

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

In the Matter of the Personal )  
Restraint of: ) No. 66499-9-I  
)  
)  
ABDIRAHMAN SHEKH SAKAWE, ) DIVISION ONE  
)  
) UNPUBLISHED OPINION  
Petitioner. )  
) FILED: June 4, 2012

Per Curiam. Abdirahman Sakawe was convicted by a jury of second degree robbery, attempted second degree robbery, and second degree assault in King County Superior Court No. 08-1-00224-8 KNT. He has now filed this personal restraint petition claiming he received ineffective assistance of counsel. To prevail here, Sakawe must establish either (1) actual and substantial prejudice arising from constitutional error, or (2) nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). Bare assertions and conclusory allegations are not sufficient to command judicial consideration and discussion in a personal restraint proceeding. In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

To establish ineffective assistance, Sakawe must show that counsel's performance was deficient and that prejudice resulted from the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984); State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). Among other things, Sakawe contends that defense counsel failed to advise him of the immigration consequences of pleading guilty versus going to trial. With his original petition, Sakawe provided the affidavit of Ann Benson, Directing Attorney for the Washington Defender Association's Immigration Project, stating that 1) Sakawe's convictions led to an immigration court's finding that he is deportable; and 2) a conviction of either of the offenses listed in the State's two pre-trial plea bargain offers would not have rendered Sakawe subject to deportation. In his sworn declaration, Sakawe states that 1) he told defense counsel of his immigration status; 2) defense counsel did not advise him of the immigration consequences of the State's plea bargain offers; 3) staying in the United States is very important to him; and 4) had he known that the offered plea bargains would not have rendered him deportable, he would have pleaded guilty to one of the offers.

The Acting Chief Judge remanded the matter to the trial court for a reference hearing to determine whether defense counsel discussed with Sakawe the potential consequences to his immigration status of conviction resulting from the plea offers or from trial on the original charges and whether Sakawe would have pleaded guilty if properly advised regarding immigration matters. After considering sworn testimony of Sakawe's two defense attorneys, Ann Benson, and Sakawe, the trial court entered findings of fact. The trial court found that Sakawe's trial attorney incorrectly advised him that he would be subject to deportation if he

accepted either of the State's two pretrial plea bargain offers. As to the question of whether Sakawe would have pleaded guilty if he had been properly advised regarding immigration matters, the trial court found:

The procedural context of this case makes this question very difficult. After protesting his innocence, being emphatic with his counsel that he was not interested in any plea offers, and choosing the strategy of going to trial, Sakawe now testifies that had he known about the immigration consequences, his decision would have been different. Although this testimony is inherently suspect, it does not change the fact that Sakawe was never given the opportunity to make the choice given counsel's incorrect legal advice.

In fact, given his counsel's legal advice, he chose the only option that held out any hope of staying in the United States, proceeding to trial. If acquitted, he could remain in the United States.

Sakawe testified that he does not want to return to Somalia. He has had limited contact with anyone there since his departure from Somalia at six years of age, and is aware of the civil war that continues today. He testified that he would have accepted either of the plea offers had he known that in doing so he could avoid deportation.

The Court finds that Sakawe would have pled guilty if he had been properly advised regarding immigration matters.

Findings of Fact on Reference Hearing, 6.

Defense counsel has a duty to discuss plea negotiations with a client and must "[provide] sufficient information to enable the client to make an informed judgment whether or not to plead guilty." State v. Holm, 91 Wn. App. 429, 435, 957 P.2d 1278 (1998). Failure to advise a defendant "of the available options and possible consequences constitutes ineffective assistance of counsel." In re Pers. Restraint of McCready, 100 Wn. App. 259, 263, 996 P.2d 658 (2000). In McCready, after rejecting a plea bargain, going to trial, and being convicted, McCready filed a personal restraint petition claiming he

received ineffective assistance of counsel because his attorney failed to inform him that a firearm enhancement would run consecutive to his sentence on the original charge. Id. at 261-63. At a reference hearing, the trial court found that defense counsel did not inform McCready that his absolute minimum time if convicted as originally charged would be 10 years: a five-year mandatory minimum plus a consecutive five- year firearm enhancement. Id. at 262-63. This court held that “McCready’s rejection of the plea offer was not voluntary because he did not understand the terms of the proffered plea bargain *and the consequences of rejecting it.*” Id. at 263. This court granted McCready’s petition and remanded for retrial, observing that if McCready had been properly advised, “he may have made a different choice . . . decided not to take the chance on acquittal . . . and, instead, opted for the plea bargain.” Id. at 265.

Here, the trial court found that defense counsel properly advised Sakawe that he would be rendered deportable if convicted of original charges. However, defense counsel gave Sakawe an incorrect statement of the law as it applied to his situation, telling him that he would be rendered deportable if he accepted the plea bargain offer. Defense counsel advised Sakawe that he would be deportable because the offer involved a “crime of moral turpitude.” Findings of Fact on Reference Hearing, 4. But given Sakawe’s entrance into the United States as a refugee when he was six years old in 1996 and the fact that he had since obtained “lawful permanent resident” status deemed to have

begun in 1996, the trial court found the relevant question was whether he would be sentenced to less than a year in confinement. Finding of Fact on Reference Hearing, 2-3. Each of the two plea bargain offers allowed for a potential sentence of less than 12 months. Sakawe's standard range for the charges for which he was tried was 22 to 29 months. Under these circumstances, defense counsel's incorrect statement of the law prevented Sakawe from making an informed judgment whether or not to plead guilty.

Sakawe has also established that he was prejudiced by his attorney's deficient performance. The trial court here specifically found that Sakawe would have pleaded guilty if he had been properly advised regarding immigration matters. Under McCready, the proper remedy is reversal and remand for retrial.

Granted and remanded for retrial.

For the court:

Becker, J.

Schiveller, J.

Speckman, A.C.J.