No. 98019-5

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JEROME J. McFIELD,

Petitioner

APPEAL FROM DIVISION I
OF THE COURT OF APPEALS
#80105-8-I

PETITION FOR REVIEW

BRETT A. PURTZER
WSB #17283

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner
1008 South Yakima Avenue, Suite 302
Tacoma, Washington 98405
(253) 272-2157

Table of Contents

TABLE OF AUTHORITIES

Cases

Rules

I. IDENTITY OF PETITIONER

Jerome McField, petitioner, respectfully requests that this Court accept review of the Court of Appeals decision in case number 80105-8-I.

II. COURT OF APPEALS DECISION

Petitioner respectfully requests that this Court review the Court of Appeals decision, affirming the trial court's decision in this case. The Court of Appeals erroneously determined that the trial court did not abuse its discretion in denying petitioner's motion to withdraw his guilty plea, and, that petitioner did not establish that his trial counsel's performance was ineffective for failing to obtain and review all discovery with him before he entered his plea.

A copy of the decision from the Court of Appeals, Division I, terminating review which was filed on November 26, 2019 is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision that petitioner was not denied effective assistance of counsel when trial counsel failed to obtain all discovery and review all discovery with petitioner before petitioner entered his guilty plea?

2. Did the Court of Appeals err in affirming the trial court's decision that petitioner's guilty plea was knowingly and voluntarily entered when trial counsel failed to obtain all discovery from the State and

failed to review all discovery with petitioner before petitioner entered his guilty plea?

IV. STATEMENT OF THE CASE

A. *Procedural History*

Petitioner adopts the procedural history as set forth in his opening appellate brief as if fully set forth herein.

B. *Facts*

Petitioner adopts the statement of facts as set forth in his opening appellate brief as if fully set forth herein.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioner respectfully requests that this Court accept review of this case as it involved a decision of the Court of Appeals that conflicts with the Supreme Court's decisions in *State v. Jones*, 183 Wn.2d 327, 352 P.2d 776 (2015) and *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). *See* RAP 13.4(b)(1).

A. MR. McFIELD'S COUNSEL WAS INEFFECTIVE FOR NOT OBTAINING AND PROVIDING ALL DISCOVERY TO MR. McFIELD BEFORE HE ENTERED HIS GUILTY PLEA.

1. Ineffective Assistance of Counsel

To show ineffective assistance of counsel, a defendant must show that (1) his or her lawyer's representation was deficient and (2) the deficient performance prejudiced him/her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) . Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the

circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when but for counsel's deficient performance, the proceeding's result would have been different. *McFarland*, 127 Wn.2d at 335. If a party fails to satisfy one prong, this Court need not consider the other. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Ineffective assistance of counsel is an exception from the actual and substantial prejudice standard: we presume prejudice where a petitioner successfully establishes ineffective assistance of counsel. *In Re Pers. Restraint of Lui*, 188 Wn.2d 525, 538, 397 P.3d 90 (2017). Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *In Re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

A criminal defendant has a state and federal constitutional right to effective assistance of counsel. *Strickland*, 466 U.S. at 686; *State v. Tinkham*, 74 Wn.App. 102, 109, 871 P.2d 1127 (1994). To discharge this duty, trial counsel must investigate the case, and investigation includes witness interviews. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1992) ("Failure to investigate or interview witnesses, . . . is a recognized basis upon which a claim of ineffective assistance of counsel may rest." (*citing State v. Visitacion*, 55 Wn.App. 166, 173-74, 776 P.2d 986 (1989))).

Here, trial counsel's failure to obtain all discovery and review all discovery with petitioner is tantamount to a failure to properly investigate a case and properly advise the client.

2. *Trial Counsel's Failure to Obtain and Provide all Discovery to Mr. McField before he entered his Guilty Plea Constitutes Ineffective Assistance of Counsel.*

As set forth above, the right to effective assistance of counsel includes the requirement that "trial counsel ... investigate the case". *See State v. Jones*, 183 Wn.2d 327, 346, 352 P.2d 776 (2015). Here, trial counsel was deficient and ineffective for failing to obtain all discovery and provide the discovery to Mr. McField before he entered his guilty plea. Further, this failure prevented Mr. McField from making a knowing, intelligent and voluntary decision because he did not know all of the facts contained within the discovery.

