Supreme Court No. 93126-7
No. 71748-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALVIN WALKER,

Petitioner.

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

The Honorable Regina Cahan

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Constitutional Provisions

Rules

Other Authorities

A. IDENTITY OF PETITIONER

Alvin Walker was the appellant in Court of Appeals No. 71748-1-I, decided March 1, 2016. The Court of Appeals, Division One, subsequently issued its order of denial of motion reconsideration on April 22, 2016. Appendix A.

B. COURT OF APPEALS DECISION

Mr. Walker seeks review of the Court of Appeals decision in No. 71748-1, affirming the trial court's denial of his motion to withdraw his guilty plea and resulting determinate term of imprisonment, which plea was entered at a time when his CrR 7.8 motion was pending to challenge his jury trial judgment of conviction and resulting indeterminate term. Appendix A.

Mr. Walker seeks to withdraw the plea because of manifest injustice; he respectfully argues that under all the circumstances, this Court should allow plea withdrawal under this State's rules of appeal and error.

C. ISSUES PRESENTED ON REVIEW

1. The due process clause of the Fourteenth Amendment requires a guilty plea be knowing, intelligent, and voluntary. In Washington, a guilty plea must be set aside when necessary to correct a manifest injustice. An involuntary plea is one of the indicia of a manifest injustice, and plea

pressures may render a guilty plea involuntary. In inducing Mr. Walker to plead guilty, his counsel equated his determinate-plus sentence to life imprisonment, misrepresented the consequences of not pleading guilty, and told him the judge hearing his case would not give him a "fair break." Did these pressures render Mr. Walker's guilty plea involuntary?

2. In order for a guilty plea to be knowing and voluntary, the accused must understand all direct consequences of the plea. Where the record did not show that Mr. Walker understood a part of the plea agreement that abridged his right to appeal, was the guilty plea involuntary? In the absence of substantial evidence in the record, must the trial court's finding to the contrary be stricken?

3. An attorney's conflict of interest will violate an accused person's Sixth Amendment right to the effective assistance of counsel where an actual conflict adversely affects his or her performance. In such a case, prejudice is presumed. The Rules of Professional Conduct prohibit a lawyer from representing a client if the representation will be materially limited by a personal interest of the lawyer who is pursuing additional interests; here, a degree of protection from liability. They also mandate that before a lawyer may limit his or her personal liability to a client, the client must be afforded independent counsel. Was Mr. Walker denied the effective assistance of counsel where, in conjunction with an appeal

waiver in a guilty plea, his lawyers obligated him to endorse language expressing his satisfaction with his lawyers' representation, and he did not have the benefit of independent counsel?

D. STATEMENT OF THE CASE

Plea and Motion to Withdraw. Alvin Walker appealed following the denial of a motion to withdraw his guilty plea to two criminal counts, assault in the first degree and rape in the third degree. CP 404-10, 425-47. The guilty plea succeeded an unusual and protracted procedural history. The State originally prosecuted Mr. Walker in connection with an incident that occurred in November 2008 involving his ex-girlfriend, Bridget Mitchell. CP 22-24, 32-33. Represented by counsel from the Defender Association (TDA), Mr. Walker proceeded to trial and was convicted as charged, and sentenced to an indeterminate term of 159 months to life. CP 13, 37, 39-41. His contentions of ineffective assistance were rejected on appeal. CP 24-28. Mr. Walker subsequently contacted the Innocence Project Northwest (IPNW) for assistance in obtaining relief from his convictions. IPNW filed a CrR 7.8 motion for relief from judgment on March 5, 2013. CP 31-240. The motion was premised on two grounds. First, Mr. Walker's trial counsel rendered ineffective assistance when he failed to review medical records that would have undermined the State's theory of the assault. CP 218, 226-28. These records were in the case file,

as they had been obtained by Mr. Walker's previously-assigned counsel at TDA, and were even referenced in previous counsel's transfer memo. CP 154, 159, 218. Second, Mr. Walker's trial counsel failed to seek a material witness warrant for a key exculpatory witness, Phyllis Barquet, who claimed that Mr. Walker was innocent of the charged assault, and that she herself was the perpetrator. CP 216-17.

The CrR 7.8 motion was transferred to the Court of Appeals, but the Court remanded it back to King County Superior Court for a reference hearing and determination on the merits. CP 241-44.

On November 1, 2013, Mr. Walker entered a straight guilty plea to an amended information charging assault in the first degree and an Alford plea to rape in the third degree. CP 294-315, RP 4-21. At the plea hearing, his lawyer, Ms. Torres, explained to the court that the agreement with the State was reached "relatively late yesterday so hence the scrambling to try and get it done today." RP 4. Notwithstanding the professed need for haste, Ms. Torres took the time to draft an unusual and unorthodox "Exhibit A to Statement of Defendant on Plea of Guilty." CP 304, 314. The exhibit consisted of an appeal waiver, a crossed-out statement, and the declaration, "I am satisfied with the representation and counsel I have received from my attorneys, Fernanda Torres and David

Allen." The appendix was affixed to the plea statements for the two offenses and signed by Mr. Walker.

