IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27611-2-III**
Respondent,	)	
	)	**Division Three**
v.	)	
MARTIN GERALD GANN,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

Sweeney, J. — The courts will set aside a guilty plea if it is made without knowledge of its consequences or if the State recommends an agreed-upon sentence but then later expresses reservations about the proposed sentence. *See State v. Lake*, 107 Wn. App. 227, 233-34, 27 P.3d 232 (2001). The appellant here challenges the validity of his guilty plea and the denial of his request for a Special Sex Offender Sentencing Alternative (SSOSA) sentence, RCW 9.94A.670. This record supports the conclusion that the appellant understood the sentencing consequences of his offenses and that he understood he waived certain rights by pleading guilty. We also conclude that the State did not violate the plea agreement by telling the court that the State was not aware of the

appellant's past sex offender treatment. We, therefore, conclude that the appellant's plea was valid. And we affirm his convictions and sentence.

FACTS

The State charged Martin Gann with and he pleaded guilty to three counts of indecent liberties.

The trial judge informed Mr. Gann of the elements of the charges against him, and he indicated that he understood those elements:

> THE COURT: You're charged by Amended Information that will be filed today. Count I, Indecent Liberties, elements, in the State of Washington, on or about between August 1, 2002, and April 1, 2003, by forcible compulsion, you did knowingly cause BAS and SLD, not the spouse of the defendant, to have sexual contact with the defendant or another.
>
> Are you aware of that count and those elements?
>
> THE DEFENDANT: Yes, I am.
>
> THE COURT: You're charged in Count II with Indecent Liberties. Do you need me to read the elements of that charge to you?
>
> THE DEFENDANT: No.
>
> THE COURT: Count III, Indecent Liberties. Do you need me to read the elements of that charge to you?
>
> THE DEFENDANT: No.

Report of Proceedings (RP) (Aug. 11, 2008) at 6-7. Mr. Gann also told the court that he had read a copy of the amended information and had reviewed it with his attorney. He further indicated that he understood the offenses' elements and that each offense charged carried a maximum sentence of life in prison and that the standard range sentence for each count was 98 to 130 months with a

community custody term of life.

The trial court then advised Mr. Gann that his guilty plea would waive, among other rights, his right to trial, his right to confront witnesses, and his right to remain silent:

> THE COURT: You have some important constitutional rights, Mr. Gann. They start with right to counsel, right to have counsel present during all questions, right to a speedy public trial, *the right to hear and question witnesses*, the right to testify, *the right to remain silent*, the right to be presumed innocent until such time as the State proves beyond a reasonable doubt any charges against you. If you were found guilty after the trial, you would also have the right to appeal.
> Do you understand those rights?
> THE DEFENDANT: Yes, I do.
> THE COURT: On the other hand, if you plead guilty and if the Court accepts your plea, you'll be found guilty. *No trial*. No appeal. The only issue remaining would be sentencing.
> Do you understand those consequences?
> THE DEFENDANT: Yes, I do.

RP (Aug. 11, 2008) at 7-8 (emphasis added).

The court then accepted Mr. Gann's guilty plea on all three counts of indecent liberties:

> Counsel, I have found that Mr. Gann has knowingly and voluntarily plead[ed] guilty to the three counts . . . I find Mr. Gann guilty as charged: Count I, Indecent Liberties; Count II, Indecent Liberties; and Count III, Indecent Liberties.

RP (Aug. 11, 2008) at 17.

The State then recommended a SSOSA sentence with 12 months of confinement and credit for time served. The court was not prepared to consider the State's recommendation because it had not received a SSOSA report. Mr. Gann's attorney told the court that he and the State had had the report for a week. The court got a copy of the report, called a recess, and reviewed it.

The court then heard from several people, including the victims and their advocates and parents. The statements included references to a deferred charge against Mr. Gann in Montana that was dismissed after he completed a sex offender treatment program. Defense counsel objected to the victims and their families having received information about Mr. Gann's Montana charge and treatment:

> The only concern that I have is that it appears that the probation officer doing the evaluation saw fit to share information that was taken through confidential information and pass it on to these families. This stuff was not – Mr. Gann was not convicted of anything. The indication that he participated in some kind of counselling [sic] is not a detail that the attorneys had access to until after publication of the probation-officer report. The fact that this stuff was shared with 14-year-old children who are now referencing [SSOSA] and the fact that he had an incident in Montana, that – that concerns me, your Honor, because it has inflamed these people. And I submit to you that that's not the place for the probation officer. This report should have been shared with the Court and with the parties, not the victims' families. These people were in a horrible position to begin with . . . and adding to that has now created a situation where the – the people who said "Yes, we think SSOSA is a good idea" are now in here advocating to the contrary.

RP (Oct. 21, 2008) at 38-39. The prosecutor and defense counsel told the court they did not know at the time of the plea hearing that Mr. Gann had received treatment in the past.

The sentencing court then asked Mr. Gann to stand to deliver his statement. Mr. Gann apparently did not stand right away because he did not hear well. The court asked Mr. Gann if he had heard everything that was said at the sentencing hearing up to that point. He replied that he had.