Trial counsel failed to obtain all of the photos from the scene and trial counsel's failure to allow Mr. McField to review all discovery before entering his guilty plea establishes counsel's ineffectiveness. During the motion to withdraw his guilty plea, Mr. McField, and his father, testified that neither had viewed the police reports, and Mr. McGowan acknowledged such as well. RP 43:12-44:19. Further, in Mr. McField's statement of additional authorities, he noted that he had not received any of the 250 scene photos associated with his case. The Court of Appeal's decision states that such failure to obtain the photos does not demonstrate trial counsel failed to investigate the case. Such decision is erroneous.

If trial counsel has not obtained all discovery related to this case, then trial counsel has not properly investigated the case. Here, trial counsel never obtained all discovery, i.e., scene photos associated with petitioner's case that were referenced in the discovery. As such, it is unclear how the Court of

Appeals can render its opinion that the failure to obtain the photos is disputed. Respectfully, Mr. McField did not obtain the photos until well after he had entered his plea. As such, Mr. McField's position is unrebutted.

Additionally, no trial tactic can include the failure to review evidence with a client before trial. "Failure to investigate ... is a recognized basis upon which a claim of ineffective assistance of counsel may rest." *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). *See also, State v. Tinkham*, 74 Wash.App. 102, 109, 871 P.2d 1127 (1994) (to discharge duty of effective assistance of counsel, counsel must investigate the case.)

As such, trial counsel's performance was deficient and prejudicial as a reasonable likelihood exists that the decision of whether Mr. McField would have entered his guilty plea, had he received and reviewed all discovery, would have been different but for counsel's deficient performance. As such, Mr. McField has established that he was prejudiced by trial counsel's performance.

B. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF MR. McFIELD'S MOTION TO WITHDRAW HIS GUILTY PLEA.

As set forth in section A, Mr. McField did not receive all of the discovery related to his case because trial counsel had not obtained all discovery nor provided the police reports to Mr. McField to view before he entered his plea. Both of these failures constitute deficient performance.

Mr. McField urges that his guilty plea was not knowingly and intelligently entered because he was coerced into entering his plea based upon Mr. McGowan's threat of a potential sentence, if he went to trial, and because he did not have an opportunity to review the police reports outlining the facts of the case.

Additionally, he did not have any opportunity to see any witness interviews before entering the plea. As such, he did not knowingly, intelligently and voluntarily enter his guilty plea.

CrR 4.2(f) states as follows:

> The court shall allow a defendant to withdraw defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.

"A trial judge's decision on whether to allow a defendant to withdraw a guilty plea is reviewed for abuse of discretion." *State v. A.N.J.*, 168 Wn.2d 91, 107, 225 P.3d 956 (2010).

> Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily. *State v. A.N.J.*, 168 Wash.2d 91, 117, 225 P.3d 956 (2010) (*citing In re Pers. Restraint of Mendoza Montoya*, 109 Wash.2d 270, 277, 744 P.2d 340 (1987); *Boykin v. Alabama*, 395 U.S. 238, 242.43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). A trial court may not accept a guilty plea without first determining that a criminal defendant has entered into the plea "voluntarily," competently and with an understanding of the nature of the charge and the consequences of the plea."

CrR 4.2(d).

> . . .
>
> However, we permit "'a defendant to withdraw his plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.'"

State v. Taylor, 83 Wash.2d 594, 595, 521 P.2d 699 (1974)(*quoting* CrR 4.2(f).)

Here, based upon Mr. McField's testimony, he did not make a knowing, intelligent and voluntary decision as to whether to plead guilty, despite his words at the plea hearing, because of undue duress being placed upon him by his

lawyer and because he did not receive the discovery in his case before entering the plea. Based upon the lack of knowledge Mr. McField had about the facts of his case, and the evidence he did not receive until after his plea; i.e., photographs, he could not possibly enter a knowing, intelligent and voluntary plea because he never reviewed the evidence against him, despite consulting with his lawyer. Mr. McField's testimony is supported by that of his father who also never reviewed the discovery, despite continued requests to do so. As such, the trial court erred when it denied Mr. McField's motion to withdraw his plea as such withdrawal is necessary to correct a manifest injustice.

VI. CONCLUSION

Based on the arguments, records and files contained herein, petitioner respectfully requests that this Court accept review of this matter.