The very same day that Mr. Walker entered the plea, after he returned to the jail, he wrote a letter to the court begging for the plea to be withdrawn. CP 400, 401. The court appointed Mr. Walker new counsel and permitted Ms. Torres to withdraw. Mr. Walker later submitted a declaration that supplied additional facts in support of his motion to withdraw the plea. CP 401. He explained that the guilty plea was negotiated and entered very quickly. Id. He stated that after a year of work on the CrR 7.8 motion, "the day before my motion hearing, Ms. Torres came to me telling me to plead guilty to the State's offer, and that I needed to take the State's offer now." CP 402. He said that he did not have enough time to "really consider the plea in all its detail", and he did not receive a copy of the plea paperwork. Id. He stated that to induce him to enter the plea, "Ms. Torres kept referring to the Indeterminate Sentence Review Board. She kept on stressing that I would do life in prison and never get out ever if I went forward with my motions." Id. He stated that Ms. Torres brought Mr. Allen to talk to him "about life in prison and to convince me to plead guilty. Both of them emphasized that I had to take the offer right now." Id.

Mr. Walker also explained the circumstances behind Appendix A to the plea agreement. Mr. Walker explained, "I felt that Ms. Torres no longer wanted to represent me or to work on my case, and that she was more concerned about her own interests than mine." Id. Ms. Torres testified at the hearing on Mr. Walker's motion to withdraw his guilty plea. She stated that sometime during the week prior to November 1, 2013, she advised Mr. Walker that she would be striking the portion of the CrR 7.8 motion relating to trial counsel's failure to secure the presence of Ms. Barquet. RP 62-63. She testified to her opinion that without the aspect relating to Ms. Barquet, the CrR 7.8 motion was "less strong", and that she had told Mr. Walker it would be "very difficult to prevail on appeal" if they lost the CrR 7.8 motion. RP 65.

The morning of the plea itself, Ms. Torres stated that she met with Mr. Walker for about two hours to go over the plea paperwork, and then again after speaking with the prosecutor. RP 69. With regard to Exhibit A, which contained the appeal waiver and expression of "satisfaction" with the representation she and Mr. Allen had provided, she explained,

> The document that I initially reviewed with Mr. Walker had the explicit statement of the waiver, or that by pleading guilty he was not waiving his right to claim ineffective assistance of counsel – of me and anybody else that worked on his case at this stage, and that was stricken.[1]

[1] Specifically, that portion of the document read, "I understand this does not include a waiver to a claim of ineffective assistance of counsel." RP 81.

RP 70. She admitted that the portion indicating that Mr. Walker was satisfied with the representation that he had received from her and Mr. Allen was part of the original document that she reviewed with him. Id. Even though she had stricken the portion stating that Mr. Walker was not waiving his right to claim ineffective assistance of counsel, she opined, "I didn't think he could waive that on my advice because of the conflict." RP 71. When the prosecutor asked Ms. Torres whether she "would have advised him that he could waive that" she said "No." Id.

On cross-examination, Ms. Torres admitted that when she met with Mr. Walker on October 31, 2013, she had not even seen a formal written State's sentencing recommendation, and that the plea forms themselves were prepared the morning of the hearing. RP 77-78. She did not give him his own copy. RP 78. When she reviewed the plea forms with him, the part that expressly stated Mr. Walker was not waiving his right to claim ineffective assistance of counsel had not been stricken out. RP 79. She stated that she discussed this change with Mr. Walker but did not remember for how long. RP 84. She did not testify to the specifics of this discussion.

The plea hearing itself did not shed any light on the nature of Ms. Torres's discussions with Mr. Walker about "Exhibit A", as the prosecutor

only inquired, "All right, and you are in agreement with this Exhibit A to your [plea] statements?" RP 12.

Ms. Torres admitted Mr. Walker "was reluctant in having to go over any of this at all" and that he was unhappy about the decision to plead guilty. RP 85. She stated that Mr. Walker did not want to plead guilty, but that at some point he changed his mind. RP 91-92. Ms. Torres also admitted that the additional statement Mr. Walker was obligated to agree to—that he was satisfied with the representation he received from her and Mr. Allen—was "designed to make it harder" for him to claim ineffective assistance of counsel, but that she did not believe it would do so. RP 93. Nevertheless she acknowledged that "[i]n retrospect we should have taken all of it out ... but that statement, I think in theory that it would be designed to make it harder and it doesn't make a difference is what I would have explained to him." Id. She conceded, in response to Mr. Walker's lawyer, that she did not remember "explicitly or specifically" whether she in *fact* explained this to Mr. Walker. RP 94.

