuntary because the error pertained only to a lesser crime and did not affect the defendant's "controlling sentence range." *Id.*at 438. However, *Smith* did not address whether the same rationale applied when the error pertained to a statutory maximum rather than a standard sentencing range. Moreover, *Weyrich* and *Stockwell* were decided after *Smith*, and in both cases, our Supreme Court explicitly stated that the statutory maximum for a charged crime is a direct consequence of a guilty plea. *Stockwell*, 179 Wn.2d at 594 *Weyrich*, 163 Wn.2d at 557. Thus,

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Smith does not support the State's argument, and we are bound by our Supreme Court's pronouncements in *Weyrich* and *Stockwell*. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (once our Supreme Court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled).

Here, the sheer number of errors in Welter's offender scores, standard sentencing ranges, and statutory maximum should be sufficient to conclude that Welter's plea was not made knowingly, voluntarily, and intelligently. Moreover, given our Supreme Court's express pronouncement that the statutory maximum for a charged crime is a direct consequence of a guilty plea, I would reverse the trial court's denial of Welter's motion to withdraw his guilty plea.

Lee, J.