IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TANYA RAE GARDNER, Appellant.	No. 40775-2-II UNPUBLISHED OPINION

Penoyar, C.J. — Tanya Gardner appeals the trial court's order denying her motion for the withdrawal of counsel. She asserts that the State's plea offer constructively denied her the constitutional right to counsel under the federal and state constitutions. We affirm the trial court's denial of Gardner's motion.

FACTS

On February 1, 2010, the State charged Gardner with three counts of unlawful delivery of a controlled substance (oxycodone).[1] The State alleged that Gardner had delivered controlled substances to a confidential informant on three separate occasions.

The State offered to dismiss two charges against Gardner, one count of unlawful delivery of a controlled substance and another pending charge, and to recommend a low-end, standard-range sentence in exchange for Gardner's guilty plea. During discovery, defense counsel sought the confidential informant's identity. The State informed defense counsel that it was the prosecutor's policy that in cases involving confidential informants, the State provides a plea offer at the lower end of the sentencing range. But, under the policy, if the State names the informant,

[1] In violation of RCW 69.50.401(1).

the State revokes the plea offer. In light of the policy, defense counsel withdrew the request for the confidential informant's identity. According to the State, it otherwise provided defense counsel with full discovery, including an affidavit of credibility regarding the confidential informant.

Defense counsel then moved to withdraw, arguing that continued representation of Gardner would cause him to violate the Rules of Professional Conduct. The trial court denied the motion. The trial court certified this case for discretionary review under RAP 2.3(b)(4). We accepted discretionary review.

ANALYSIS

Gardner's only argument on appeal is that the State's plea offer constructively deprived her of her right to counsel under the Washington and United States Constitutions. We disagree.

We review a trial court's ruling on an attorney's motion to withdraw for abuse of discretion. *See State v. Hegge*, 53 Wn. App. 345, 350, 766 P.2d 1127 (1989). A court "'necessarily abuses its discretion by denying a criminal defendant's constitutional rights.'" *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting *State v. Perez*, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)). We review de novo a claim of a denial of constitutional rights. *Iniguez*, 167 Wn.2d at 280.

A criminal defendant has a right to the assistance of counsel at every critical stage of a criminal proceeding. U.S. Const. amend. VI; Wash Const. art. I, § 22; *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). "'[T]he right to counsel is the right to the effective

assistance of counsel.'" *United States v. Cronic*, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970)); *see also State v. Crawford*, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006). "If no actual 'Assistance' 'for' the accused's 'defense' is provided, then the constitutional guarantee has been violated." *Cronic*, 466 U.S. at 654.

The right to counsel requires that the defense be permitted to participate fully and fairly in the adversary factfinding process. *Herring v. New York*, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); *State v. Perez-Cervantes*, 141 Wn.2d 468, 490, 6 P.3d 1160 (2000). "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659. Circumstances of sufficient magnitude to create a presumption of prejudice have been found on "occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659-60.

"A defendant does not have a constitutional right to plea bargain." *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d 376 (1981) (citing *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977)). "The presence of counsel during all stages of plea bargaining is mandated by the courts." *State v. Swindell*, 93 Wn.2d 192, 198, 607 P.2d 852 (1980).

"Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." *State v. A.N.J.*, 168 Wn.2d 91, 111,

225 P.3d 956 (2010) (citing *State v. S.M.*, 100 Wn. App. 401, 413, 996 P.2d 1111 (2000)). "[A] defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *A.N.J.*, 168 Wn.2d at 109. "[A]t the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." *A.N.J.*, 168 Wn.2d at 111-12.