Court of Appeals decision. The Court of Appeals, relying on the fact that Mr. Walker told the court, at the time he entered his guilty plea, that he understood the plea, did not need more time, and was entering the plea voluntarily, stated that Walker had not shown that his decision to plead guilty was coerced rather than involuntary. Decision, at p. 3.

The Court of Appeals also held that while the expression of satisfaction was evidence that Walker's attorneys sought to protect themselves from allegations of ineffective assistance, Walker did "not show that this interest amounts to a conflict that adversely affected performance" or "how his attorneys' self interest caused the allegedly deficient performance." Decision, at p. 5.

E. ARGUMENT IN FAVOR OF REVIEW

(a). Review is warranted under RAP 13.4(b)(3) because plea withdrawal presents issues arising under the federal and state constitutions.

Principles of due process require guilty pleas to be knowing, intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); In re Personal Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004); U.S. Const. amend. XIV; Const. art. I, § 3; CrR 4.2(d). Consistent with this constitutional mandate, according to court rule, a court must allow withdrawal if (a) the plea was not valid when it was made, or (b) whenever it is necessary to correct a manifest injustice. CrR 4.2(f); see State v. McDermond, 112 Wn. App. 239, 243, 47 P.3d 600 (2002), overruled on other grounds, State v. Mendoza, 157 Wn.2d 582, 590-91, 141 P.3d 49 (2006). A manifest injustice is one "that is obvious." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Washington courts recognize four nonexclusive indicia of per se manifest

injustice: (1) ineffective assistance of counsel, (2) a defendant's failure to ratify the plea, (3) an involuntary plea, or (4) the State's breach. Id. at 597. The defendant bears the burden of showing a manifest injustice. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

Here, Mr. Walker's plea was not voluntary because of the coercive effect of pressures surrounding the entry of the guilty plea and misrepresentations by counsel regarding the potential consequences of accepting versus rejecting the plea. It was not knowing because there is insufficient evidence to support a finding that Ms. Torres explained Appendix A to the plea agreements to Mr. Walker. Additionally, Ms. Torres had a conflict of interest based upon her desire to insulate herself from claims of ineffective assistance of counsel, and thus rendered ineffective assistance. Finally, the timing of Mr. Walker's motion to withdraw a guilty plea—made within hours, if not minutes, of the plea hearing—although no longer a dispositive factor under CrR 4.2, lends weight to the conclusion that the plea must be set aside to correct a manifest injustice. Cf. State v. A.N.J., 168 Wn.2d 91, 107, 225 P.3d 956 (2010) (finding that defendant's claim that he did not understand consequences of plea "may simply be more credible if made before sentencing than it would be if the defendant rolls the dice on a favorable sentence and is disappointed").

These considerations of Due Process warrant review by this Court. RAP 13.4(b)(3); U.S. Const. amend. XIV; Const. art. I, § 3.

1. **Mr. Walker's guilty plea was not voluntary because of the improperly coercive pressures placed on him by his counsel and misrepresentations regarding the consequences of rejecting the plea.**

Plea bargaining pressures may render a plea involuntary. State v. Frederick, 100 Wn.2d 550, 556, 674 P.2d 136 (1983), overruled on other grounds, Thompson v. Department of Licensing, 138 Wn.2d 783, 794, 982 P.2d 601 (1999). Thus, a defendant may properly challenge the voluntariness of his plea based on coercion, even where he has denied coercive influences during the plea colloquy. Id. at 557.

At the plea hearing, Mr. Walker denied that anyone had made threats or promises to induce him to plead guilty. RP 14. However the timing of his request to withdraw the guilty plea and his unequivocal expression of stress, anxiety, and "devastation" regarding the circumstances of the plea's entry undermine confidence in Mr. Walker's statements at the plea hearing. The evidence established the following:

- The plea offer was not made until the afternoon October 31, 2013. RP 67, 75.
- When Ms. Torres met with Mr. Walker that same day regarding whether he would enter the plea, she did not have any paperwork to show him. RP 68, 76.

- Mr. Allen attended the meeting with Mr. Walker on November 1, 2013. A "large part of the discussion that Mr. Allen had with him" was the fact that if Mr. Walker did not accept the plea offer, he could be "subject to imprisonment for the rest of his life" under the indeterminate sentence that previously had been imposed by the court. RP 86.

