IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 64810-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
JUSTIN JOSEPH ALEXANDER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 13, 2011

spearman, j. — Justin Alexander appeals his judgment and sentence for domestic violence felony violation of a court order. His sole contention is that the trial court erred when it failed to inquire into his statement at the sentencing hearing that his attorney had advised him the prosecutor would recommend a sentence at the low end of whichever standard range applied. He requests that we remand to determine whether he was misadvised. We conclude that the trial court did not err and affirm.

FACTS

On July 30, 2009, Alexander violated a no-contact order when he pointed a gun at Jennifer Kasama and attempted to hit her with his car. The two had resumed a dating relationship about a month before. On that day, they were at

Kasama's house when they got into a fight, and Kasama told him to leave. She heard a loud noise outside and went to investigate with her two roommates. One of the roommates and Alexander began arguing, and Alexander pulled out a rifle and pointed it at Kasama from five to six feet away. Alexander stated that he had come to shoot Kasama in the face. He put the rifle into his car, got inside, and backed into the street. At the base of the driveway, where Kasama was standing, Alexander lunged the car at her and she jumped away to avoid being hit.

Alexander was charged by information with one count of assault in the second degree and one count of felony violation of a court order. Both charges were further designated domestic violence. Before the case was set for a bench trial, the State and Alexander reached a plea agreement. Alexander pleaded guilty to domestic violence felony violation of a court order in exchange for the State dismissing the assault charge. The prosecutor, defense counsel, and Alexander signed a "Statement of Defendant on Plea of Guilty to Felony Non-Sex Offense" and a "Felony Plea Agreement." Both of these documents refer to Alexander's offender score as a four, with a standard sentencing range of 22 to 29 months, but note that Alexander was challenging one point from the offender score, which was based on the State's belief that he was on community custody at the time of the crime. The statement provides, "The prosecuting attorney will

make the following recommendation to the judge: 22 months incarceration." It also states that "[t]he prosecutor will make the recommendation stated in the plea Agreement and State's Sentence Recommendation, which are incorporated by reference." The State's sentence recommendation contains the same 22-month recommendation.

A plea colloquy was conducted on November 30, 2009, during which Alexander acknowledged that the State's understanding of his standard range was 22 to 29 months. He noted that his only challenge was that he was not on community custody at the time of the crime. He also acknowledged that the State was recommending 22 months and certain other terms, including "recoupment." His only question regarded the meaning of that term. He acknowledged that, other than the plea negotiations, nobody had made any threats or promises to get him to plead guilty, and affirmed that he had no other questions for the trial court or his attorney about entering the plea. Alexander then indicated his plea of guilty to the count of domestic violence felony violation of a court order. His attorney stated that, other than his question about recoupment, she had answered his questions. The trial court conducted a brief colloquy of its own and then accepted Alexander's plea of guilty. Alexander once again stated that he had no questions for the trial court or for his attorney.

At the sentencing hearing on December 4, 2009, the prosecutor conceded

that, according to the Department of Corrections, Alexander had not in fact been on community custody. Therefore, his offender score was three, with a standard range of 15 to 20 months. The prosecutor stated that her recommendation was for a low-end sentence when she understood the range to be 22 to 29 months, but that, as she indicated to defense counsel, "with a range of 15 to 20 we would be recommending high end." The prosecutor then recommended a 20-month sentence. Neither Alexander nor defense counsel objected.

Defense counsel argued for a Drug Offender Sentencing Alternative (DOSA). Alexander, given an opportunity to allocute, reiterated his attorney's request for a DOSA, attributing his criminal behavior to drugs and alcohol. He did not ask for a low-end sentence or object to the prosecutor's 20-month recommendation during his allocution. He stated, "[W]hat worries me the most is not—not—not going to prison for longer time but not getting out and being able to stay straight and I think that DOSA would keep – keep me on that path because that's what I struggle with."

After further argument, the trial court imposed a sentence of 20 months. At this time, Alexander objected:

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

The prosecutor stated that she had indicated to defense counsel that if Alexander was not on community custody at the time of the offense, she would recommend the high end of 15 to 20 months, but that if he was on community custody, she would recommend the low end of 22 to 29. Alexander stated, "My lawyer explained to me three or four times that either way I was going to get the minimum." The court's response to Alexander's statement does not appear in the record, but the court sentenced Alexander to 20 months of confinement.[1] Alexander appeals.

