70927-5

70927-5

NO. 70927-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERVIN COX,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Federal Court Decisions

United States Constitution

Court Rules

A. INTRODUCTION

Knowing that the prosecution's policy was to withdraw plea offers if a defense attorney interviewed complaining witnesses who alleged sexual offenses, Ervin Cox's attorney did not interview the two complainants before advising Mr. Cox to plead guilty. He conducted no other known investigation even though the incidents allegedly occurred years earlier, both complainants were adults, and Mr. Cox said they were lying from the inception of the case.

Mr. Cox followed counsel's advice and entered an *Alford*[1] plea once threatened with a far longer sentence. But one day later, he asked to withdraw the plea. The court refused, ruling that it was never unreasonable for defense counsel to advise a client to plead guilty in exchange for a favorable plea offer, even if the attorney had not been permitted to investigate the allegations. The court refused to hold an evidentiary hearing or order defense counsel to explain how he had evaluated the strength of the State's case absent an investigation. Mr. Cox is entitled to withdraw his *Alford* plea because he did not receive effective assistance of counsel prior to entering his plea.

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

B. ASSIGNMENTS OF ERROR

1. Mr. Cox did not receive effective assistance of counsel prior to pleading guilty, in violation of the Sixth Amendment and article I, section 22 of the Washington Constitution.

2. The court erred by refusing to hold an evidentiary hearing when it received no information from defense counsel explaining his basis to advise Mr. Cox to pled guilty. CP 30.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right to effective assistance of counsel prior to entering a guilty plea includes the right to receive the attorney's informed advice about the strength of the State's case. While interviewing the State's witnesses is not always required, numerous cases use the lack of witness interviews to find an attorney's deficient performance. Pursuant to a blanket policy of the prosecution, Mr. Cox's lawyer did not interview the complainants even though Mr. Cox claimed they were lying. When it is uncontested that defense counsel did not interview the witnesses, there is no physical evidence, the attorney only met with Mr. Cox one time in private, and no other investigation occurred, did Mr. Cox receive effective assistance of counsel?

2. A person's request to withdraw a guilty plea based on having received ineffective assistance of counsel is a fact-specific inquiry into whether the attorney reasonably investigated the allegations and accurately advised the accused of the law. Here, the court refused to hold an evidentiary hearing or order defense counsel to give any explanation of the nature of his investigation or basis of his advice that Mr. Cox plead guilty. When the uncontested allegations show no defense investigation occurred and the defendant maintained his innocence even when pleading guilty, was there sufficient evidence showing it was unreasonable for defense counsel to conduct no investigation?

D. STATEMENT OF THE CASE

In November 2012, A.L. and S.D., both adults, told the police that years earlier they had been subjected to sexual contact by Ervin Cox. CP 131-32. A.L. said it happened only once, sometime between 2006 and 2007, and S.D. said it happened several times between 2005 and 2007. CP 128-29. Mr. Cox told the police the allegations were false and the complainants concocted them. CP 129. Mr. Cox's wife, who was A.L.'s mother and S.D.'s grandmother, made it "very clear" to the

police that she did not believe A.L. or S.D. *Id.* The State charged Mr. Cox with two counts of child molestation in the second degree. CP 131.

Mr. Cox was 65 years old at the time the charges were filed. CP 107. Four days after it filed the charges, the prosecution told defense counsel that if Mr. Cox pled guilty as charged, it would recommend a 36-month standard range sentence, but if he did not accept this offer, it would file an amended information adding three felony charges. CP 33, 52, 56-57. If Mr. Cox was convicted of these additional charges, his standard sentence would be "an indeterminate sentence with a minimum between 210-280 months and a maximum of life." CP 33.