- According to Mr. Walker's letter to the court, Ms. Torres and Mr. Allen "kept on stressing me about doing life and not getting out ever." CP 400. His subsequent sworn declaration confirms:

In talking to me about the plea offer, Ms. Torres kept referring to the Indeterminate Sentence Review Board. She kept on stressing that I would do life in prison and never get out ever if I went forward with my motions. Ms. Torres brought Mr. Allen to talk to me about life in prison, and to convince me to plead guilty. Both of them emphasized that I had to take the offer right now. CP 402.

- Ms. Torres and Mr. Allen told Mr. Walker that he would "not get a fair break" from the court at the CrR 7.8 motion. CP 400.

These tactics were improper and unduly coercive in several respects. First, it was improper of Ms. Torres and Mr. Allen to equate Mr. Walker's indeterminate sentence on the rape in the second degree count with "life in prison." It is true that the sentence involved a minimum term of 159 months and a maximum term of life. However the Indeterminate Sentence Review Board (ISRB) considers many factors when deciding a person's releasability. See WAC 381-90-050. The pivotal question is "whether it is more likely than not that the offender will engage in sex offenses if released to the community in spite of board-imposed conditions of community custody." WAC 381-90-050(3). Given Mr. Walker's lack of similar offense history and age at the time of release, the ISRB might

well determine at the outset that release was appropriate. Thus, although life imprisonment was a theoretical possibility, it was not a certainty, and it was improper for Ms. Torres and Mr. Allen to overstate this risk.

Second, the claim that Mr. Walker would be "subject to imprisonment for the rest of his life" misrepresented the legal posture of his case. This claim would be true only if (a) he litigated his CrR 7.8 motion and lost, (b) he won his CrR 7.8 motion and the State appealed and prevailed; or (c) he won his CrR 7.8 motion and was reconvicted of the originally-charged crimes. The "life sentence" was thus highly contingent on a number of factors, and not guaranteed.

It was far from clear that Mr. Walker would lose his CrR 7.8 motion. Even though Ms. Torres had decided to withdraw the claim relating to Ms. Barquet, Mr. Walker still had a viable ineffective assistance of counsel claim based upon his trial attorney's failure to review Mr. Walker's medical records and secure appropriate expert testimony. CP 46. As noted in the CrR 7.8 motion, given that the records were physically in the file, trial counsel's failure to review them was "inexplicable." CP 44. See A.N.J., 168 Wn.2d at 110-11 (counsel has duty to conduct reasonable investigation and familiarize himself with the evidence). The records showed immense damage to Mr. Walker's rotator

cuff. CP 45, CP 226-28 (declaration of Dr. Albert Gee). The motion emphasized that this corroborated Walker's trial testimony. CP 46.

Ms. Torres opined that if Mr. Walker were to win his CrR 7.8 motion, the likelihood of a State appeal was "100%." RP 65. She could not persuasively claim, however, that the State would *prevail* on appeal. A ruling on a CrR 7.8 motion generally is reviewed for an abuse of discretion. State v. Martinez-Leon, 174 Wn. App. 753, 760, 300 P.3d 481, rev. denied, 179 Wn.2d 1004 (2013). Given trial counsel's indisputably deficient performance regarding the medical evidence, it is unlikely that an appellate court would determine granting a CrR 7.8 motion on this basis would be an abuse of discretion.

Third, Ms. Torres and Mr. Allen were wrong to tell Mr. Walker that he would not get a "fair break" from the court if he litigated his CrR 7.8 motion. See CP 400. This statement was tantamount to a threat that he would lose the motion *not* because it would fail on the merits, but because the judge would not discharge her constitutional and ethical duties to try the matter fairly and impartially. See Const. art. IV, § 28; Code of Judicial Conduct, Canon 2.2.

In sum, plea bargaining pressures or coercion by an accused person's lawyer may render a plea involuntary. See Iaea v. Sunn, 800 F.2d 861, 867 (9th Cir. 1986) (collecting cases). Here, the combined

effect of counsel's overstatement regarding the risk of life imprisonment, the misrepresentation regarding possible outcomes, and the threat that the judge would not give Mr. Walker a "fair break" deprived Mr. Walker of free will in changing his plea, and rendered the plea involuntary.

This conclusion is fortified by the fact that Mr. Walker had very little time between when the offer was conveyed and when he was obliged to enter the plea to reflect upon the decision, and by the fact that Mr. Walker voiced his unhappiness with the plea at his first available opportunity following the hearing. This Court should conclude that Mr. Walker's plea was involuntary.

