NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 29 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TERRY W. MOWATT, Petitioner - Appellant, v. ELDON VAIL, WA Department of Corrections; JOHN W. GAY Warden, Florence Correctional Center, Respondents - Appellees.	No. 08-35142 D.C. No. CV-06-01590-JLR MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted November 2, 2008
Seattle, Washington

Before: B. FLETCHER and RAWLINSON, Circuit Judges, and EZRA,** District Judge.

Defendant Terry Mowatt appeals the denial without an evidentiary hearing of his habeas petition pursuant to 28 U.S.C. Section 2254 asserting that 1) he

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

received ineffective assistance of counsel during negotiation of his guilty plea, 2) his plea of guilty was not knowing, voluntary, and intelligent, and 3) his plea was taken by a judge pro tem lacking authority under Washington state law in violation of his federal constitutional rights.

In making our decision, we look to the Washington Court of Appeals opinion as the last reasoned state court opinion. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991). As Mowatt filed his federal habeas petition after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), he can prevail only if he can show that the state court's adjudication of his claims:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). We review the district court's denial of Mowatt's petition for a writ of habeas corpus de novo and its factual findings for clear error and affirm. *Pinholster v. Ayers*, 525 F.3d 742, 756 (9th Cir. 2008).

The Washington Court of Appeals did not act unreasonably in determining that Mowatt's counsel was not deficient. Under the facts accepted by the Washington Court of Appeals, Mowatt's attorney misinformed him concerning the basis for the prosecutor's threat of an exceptional sentence and indicated that he believed an exceptional sentence could be imposed on that inaccurate basis, though he did not guarantee that it would. At worst, this error caused Mowatt's attorney to inaccurately predict Mowatt's likely sentence if he were convicted after refusing to plead. We conclude it was reasonable to determine that such action is not "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *see, e.g.*, *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) (indicating that "a mere inaccurate prediction, standing alone" by counsel as to the likely outcome of pleading or of a failure to plead does not constitute ineffective assistance of counsel). Furthermore, we find no prejudice from counsel's misunderstanding. The actual basis suggested by the prosecutor for an exceptional sentence is supported by Washington law. *C.f.*, *State v. Suleiman*, 143 P.3d 795, 799 (Wash. 2006) (recognizing that analogous vehicular assault victims could be regarded as particularly vulnerable for purposes of justifying exceptional sentence). Thus, Mowatt's inaccurate basis for pleading was harmless error, since Mowatt was not in fact misinformed as to the possibility of receiving an

exceptional sentence. In addition, given Mowatt's lack of an effective defense prior to trial, there does not exist "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).[1]

The Washington Court of Appeals also did not act unreasonably in determining that Mowatt's plea was knowing, voluntary, and intelligent. Mowatt asserts that his plea was not knowing and intelligent because his attorney engaged in ineffective assistance of counsel by failing to advise him about the possibility of arguing at sentencing that the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), invalidated Washington's exceptional sentencing scheme. At the time of Mowatt's plea it was not clear *Apprendi* rendered Washington's exceptional sentencing scheme unconstitutional. That was not determined until *Blakely v. Washington*, 542 U.S. 296, 303 (2004). The failure of an attorney to

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[1]Mowatt also appeals the denial of his request for an evidentiary hearing to present the testimony of Dr. John I. Thornton concerning Mowatt's counsel's alleged improper reading of the autopsy report in proffering his inaccurate basis for an exceptional sentence. We review "[t]he decision by a district court to grant or deny an evidentiary hearing . . . .for abuse of discretion." *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008). For the reasons already given, Dr. Thornton's proposed testimony, even if accepted, would not support a finding of ineffective assistance. Hence, we do not find that the district court's denial of an evidentiary hearing was an abuse of discretion. *See Schriro v. Landrigan*, 127 S. Ct. 1933, 1940 (2007).

anticipate a change in the legal landscape benefitting the attorney's client does not constitute deficient representation and, therefore, cannot render a plea involuntary. *See Brady v. U.S.*, 397 U.S. 742, 757 (1970). In addition, for the reasons stated above, it is not reasonably probable that Mowatt would have pled differently had his counsel informed him of the possibility of raising an *Apprendi* challenge.

Finally, the Washington Court of Appeals properly determined that the judge pro tempore who accepted Mowatt's plea had authority to do so under Washington law. Under Washington law, a judge pro tempore approved by the elected judge assigned to a case and consented to by the parties is empowered to "try[]" that case, which necessarily includes the power to take any pleas. *See* Wash Const. art IV, Section 7; Wash. Rev. Code. Section 2.08.180; *see also* Wash. Rev. Code. 2.28.150 ("When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws."); *Nelson v. Seattle Traction Co.* 66 P. 61, 61 (Wash. 1901) ("We construe the statute to mean that a judge pro tempore acquires jurisdiction of a cause from the time of his appointment and qualification, and he thereafter tries what remains to be done in

the case, whether it be the trial of questions of fact or of law, or both.”). The Washington Court of Appeals properly determined that Mowatt consented to the pro tem judge presiding over his plea and the record shows the pro tem judge was approved by the court via stipulation printed with the elected judge’s signature. We affirm.

AFFIRMED.