No.: 102736-2

COA No. 56309-6-II
Grays Harbor County No. 20-1-00307-14

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff / Respondent,

v.

JAMES RUSSELL BRADY
Defendant / Petitioner.

ON APPEAL FROM THE COURT OF APPEALS, DIVISION TWO, AND THE SUPERIOR COURT OF THE STATE OF WASHINGTON, GRAYS HARBOR COUNTY

PETITION FOR REVIEW

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A. *IDENTITY OF PETITIONER AND DECISION BELOW*

James Brady, Petitioner, was the appellant in the Court of Appeals on direct review of criminal convictions. He asks the Court to grant review of the decision issued by Division Two in *State v. Brady*, __ Wn. App.2d __ (2023 WL 8769012) (unpublished), issued December 19, 2023. A copy of the decision is attached as Appendix A.

B. *ISSUES PRESENTED FOR REVIEW*

1. In *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010), this Court held that the Sixth Amendment and Article 1, § 22 require that appointed counsel advising about whether to enter a plea agreement must "actually and substantially" help the client make "an informed decision" about whether to waive their rights and engage in the deal.

   Where there is a "global" agreement in which the State requires codefendants to both enter pleas and where counsel knows that his client's greatest concern in deciding whether to engage in that agreement was whether his codefendant was likely to be allowed to serve her term as electronic home monitoring to avoid further trauma to her children, does counsel fail in his constitutional duties by affirmatively misadvising his client about the likelihood that such a result would occur,

failing to take reasonable measures to ensure his advice was correct, and failing to make reasonable efforts to increase the likelihood that his client would get the desired results?

2. Is it a miscarriage of justice to refuse to allow that client to withdraw his equivocal plea entered under *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984)?

3. Is it further ineffective assistance when new counsel failed to be familiar enough with the facts and the law to understand the issues, raises a completely inappropriate and unfounded accusation against the prosecution as the only issue, and does not raise a valid ineffective assistance claim?

C. *STATEMENT OF THE CASE*

Petitioner James Brady was involved in an altercation when his girlfriend, Christine Mills, was trying to pick up the children she had in common with Jeremy Orr, 6-year-old V and 5-year-old T. CP 173-75. It was alleged that Mr. Brady ended up holding Mr. Orr and his girlfriend, Jahkylee Wells, at gunpoint while Ms. Mills collected her children and that later Mr. Brady again pointed a gun at Mr. Orr while Ms. Wells'

brother pointed an AR-15 at Mr. Brady, Ms. Mills, and the children. CP 174-75. For her part, Ms. Mills was alleged to have at some point grabbed Ms. Wells by the hair and hit her head against the car. CP 174.

Mr. Brady maintained his innocence but was deeply concerned for Ms. Mills, who had never been in trouble before. 1RP 1-3, 6-7, 11, 2RP 15-16, 20-22, 24, 28-42, 49-50, 55-59, 100-108. The State had charged Ms. Mills and Mr. Brady as codefendants and said the cases needed to be dealt with "together." 2RP 24; 4RP 3-5.

After nearly a year of pretrial proceedings, the prosecutor made a "global offer. . . to both defendants that require[d] them both to accept." 1RP 18-19. Mr. Brady was told there would be no deal for Ms. Mills if Mr. Brady did not agree to enter pleas and accept an exceptional sentence, and that even though Ms. Mills was a first-time offender the State would try to put her away for seven years. CP 195-97; 2RP 80.

Mr. Brady's appointed counsel admitted that Mr. Brady repeatedly raised his concerns about what would happen to Ms. Mills. 2RP 98. During the nearly a year pretrial, Mr. Brady made it clear that this issue was "very important" and indeed they discussed it frequently. 2RP 98-101. Mr. Brady finally agreed to accept an equivocal plea under *In re Barr* after his attorney repeatedly advised him that the global deal was pretty much guaranteed to involve Ms. Mills avoiding jail and serving a sentence on electronic home monitoring (EHM). 2RP 98.

Indeed, the issue was so important to Mr. Brady that he continued to raise questions after he spoke with Ms. Mills when the deal was supposedly almost made and she was unsure about whether it would involve her serving only EHM. 2RP 98. Mr. Brady asked his appointed attorney to verify that this was the deal. 2RP 99. Instead of writing something into the plea agreements, calling the prosecutor, or advising his client that a

judge did not have to agree to these terms, counsel telephoned Ms. Mills' attorney who stated his belief that Ms. Ms. Mills was "getting EHM" with the plea agreement. 2RP 100.