2. **The plea was not knowing and intelligent because Ms. Torres failed to ensure that Mr. Walker understood "Appendix A" to the plea agreement.**

Mr. Walker's guilty plea to both counts included a typed Appendix which, by its express terms, was "incorporated as part of [Mr. Walker's] Statement of Defendant on Plea of Guilty to both Counts I and II." CP 304, 314. The language of the Appendix was confusing, and made more so when the parties struck the portion that expressly permitted Mr. Walker to challenge the effectiveness of his counsel on appeal. It was undisputed that when Ms. Torres went over the plea forms with Mr. Walker, this language had not been stricken. RP 79. The court found, however, that

> Torres reviewed exhibit A with Walker after the waiver language was stricken and explained to him that the stricken language did not change the rights he was waiving because he could not waive his right to claim ineffective assistance, nor could she advise him to do so.

CP 406 (Finding of Fact 6).

In order for a plea to be knowing and voluntary, an accused person must understand all the direct consequences of his plea. State v. Weyrich, 163 Wn.2d 554, 556-57, 182 P.3d 965 (2008); Isadore, 151 Wn.2d at 298. Contrary to the trial court's finding, the record does not establish that Ms. Torres ever explained the import of "Appendix A" to the plea forms to Mr. Walker. Ms. Torres testified that she "would have" explained its meaning, but when directly questioned on this subject, she said she did not remember "explicitly or specifically" that she did so. RP 93, 94.

Findings of fact may only be upheld on appeal if they are supported by substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Here, Ms. Torres was constrained to admit that she had no recollection of reviewing "Appendix A" with Mr. Walker after the language preserving his right to challenge the effectiveness of his counsel was struck. That she believed she "would have" done so is not proof that

she did do so, and the fact that she is an attorney does not make up for the want of proof. The finding of fact is not supported.

The plea colloquy does not dispel doubts regarding Mr. Walker's comprehension of "Appendix A." The prosecutor read the Appendix into the record and asked Mr. Walker if he had signed it. RP 11-12. She then asked him whether he was in agreement with the Appendix, and he assented. RP 12. But she did not note the change between the document that he signed and the one that was ratified in court. And she did not ask Mr. Walker whether he understood that the change had been made, or even if he was aware of the alteration. As noted, "Appendix A" was incorporated into the plea. The terms of Appendix A bore upon Mr. Walker's rights in connection with challenging the plea on appeal, and thus upon direct consequences of the plea. Cf. Isadore, 151 Wn.2d at 298. In the absence of evidence showing that Mr. Walker understood "Appendix A" to the plea agreement, this Court must conclude that the plea was not knowing and intelligent, and therefore was involuntary.

3. **Ms. Torres's conflict of interest prevented her from rendering the effective assistance of counsel to which Mr. Walker was entitled under the Sixth Amendment.**

Defendants have a Sixth Amendment right to the effective assistance of counsel, a right that extends to the plea-bargaining process.

Lafler v. Cooper, -- U.S. --, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012); U.S. Const. amend. VI. Where counsel has an actual conflict of interest and the conflict adversely affects her performance, then the accused need not demonstrate prejudice in order to obtain relief. Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Here, although the plea was negotiated with haste and had to be entered quickly, Ms. Torres took the time to draft language for inclusion in "Appendix A" that required Mr. Walker to affirmatively express his satisfaction in her performance. CP 304, 314. The inclusion of this language established a conflict of interest under Cuyler and requires a finding that Mr. Walker received ineffective assistance of counsel.

An accused person establishes that his lawyer rendered deficient performance where the lawyer's conduct fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. Although rules governing professional conduct do not *de facto* embody the constitutional standard for effective performance, In re Personal Restraint of Gomez, 180 Wn.2d 337, 349, 325 P.3d 142 (2014), "these standards may be valuable measures of the prevailing professional

norms of effective representation." Padilla v. Kentucky, 559 U.S. 356, 367, 130 S. Ct. 1473, 1482, 176 L. Ed. 2d 284 (2010).

RPC 1.7, pertaining to conflicts of interest, provides that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer." RPC 1.7(a)(2). Likewise, "a lawyer shall not ... make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement." RPC 1.8(h) (internal punctuation omitted); State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) ("shall" in a statute/ rule is presumptively mandatory).

Although the statement was in no way relevant to the charges or the proceedings, Mr. Walker was obligated to affirmatively voice his satisfaction with his lawyers' representation as a condition of his plea bargain. Ms. Torres agreed that the purpose of this statement, at least from the State's point of view, was to make it "harder" for Mr. Walker to allege ineffective assistance of counsel. RP 93. There is no showing that Mr. Walker was afforded an opportunity to consult with independent counsel before he endorsed this statement. Importantly, the Court of Appeals was incorrect in deciding there was no showing of adverse affect on performance, stemming from the conflict of interest. Decision, at p. 5.