DISCUSSION

Alexander argues that the court below erred in imposing his sentence without inquiring into his assertion that his attorney misinformed him about the prosecutor's recommendation.[2] He contends that the court should have, sua sponte, conducted an inquiry to determine whether to appoint new counsel. In support, he cites State v. Rosborough, 62 Wn. App. 341, 814 P.2d 679 (1991); State v. Allen, 57 Wn. App. 134, 787 P.2d 566 (1990); State v. Garcia, 57 Wn. App. 927, 791 P.2d 244 (1990); and State v. Dougherty, 33 Wn. App. 466, 655

[1] The court's response to Alexander's statement is described in the verbatim report of proceedings as "inaudible." Nonetheless, for purposes of this appeal, we accept Alexander's representation that the court made no inquiry into his claim.

[2] In its brief, the State responds to any potential claim based on ineffective assistance of counsel. While Alexander makes reference to receiving ineffective assistance, he does not press that claim on appeal. Instead, he argues that the trial court failed to conduct, sua sponte, a thorough examination of the factual circumstances of his claim that his attorney had misadvised him to determine whether to appoint new counsel.

P.2d 1187 (1982).

The State argues that the record is sufficient to conclude that the trial court did not err in imposing Alexander's sentence and denying any implied motion based on ineffective assistance of counsel. It points out that Alexander made no express motion based on ineffective assistance and argues that none of the cases he cites support his claim on appeal.

We agree with the State. First, the record belies his assertion that his attorney told him that the State would recommend the low end regardless of which standard range applied. Alexander did not raise any objections or ask any questions at previous opportunities when it was clear that the State planned to recommend 20 months if the lower sentencing range applied. He raised no objection until after the court announced his sentence. As the State contends, the timing of Alexander's objection indicates that his real complaint was with the trial court's sentence, not the prosecutor's recommendation.

We also note that the trial court was not required to accept the State's recommendation. Alexander acknowledged and agreed to this in his plea form:

> The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so or both parties stipulate to a sentence outside the standard range. If the judge goes outside the standard range, either I or the State can appeal that sentence to the extent to which it was not stipulated. If the sentence is within the standard range, no one can appeal the sentence.

Even if the State had agreed to recommend the low end of the sentence regardless of which standard range applied—a claim that is not supported by the record—the trial court could have imposed a high-end sentence. Alexander agreed that this was a possibility, and under the plea agreement that he signed he was subject to the sentence that he ultimately received.

Alexander's reliance on Rosborough, Allen, Garcia, and Dougherty is misplaced. None of these cases stand for the proposition that a trial court errs by not conducting an inquiry, sua sponte, whenever a defendant makes an allegation about defense counsel that could be construed as a request for new counsel. In all of these cases, the defendants expressly sought new counsel.[3] Here, Alexander made no argument or motion to the court below that he wanted to withdraw his guilty plea or discharge his attorney. Nor does he claim on appeal that he seeks to withdraw his guilty plea.

Finally, if and to the extent that Alexander's claim relies upon an assertion

[3] See Rosborough, 62 Wn. App. at 342 (defendant's motion for a new trial based on allegation of ineffective assistance and attorney's motion to withdraw); Allen, 57 Wn. App. at 139-40 (motion by defense counsel to withdraw at defendant's request after jury verdict but before sentencing); Garcia, 57 Wn. App. at 932 (motion to withdraw guilty plea on the ground that plea was not voluntary because defendant received ineffective assistance); Dougherty, 33 Wn. App. at 467 (motion to discharge court-appointed attorney). Furthermore, Dougherty did not involve an appeal of the trial court's denial of the motion to discharge the court-appointed attorney. In that case, Dougherty asked the trial court at his arraignment to discharge his court-appointed attorney, claiming that the attorney was passing on confidential information to the prosecutor. Id. at 467-68. The trial court denied his motion at first, but after two additional requests to proceed pro se, the trial court granted the request. Id. The court ordered the public defender to continue as standby counsel. Dougherty was convicted on both counts. Id. at 468. His claims on appeal were that (1) the trial court failed to determine whether the waiver of his right to counsel was knowingly and intelligently made and (2) he was deprived of his due process right to meaningful access to the courts by the State's failure to provide him sufficient legal materials. Id. at 468-69.

that his attorney wrongfully induced him to enter into the plea agreement, such claim relies on evidence outside of the record. We do not, on direct appeal, consider matters outside the record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted). A defendant alleging ineffective

assistance of counsel must show deficient representation based on the record below. Id. Affirmed.

Spearman, J.

WE CONCUR:

Becker, J.