At a later hearing, appointed counsel for Mr. Brady would say he was not sure it was exactly a "promise" that Ms. Mills would get EHM if Mr. Brady accepted the plea deal, but that "there was a definite understanding" that Ms. Mills was *only* looking at EHM if Mr. Brady entered the plea. 2RP 100-101. But neither appointed counsel for Mr. Brady nor counsel for Ms. Mills was familiar with Grays Harbor county superior court, where they did not usually practice. 2RP 100-103. Mr. Brady's attorney was from a county where the judges would follow a prosecutor's lead so that "when the prosecution says no objection to electronic home monitoring, that is essentially. . .parlance. . . for you're getting electronic home monitoring." 2RP 100, 103-104.

Mr. Brady's attorney just assumed that this practice was

the same in Grays Harbor county. 2RP 103-104. He made no effort to confirm this assumption prior to declaring to his client that it was so. 2RP 103-104. He did not talk with others more experienced in the county, or the prosecutor. Nor did he ask to see the agreement the State was offering Ms. Mills to see what it actually said. 2RP 102. So while he told his client the usual caveat that the ultimate sentence was up to a judge, he also told Mr. Brady "it was our understanding" that the State was offering EHM to Ms. Mills and that was the expectation of what she would get. 2RP 100.

Appointed counsel also never mentioned to Mr. Brady that there was any difference between a prosecutor not objecting to EHM versus "actively advocating" for it, and did not know which of those two Ms. Mills' agreement involved. 2RP 103.

Ms. Mills also understood the global plea deal would involve her just getting EHM. CP 273. When entering her plea,

she said she had not exactly had much time to consider her decision, and her attorney said Ms. Mills had concerns about the sentencing. CP 273. When the trial court was advising her of the plea terms and the potential sentence, he told her with her offender score the standard range was three to eight months, which meant "the judge who sentences you must sentence you to a period of incarceration not less than three months and not more than eight months," and that the prosecutor was agreeing that she "be sentenced to serve a term of three months[.]" CP 275-76. The judge asked if that was her understanding of the plea agreement and she said, "No." CP 275-76. Her attorney then explained that, under the plea, the prosecutor was "not objecting" to that time being spent on EHM. CP 275-76. She ultimately entered an *In re Barr* plea. CP 277-79. Mr. Brady entered his *In re Barr* pleas to two counts of third-degree assault (one each of Mr. Orr and Ms. Wells) and a guilty plea to unlawful firearm possession counts

shortly thereafter. 2RP 73-76; CP 148-59.

At sentencing, the prosecutor asked for the court to impose sentence on Mr. Brady first. 5RP 8. Appointed counsel told the court that Mr. Brady's deepest concern was that Ms. Mills had been dragged into this. 5RP 8. Mr. Brady had stipulated to an exceptional sentence of 300 months; if convicted as charged before the plea deal he was facing a third strike. 5RP 8. But counsel noted that was not really Mr. Brady's biggest concern; that was obviously Ms. Mills. 5RP 8.

When he addressed the sentencing court, Mr. Brady explicitly told the court his understanding that "by making this plea, this State [sic] would allow Ms. Mills to take advantage of a plea deal herself or something like house arrest or something in that nature." 5RP 10. Then, when Ms. Mills was being sentenced, the prosecutor argued that Mr. Brady was not the only one to blame, saying that Ms. Mills could have been held liable as an accomplice. 6RP 6. The prosecutor conceded that

the plea agreement allowed defense counsel to ask for Ms. Mills to serve EHM, but essentially argued against it. 6RP 6-10. Ms. Mills' counsel and Ms. Mills then asked for an EHM sentence, with Ms. Mills saying she thought that was what would happen as part of the plea deal. 6RP 13-15. The judge said EHM was not "appropriate" because Ms. Mills' conduct was not "innocent" and ordered a jail term with possible EHM after some time had been served. 6RP 15.

Within a day, Mr. Brady moved to withdraw his pleas. CP 195-97. At the later hearing on the motion, appointed counsel for the pleas, who had now withdrawn, admitted that he had assumed and not confirmed that the plea deal meant that Ms. Mills would almost certainly get EHM. 2RP 101-103. That attorney also admitted that it was absolutely clear that Mr. Brady was adamant that it was important to him that Ms. Mills get EHM if Mr. Brady were to waive his rights to prove his innocence and accept the plea deal. 2RP 104-106. Mr. Brady

also testified about being told that, while the ultimate decision on sentencing was up to the judge, his attorney had assured him that the prosecutor would recommend Ms. Mills get 90 days of EHM - but only if Mr. Brady also accepted his "deal." 2RP 106. If he had known that the deal was for the prosecutor to argue against EHM and the defense argue for it, he would not have entered into the plea agreement. 2RP 106.

Newly appointed counsel for the motion to withdraw, apparently misunderstanding the record or the issues, claimed that Mr. Brady should be allowed to withdraw his plea because the *State* had somehow failed in its promises to Mr. Brady, even there was no evidence of any such promise whatsoever. 2RP 109-11. The judge thought these arguments bordered on the absurd, amounted to punishing the State when it had no complicity in appointed counsel's errors, and were, frankly, "untenable." 2RP 111.

