NO. 47488-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TERRENCE SMITH
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jack Nevin, Frank Cuthbertson, and Kitty Ann van Doornink, Judges

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Smith assigns error to the trial court's denial of his motion to withdraw his plea.
2. Smith was denied effective assistance of counsel at the plea hearing when counsel advised him to write a statement admitting guilt after the court stated that the facts were insufficient to identity.
3. Smith was denied effective assistance when his attorney refused to provide him the opportunity to view the surveillance video prior to pleading guilty.
4. Smith was denied effective assistance when his attorney refused to provide any discovery prior to Smith pleading guilty.
5. Smith was denied effective assistance when his attorney advised him to plead guilty when the state could not prove identity.
6. Smith did not make a knowing, voluntary and intelligent decision to plead guilty.
7. The trial court abused its discretion by denying the motion to withdraw the guilty plea.

Issues Related to Assignments of Error

1. Did the trial court abuse its discretion by denying the motion to withdraw the plea that was not knowing, voluntary and intelligent?
2. Did the trial court abuse its discretion by denying the motion

to withdraw the plea where Smith was not provided effective assistance of counsel?

3. Was Smith denied effective assistance of counsel at the plea hearing when counsel advised him to write a statement admitting guilt after the court stated that there were insufficient facts to establish?
4. Was Smith denied effective assistance of counsel when his attorney refused to provide him the opportunity to view the surveillance video prior to pleading guilty?
5. Was Smith denied effective assistance when his attorney refused to provide any discovery prior to Smith pleading guilty?
6. Was Smith denied effective assistance when his attorney advised him to plead guilty without advising him that the state could not prove identity?
7. Was Smith's plea knowing, voluntary and intelligent?

B. STATEMENT OF THE CASE

Before his plea hearing, Terrence Smith requested to review discovery, but his attorney and investigator did not follow though. 3RP 24-26. 1 Prior to pleading guilty to robbery in the first degree, Smith was never provided the opportunity to review the state's case against him. CP 17-26; 3RP 24-25. During the plea hearing, the court engaged Smith in an

1 RP refers to the November 18, 2014 hearing; 1RP refers to the December 11, 2014 hearing; 2RP refers to the January 23, 2015 hearing; 3RP refers to the March 27, 2015.

extensive colloquy regarding the rights he was waiving. RP 4-7. Counsel informed the court that she "discussed [with Smith] what the facts would be that would cause the court to accept the plea of guilty to the crime of robbery in the first degree. ". RP 4, 13. The court did not discuss the factual basis for the plea but did refuse to find guilt based on the statement of probable cause, which the court deemed insufficient. RP 8-11.

After the court refused to accept the plea, counsel offered to, "talk to Mr. Smith and probably have the statement of guilt –". RP 11. The court took a brief recess and counsel returned with a handwritten statement by Smith noting what "he believes makes him guilty of the charge". RP 12. The Court asked Smith if wrote the statement to which Smith indicated "yes". RP 12-13. The court accepted the plea and did not discuss the state's case against Smith. RP 12-13.

On a different date, in front of a different judge, Smith moved to withdraw his plea and requested new counsel for that motion. 1RP 2-4. Smith stated that his attorney did not provide an honest assessment of the state's case and that he felt coerced into pleading guilty without sufficient information. 1RP 4.

> I feel that my counselor here has not been truthful with me with information involved in the case, and I feel that the decision I made that day was coerced, and I feel that I was kind of cornered into making that decision.

RP 4. The court denied the motion. 1RP 5. During the next hearing, in front of Judge Cuthbertson, Smith again requested to withdraw his plea and obtain new counsel. 2RP 16. Judge Cuthbertson granted new counsel

for Smith to argue a motion to withdraw his plea in front of judge Nevin, the judge who accepted the plea. 2RP 19-20.

New counsel, Robert Quillian, did not have time to submit an affidavit in support of the motion to withdraw. 3RP 22. Instead, Quillian placed Smith on the witness stand and took testimony from Smith. 3RP 23. Smith testified that before his plea hearing, he had repeatedly requested to review discovery, but was never provided the opportunity. 3RP 24-25.

