IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Ire the Personal Restraint Petition Of KALE A. VORAK, Petitioner.	No. 38246-6-II UNPUBLISHED OPINION

Bridgewater, J. — Kale A. Vorak appeals the trial court's denial of his personal restraint petition following the transfer of his petition from this court pursuant to RAP 16.11(b) for a determination on the merits. We hold that Vorak failed to establish that his trial counsel was ineffective during plea negotiations. We affirm.

Facts

The present matter is a civil appeal from a superior court order denying defendant's personal restraint petition in a determination on the merits. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 409-10, 972 P.2d 1250 (1999) (personal restraint petition is a civil matter). We need not belabor the details of the underlying crime for present purposes. It is sufficient to note that Vorak was convicted of charges stemming from his attempt to shoplift cold medications from a supermarket. Vorak was apprehended by store security who subdued him after he pulled a gun and fired it several

times during a scuffle with security.[1]

A jury convicted Vorak of one count of first degree robbery, two counts of first degree assault, and one count of first degree unlawful possession of a firearm, with a firearm enhancement for each assault and robbery count. Prior to trial, the State offered to dismiss one count of first degree assault, and recommend a low-end, standard-range sentence of 212 months in exchange for Vorak's plea of guilty. The State's offer also required Vorak to forgo any merger argument. Vorak rejected the plea offer, proceeded to trial, and lost. At sentencing, Vorak argued that the assault counts merged with the robbery count. The sentencing court rejected the merger argument and Vorak appealed that issue.[2] While his appeal was pending, our Supreme Court decided *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), which clarified the law on merger and controlled the disposition of Vorak's case.[3] We affirmed Vorak's convictions and sentence in an unpublished decision applying *Freeman*. *Vorak*, noted at 129 Wn. App. 1047, 2005 WL 2503702 at *1-2.

After losing his appeal, Vorak filed a personal restraint petition claiming ineffective assistance of counsel during pretrial plea bargaining. We transferred the personal restraint

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[1] *State v. Vorak*, noted at 129 Wn. App. 1047 (2005). We cite to the previous unpublished decision in this case only for purposes of providing the underlying factual and procedural background for the present matter. *See* GR 14.1(a) (unpublished Court of Appeals opinions may not be cited as authority).

[2] The trial court ultimately imposed a sentence totaling 539 months, correcting its original sentence of 719 months that was incorrectly calculated. *Vorak*, noted at 129 Wn. App. 1047, 2005 WL 2503702 at *1.

[3] *Freeman* held that the legislature did not intend first degree assault to merge into first degree robbery. *Freeman*, 153 Wn.2d at 778.

petition to the superior court for a determination on the merits. Our order directed the superior court to resolve a factual dispute as to whether Vorak's trial counsel (1) did not explain that Vorak's offender score and standard range would be higher if convicted of more charges after a trial; (2) did not explain that if convicted of both assaults after a trial, those sentences would be served consecutively; (3) did not explain that if convicted of all counts at trial, Vorak would serve three consecutive firearm enhancements, not just the one in the offer; and (4) provided poor advice about the prospects for trial success and for merger of the offenses if convicted.

The determination on the merits hearing commenced on August 6, 2008, before the Pierce County Superior Court. The court heard testimony from Vorak and his trial counsel, Dino Sepe. The court also reviewed several exhibits, including the information, judgment and sentence relating to Vorak's criminal charges, a copy of the State's plea offer, sentencing memoranda from both parties, and the verbatim transcript of the sentencing hearing.

At the August 6 hearing, Vorak testified that Sepe advised him not to take the State's plea offer because the State was being "greedy," and that he should go to trial. 1 RP at 15. Vorak said that Sepe told him that if he ended up losing at trial, he "wouldn't get much more than [the State's offer] anyways, so that there was no risk." 1 RP at 16. Vorak also claimed that Sepe told him that he was "going to the Supreme Court with [the case], he's going to win it and all that." 1 RP at 16. In addition, Vorak claimed that Sepe never told him how much time he would be sentenced to if he were convicted of all charges, never explained that three firearm enhancements would run consecutively, never explained that the two assault charges would run consecutively, and never gave him any kind of "worst case scenario." 1 RP at 17, 18.

Vorak testified that, if he had known that he was facing a potential sentence of 44 years, 11 months, he would have accepted the State's offer. However, Vorak also insisted that he had never assaulted anybody. When asked what remedy he sought, Vorak responded, "I'd like a new trial and a new attorney so that he can pursue a plea bargain for me that would be more reasonable; you know, one that he actually advocates for rather than recommending then rejecting." 1 RP at 31. Vorak stated, "I want an attorney that's willing to advocate for my defense and give me the best deal attainable." 1 RP at 31.

Vorak also admitted at the August 6 hearing that he did not know what kind of prison sentence he would have been facing as he is "an optimistic person so I didn't really dwell on that too much," but he did not believe he would be facing any more than 30 years. 1 RP at 19. Vorak testified that when the court announced his sentence, he was surprised and "the realization that I might actually have to go to jail kind of hit me hard." 1 RP at 20.