Appointed motion counsel then shifted and tried to

argue that plea counsel had been ineffective. 2RP 112-24. The judge called motion counsel out, however, because motion counsel *never argued ineffective assistance in the motion to withdraw the plea.* 2RP 112-24.

While agreeing that Mr. Brady had indeed been improperly, incorrectly told the State would support EHM for Ms. Mills as part of the plea, the judge denied the motion to withdraw the plea because the only argument motion counsel had properly raised was that the prosecution had violated a promise to Mr. Brady and it had not. 2RP 124; CP 286.

In affirming, Division Two first held that a defendant's declaration in open court that there were no other agreements between the parties at the time of the entry of pleas was "highly persuasive" that the plea was knowing, voluntary, and intelligent. App. A at 8. The Court of Appeals recognized that counsel has a constitutional duty to "actually and substantially" assist his client in determining whether to plead guilty, and

that misinforming a client about consequences which affect the calculation of the costs and benefits of standing trial can be ineffective assistance. App. A at 8-11. Division Two then declared that, essentially, Mr. Brady was simply "disappointed by Mills's sentence," and disappointment was not sufficient to require withdrawal of a plea. App. A at 12. The Court also held that it was not ineffective assistance for motion counsel to incorrectly accuse the State of breaking a promise instead of arguing ineffective assistance. App. A at 11-12.

The Court cited a "lack of prejudice," which it found based on appointed plea counsel's failure to have included anything about Ms. Mills' sentence in Mr. Brady's plea agreement or offer, which the Court seemed to think showed that *Mr. Brady* had no concerns about that in entering his plea. App. A at 11-12. Division Two did not address Mr. Brady's argument that plea counsel was prejudicially ineffective in failing to include such language in the plea. *Id*.

This Petition follows.

D. *ARGUMENT WHY REVIEW SHOULD BE GRANTED*

THE COURT OF APPEALS DECISION IMPROPERLY AFFIRMED INHERENTLY EQUIVOCAL PLEAS DESPITE THE CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF APPOINTED COUNSEL

Both the Sixth Amendment and Article 1, § 22, guarantee the accused in a criminal case the right to effective assistance of appointed counsel, which includes the right to have counsel actually and substantially assist in deciding whether to enter into a plea deal. *See In re Yung-Cheng Tsai*, 183 Wn.2d 91, 99, 351 P.3d 138 (2015); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Review should be granted under RAP 13.4(b)(3) because the issues in this case involve the significant constitutional question of the adequacy of appointed counsel for the entry of inherently equivocal pleas. Review should also be granted because of the significant constitutional question of the adequacy of motion counsel in failing to address initial

counsel's prejudicial errors.

Mr. Brady entered inherently equivocal pleas under *In re Barr.* CP 158-69. With such a plea, the accused plead to a lesser charge for which there is no factual basis in the record based on the deliberate choice of the accused that, while they dispute their guilt, entering a plea is their best option. *Barr*, 102 Wn.2d at 268-69. Further, it is assumed that a defendant intelligently concludes based on the options available that it is in her best interests to accept the deal offered by the State and avoid the risks inherent in trial. *See North Carolina v. Alford*, 400 U.S. 25, 32, 91 S. Ct. 164, 27 L. Ed. 2d 162 (1970).

Because of their nature, however, when our state's courts accept an equivocal plea, they are supposed to apply special care. *See State v. D.T.M.*, 78 Wn. App. 216, 220, 896 P.2d 108 (1995). The Court of Appeals has declared this means the court must ensure that the equivocal plea "represents a voluntary and intelligent choice among the alternative[s]"

open to the accused. *State v. Stowe*, 71 Wn. App. 182, 198, 858 P.2d 267 (1993) (*quotations omitted).* This Court held, in *Barr*, that this means the accused must be informed of the alternatives and made their choice with an understanding of the consequences of the plea, having determined through careful weighing of those options the course of action he believes best. *Barr*, 102 Wn.2d at 270.

Mr. Brady was deprived of the opportunity to engage in such a risk-benefit analysis because of the repeated, affirmative and unprofessional conduct of his appointed plea counsel.

It is not enough to say that everyone knows that a judge can impose whatever sentence they want, as the Court of Appeals did here. App. A at 11-12. Counsel was fully aware that Mr. Brady's highest concern was the sentence Ms. Mills would receive - even though Mr. Brady faced a potential third strike if he went to trial. 2RP 96-100. Mr. Brady was entitled to

have an accurate indication of that risk as part of his risk-benefit analysis in entering the equivocal plea. He was entitled to have actual and substantial assistance in deciding what was best based upon the *actual* risk that Ms. Mills would receive EHM, not counsel's unprofessional, unsubstantiated hunch.