The court listened to Mr. Gann's statement and then imposed sentence. It refused to give Mr. Gann a SSOSA sentence:

> I cannot justify giving you a SSOSA sentence. I cannot do it. Not that you don't need treatment, because you do. But this particular case cries out for punishment, and *12 months just ain't going to cut it*.
>
> Now, I don't know what you did in Montana: I don't know if you did time; I don't know what you did. But you're a danger. *You're a danger to the community*. . . . [T]he devastation that you've caused to these kids is so amazing and so over and above what I see, that *a SSOSA sentence does not benefit anyone except for you*, because it limits your jail time.

RP (Oct. 21, 2008) at 48-49 (emphasis added). Instead, it imposed 110 months of confinement with credit for time served and a life term of community custody.

DISCUSSION

Validity of Guilty Plea – Knowing Waiver

Mr. Gann first contends that his guilty plea was invalid because the trial court did not inform him of and he, therefore, did not waive his right to a jury trial, his right to confront witnesses, or his right to remain

silent.

We review the circumstances under which a guilty plea was made de novo. *Young v. Konz*, 91 Wn.2d 532, 536, 588 P.2d 1360 (1979).

A guilty plea must be made with knowledge of its consequences to be valid. *Wood v. Morris*, 87 Wn.2d 501, 505-06, 554 P.2d 1032 (1976). But "there is no constitutional requirement that there be express articulation and waiver of [the rights to silence, to confront witnesses, and to a jury trial] by the defendant at the time of acceptance of his guilty plea if it appears from the record . . . that the accused's plea was intelligently and voluntarily made, with knowledge of its consequences." *Id.* at 508.

The court expressly informed Mr. Gann that he would waive his rights to trial, to question witnesses, and to remain silent by pleading guilty. Mr. Gann told the court that he understood these consequences, that he had time to talk to his attorney about them, and that he did not have any questions for the court or his attorney. He also signed a plea statement in which he admitted to reading and understanding the consequences of his plea. Mr. Gann's plea statement creates a strong presumption that his plea was voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). And the record of Mr. Gann's plea hearing further supports that presumption. Mr. Gann's guilty plea was knowing, voluntary, and intelligent.

Validity of Guilty Plea – Breached Plea Agreement

Mr. Gann next argues that his guilty plea is invalid because the State breached its agreement to recommend a SSOSA sentence by telling the sentencing court it was not aware at the time of the plea hearing that Mr. Gann had received sex offender treatment in the past. Mr. Gann did not raise this issue in the trial court. But whether the State breached a plea agreement is an issue of constitutional magnitude. *In re Pers. Restraint of James*, 96 Wn.2d 847, 849, 640 P.2d 18 (1982). We, therefore, consider this argument for the first time on appeal. RAP 2.5(a)(3).

The State must comply with the terms of a plea agreement; and if the State agrees to recommend a sentence, it must do so. *State v. Talley*, 134 Wn.2d 176, 183, 949 P.2d 358 (1998). It may not undercut the agreement "explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement." *State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). For example, the State breaches a plea agreement by recommending an agreed-upon sentence and then expressing its reservations about the terms of the plea agreement to the court. *See Lake*, 107 Wn. App. at 233-34 (prosecutor's statement at sentencing that she was no longer sure defendant was suitable for counseling was a breach of prosecutor's plea bargain).

That did not happen here. The State agreed to recommend a SSOSA sentence in

exchange for Mr. Gann's guilty plea. And it did, in fact, recommend a SSOSA sentence. The State then responded to the court's question that it did not know about Mr. Gann's past treatment:

> THE COURT: But I'm wondering whether or not the fact that [Mr. Gann] already had been through treatment was known [at the plea hearing].
> [DEPUTY PROSECUTOR]: The treatment issue was not something the state was aware of.

RP (Oct. 21, 2008) at 45. The statement did not express any reservation about the State's SSOSA recommendation or the effect past treatment would have on the recommendation. The prosecutor did not breach the plea agreement when he candidly answered the court's question.

Validity of Guilty Plea – Statement of Additional Grounds

Mr. Gann further challenges the validity of his guilty plea in a statement of additional grounds. He argues that his guilty plea was invalid because he had not read or been read the plea documents before the plea hearing. He argues that the documents contained several changes he would not have agreed to, including lifetime supervision, a sentence of 130 months to life, and the addition of the word "forcible." The record, however, shows that, before pleading guilty, Mr. Gann told the trial court he read and reviewed the charges with his attorney. He also told the court he understood the elements of indecent liberties, which included forcible compulsion. He further informed the court he understood the offenses carried a

maximum sentence of life in prison and that the standard range sentence for each count was 98 to 130 months with a community custody term of life.