After Smith filed the motion to withdraw, an investigator visited Smith and showed him the surveillance video of the bank robbery and photos of the scene of the crash. 2RP 24. After viewing the video and other discovery, Smith realized that the state could not establish identity. Smith requested to withdraw his plea, and testified that he would not have pleaded guilty if he had been able to first review the state's evidence against him. 3RP 24-26.

Mr. Quillian informed the court that the notes on former counsel's trial file confirmed that counsel and the investigator had not provided Smith with any discovery or other information about the state's case. 3RP 27. Mr. Hill, the prosecuting attorney on this case informed the court that without DNA, "you were never going to know for sure which brother it was." 3RP 28. The robbery involved Smith and his identical twin brother. Id. Hill argued to the court that notwithstanding the issue with identity he believed he could establish identity based on clothing. Id.

During the plea hearing Judge Nevin disagreed with the prosecutor's assessment that he could establish identity based on clothing, because the eyewitnesses gave disparate statements regarding clothing, and the perpetrators had masks covering their faces. RP 8-11. The prosecutor offered that "it' s a very young case. The fact we got this to a guilty plea this quickly doesn't happen very often for a case of this nature. He' s moving through the system very fast." RP 14. Without any discussion on the record and without any written findings or conclusions, the court denied the motion to withdraw. 3RP 32-33.

> The weight of your question, of course, is the question of whether or not there is a basis, based upon this information, to withdraw the guilty plea. And I' m not satisfied that there is. I' m satisfied that the evidence in this case, circumstantial and direct, is substantial insofar as it relates to this issue of identity. Granted, my exposure to this case is fairly limited. I was in the criminal division presiding, and, accordingly, I took a plea. And I don' t recall, specifically, how counsel remedied the plea, but I know they remedied it because I said I needed to know the specifics. And it may be that I had an inquiry of Mr. Smith, I don' t remember, I don' t. I do remember either you or your brother was a football
> player……
>
> And so anyway, in any event, we have to look at certain criteria and I' m not satisfied there' s a basis to allow the withdrawal of the guilty plea. Accordingly, I' m denying that as well as the other motions posed by Mr. Smith.

3RP 32-33.

During the sentencing hearing, the court relied on the same statement of probable cause to find that the state could not establish

identity. RP 8

> Is the Declaration of Probable Cause provided to me here? I' m going to review, pursuant to the plea of guilty and the request of the accused, I' ll review the Declaration of Probable Cause. Short pause in proceeding)
> THE COURT: **I' m having trouble finding how this supports a plea of guilty to Robbery in the First**
> **Degree.** I understand all the circumstantial evidence, I get the car, I get the weapon, I get the cash. Is it your position that this is enough to satisfy the providency [sic] of a plea? **There is nothing here to say he' s the guy that was either behind the wheel or was the guy that had the gun**.

(Emphasis added) RP 8.

> Maybe I' m just missing something. You, obviously, have lived with this longer than I have, but in the second paragraph it says that the witness named Crandall saw the person, and he had on -- well, first of all, as reported from the people at the bank he had a bandana over his face, a red and black flannel shirt. And then the person in the next door in the strip mall said that he ran by the front of the business wearing a button up shirt, jeans, and had a bandana on his head. So that' s talking about the same person, right?
>
> MR. HILL: Yes, it is.
> THE COURT: A button up shirt, jeans, and a bandana --
> MR. HILL: It is a pair of gray sweatpants in actuality. Now, some of the pictures, as you look at it, the gray pants actually look a little bit to be tinged with a blue.
> THE COURT: The point here is it says that he had jeans, a bandana on his head, and then says here, though, later on, that he was wearing a white tank top and baggy gray sweatpants.
> MR. HILL: Yes. So what he
> MR. HILL: Yes. So what he' s really wearing is a pair of baggy gray sweatpants --
> THE COURT: **I get that. But you' re asking me to rely exclusively on this to the exclusion of**

> **anything else. What they said this gentlemen was wearing and what they said the shooter was wearing are two different things as described.**
> MR. HILL: The witness outside of the bank didn't' t see him for as long and her description of clothing is not accurate. The witness inside the bank who was brought to the scene –
> THE COURT: **I understand that totally. But, again, you' re asking me to rely on this to support a guilty plea. I don' t think I can do that.**

(Emphasis added) RP 8-11. The court's order denying the motion to withdraw the plea did not contain any written findings or conclusions and only contained a single word, "Denied". CP 76.