Put simply, Mr. Brady was entitled to be told that the plea agreement for Ms. Mills was shaky at best as to whether Ms. Mills was going to get EHM, given that it was not even an agreed recommendation.

Mr. Brady was denied that information. Plea counsel affirmatively misadvised him, drawing on assumptions from the general practice in another county, that a prosecutor's agreement to a particular sentence meant it was virtually assured that the sentence would be imposed. 2RP 100-104. Plea counsel's only call was to Ms. Mills' counsel - also inexperienced in the county. 2RP 100-104. Counsel's testimony reveals that this is not a case where a defendant is

having buyer's remorse but one where counsel failed in his duties to properly advise his client of the relative risks and based on his unprofessional failures admittedly led his client to believe that the risk of Ms. Mills getting anything but EHM was very small.

Plea counsel did not just misadvise his client about the likelihood that Ms. Mills would get EHM if Mr. Brady waived his constitutional rights; plea counsel also failed to make reasonable efforts to help ensure the result crucial to his client or to verify the information and advice he gave. He did not ask to look at the agreement for Ms. Mills to make a reasonable evaluation of its terms. 2RP 103-104. He did not negotiate with the prosecutor to include anything about Ms. Mills' case in Mr. Brady's equivocal pleas. He did not contact the State's attorney to confirm whether the prosecutor was merely not going to object versus advocating for EHM for Ms. Mills. 2RP 101-103. Nor did he explain to his client that there was a big

difference between the two. 2RP 100-102.

Plea counsel was laboring under his own unprofessional, mistaken assumptions about what would happen with Ms. Mills' plea and the sentencing up until sentencing himself. *See* 2RP 103. The Court of Appeals itself recognized that Mr. Brady "clearly had an emotional investment in Mills receiving home confinement," and that he was misinformed about the State's recommendation for her sentence. App. A at 12. It then relied on the faulty conclusion that, because a judge can impose whatever sentence she chooses, Mr. Brady must have known "there was never a guarantee" that Ms. Mills would receive EHM. App. A at 12.

That is not the point. Aside from motion counsel's unprofessional, unsupported accusations against the prosecutor below, Mr. Brady has never argued that he was given such a guarantee or that he was entitled to one. He argued that he was affirmatively misadvised about the actual

likelihood that Ms. Mills would receive the EHM sentence, and that counsel unprofessionally failed to take basic steps to avoid that misadvice or to try to ensure his client's desires would more likely be met.

This Court should grant review. The Court of Appeals decision did not give proper consideration to the equivocal nature of the pleas and the cost-benefit nature of such pleas. A person deciding whether to enter an equivocal plea is entitled to effective assistance of counsel, which requires that counsel at least meet minimum professional standards to ensure that his advice about the risks is correct. The significance of the constitutional question of effective assistance of plea counsel is high. Our criminal justice system is no longer a system of trials; it is a system of pleas. *Lafler v. Cooper*, 566 U.S. 156, 176, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). Our state is no different. In 2021, there were 12,374 criminal cases resolved by plea as compared to only 510 after

trial. *See* Caseloads of the Courts of Washington (2021 Annual Report) at 3, available at https://www.courts.wa.gov/caseload/content/archive/superior/Annual/2021.pdf. The adequacy of plea counsel thus has great impact on the constitutional protections for the accused guaranteed in our system.

The Court of Appeals incorrectly held that plea counsel was not ineffective. This error led it to the faulty conclusion that motion counsel was also not ineffective. This Court should grant review and reverse.

E. *CONCLUSION*

Mr. Brady was entitled to have appointed counsel actually and substantially assist him in the decision about whether to accept the global plea. He was deprived of that right. Further, his motion counsel then failed to argue ineffective assistance, instead angering the judge with a baseless accusation against the State.

The Court of Appeals erred in finding there was no ineffective assistance. Mr. Brady entered inherently equivocal pleas; he should now be allowed to withdraw them. This Court should grant review and should so hold.

DATED this 18th day of January, 2024,

ESTIMATED WORD CT: 3,400

Respectfully submitted,

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Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTINE NICOLE MILLS, Defendant, and JAMES RUSSELL BRADY, Appellant.	No. 56309-6-II UNPUBLISHED OPINION

GLASGOW, C.J.— In 2020, James Russell Brady was dating Christine Mills. The couple had an altercation with the father of Mills' children when they were exchanging the children after residential time with the father. The State charged Brady with several counts including second degree assault, a most serious or strike offense. If convicted as charged, Brady would be sentenced to life in prison as a persistent offender. The State also charged Mills after the incident.

Brady's primary concern was preventing jail time for Mills. The State offered the codefendants joint plea deals available only if they both accepted. Brady's offer let him plead guilty to crimes that would not result in life in prison. Mills' offer stated that the State would not oppose her request to serve her entire sentence on home confinement. Based on what his counsel told him, Brady believed Mills would receive a home confinement sentence.