Sepe also testified at the reference hearing, stating that he is an experienced criminal trial attorney with an active appellate practice, and that he has represented criminal defendants for more than 20 years. His caseload consists primarily of class A felonies, including death penalty cases.

Sepe testified that he discussed the State's plea offer with Vorak, including the demand that Vorak forgo a merger argument. He also advised Vorak that if he were convicted of all the charges, his offender score and standard range would be higher than what was in the offer. Sepe testified that he explained the status of merger law in Washington, particularly the split among the divisions of the Court of Appeals at the time. Sepe stated that he told Vorak that he was

confident they would win a merger argument, but made it clear that he could not guarantee the outcome. Sepe testified that he made clear that if they lost the merger argument the assault charges would run consecutively and that three firearm enhancements would run consecutively. Sepe testified that he would never advise a client to forgo a reasonable plea offer just because he wanted to litigate an issue.

Following testimony and closing argument, the court reiterated the exact issues it was directed to address in our transfer order. The court ruled that Vorak did not meet his burden of proving ineffective assistance of counsel by a preponderance of the evidence, and denied his personal restraint petition. The court found no attorney error and no violation of the ethical obligation to discuss plea negotiations. The court also ruled that based on the evidence presented, there was no reasonable probability that Vorak would have accepted the plea agreement. The court issued findings of fact and conclusions of law supporting its decision. Vorak filed a notice of appeal.

Discussion

A decision of a superior court in a personal restraint proceeding transferred to that court for a determination on the merits by the Court of Appeals is subject to review in the same manner, and under the same procedure, as any other trial court decision. RAP 16.14(b). The matter is civil. *In re Gentry*, 137 Wn.2d at 409. We review the trial court's findings of fact for substantial evidence and then determine whether the findings support the conclusions of law and judgment. *State* ***v.*** *Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). We review the trial court's conclusions of law de novo and we will generally uphold those conclusions if they are supported

by the findings of fact. *In re Disciplinary Proceeding Against Poole,* 164 Wn.2d 710, 723, 193 P.3d 1064 (2008).

Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true. *In re Gentry*, 137 Wn.2d at 410. Conflicting evidence may be substantial so long as some reasonable interpretation of it supports the findings. *In re Gentry*, 137 Wn.2d at 411. We do not review the trial court's credibility determinations because the trial court had the opportunity to evaluate the witnesses' demeanor and judge their credibility. *In re Gentry*, 137 Wn.2d at 410-11.

At the evidentiary hearing, the petitioner bears the burden of proving deficient performance by a preponderance of the evidence. *See State v. Robinson*, 138 Wn.2d 753, 770, 982 P.2d 590 (1999). A personal restraint petitioner must demonstrate by a preponderance of the evidence actual and substantial prejudice either by a violation of his constitutional rights or by a fundamental error of law. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 874, 16 P.3d 601 (2001).

Both the federal and state constitutions guarantee a defendant effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996) (citing U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). A party alleging ineffective assistance must demonstrate (1) deficient representation, i.e., representation below an objective standard of reasonableness based on consideration of all the circumstances; and (2) resulting prejudice, i.e., the reasonable probability that except for counsel's unprofessional errors,

the result would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test of *Strickland*, 466 U.S. at 687)). Courts engage in a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335.

Here, the trial court determined that Vorak had failed to establish by a preponderance of the evidence that Sepe provided ineffective assistance during the pretrial plea negotiations. Vorak challenges this determination in two ways. First he contends that the trial court's findings of fact 6, 7, 8, and 9 are not supported by substantial evidence. Vorak also contends that Sepe urged Vorak to reject the plea offer based on his view that the assault and robbery charges would merge and that such view was unreasonable in light of developing case law. We reject both contentions.

The record reveals that each of the challenged findings is supported by substantial evidence. Each finding is attributable to a portion of Sepe's testimony. While Sepe's testimony and Vorak's testimony were often at odds, whom to believe and what weight is to be given such testimony are determinations for the fact finder that are not reviewable. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (reviewing court must defer to the fact finder on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence). *In re Gentry*, 137 Wn.2d at 410-11 (conflicting evidence may still be substantial, so long as some reasonable interpretation of it supports the challenged findings; although there may be other reasonable interpretations of the evidence, that does not justify appellate court reversal of a trial court's credibility determinations).