The prosecution's office had a policy that if defense counsel interviewed the complaining witnesses in a child sexual assault case, it would not engage in plea negotiations. 8/13/13RP 6-7. Here, the prosecutor told defense counsel to trust his judgment that one of the complainants was "compelling" as a witness. CP 54. Defense counsel did not interview either complaining witness, presumably due to the State's policy, even though both complainants were adults at the time the charges were filed. 8/13/13RP 7; CP 88, 92. Defense counsel did not conduct any other investigation. CP 92. He met one time privately

and in-person with Mr. Cox. CP 92. He told Mr. Cox to plead guilty or risk more serious charges. *Id.*

Mr. Cox agreed to enter an *Alford* plea to the two charges. 4/30/13RP 2; CP 107, 113. The court accepted his plea after questioning him about his understanding of the plea and awareness of the rights he was waiving. 4/30/13RP 2-7. The next day, Mr. Cox sent a letter to the judge asking to "reconsider" and withdraw his plea. CP 125. He explained he felt threatened and confused. *Id.* The court appointed an attorney to determine whether Mr. Cox wanted to formally request to withdraw his plea. 6/6/13RP 7-8, 15.

The newly appointed attorney filed a motion to withdraw the plea based on the original attorney's deficient performance. CP 86-93. He explained that the first lawyer had conducted no investigation and spent little time with Mr. Cox. CP 88. 92. The court refused to hold an evidentiary hearing or require defense counsel to explain what actions he took in the case. CP 30 (attached as Appendix A). It ruled that failing to interview witnesses was reasonable when an interview would result in more serious charges. *Id.* After denying Mr. Cox's motion to withdraw his guilty plea, the court imposed a standard range sentence of 39 months. 9/4/13RP 10.

E. ARGUMENT.

Mr. Cox should have been allowed to withdraw his *Alford* plea when the plea resulted from his attorney's failure to perform the basic investigation necessary to evaluate the State's case

1. *A guilty plea is not knowing, intelligent, and voluntary when premised on the State's insistence that the attorney may not investigate the allegations.*

A criminal defendant's waiver of his right to trial by jury and entry of a guilty plea must be an intentional relinquishment of a known right, indulging in every presumption against waiver. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); U.S. Const. amends. 6, 14. An involuntarily entered plea establishes a manifest injustice permitting withdrawal of the plea. *State v. Turley*, 149 Wn.2d 395, 398, 69 P.3d 338 (2003); CrR 4.2(f).

A defendant is entitled to effective assistance of counsel in the process of plea negotiation. *Missouri v. Frye*, _ U.S. _, 132 S.Ct. 1399, 1405-06, 182 L.Ed.2d 379 (2012). "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler v. Cooper*, _U.S. _, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012).

At the plea bargaining stage, "defendants cannot be presumed to make critical decisions without counsel's advice." *Id.* at 1385. Ineffective assistance of counsel occurs when "counsel's representation fell below an objective standard of reasonableness," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 1384 (quoting *Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

A client's intent to plead guilty does not excuse a lawyer from adequately investigating the case or pursuing available avenues of relief. *State v. A.N.J.*, 168 Wn.2d 91, 113, 116, 118, 225 P.3d 956 (2010). "Anything less" than effective representation during plea bargaining "might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Frye*, 132 S. Ct. at 1407-08 (quoting *inter alia Spano v. New York*, 360 U.S. 315, 326, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) (Douglas, J., concurring)).

Denial of effective assistance of counsel is one way to establish a manifest injustice requiring a court to permit plea withdrawal. *A.N.J.*, 168 Wn.2d at 119. A trial court's denial of a motion to withdraw a plea

is generally reviewed for abuse of discretion. *State v. Williams,* 117 Wn.App. 390, 398, 71 P.3d 686 (2003), *rev. denied,* 151 Wn.2d 1011 (2004). But an ineffective assistance claim is reviewed de novo because it presents mixed questions of law and fact. *A.N.J.,* 168 Wn.2d at 109.

2. *Evaluating the State's evidence is a fundamental requirement of competent attorney performance*

To provide constitutionally adequate representation, defense counsel must at a minimum, conduct a reasonable investigation enabling informed decisions about how best to represent the client. *In re Pers. Restraint of Fleming,* 142 Wn.2d 853, 866, 16 P.3d 610 (2001) (citing *Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir.1994)).