Both codefendants accepted the plea offers. Brady agreed to and was sentenced to 300 months, an exceptional sentence above the standard range. The trial court also imposed a crime victim penalty assessment. For Mills, the trial court imposed a three-month sentence, but the court allowed her to serve only the last 30 days on home confinement.

Brady then moved to withdraw his guilty plea, arguing that the State had breached his plea agreement by not supporting Mills' request for home confinement. The trial court denied Brady's motion to withdraw.

Brady appeals. He argues that the trial court should have allowed him to withdraw his plea because he received ineffective assistance of counsel at every stage. And he asserts that we must remand for the trial court to strike the imposition of the crime victim penalty assessment.

We remand for the trial court to strike the crime victim penalty assessment from Brady's judgment and sentence. We otherwise affirm.

FACTS

According to the declaration of probable cause, Brady and Mills had an altercation with the father of Mills' children and his new partner during an exchange of the children after residential time with the father. During the incident, Brady pointed a gun at both the children's father and his partner, and Mills allegedly grabbed the partner by the hair and slammed her head against a car.

The State prosecuted Brady and Mills as codefendants. The State charged Brady with two counts of second degree assault and one count of first degree unlawful possession of a firearm. Brady had prior convictions for vehicular assault and second degree assault, which were strike offenses under the Persistent Offender Accountability Act of the Sentencing Reform Act of 1981, ch. 9.94A RCW, so the current assaults, if proven, would subject him to life in prison. RCW

9.94A.030(32)(b), (p).[1] The State charged Mills with two counts of second degree assault and one count of fourth degree assault.

I. PLEA PROCEEDINGS

Early in proceedings, the State alerted the trial court that it had made a "global offer" of plea deals to both defendants "that require[d] them both to accept." Verbatim Rep. of Proc. (VRP) (June 16, 2021) at 19. Brady's plea offer allowed him to plead guilty to two counts of third degree assault, one count of first degree unlawful possession of a firearm, and one count of second degree unlawful possession of a firearm to avoid the mandatory life sentence he would receive if convicted of second degree assault. Instead, the State would recommend an agreed exceptional sentence of 300 months. The State's offer to Mills allowed her to plead guilty to two counts of felony harassment with a sentencing recommendation of three months. The plea agreement stated that Mills was "allowed to argue to convert jail to [home confinement]" time, but the State did not promise to *recommend* home confinement. Clerk's Papers (CP) at 293

Brady and Mills each accepted the plea offers. In a written statement, Brady explained that he was pleading guilty because he "committed more serious offenses which could constitute a third strike, and [he was] accepting the offer from the State of Washington to plead to less serious offenses to avoid the substantial likelihood that [he] would be sentenced to life in prison on the original charges." CP at 168. Brady agreed to an exceptional sentence recommendation of 300 months, and he acknowledged that he understood "[t]he judge does not have to follow anyone's recommendation as to sentence." CP at 162.

[1] The list of strike offenses has been amended since Brady's offenses in 2020, but the relevant language pertaining to his strike offenses has not changed, so we cite to the current placement within the statute.

At a hearing on the plea, the trial court conducted a colloquy to determine whether Brady understood the charges, the possible sentencing ranges, and the exceptional sentence that he had agreed to. VRP (June 29, 2021) at 68-74. The trial court asked Brady, "Other than promises set forth in the plea agreement, . . . have any promises been made to you to . . . induce you or cause you to want to plead guilty today?" *Id*. at 74-75. Brady answered, "No," and asserted that he was acting voluntarily in pleading guilty. *Id*. at 75. The trial court found that Brady was acting knowingly, intelligently, and voluntarily and accepted his guilty plea. *Id*. at 77-78.

II. SENTENCINGS

At sentencing, Brady asked the court "for leniency, but not for [himself], for Ms. Mills, who is just another victim in this." VRP (July 19, 2021) (Brady) at 10. He believed that because he had pleaded guilty, the "State would allow Ms. Mills to take advantage of a plea deal herself [for] . . . house arrest or something in that nature." *Id*.

The trial court followed the agreed recommendation in Brady's plea agreement and imposed an exceptional upward sentence of 300 months based on Brady's high offender score and stipulation to the exceptional sentence. The trial court found that Brady was indigent under RCW 10.101.010(3)(c) because his annual income was less than 125 percent of the federal poverty level. Thus, the trial court imposed only one mandatory legal financial obligation, the crime victim penalty assessment.

At Mills' sentencing, which occurred immediately after Brady's, the prosecutor stated that he knew Mills was going to request home confinement. "[T]hat is something that . . . I said that [Mills] could argue for because of COVID because the jail is overcrowded, especially with regards with females, because of the coronavirus, the capacity over there is extremely limited." VRP (July

19, 2021) (Mills) at 6. The State asked the trial court to impose a three-month sentence but did not specifically request home confinement. Mills and her attorney both requested a sentence of home confinement.