Ultimately, the prospective limitation of Ms. Torres and Mr. Allen's liability is particularly problematic given the haste within which the plea was entered and the acute pressures that Ms. Torres and Mr. Allen brought to bear on Mr. Walker in order to induce him to plead guilty. As noted, the advice that they gave him was inaccurate and misleading in material respects. This Court should conclude that Ms. Torres and Mr. Allen's interest in insulating themselves from liability adversely affected their performance. The plea should be withdrawn.

(b). Reversal is required and Mr. Walker must be allowed to withdraw his plea.

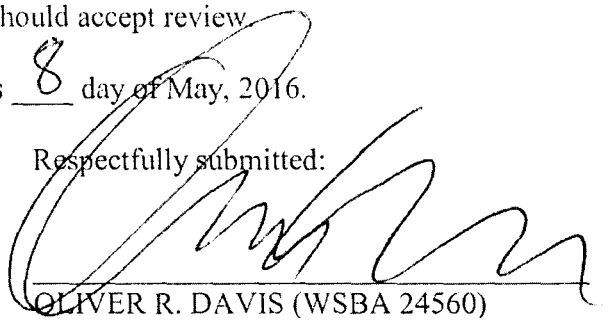
Mr. Walker's guilty plea was involuntary, and counsel's performance was adversely affected by a conflict of interest.

F. CONCLUSION

This Court should accept review.

DATED this 8 day of May, 2016.

Respectfully submitted:



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Appendix A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 71748-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
ALVIN WALKER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: February 8, 2016

SPEARMAN, C.J. — Alvin Walker appeals the denial of his motion to withdraw his guilty plea. He argues that his plea was not knowing, intelligent, and voluntary. He also asserts that he received ineffective assistance of counsel because his attorneys had a conflict of interest. Finding no error, we affirm.

FACTS

Walker was convicted by a jury of second degree assault, felony harassment, and second degree rape. The trial court imposed standard range sentences for the assault and harassment charges and an indeterminate term of 159 months to life on the rape charge. This court affirmed Walker's conviction.

Fernanda Torres, an attorney with the Innocence Project Northwest, filed a CrR 7.8(b)(5) motion for relief from judgment on Walker's behalf. The motion asserted that the performance of Walker's trial counsel was deficient because the attorney (1) failed to request a material witness warrant to secure the testimony of a potential defense witness and (2) failed to review medical records that supported Walker's defense. About a week before the motion hearing, Torres and her co-counsel David Allen decided to

strike the part of the motion concerning the potential witness. In Torres's opinion, the amended motion was significantly weaker than the original motion. Torres informed Walker of the amendment and told him that she did not expect to prevail on the CrR 7.8 motion. Walker authorized Torres to attempt to negotiate a settlement with the State.

The day before the motion hearing, the State offered a plea of assault in the first degree and rape in the third degree, which would result in a determinate sentence of 138 months. Torres discussed the offer with Walker for about two hours that morning. A large part of their discussion concerned the difference between a determinate sentence, under which Walker was certain to be released at the end of his term, and an indeterminate sentence, under which Walker could serve life in prison if the indeterminate sentence review board found that he was likely to reoffend. Torres and Allen met with Walker again that afternoon. Walker authorized them to accept the offer and Torres prepared the plea documents.

On the morning of the motion hearing, Torres reviewed the documents with Walker, which included a straight plea to the assault charge and an Alford plea[1] to the sex offense. A document titled "Exhibit A" was attached to both pleas. Exhibit A included statements addressing Walker's right to claim ineffective assistance of counsel and expressing satisfaction with his attorneys:

> Pursuant to this plea agreement, I agree to waive any appeal of my conviction or imposition of a standard range sentence on the amended charges. . . . I understand this does not include a waiver to a claim of ineffective assistance of counsel. I am satisfied with the representation and counsel I have received from my attorneys, Fernanda Torres and David Allen. I also understand that by pleading

[1] Under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a defendant may, under some circumstances, enter a guilty plea without admitting his guilt. Washington adopted the Alford holding in State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976).

> guilty to these charges, I am agreeing to the dismissal of my CrR 7.8(b) motion.

Clerk's Papers (CP) at 366. (Emphasis added.).

Following her meeting with Walker, Torres reviewed the plea paperwork with the State. The State objected to the sentence in Exhibit A that stated "I understand this does not include a waiver to a claim of ineffective assistance of counsel." CP at 406. Torres blacked out that sentence. Torres met with Walker again and Walker signed the plea documents.

At the plea colloquy, Walker stated that he understood the plea, adopted the factual statements as his own, and was not acting in response to threats or promises. He stated that he agreed with Exhibit A and did not need more time to consult with his lawyer. After finding that Walker's decision was knowing, intelligent, and voluntary, the court accepted his guilty plea.