Gardner cites *United States v. Morris*, 470 F.3d 596 (6th Cir. 2006), to support her contention that the plea offer denied her the constitutional right to the assistance of counsel. In *Morris*, the defendant was charged in state court, but the investigation and prosecution of his alleged crimes were conducted through a joint effort between the federal government and state authorities. 470 F.3d at 598. The defendant took part in a "pre-preliminary examination," a procedure established to reduce jail overcrowding by expediting cases through the acceptance of plea offers. *Morris*, 470 F.3d at 598. He met his attorney for the first time immediately before this examination; during this meeting, his attorney advised him of the State's plea offer and the federal sentencing guidelines. *Morris*, 470 F.3d at 598. His attorney had not practiced in federal court and had no experience interpreting the federal sentencing guidelines. *Morris*, 470 F.3d at 598. She provided him with an incorrect estimate of his federal guideline range. *Morris*, 470 F.3d at 599. The meeting took place in a cell located behind a courtroom, through a meshed screen, and in the presence of other detainees. *Morris*, 470 F.3d at 599. After the meeting, the defendant was taken into the examination room, where the State made a plea offer that required

the defendant's immediate decision. *Morris*, 470 F.3d at 599. The defendant was not able to discuss his options privately with his attorney, and his attorney was not given time to investigate or interview witnesses. *Morris*, 470 F.3d at 599. The defendant rejected the plea offer and was referred to federal court. *Morris*, 470 F.3d at 599. The Sixth Circuit concluded that the defendant was constructively denied counsel because the circumstances, such as lack of time for adequate preparation and the lack of privacy for attorney-client consultation, would have precluded any lawyer from providing effective advice. *Morris*, 470 F.3d at 602.

Unlike *Morris*, Gardner's defense counsel did not suffer from circumstances that would have precluded any lawyer from providing effective advice. Gardner does not have a constitutional right to plea bargain; to set the terms of a plea offer; or, at the plea stage, to know every detail of the State's evidence against her. The terms of the plea offer did not interfere with her ability to participate fully in the adversarial process. If she had declined to accept the plea offer, she could have requested the confidential informant's identity, interviewed the confidential informant, and cross-examined the informant at trial. Gardner was not constructively deprived of her right to assistance of counsel.

Although Gardner asserts that "[t]his is not an ineffective assistance claim," she repeatedly cites *A.N.J.*, 168 Wn.2d 91.[2] Appellant's Reply Br. at 19. In *A.N.J.*, the State offered the defendant a plea deal: if the defendant would plead guilty to one count of first degree child molestation, the State would recommend a special sex offender disposition alternative; and, if the defendant finished treatment, the charge would be reduced to second degree child molestation.

[2] *A.N.J.* is a case in which our Supreme Court concluded that specific errors made by counsel deprived the defendant of his right to effective assistance of counsel. 168 Wn.2d at 109.

168 Wn.2d at 101. Defense counsel spent as little as less than an hour with the defendant before the plea hearing, did no independent investigation, did not review the plea agreement carefully, and did not consult with experts. *A.N.J.*, 168 Wn.2d at 102. The defendant pleaded guilty but after hiring a new attorney, moved to withdraw his guilty plea. *A.N.J.*, 168 Wn.2d at 102. The trial court denied his motion. *A.N.J.*, 168 Wn.2d at 105. Our Supreme Court concluded that the defendant had received ineffective assistance of counsel and held that "at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." *A.N.J.*, 168 Wn.2d at 111-12.

Gardner argues that the terms of the State's plea offer would have prevented even a fully competent lawyer from providing effective assistance because defense counsel could not have reasonably evaluated the State's evidence without the confidential informant's identity. Here, defense counsel could have provided reasonable and competent advice regarding the plea offer based on the information that has been provided. According to the State, it otherwise provided defense counsel with full discovery, including an affidavit of credibility regarding the confidential informant.[3] Defense counsel could have evaluated this evidence and informed Gardner of the specific terms of the State's plea offer. Defense counsel could have reasonably evaluated the evidence against Gardner and effectively assisted her in making an informed decision as to whether to plead guilty or go to trial.[4]

[3] Even if Gardner had received no information about the informant, the result would be the same. The missing information is simply part of what defense counsel may discuss with the client as they consider the State's offer.