The trial court stated that it could not "look at what happened in this case and say that electronic home monitoring is an appropriate outcome because it is not." *Id*. at 15. "This case is too serious for it to be handled simply as go home and strap on an ankle bracelet and promise to be good." *Id*. The trial court emphasized that, per police reports, Mills "actually assaulted [the partner] at one point, violently assaulted her." *Id*. The trial court imposed three months of confinement but allowed Mills to serve the final 30 days on home confinement.

III. MOTION TO WITHDRAW PLEA

The day after sentencing, Brady sent the trial court a letter seeking to withdraw his guilty plea. He also filed a CrR 7.8(b) motion to withdraw his plea. The trial court allowed plea counsel to withdraw and appointed Brady new counsel.

The new counsel then moved to withdraw Brady's guilty plea. Brady stated that he had been told by his plea attorney that the State would recommend a home confinement sentence for Mills. He argued in part that the "State did not keep its agreement" to do so.[2] CP at 214.

At a plea withdrawal hearing, Brady's plea counsel testified that Brady was concerned about Mills receiving home confinement as part of her plea deal, leading the attorney to contact Mills' counsel:

> Ultimately, my understanding [was] that Ms. Mills had been offered a deal, which would allow her to do electronic home monitoring. At one point I received a call

[2] Brady also argued that there was not a sufficient factual basis for his guilty plea to the third degree assault charges, and that the plea agreement contained incorrect offense dates for some of the charges. These arguments are not at issue on appeal.

> from Mr. Brady and [he] said that he had spoken with Ms. Mills, [and] she said the agreement may not be for that. . . .
>
> I called [Mills' attorney]. I said, is Christine Mills getting [home confinement] or is she going to jail? And he said, she's getting [home confinement]. I said, cool. And then I relayed that to Mr. Brady that - that she was getting [home confinement].

VRP (Oct. 8, 2021) at 99. Plea counsel then explained that it was well known that the trial court did not have to accept any sentencing recommendation from the parties:

> [WITHDRAWAL COUNSEL]: Did you convey to Mr. Brady any promise that the State would make to Mr. Brady about what they would do in their recommendation on Ms. Mills' case?
>
> [PLEA COUNSEL:] I don't know that [the prosecutor] made a promise to me or to Mr. Brady. But there was a definite understanding . . . that Ms. Mills was looking at electronic home monitoring. I mean obviously everyone knows that the ultimate sentence is up to the judge. That's in every plea agreement. But it was our understanding that the State . . . had left that open for Ms. Mills, whether it had been a joint recommendation or no objection.

Id. at 100. Plea counsel also stated that he and Mills' attorney were both from Pierce County, where "when the prosecution says no objection to electronic home monitoring, that is essentially our parlance [t]here for you're getting electronic home monitoring." *Id*. Plea counsel did not call the prosecutor to confirm the information from Mills' attorney, and counsel stated that he never sought to review a codefendant's plea agreement unless that person had agreed to testify against his client.

Brady also testified at the hearing. He said that plea counsel had told him that the State would recommend—not just not oppose—home confinement for Mills. He asserted that he would not have pleaded guilty if he had known that the State did not intend to support Mills' request for home confinement. On cross-examination, Brady acknowledged that "the decision is up to the judge" for what sentence to impose in every case, which he knew because he had pleaded guilty in other cases. *Id*. at 107. And Brady's withdrawal counsel acknowledged that Brady's plea agreement did not contain any promises about Mills' sentence.

The trial court stated that it understood Brady's argument as contending that he wanted to withdraw his plea "because another defendant's attorney misinformed Mr. Brady's attorney of what [Mills'] plea agreement was and then Mr. Brady's attorney conveyed that [misinformation] to Mr. Brady." *Id*. at 111. When withdrawal counsel argued that plea counsel rendered ineffective assistance by not confirming Mills' plea offer with the State, the court rejected the argument that "[plea counsel] did anything that was ineffective or fell . . . below the appropriate standard of care . . . I don't believe there's a problem with [plea counsel] relying upon the statements made to him by [Mills' attorney]." *Id*. at 112-13. The trial court also explained that it did not believe that the State had failed to keep any promise to Brady, because "the plea agreement with Mr. Brady does not refer in any way to promises made in the Mills plea agreement." *Id*. at 124. And the trial court emphasized that Brady had made both oral and written affirmations that no promises except those in his plea agreement caused him to plead guilty. The trial court denied Brady's motion to withdraw his plea.