"[A] defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *A.N.J.*, 168 Wn.2d at 109. Based on an attorney's "duty to assist a defendant in evaluating a plea offer," and "making an informed decision as to whether to plead guilty or to proceed to trial,"

> at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.

Id. at 111-12 (citing *inter alia* RPC 1.1; RPC 1.2(a)).

It is "dysfunctional" for the prosecution to create a system premised on the disincentive of defense counsel investigating a client's case. *A.N.J.*, 168 Wn.2d at 112. Similarly, "[a] defendant is denied his right to counsel if the actions of the prosecution deny the defendant's attorney the opportunity to prepare for trial. Such preparation includes the right to make a full investigation of the facts and law applicable to the case." *State v. Burri*, 87 Wn.2d 175, 180, 550 P.2d 507 (1976).

Interviewing witnesses is an essential part of a reasonable investigation. *State v. Zhao*, 157 Wn.2d 188, 205, 137 P.3d 835 (2010) (Sanders, J. concurring). When a lawyer relies on someone else's rendition of a critical witness's statement, he or she abdicates the "professional judgment" at the root of evaluating a witness's claims.

> A witness's testimony consists not only of the words he speaks or the story he tells, but of his demeanor and reputation. A witness who appears shifty or biased and testifies to X may persuade the jury that not-X is true, and along the way cast doubt on every other piece of evidence proffered by the lawyer who puts him on the stand. But counsel cannot make such judgments about a witness without looking him in the eye and hearing him tell his story.

Lord v. Wood, 184 F.3d 1083, 1095 (9th Cir. 1999). Although a lawyer is not constitutionally obligated to conduct in-person interviews, when a lawyer has not participated in witness interviews, his decisions "will

be entitled to less deference than if he interviews the witness." *Id.* at n.8; *State v. Mankin*, 158 Wn.App. 111, 123-24, 241 P.3d 4217 (2010) ("the right to adequate trial preparation includes the right to interview witnesses in advance of trial"); *see also In re Pers. Restraint of Davis,* 152 Wn.2d 647, 739, 101 P.3d 1 (2004) ("While defense counsel is not required to interview every possible witness, the failure to interview witnesses who may provide corroborating testimony may constitute deficient performance.").

In *A.N.J.*, the court held that the defendant received ineffective assistance of counsel when entering a guilty plea because "taken together," counsel had not interviewed witnesses, his "contractual constraints" gave him an incentive not to interview witnesses, he spent "limited time with his client before the plea," and had spent "limited time" explaining the statement on plea of guilty. *A.N.J.*, 168 Wn.2d at 117. Similar deficiencies occurred in the case at bar. The prosecutor explained his office's "general position" in all sexual assault prosecutions is that no further plea offers will be made when an accused person subjects the complaining witnesses to a defense interview. 8/13/13RP 6-7. The prosecution agreed that defense counsel had not interviewed the complainants before Mr. Cox pled guilty. *Id.* at 7; *see*

CP 54 (email from prosecutor to defense counsel, saying "I realize you haven't interviewed witnesses to assess their testimony" but assuring counsel that one complainant was compelling).

Mr. Cox similarly asserted that the defense conducted no interviews "of the witnesses or alleged victims." CP 88. Defense counsel "rarely met" with Mr. Cox. CP 88. Mr. Cox never met any investigator and was never informed that any investigation occurred. CP 88, 92. Without an investigation, counsel was not in a position to meaningfully advise Mr. Cox about the strengths and weaknesses of the State's case. Mr. Cox claimed the accusers were lying because they wanted to kick him out of his home and take his job. CP 75-76. Even though Mr. Cox and his wife challenged the truthfulness of the allegations at the inception of the case, defense counsel had no basis to evaluate the believability of the complaining witnesses before advising Mr. Cox whether to accept the plea offer, other than relying on the prosecution's assessment. CP 128-29.

The State's policy barring interviews with the complaining witnesses made little sense in the case at bar. The two charges arose from alleged incidents during the broadly defined period of 2005-2007, but no charges were filed until November 30, 2012. CP 131. The

complainants were adults at the time the case proceeded in superior court. CP 88. The accusers' credibility and ability to recall would be the central issue in the case, there was no evidence other than their allegations, and yet defense counsel never exercised his professional judgment in evaluating the claims against Mr. Cox before advising him to plead guilty.