Following sentencing, Smith filed a timely notice of appeal.

C. ARGUMENTS

1. SMITH'S PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT.

The trial court abused its discretion by denying the motion to withdraw Smith's guilty plea because it was not knowing, voluntary and intelligent and Smith was denied effective assistance of counsel at his plea hearing. Prior to pleading, counsel failed to adequately consult with Smith and explain that the state could not prove identity. Under CrR 4.2(f) these errors constitute per se manifest injustice. CrR 4.2(f).

This Court reviews a trial court's denial of a motion to withdraw a guilty plea for abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). An abuse of discretion occurs if a trial court's decision is manifestly unreasonable or is based on untenable grounds or reasons. Id. A manifestly unreasonable decision is one that is outside the

range of acceptable choices, given the facts and applicable legal standard. Id. A trial court's decision is based on untenable reasons if it uses an incorrect standard or if the facts do not meet the requirements of the correct standard. Id. The trial court must permit a defendant to withdraw a guilty plea to correct a manifest injustice. CrR 4.2(f). A manifest injustice is one that is obvious, directly observable, overt, and not obscure. Id.

CrR. 4.2, provides four *per se* nonexclusive instances where a manifest injustice exists: where (1) the defendant did not ratify the plea, (2) the plea was not voluntary, (3) the defendant received ineffective assistance of counsel, or (4) the plea agreement was not kept. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). These instances are considered "demanding" *State v. Nguyen*, 179 Wn.App. 271, 283, 319 P.3d 53 (2014) (quoting, *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

Smith was charged with robbery in the first degree. CP 14. Robbery in the first degree requires the state to prove the identity of the perpetrator. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). During the plea hearing, the trial court informed counsel that the state could not establish identity based on the statement of probable cause which contained both the state's eyewitness testimony and photographs of the getaway car after it crashed. Supp. CP (Statement of probable cause ___); RP 8-11.

Without explanation, after the motion to withdraw the plea, based on the same evidence, the same judge ruled that even though he did not

remember taking the plea, since he did take the plea there must have been sufficient evidence to support the plea. 3RP 32-33. This was an abuse of discretion because relying on a past decision based on facts the judge could not remember is an untenable basis for a decision. a failure to remember. This is outside the range of acceptable choices. *Lamb*, 175 Wn.2d at 127.

(ii) Plea Involuntary.

Here, Smith was denied effective assistance of counsel and his plea was not knowing, voluntary and intelligent because he was unaware that the state could not prove its case against him until after the plea hearing when he was finally provided the opportunity to view the surveillance video from the bank and photographs from the scene of the car crash. 3RP 24-25. The prosecutor tried to convince the court that it could prove its case based on eyewitness testimony but after reviewing that testimony, the trial court disagreed. RP 8-12.

To permit a defendant the opportunity to make a meaningful decision about a plea, at minimum counsel must reasonably evaluate the State's evidence and the likelihood of the defendant's conviction at a trial and communicate counsel's findings with his or her client. *State v. A.N.J.*, 168 Wn.2d 91, 111-12, 225 P.3d 956 (2010). In other words, the defendant must know and understand the state's case against him. *State v. Zhao*, 157 Wn.2d 188, 202-03, 137 P.3d 835 (2006) (plea knowing, voluntary and intelligent, because the defendant knew that the state's

evidence did not support the amended charges and chose to plead to the amended charge).

Here, by contrast to *Zhao*, trial counsel informed the court that she "discussed what the facts would be that would cause the court to accept the plea. We' d ask the court to look at the Declaration of Probable Cause instead of Mr. Smith making a statement." RP 4. This indicates that trial counsel mis-advised Smith that the facts were sufficient to support the state's case. The trial court disagreed. RP 4-13.

In the context of the trial court accepting an *Alford* plea, the State Supreme Court provided that a defendant can make an intelligent decision to plead guilty if "the record before the judge contains strong evidence of actual guilt". *In re Matter of Montoya*, 109 Wn.2d 270, 280-81, 744 P.2d 340 (1987) (*Alford* plea is valid if defendant is aware that state had a strong case against him); *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

For example, in *Matter of Montoya*, 109 Wn.2d 270, 281, 744 P.2d 340 (1987), the court held that if a defendant "intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt", such a plea is valid. Id (citing, *North Carolina v. Alford*, 400 U.S. at 31, 37.