Mr. Gann also contends that his plea was not knowing, intelligent, and voluntary because he was told that the court always followed a plea-bargained sentencing recommendation. A sentencing court is, of course, not bound by a plea agreement. RCW 9.94A.431(2); *State v. Wakefield*, 130 Wn.2d 464, 474, 925 P.2d 183 (1996). And, again, the record shows Mr. Gann was aware of this. RP (Aug. 11, 2008) at 7; Clerk's Papers at 13.

SSOSA Sentence

Mr. Gann couches the next argument of his main appeal as a procedural challenge to the sentencing court's denial of his request for a SSOSA sentence. A defendant may appeal a standard range sentence only if the sentencing court failed to follow proper sentencing procedures. RCW 9.94A.585(1); *State v. Autrey*, 136 Wn. App. 460, 469, 150 P.3d 580 (2006). Mr. Gann contends that the sentencing court's decision to deny his request for a SSOSA sentence was procedurally flawed because it was based on facts not in the record—that he had a prior conviction and served jail time for that conviction. He maintains that a sentence should be based on facts in the record. *State v. Russell*, 31 Wn. App. 646, 644 P.2d 704 (1982).

We review a sentencing court's refusal to impose a SSOSA sentence for abuse of discretion. *State v. Frazier*, 84 Wn. App. 752, 753, 930 P.2d 345 (1997).

Mr. Gann contends that the sentencing court denied his request for a SSOSA sentence based on the belief that he had a prior conviction and served a sentence for that conviction. He is mistaken. The court refused to impose a SSOSA because it found that such a sentence would be too lenient, that Mr. Gann was a danger to the community, and that the community would not benefit from the use of a SSOSA sentence. RP (Oct. 21, 2008) at 48-49. These are tenable grounds for refusing to impose a SSOSA sentence, and they are supported by this record. *See* RCW 9.94A.670(4); *see* former RCW 9.94A.670(4) (2004); *see also* former RCW 9.94A.670(4) (2002) (community benefit factor). Mr. Gann, therefore, has not shown that the sentencing court abused its discretion by refusing to impose a SSOSA sentence.

Ineffective Assistance of Counsel

Mr. Gann next claims his lawyer was ineffective. We review these claims de novo. *State v. Meckelson*, 133 Wn. App. 431, 435, 135 P.3d 991 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

We strongly presume that Mr. Gann was effectively represented. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). He must, therefore, show that

his attorney's conduct was deficient *and* prejudicial. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

He first argues that his attorney failed to object to "the state or [Department of Corrections] providing the victims and/or victim advocates with erroneous information about the alleged Montana matter." Appellant's Br. at 10. The record shows something else. Mr. Gann's attorney lodged a detailed objection with the court on this very point. RP (Oct. 21, 2008) at 38-39.

Mr. Gann also contends that his attorney should have objected to the prosecutor's statement that it did not know Mr. Gann had received sex offender treatment in the past. Again, the prosecutor's statement was not improper.

Mr. Gann's next two claims of ineffective assistance of counsel fail because he has not shown that his attorney's conduct was prejudicial. Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

First, Mr. Gann's attorney did not inform the sentencing court until the end of the sentencing hearing that Mr. Gann has difficulty hearing. Mr. Gann does not explain how revealing this information earlier would have persuaded the court to impose a SSOSA sentence instead of the 110-month sentence he received. Moreover, Mr. Gann reassured

the court that he had heard everything that had been said up to the point that the court learned of his hearing problem. His attorney's conduct, then, did not affect the result here.

Second, Mr. Gann's attorney gave the sentencing court a copy of the SSOSA report at the sentencing hearing instead of before the hearing. This omission did not prevent the court from considering the report before imposing sentence. And it is not clear whether reviewing the report earlier would have changed Mr. Gann's sentence—the SSOSA report is not part of our record on appeal. We conclude on the basis of the record before us, then, that counsel's conduct did not prejudice Mr. Gann.

Ineffective Assistance of Counsel – Statement of Additional Grounds

Mr. Gann further contends in his statement of additional grounds that his trial attorney rendered ineffective assistance of counsel by not advising him that the attorney could and should represent Mr. Gann at his presentence report interrogation. He asserts that, without his attorney, he was intimidated by the person conducting the interrogation and thought he had to comply with all of her questions. His complaint refers to matters outside of this record. And we cannot then review it. *State v. Johnston*, 100 Wn. App. 126, 135-36, 996 P.2d 629 (2000).

Mr. Gann also claims that his attorney was ineffective when he did not object to

the presentence investigation report. He contends that the report was incorrect. Even assuming this omission was unreasonable, Mr. Gann does not address the prejudice prong of the ineffective assistance of counsel test. His failure to establish both elements of the test defeats his claim. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Finally, Mr. Gann asserts that his attorney agreed to an incorrect calculation of credit for time served. His attorney agreed that the State would recommend five days of credit, and he claims he was entitled to six days. His judgment and sentence, however, provides that the jail would be responsible for computing his credit for time served. And neither this record nor Mr. Gann suggests that the jail has failed to correctly calculate these credits. Counsel's conduct, then, was not prejudicial.

We affirm Mr. Gann's convictions and sentence.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Schultheis, C.J.

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Kulik, J.