Later that same day, Walker sent a letter to the trial court asking to withdraw his plea. After the court appointed new counsel, Walker argued that the plea was not voluntary because of the short time he had to consider the offer and because his attorneys exaggerated the possibility that he would spend life in prison under his indeterminate sentence. He argued that the plea was not knowing because he did not understand the rights he relinquished in Exhibit A. He also argued that the sentence in Exhibit A that asserted his satisfaction with the representation he received from his attorneys demonstrated that his attorneys had a conflict of interest.

At the hearing on Walker's motion to withdraw his guilty plea, Torres testified to her meetings with Walker during plea negotiations. She stated that she reviewed Exhibit A with Walker after striking the sentence concerning Walker's right to claim ineffective

assistance of counsel and explained to him that striking the sentence had no effect. Torres also stated that the sentence in Exhibit A expressing Walker's satisfaction with representation was intended to make it more difficult for Walker to prevail on a claim of ineffective assistance of counsel. Torres stated that she did not believe the sentence had any practical effect. She also stated that, in retrospect, she should have stricken the expression of satisfaction when she struck the sentence concerning Walker's right to claim ineffective assistance of counsel.

The trial court considered Torres's testimony, Walker's declaration, the briefing of both parties, and the recording of the plea hearing. The court denied Walker's motion to withdraw his guilty plea because it found that he failed to demonstrate a manifest injustice. Walker appeals.

DISCUSSION

Walker argues that the trial court erred in denying his motion to withdraw his guilty plea. A trial court's decision on a motion to withdraw a guilty plea is reviewed for abuse of discretion. State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (citing In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 879-80, 123 P.3d 456 (2005)). A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons. . . ." State v. Powell, 126 Wn.2d 244, 258, 893 P.3d 615 (1995). To prevail in a motion to withdraw a guilty plea, a defendant must establish that withdrawal of the plea is necessary to correct a manifest injustice. CrR 4.2(f); State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). A manifest injustice may be found if the defendant did not receive effective assistance of counsel, the plea was not ratified

by the defendant, the plea was involuntary, or the prosecution breached the plea agreement. Taylor, 83 Wn.2d at 597. Walker claims that a manifest injustice exists in this case because his plea was involuntary and because he received ineffective assistance of counsel. We address each claim in turn.

A "strong presumption" of voluntariness arises when a defendant has admitted to reading, understanding, and signing a plea form. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). A defendant's statement on the record that he is entering the plea voluntarily is "'highly persuasive.'" State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984) (quoting State v. Frederick, 100 Wn.2d 550, 556, 674 P.2d 136 (1983)). A "bare allegation" of coercion in a defendant's affidavit is not sufficient to overcome such "highly persuasive" evidence. Id. The timing of a defendant's motion to withdraw a guilty plea may be considered, but is only given weight if the motion is made promptly after the discovery of previously unknown consequences or information. State v. A.N.J., 168 Wn.2d 91, 107, 225 P.3d 956 (2010).

Walker argues that his plea was involuntary because his attorneys improperly pressured him to plead guilty and because he did not knowingly and intelligently enter the plea. He first asserts that Torres and Allen coerced his decision to plead guilty by misrepresenting his chances of prevailing on the CrR 7.8 motion, equating his indeterminate sentence with life in prison, and by failing to allow him sufficient time to consider the plea offer. Walker contends that the fact that he asked the court to withdraw his guilty plea within hours of the plea hearing also supports the conclusion that the plea must be set aside to correct a manifest injustice.

In reaching its decision, the trial court considered Walker's statements on the record that he understood the plea, did not need more time, and was entering the plea voluntarily. The court considered the timing of Walker's request and the statements in his declaration. The court heard Torres's testimony and considered the length of time that Walker had to review the plea offer, the number and duration of meetings with his attorneys, and the topics discussed during those meetings. The court found Walker had not shown that his decision to plead guilty was coerced. It further found that although Walker's request to withdraw the plea occurred within hours of the plea hearing, that fact was entitled to no weight because the request was not based on previously unknown consequences or information.

Walker also argues that his decision to plead guilty was not knowing and intelligent because he did not understand the effect of the change to Exhibit A. He challenges the portion of Finding of Fact number six that states, "Torres reviewed exhibit A with Walker after the waiver language was stricken and explained to him that the stricken language did not change the rights he was waiving. . . ." CP at 406. Walker contends that when Torres reviewed Exhibit A with him the document included the sentence: "I understand this does not include a waiver to a claim of ineffective assistance of counsel." Id. He asserts that striking the sentence affected his rights on appeal, Torres did not explain the significance of the change, and he thus waived a right unknowingly. Walker's argument fails because the deleted sentence did not change Walker's rights or the consequences of his plea. The sentence merely stated that Walker understood that he had the right to claim ineffective assistance of counsel. Deleting the sentence did not waive the right.