The corollary, present in this case, is that Smith could not make a knowing, voluntary and intelligent decision to plead guilty where the record did not establish guilt, and where Smith was not provided the state's discovery, which confirmed the weakness of the state's case.

Montoya, 109 Wn.2d at 280-81.

When the trial court informed counsel that he would not accept the plea, he did not engage Smith in any sort of discussion to determine if Smith understood that the state did not have a case against him. Rather the trial court addressed the prosecutor, who unsuccessfully attempted to persuade the court that it had facts sufficient to make its case against Smith. RP 8-11. Counsel for Smith chimed in that she would "talk to Mr. Smith and probably have the statement of guilt –". RP 11.

The cumulative information in front of Smith at the time of the plea was insufficient for him to make a knowing, voluntary and intelligent decision to plead guilty. The trial court's refusal to accept the plea did not establish that Smith made a knowing, voluntary and intelligent decision to plead guilty. It is well established that "[t]rial judges are to refrain from offering defendants any advice, direct or implied, about the wisdom of pleading guilty." *State v. Watson*, 159 Wn. 162,165 149 P.3d 360 (2006) (trial court advised Watson to "take [the State's plea] offer.")).

Here the trial court, seemingly understood this prohibition, when he told counsel, not Smith, that after declining to accept the plea based on the statement of probable cause, he was not trying to be "obtrusive" but he was concerned with appellate review. RP 11.

While there was discussion between counsel and the court about the lack of a factual basis for the plea, there is no evidence that Smith was advised or understood that the state did not have a case against him. RP 12-13. Rather counsel explained that the court would not accept the plea

based on the statement of probable cause unless Smith indicated his guilt, which is different from explaining that the state does not have a case. RP 12.

According counsel informed the court that Smith wrote a statement "that he believes makes him guilty of the charge". This does not indicate that Smith made a knowing, voluntary and intelligent decision to plead guilty. RP 12. Smith's plea was not knowing, voluntary and intelligent, in violation of CrR 4.2, because counsel never advised him that the state could not prove its case. RP 12-13. Accordingly, Smith should be permitted to withdraw his plea.

2. COUNSEL WAS INEFFECTIVE FOR FAILING TO CONSULT WITH SMITH PRIOR TO THE PLEA HEARING ABOUT THE WEAKNESSES IN THE STATE'S CASE.

Smith received ineffective assistance of counsel before the plea hearing because trial counsel failed to inform him that the state could not prove identity. Counsel also failed to adequately consult with Smith and did not provide Smith the opportunity to review the state's evidence against him. RP 11-12; 3RP 24-26. Smith made repeated requests to see the surveillance video and Smith testified that if had been provided with discovery before the plea hearing, he would not have pleaded guilty. 1RP 2-5; 3RP 24-26.

The standard of review for a challenge to the effective assistance of counsel is de novo. *A.N.J.*, 168 Wn.2d at 109. A defendant has an absolute right to 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. Yung-Cheng Tsai*, 183 Wn.2d 91, 99, 351 P.3d 138 (2015); *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); Sixth Amendment to the U.S. Constitution and Washington article I, section 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Brousseau*, 172 Wn.2d 331, 352, 259 P.3d 209 (2011); *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011).

At a minimum effective representation "entails certain duties" such as "the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. " *Yung-Cheng*, 183 Wn.2d at 100, (*quoting Strickland*, 466 U.S. at 688.

A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33; *citing*, *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137

Wn.2d 736, 745–46, 975 P.2d 512 (1999).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is unreasonable). The *Strickland* test applies to claims of ineffective assistance of counsel in the plea process. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

Effective assistance requires that defense counsel assist a defendant in making an informed decision about whether to plead guilty or go to trial. *A.N.J.*, 168 Wn.2d 111; *Nguyen*, 179 Wn.App. at 282. This means that for a plea to be voluntary, the defendant "must make related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.' " *United States v. Ruiz*, 536 U.S. 622, 628, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002).