Brady appeals the order denying his motion to withdraw his plea.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Brady contends that we must remand for the trial court to allow Brady to withdraw his plea to correct a manifest injustice. Brady argues that he received ineffective assistance of counsel during plea negotiations because plea counsel failed to conduct a reasonable investigation into the details of Mills' plea offer or alert the trial court that the plea offers were related. Brady asserts that plea counsel should have confirmed whether the State would endorse Mills' request for a home confinement sentence with the prosecutor, and he should have inquired about the sentencing

practices of judges in Grays Harbor County. Brady argues the failure to do so was "affirmative misadvice" that prejudiced Brady because he would not have otherwise pleaded guilty. Br. of Appellant at 45. As a result, he insists that his guilty plea was not knowing, intelligent, and voluntary. We disagree.

We review a trial court's order on a motion to withdraw a guilty plea for abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). "A trial court abuses its discretion if its decision 'is manifestly unreasonable or based upon untenable grounds or reasons.'" *Id.* (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). If a motion to withdraw a guilty plea was made after judgment was entered, withdrawal of the plea must meet the requirements of CrR 7.8. *Id*. at 128. A defendant may withdraw their guilty plea if the plea was not knowing, intelligent, or voluntary. *See In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 595, 316 P.3d 1007 (2014). "[A] defendant's denial of improper influence in open court" is highly persuasive evidence that the defendant's plea was voluntary, although it is not dispositive. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

A. Cases Addressing Effective Assistance in the Plea Process

"The Sixth Amendment right to effective assistance of counsel encompasses the plea process." *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). "Counsel's faulty advice can render the defendant's guilty plea involuntary or unintelligent." *Id*. However, we strongly presume that counsel performed effectively. *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 539, 397 P.3d 90 (2017). A defendant seeking to withdraw their plea based on counsel's inadequate advice must establish that counsel performed deficiently and that the deficient performance prejudiced the defendant. *In re Pers. Restraint of Tricomo*, 13 Wn. App. 2d 223, 237, 463 P.3d 760 (2020).

The failure to demonstrate either prong of the test will end our inquiry. *State v. Classen*, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018). To establish prejudice related to a guilty plea, "a defendant must show that there is a reasonable probability that, but for the deficiency, [they] would not have pleaded guilty and would have insisted on going to trial." *Tricomo*, 13 Wn. App. 2d at 237

"[A] defense attorney has a basic duty to know and apply relevant statutes and professional norms, and the unreasonable failure to fulfill that duty is constitutionally deficient." *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 101 n.1, 351 P.3d 138 (2015). Counsel's decisions that were made based on an investigation "'are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Lui*, 188 Wn.2d at 539 (internal quotation marks omitted) (quoting *Wiggins v. Smith,* 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)).

During plea bargaining, counsel has a duty to "'actually and substantially'" assist the defendant in determining whether to plead guilty. *State v. Stowe*, 71 Wn. App. 182, 186, 858 P.2d 267 (1993) (quoting *Osborne*, 102 Wn.2d at 99). This includes an obligation to inform the defendant of all *direct* consequences of the guilty plea. *Id*. at 187. Defense attorneys do not have to inform their clients of *all* possible consequences of a guilty plea, but counsel can perform deficiently by "affirmatively misinform[ing]" clients about collateral consequences that affect the defendant's "calculations about the costs and benefits of standing trial." *Id*. at 187-88.

In *Stowe*, defense counsel knew that the defendant "would rather risk a trial, and a potential lengthy prison sentence, than plead guilty and definitely face discharge from the military." *Id*. at 188. Counsel asked a military police liaison with no legal training stationed at the courthouse

whether Stowe could stay in the military if he entered an *Alford*[3] plea, and counsel reported the liaison's affirmative answer to Stowe without researching the applicable law. *Id*. at 185. In fact, the military does not distinguish between *Alford* pleas and other guilty pleas, and the Army dishonorably discharged Stowe immediately after he entered his plea. *Id*. Because it was clear that Stowe only seriously considered pleading guilty after "counsel led him to believe that an *Alford* plea would allow him to maintain his Army career," we held that counsel performed deficiently. *Id*. at 188. And "Stowe would have demanded a trial" without the erroneous advice, satisfying prejudice. *Id*. at 189.

An attorney providing misinformation to a defendant will not automatically render the defendant's guilty plea involuntary. *Id.* at 188. In particular, courts are less inclined to identify ineffective assistance based on misinformation when a defendant received accurate information before entering a guilty plea. We held that a defendant could not demonstrate ineffective assistance from counsel's assertion that the trial court was bound by the plea agreement sentencing recommendation because "the guilty plea statement and the court itself" told him "that the court could impose any sentence within the standard range." *In re Pers. Restraint of Reise*, 146 Wn. App. 772, 788, 192 P.3d 949 (2008). Thus, the defendant "was correctly informed about this consequence before he pleaded guilty." *Id*. *But see In re Pers. Restraint of Quinn*, 154 Wn. App. 816, 840-41, 226 P.3d 208 (2010) (allowing a defendant to withdraw his guilty plea due to affirmative misadvice that he would face 36 to 48 months of community custody instead of the statutorily mandated life term).