Walker's assertion that Torres did not explain the effect of deleting the sentence is not supported by the record. A finding of fact is upheld on appeal if it is supported by substantial evidence. A.N.J., 168 Wn.2d at 107. Walker argues that Torres stated that she did not specifically remember explaining the amendment to Exhibit A and that she only said she "would have" explained it. Brief of Appellant at 19-20. But Torres consistently and repeatedly stated that she explained the sentence concerning the right to bring a claim of ineffective assistance of counsel and that removing the sentence had no effect. Although she frequently used the conditional tense, her testimony as a whole does not express uncertainty. Torres did not specifically remember explaining the sentence expressing Walker's satisfaction with counsel, but she did remember explaining the sentence concerning his right to claim ineffective assistance of counsel. We conclude that substantial evidence supports the trial court's finding that Torres explained the amendment to Exhibit A.

The trial court considered all evidence before it and based its ruling on the correct legal standard. Walker's statements at the plea colloquy and Torres's testimony support the conclusion that his decision to enter the plea was knowing, intelligent and voluntary. The denial of Walker's motion is thus not "manifestly unreasonable or based upon untenable grounds . . . ." Powell, 126 Wn.2d at 258. The trial court did not abuse its discretion.

Walker next argues that Exhibit A demonstrates that he received ineffective assistance of counsel because Torres and Allen had a conflict of interest. We review a claim of ineffective assistance of counsel de novo. In re Pers. Restraint of Gomez, 180 Wn.2d 337, 347-48, 325 P.3d 142 (2014). A conflict of interest is not a per se violation

of the right to effective assistance of counsel. Id. A defendant must show both that counsel actively represented conflicting interests and that the conflict adversely affected counsel's performance. Id. at 348-49 (citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). To establish that a conflict existed and negatively impacted performance, the defendant must point to "specific instances in the record" State v. Graham, 78 Wn. App. 44, 55, 896 P.2d 704 (1995) (citing State v. Martinez, 53 Wn. App. 709, 715, 770 P.2d 646 (1989)). Review of counsel's performance is highly deferential. Gomez. 180 Wn.2d at 348 (citing Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Walker argues that Torres and Allen violated the rules of professional conduct (RPCs) regarding conflicts of interest and prospective limitations on liability. The RPCs "do not 'embody the constitutional standard for effective assistance of counsel,'" but they do serve as guidelines "for determining what is reasonable." Gomez, 180 Wn.2d. at 349 (quoting State v. White, 80 Wn. App. 406, 412-13, 907 P.2d 310 (1995)). Under RPC 1.7(2), a concurrent conflict of interests exists if "there is a significant risk that the representation of one or more clients will be materially limited ... by a personal interest of the lawyer." Under RPC 1.8(h), "a lawyer shall not ... make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented by a lawyer in making the agreement."

Walker argues that the expression of satisfaction in Exhibit A demonstrates that his attorneys improperly sought to protect their personal interests. Walker asserts that Torres's and Allen's interest in insulating themselves adversely affected their performance because they provided inaccurate and misleading advice and allowed him

insufficient time to consider the plea. He also contends that, by including the statement that he was satisfied with their performance in the plea documents, Torres and Allen effectively required him to waive his right to claim ineffective assistance of counsel as part of his plea bargain.

We reject his argument because, while the expression of satisfaction is evidence that Walker's attorneys sought to protect themselves from allegations of ineffective assistance, Walker does not show that this interest amounts to a conflict that adversely affected performance. Walker's assertion that Torres and Allen gave him inaccurate and misleading information is a bare allegation, unsupported by "specific instances in the record." Graham, 78 Wn. App. at 55. Walker makes no argument as to how his attorneys' self interest caused the allegedly deficient performance. Walker also fails to show that the expression of satisfaction prevented him from claiming ineffective assistance of counsel or amounted to a prospective limitation on liability in violation of RPC 1.8(h).

The expression of satisfaction served no purpose and, as Torres stated, it would have been wiser not to include it in the plea documents. But the sentence does not establish that Walker's attorneys had a conflict of interest that adversely affected their representation or that they entered into an improper prospective limitation of liability. We hold that the trial court did not err in denying Walker's motion to withdraw his guilty plea based on ineffective assistance of counsel.

Affirmed.

Spearman, C.J.

WE CONCUR:

Leach, J.

Ian, J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALVIN WALKER, Appellant.	)	No. 71748-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Alvin Walker filed a motion to reconsider the opinion issued in the above matter on February 8, 2016. A majority of the panel has determined the motion should be denied.

NOW therefore, it is hereby ordered appellant's motion to reconsider is denied.

DATED this 22nd day of April, 2016.

FOR THE COURT:

Spearman, C.J.

Presiding Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71748-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: May 10, 2016