[4] We note the difficulty in formulating a bright line rule for when counsel has insufficient

Even if the State had not provided Gardner with an "Affidavit of Credibility," the law does not require the State to disclose a confidential informant's identity at the plea bargain stage of the proceedings. In *State v. Moen*, 150 Wn.2d 221, 225, 76 P.3d 721 (2003), the defendant argued that "the State's policy of refusing to plea bargain with a criminal defendant who successfully compels disclosure of the State's confidential informant in a [related] civil forfeiture action chills his right to obtain discovery in the civil case and thus violates due process." Our Supreme Court held that the policy did not violate the defendant's due process rights. *Moen*, 150 Wn.2d at 231.

In reaching its conclusion, the court recognized the contractual nature of plea bargains, reasoning that "[a] plea bargain is a contract and both sides to the agreement must perceive an advantage to entering the bargain." *Moen*, 150 Wn.2d at 230 (internal citation omitted). Further, the court noted the legitimate State interest in protecting the identity of confidential informants. *Moen*, 150 Wn.2d at 230 (citing *State v. Casal*, 103 Wn.2d 812, 815, 699 P.2d 1234 (1985)). "When the State is compelled to disclose an informant's identity, it loses a valuable asset or tool of law enforcement. Under the policy, the State gains protection of its informants and, in exchange, the defendant receives the opportunity to bargain for a reduction or dismissal of charges." *Moen*, 150 Wn.2d at 230.

> We recognize that the prosecutor's policy requires the defendant to forgo his right to request disclosure of an informant's identity. However, a condition insisted on by the State that requires a defendant to give up a constitutional right does not, by itself, violate due process. "Agreements to forgo seeking an exceptional sentence, to decline prosecuting all offenses, to pay restitution on uncharged crimes, and to waive the right to appeal are all permissible components of valid plea agreements." *State v. Lee*, 132 Wn.2d 498, 506, 939 P.2d 1223 (1997); *see State v. Perkins*, 108 Wn.2d 212, 737 P.2d 250 (1987). The

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information to provide competent advice in the plea bargaining process. While we can determine that there was sufficient information here and insufficient information in *A.N.J.*, future cases will have to be evaluated on a case-by-case basis.

> theoretical basis for all plea bargaining is that defendants will agree to waive their constitutional rights.

Moen, 150 Wn.2d at 230-31.

Gardner argues that *Moen* is distinguishable because here the prosecutor did not refuse to make an offer and, "[h]aving done so, the State could not restrict counsel's constitutional function during the plea bargaining process." Appellant's Br. at 11. Further, Gardner asserts that the plea offer violates CrR 4.7(f)(2), which reads, "Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied." The *Moen* court's reasoning supports the conclusion that the State's plea offer was proper.

As we discussed above, the plea offer did not violate Gardner's constitutional right to the assistance of counsel. Further, a plea bargain is a contract, and the terms of the offer presented advantages to both parties: Gardner would have received the benefit of a lenient sentence and, in exchange, the State would have received the benefit of protecting its informant's identity. While the State asked Gardner to waive her right to request disclosure of the informant's identity, waivers are necessary components of plea agreements.[5] *See Moen*, 150 Wn.2d at 230-31. If Gardner had declined the plea offer and proceeded to trial, she would then have had a right, under CrR 4.7(f)(2), to learn the confidential informant's identity.

[5] Gardner asserts that if CrR 4.7(f)(2) is ambiguous, the rule of lenity applies and requires the disclosure of the informant's identity. Here, Gardner's waiver of her right to request the disclosure of the informant's identity is a term of the State's plea offer. Thus, CrR 4.7(f)(2) does not apply in this circumstance.

The State's plea offer did not preclude defense counsel from providing effective assistance of counsel. Further, the law did not require the State to disclose the confidential informant's identity before Gardner decided whether to accept the plea offer. Accordingly, we hold that the trial court correctly denied Gardner's motion for the withdrawal of counsel.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Van Deren, J.

Worswick, J.