"[E]ven the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision." *State v. Silva*, 108 Wn.App. 536, 541, 31 P.3d 729 (2001). Mr. Cox was not an experienced litigant, having no substantial familiarity with the criminal justice system. His attorney performed no known investigation. CP 88, 92. Counsel advised Mr. Cox to plead guilty without being able to meaningfully evaluate the evidence against his client. Given the accusations that the complaining witnesses lacked credibility that arose from the outset of the case, the time that passed between the claimed incident and the report to the police, and the clearly established professional norms that make investigating a case a fundamental duty of counsel, the lack of investigation constituted unreasonable performance.

3. *The trial court unreasonably refused to hold an evidentiary hearing to determine whether defense counsel's failure to investigate the allegations constituted deficient performance.*

In *A.N.J.*, the Supreme Court explained that the inquiry into whether defense counsel's failure to investigate the allegations constitutes deficient performance is fact-specific. 168 Wn.2d. at 108-12. The *A.N.J.* Court evaluated the type of investigation performed by defense counsel to determine whether defense counsel complied with his duty to reasonably evaluate the evidence against the accused. *Id.* at 112.

Mr. Cox claimed defense counsel's inadequate investigation caused him to plead guilty. CP 91-93. It was undisputed that defense counsel had not interviewed the complaining witnesses. The prosecution insisted that its policy was to revoke plea bargain offers if the defense interviewed the complaining witness in any case involving a sex offense. 8/13/13RP 6-7. Defense counsel would not provide any further information about his investigation or the reasons he advised Mr. Cox to plead guilty without a court order. CP 36.

Yet the trial court refused to hold an evidentiary hearing to inquire into the reasonableness of defense counsel's investigation. CP

30 (attached as App. A). It did not order defense counsel to explain the nature of his investigation or the information on which he relied to advise Mr. Cox to plead guilty, even though there was no evidence that defense counsel had interviewed witnesses or conducted other investigation into the claims that his client said were false at the outset.

The court ruled that as a matter of law, it was not unreasonable for an attorney to choose not to interview witnesses in order to take advantage of a favorable plea offer. CP 30. But this plea offer would only be "favorable" to the client if counsel's advice was premised on a meaningful evaluation of the strength of the evidence against Mr. Cox.

For example, in a recent case finding a systemic violation of the right to counsel by a municipal court public defender, the City claimed that the benefits of receiving a favorable plea offer outweighed the accused persons' interest in a better-prepared defense attorney. *Wilber v. City of Mt. Vernon, et al*, 2013 WL 6275319, *4 (W.D. Wash. 2013). But the federal district court rejected that notion and explained, "[a]dvising a client to take a fantastic plea deal ... may appear to be effective advocacy, but not if the client is innocent." *Id.*[2]

[2] Citation to this opinion is permissible pursuant to RAP 10.4(h), GR 14.1(b), and FRAP 32.1.

Based on the information presented to the trial court, there was no factual basis for the court to conclude that counsel's performance had been reasonable. Counsel had not investigated the case, he met with Mr. Cox in person and in private only one time and otherwise spent only a limited time discussing the case with Mr. Cox, and he knew that Mr. Cox maintained his innocence by agreeing only to an *Alford* plea. CP 88, 92. Counsel also knew that the charged offenses had occurred many years earlier, they were not timely reported to law enforcement, and Mr. Cox claimed the complainants had ulterior motives for accusing him. CP 75-76; CP 131. The court abused its discretion by failing to conduct an inquiry into the apparent deficiency of counsel's pre-plea efforts and advice to his client. The court's mistaken belief that taking a favorable plea bargain necessarily excuses the failure to investigate any necessary investigation occurred in the case at bar was a legally erroneous ruling that requires reversal.