Regarding Vorak's specific allegations of error, finding 6 stated:

> 6. Sepe discussed the substance of both letters with Vorak, but a plea agreement was never reached. Throughout the plea negotiations, Sepe advised Vorak of the following:
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> a. If Vorak rejected the offer he would go to trial on *all* the charges listed in the original information and, if convicted, Vorak's offender score and standard range would be higher than that represented in the plea offer;
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> b. If Vorak were convicted of both first degree assaults at trial, the sentences on those offenses would be consecutive;
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> c. Vorak would serve three consecutive firearm enhancements if he were convicted of all charges and the enhancements at trial;
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> d. Vorak's prospects of succeeding on the merger issue were good, but Sepe could not make any guarantees as to how the trial court or, ultimately, the Supreme Court would resolve this issue;
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> e. Vorak's prospects for avoiding conviction on the assaults at trial were good, but Sepe could not guarantee that he would be acquitted.

CP at 23. Vorak acknowledged that Sepe discussed the plea offer with him and demonstrated that he understood the terms of the offer at the time. Sepe's testimony indicates that he discussed the plea offer with Vorak. Sepe also testified regarding his standard practices regarding how he advises his criminal defendant clients and stated that he did not vary from his standard practice with Vorak. These practices included that he advise clients that their offender score and standard range would be greater if they reject a plea offer, proceed to trial, and are convicted of all charges. Sepe testified that he discusses worst case and best case scenarios with this clients based on the particulars of each case, stressing the numbers resulting from contingencies such as consecutive sentences. Sepe testified that he made clear to Vorak that if he went to trial and was convicted on all charges, and if the defense's proffered merger argument did not prevail, Vorak would face consecutive sentences for each of the assault convictions and consecutive sentences for each of the firearm enhancements. Sepe testified that he made clear to Vorak that while he felt confident that the assault counts would merge with the robbery count, there were no

guarantees as to such result or as to the outcome of trial. Accordingly, we hold that substantial evidence supports finding 6a-e.

Finding 7 stated, "During these discussions, Sepe gave Vorak various 'best case' and 'worst case' scenarios based on different results that could occur if Vorak proceeded to trial." CP at 23. As noted, Sepe indeed so testified. We hold that substantial evidence supports finding 7.

Finding 8 stated:

> When Sepe and Vorak discussed whether Vorak's assaults and robbery would merge at sentencing, Sepe advised Vorak that the state of the law on merger was unsettled at the time, but he (Sepe) believed they had a persuasive argument on the issue. Sepe never guaranteed that they would win at trial or on appeal. Sepe advised Vorak that if the crimes did not merge, Vorak would be looking at a much longer sentence than that which was offered in the plea offer.

CP at 23. Vorak acknowledged that Sepe explained to him how the law of merger was unsettled at the time of the plea negotiations. Vorak's testimony regarding his discussions with Sepe during the pretrial period on the various approaches taken by different divisions of the Court of Appeals on the merger issue demonstrated a sophisticated understanding of the unsettled state of the law of merger at the time. As noted, Sepe testified that he explained to Vorak that merger law was unsettled, and that while he felt confident that the assaults would merge with the robbery, he made clear that there were no guarantees and should the defense's merger argument fail, Vorak would face "a whole lot more time." 1 RP at 47. We hold that substantial evidence supports finding 8.

Finding 9 stated:

> Vorak rejected the plea offer and proceeded to trial on February 5, 2004. Vorak's decision to forgo the offer and proceed to trial was a fully informed decision. The decision to reject the plea offer was Vorak's decision alone. Sepe did not put undue pressure on Vorak to reject the offer.

CP at 23-24. As the above discussion indicates, Sepe informed Vorak of potential risks he faced going to trial. Sepe also testified that he did not force or suggest that Vorak reject the plea. Sepe testified that "[Vorak] rejected the offer." 1 RP at 50. We hold that substantial evidence supports finding 9. Accordingly, we hold that substantial evidence supports the challenged findings, which support the trial court's conclusion that Vorak failed to establish that Sepe was ineffective during the pretrial plea negotiations period.

Finally, we are unpersuaded by Vorak's contention that Sepe urged him to reject the plea offer based on Sepe's unreasonable interpretation of merger law, and that Sepe's view of the law amounted to deficient performance. First, the trial court found that Vorak's decision to forgo the State's plea offer and proceed to trial was a fully informed decision, which was Vorak's alone, and that Sepe did not put undue pressure on Vorak to reject the offer. That finding is supported by substantial evidence. Moreover, as noted, the issue of whether the assaults here merged into the robbery was unsettled in Washington until our Supreme Court held in *Freeman* that first degree assault does not merge into first degree robbery. *Freeman*, 153 Wn.2d at 778. *Freeman* was decided while Vorak's appeal was pending. Accordingly, Sepe's merger argument—made prior to *Freeman's* resolution of that issue—was not unreasonable and does not advance Vorak's claim of deficient performance. *Cf. State v. Millan*, 151 Wn. App. 492, 502, 212 P.3d 603 (2009) (defense counsel's failure to anticipate changes in the law does not amount to deficient performance).

In sum, we hold that the trial court correctly determined that Vorak failed to establish by a preponderance of the evidence that Dino Seppe provided ineffective assistance during pretrial plea negotiations. Accordingly, the trial court properly denied Vorak's personal restraint petition.

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 pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.