Because "[e]ffective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial," an attorney's failure to adequately investigate the merits of the State's case and possible defenses may constitute deficient performance." *State v. Fedoruk*, 184 Wn.App. 866, 880, 339 P.3d 233 (2014), (*quoting A.N.J.*, 168 Wn.2d at 111)).

When a defendant challenges his guilty plea on the basis of ineffective assistance of counsel, he must show with reasonable

probability that, but for counsel's deficient performance, he would not have pleaded guilty and would have proceeded to trial. *State v. McCollum*, 88 Wn.2d 977, 982, 947 P.2d 1235 (1997); *State v. Garcia*, 57 Wn.App. 927, 933, 791 P.2d 244 (1990).

"Generally, this is shown by demonstrating to the court some legal or factual matter which was not discovered by counsel or conveyed to the defendant himself before entry of the plea of guilty." Id. An unreasonable failure to research or apply relevant statutes without any tactical purpose, constitutes constitutionally deficient performance. *State v. Kyllo*, 166 Wn.2d 856, 865-69, 215 P.3d 177 (2009) (deficient performance where reasonably adequate research would have shown that a former pattern jury instruction misstated the law on self-defense); *Aho*, 137 Wn.2d at 745-46 (deficient performance where reasonably adequate research would have prevented the possibility of conviction based on acts predating the relevant statute's effective date). "The unreasonable failure to research and apply RCW 10.40.200 is as constitutionally deficient as the unreasonable failure to research and apply any relevant statute. *Yung-Cheng*, 183 Wn2d at 102-03.

"An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S., ___, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (12014).

[W]here the alleged error of counsel is a failure to investigate or

discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. *Hill*, 474 U.S. at 59.

Smith's attorney did not sufficiently research the facts and apply them to the statute to determine that the state could not prove identity, and she did not inform Smith of this fatal flaw in the state's case. *Strickland*, 466 U.S. at 690-91. Here counsel failed to uphold her "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Fedoruk*, 184 Wn.App. at 881; *Strickland*, 466 U.S. at 690-91.

Here the salient facts not conveyed to Smith were that the state's case including the eyewitness accounts and the surveillance video were insufficient to establish identity. RP 7-12; 3RP 24-26. Smith's attorney did not adequately investigate or review the state's discovery because she advised Smith that the state had enough evidence to establish identity, when in fact the state could not prove identity. RP 4-12. After viewing the surveillance video and reviewing discovery, Smith testified that he would not have pleaded guilty if counsel had advised him of the weakness in the state's case or provided him the opportunity to evaluate the state's evidence. 3RP 24-25.

In *A.N.J.* the Washington Supreme Court found counsel's assistance ineffective where defendant's counsel did not make requests for

discovery, failed to file motions, only spent 5 to 10 minutes with the minor defendant and his parents at pretrial conference, misinformed A.N.J. of the consequences of his plea, and failed to adequately inform A.N.J. of the charges against him. *A.N.J.*, 168 Wn.2d at 100-02, 120.

While the record in Smith's case does not disclose the extent of counsel's investigations or interviews, the prosecutor noted that the case was very young, and the record established that counsel never shared discovery with Smith. RP 14; 3RP 24-26. Counsel also on the record informed the court, contrary to the evidence, that the statement of probable cause had facts sufficient to establish guilt. RP 4.

Under *A.N.J.*, and the cases cited herein, this constituted prejudicially ineffective assistance of counsel. First, counsel should have read the discovery to determine it was inadequate to establish identity. Second, counsel should have permitted Smith to review the discovery so that she and Smith could have intelligently discussed the state's case. Third, and finally, after the trial court refused to accept the plea, counsel should not have instructed Smith to write a statement of guilt without first explaining to Smith that the state could not prove identity. *A.N.J.*, 168 Wn.2d at 100-02, 120.

Here, trial counsel did not provide meaningful assistance during the plea hearing. Smith establishes prejudice here because there is a reasonable likelihood that if counsel had properly investigated this case and informed Smith of the flaws in the state;' case, he would not have pleaded guilty. Accordingly, this Court should vacate the plea and remand

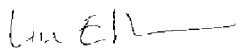
for a trial.

D. CONCLUSION

Terrence Smith respectfully requests this Court vacate Smith's plea and remand for trial.

DATED this 6th day of October 2015.

Respectfully submitted,



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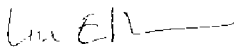

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