[3] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Brady relies on *State v. Williams*, which acknowledged that "'special care should be taken in reviewing guilty pleas entered in exchange for a prosecutor's promise of lenient treatment of a third party.'" 117 Wn. App. 390, 399, 71 P.3d 686 (2003) (quoting *State v. Cameron*, 30 Wn. App. 229, 231, 633 P.2d 901 (1981)). "[W]hen a court is informed that a plea is part of a package deal, the court must specifically inquire about whether the codefendant pressured the defendant to go along with the plea and carefully question the defendant to ensure he is acting of his own free will." *Id*. at 400.

In *Williams*, the prosecutor did not expressly inform the trial court that the pleas of the father and son codefendants were a package deal. *Id*. The father later asserted "that he felt pressured to enter into the plea agreement because he did not want his son to have a felony conviction." *Id*. at 401. But Division One concluded that the failure to alert the trial court was harmless for several reasons. The trial court clearly knew the pleas were a package deal, Williams "did not assert that there were any direct threats or promises by his son to induce him to plead guilty," and "evidence presented at the hearing on the guilty plea . . . clearly indicate[d] that the guilty plea was freely and voluntarily made." *Id*. "Although Williams was undoubtedly influenced at least in part by a desire to help his son, the desire to help a loved one and the accompanying emotional and psychological pressure do not, standing alone, render a guilty plea involuntary." *Id*. at 401-02.

B. Whether Brady Received Effective Assistance During Plea and Plea Withdrawal Proceedings

Here, assuming without deciding that plea counsel preformed deficiently, Brady has not shown prejudice. "The voluntary nature of a defendant's guilty plea is not automatically destroyed because of erroneous advice by counsel." *Stowe*, 71 Wn. App. at 188.

The State charged Brady and Mills as codefendants and the trial court knew that the pleas were connected. However, there were no promises about Mills' sentence in Brady's plea offer or agreement. And Brady repeatedly asserted that there were no promises outside of his plea agreement that were inducing him to plead guilty. His stated basis for pleading guilty was that he sought to avoid conviction for a third strike offense that would have triggered a mandatory life sentence.

Further, although Brady clearly had an emotional investment in Mills receiving home confinement and was misinformed about the State's recommendation for her sentence, Brady knew from previous guilty pleas that the sentencing judge always has discretion to depart from even an agreed recommended sentence. Thus, he knew that there was never a guarantee that Mills would receive the sentence she requested. *See id*. Moreover, the trial court's comments that Mills' acts were "too serious" for home confinement indicate that the court would likely not have been swayed by the State's endorsement of home confinement. VRP (July 19, 2021) (Mills) at 15. The fact that Brady was disappointed by Mills' sentence does not, by itself, mean that his guilty plea was involuntary. *Reise*, 146 Wn. App. at 788; *Williams*, 117 Wn. App. at 401-02. The trial court did not abuse its discretion by denying Brady's motion to withdraw his guilty plea.

Brady next argues that his second attorney provided ineffective assistance regarding the motion to withdraw Brady's guilty plea. He contends that withdrawal counsel should have argued based on plea counsel's ineffective assistance instead of focusing on whether the State promised Brady that it would support Mills' request for home confinement. Brady reasons that the failure to raise an ineffective assistance argument was, itself, ineffective assistance. We disagree. Even had withdrawal counsel raised plea counsel's arguably deficient performance, the lack of prejudice

discussed above would have defeated that ineffective assistance argument if made below. Thus, the ineffective assistance claim regarding withdrawal counsel's performance also fails.

II. CRIME VICTIM PENALTY ASSESSMENT

Brady also argues that we must remand for the trial court to strike the crime victim penalty assessment from his judgment and sentence because the assessment is no longer a mandatory legal financial obligation. He argues that a recent amendment to RCW 7.68.035 provides that trial courts shall not impose the penalty assessment on a defendant who was indigent at sentencing, and that the superior court made such a finding here. LAWS OF 2023, ch. 449, § 1. The trial court did find Brady indigent under RCW 10.101.010(3)(c). A new statute applies to all cases that were pending on direct appeal when the statute took effect. *State v. Jefferson*, 192 Wn.2d 225, 246, 429 P.3d 467 (2018). And the State does not object to remand for purposes of striking the penalty assessment. Accordingly, we remand for the trial court to strike the crime victim penalty assessment.

CONCLUSION

We remand for the trial court to strike the crime victim penalty assessment from Brady's judgment and sentence. We otherwise affirm.

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 in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.

We concur:

Cruser, J.

Che, J.

RUSSELL SELK LAW OFFICE

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