4. *Mr. Cox demonstrated that counsel's deficient performance caused him to enter a guilty plea without receiving effective assistance of counsel.*

A defendant sufficiently proves he was prejudiced by his attorney's unreasonable advice if there is a "reasonable probability" that but for counsel's errors, he would not have entered this plea. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L. Ed .2d 203 (1985); *State v. Sandoval*, 171 Wn.2d 163, 174-75, 249 P.3d 1015 (2011).

A "reasonable probability exists if the defendant 'convince[s] the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Sandoval*, 171 Wn.2d at 174-75 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)). "This standard of proof is 'somewhat lower' than the common 'preponderance of the evidence' standard." *Id.* at 175 (citing *Strickland*, 466 U.S. at 694).

Defense counsel's disregard of his professional obligation to evaluate the strength of the State's case before advising his client to plead undermines confidence in the outcome of the trial and prejudiced Mr. Cox. *See Strickland,* 466 U.S. at 687.

Mr. Cox immediately asked to withdraw his *Alford* plea as soon as he entered it. In the *Alford* plea, he did not admit his guilt; instead he

maintained his innocence but felt that he would not be able to prevail at trial. An *Alford* plea requires closer scrutiny because the accused has not admitted guilt. *See In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 277-78, 744 P.2d 340 (1987) ("When a defendant makes an *Alford* plea, the trial court must exercise extreme care to ensure that the plea satisfies constitutional requirements."). These actions show Mr. Cox did not wish to plead guilty but did so because he felt he had no choice. He immediately regretted the decision and persisted in his efforts to withdraw his plea.

The strength of the State's case does not appear overwhelming. No physical evidence or corroborative, neutral eyewitnesses supported the allegations. The complainants waited a number of years to report the allegations to the police. Complainant A.L. had made the same allegation in 2009 but then she never appeared for a scheduled interview and the prosecution refused to bring charges based on the lack of evidence. CP 128. Mr. Cox insisted that both complainants had motives to lie. CP 75-76. There is a reasonable probability that if counsel had investigated the case, interviewed the complainants, and spent more time discussing the accusations with Mr. Cox, he would not

have entered a guilty plea. This case should be remanded so that Mr. Cox is afforded the opportunity to withdraw his plea.

F. CONCLUSION.

Based on the undisputed allegations that defense counsel never investigated the strength of the State's case, Mr. Cox should be permitted the opportunity to withdraw his guilty plea or alternatively, the court should order an evidentiary hearing to determine the reasonableness of counsel's performance and its prejudicial effect.

DATED this 30th day of April 2014.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

FILED

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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,

Plaintiff,

v.

Cox, Ervin Defendant.

No. 12-1-02434-5

ORDER ON MOTION

THIS MATTER having come on regularly before the undersigned Judge of the above court on the motion of [ ] State [X] defendant [ ] court to:

withdraw guilty plea

AND THE COURT having considered the records and files herein and being fully advised;

Now Therefore,

IT IS HEREBY ORDERED that defendant's motion is denied.

Regarding the alleged coersion affecting the voluntariness of the plea on 4-30-13, the defendant has not met his burden of proving that his will was overborne. The court relies on the transcript of the colloquy and finds that the defendant's plea was knowingly, voluntarily, and intelligently entered, as is further shown by the defendant's signature on the plea.

Regarding alleged ineffective assistance of counsel, the choice not to interview the alleged victims was reasonable in light of the additional charges that would have been filed. The defendant has not demonstrated any prejudice to his criminal case resulting from the alleged failure of counsel to collect forensic evidence from computers at the defendant's home.

An evidentiary hearing on the specifics acts of Jason Schwarz is not necessary in this case.

DONE IN OPEN COURT this 13 day of August, ~~2012~~ 2013

Judge
Joseph P. Wilson

Presented by:

35574
Deputy Prosecuting Attorney

Approved for ~~entry, copy received~~:

28242
Attorney for Defendant

Defendant

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

STATE OF WASHINGTON, Respondent, ERVIN COX, Appellant.	)))))))))	NO. 70927-5-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON, THIS 30TH DAY OF APRIL, 2014.

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