Respectfully submitted this 24th day of December, 2019.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

By: _____
BRETT A. PURTZER
WSB #17283

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the petition for review to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Counsel for Respondent

Kathleen Proctor
Deputy Prosecuting Attorney
930 Tacoma Avenue South,
#946
Tacoma, WA 98402

☐U.S. Mail
☐Hand Delivery
☐ABC-Legal Messengers
☒Email

Appellant

Jerome J. McField
DOC #407597
Washington Corrections Center
P. O. Box 900
Shelton, WA 98584

☒U.S. Mail
☐Hand Delivery
☐ABC-Legal Messengers
☐Email

Signed at Tacoma, Washington, this 24th day of December, 2019.

LEE ANN MATHEWS

FILED
11/26/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JEROME JOSEPH MCFIELD, Appellant.	No. 80105-8-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Jerome McField filed a motion to reconsider the court's opinion filed on October 7, 2019. The panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, A.C.J.

FILED
10/7/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JEROME JOSEPH MCFIELD, Appellant.	)	No. 80105-8-I DIVISION ONE UNPUBLISHED OPINION FILED: October 7, 2019

MANN, A.C.J. — Jerome McField entered into a guilty plea to resolve multiple charges, but then moved to withdraw his guilty plea. McField claimed that he did not enter into the plea knowingly, voluntarily, and intelligently. On appeal, McField contends that the trial court erred in denying his motion to withdraw his plea and that he was denied effective assistance of trial counsel. We affirm.

I.

On June 28, 2016, the State charged McField with one count of assault in the first degree with a firearm enhancement, one count of unlawful possession of a firearm in the first degree, and one count of obstructing a law enforcement officer. The State later added two additional counts of assault in the first degree each with firearm enhancements, one count of drive-by shooting, and three counts of assault in the

second degree with firearm enhancements. At arraignment, McField entered a not guilty plea on all counts.

McField was represented by attorney Matthew McGowan. McField's charges arose out of three separate instances that could have been tried separately. McGowan estimated that if McField lost at trial, his sentence would have been in the "35- to 45-year range, but that with depending on how many trials there were and how a judge decided to sentence at the end, it could be up to 50 or 60 years."

The State offered McField a plea deal with a recommended sentence of 15 years. McField reviewed the plea offer with McGowan.

On July 24, 2017, McField accepted the deal and pleaded guilty to one count of assault in the first degree with a firearm sentencing enhancement, and one count of unlawful possession of a firearm in the first degree. McField signed the statement of defendant.

McField was crying when he entered into the plea deal. McField told the judge that he had reviewed the agreement, that he was waiving his rights to trial, and that no one was forcing him to accept the plea deal.

> [MCGOWAN]: . . . I believe he's moving forward today with his plea knowingly, intelligently and voluntarily.
> THE COURT: Mr. McField, good morning. Do you agree with everything that Mr. McGowan, your attorney, just said?
> [MCFIELD]: Yes, Your Honor.
> THE COURT: Have you had the opportunity to thoroughly review the Statement of Defendant on Plea of Guilty with Mr. McGowan?
> [MCFIELD]: Yes, Your Honor.
> THE COURT: Did he answer all of your questions about the form, about the decision to plead guilty, and about your case?
> [MCFIELD]: Yes, sir.

The court accepted the plea, finding that McField entered into the guilty plea knowingly, voluntarily, and intelligently.

The day after entering the guilty plea, McField told McGowan that he wanted to withdraw the guilty plea. McGowan acknowledged that McField was not happy about the plea and that another attorney, Robert Quillian, took over the case soon after.

McField filed a motion to withdraw his guilty plea. The hearing on the motion was held on April 17, 2018. At the hearing, McField confirmed that he signed the statement of defendant, but said that he was coerced into accepting the plea because trial was scheduled to start that day. McField said that McGowan told him "that the plea was the best way to go; that if I continued, that trial was going to start that day and that I had no defense and that I was going to get 60 to 80 years if I didn't take the deal."

McField testified that at the time he entered the guilty plea, he did not believe that he was voluntarily entering into a plea. McField also testified that he never had the opportunity to review the police reports in his case. McGowan and his assistant defense counsel, Kelley Kavanaugh, testified about reviewing the discovery, including the police reports, with McField.

The court found that McGowan

> provided the defendant with effective assistance of counsel through the duration of the representation and was prepared to proceed to trial had the defendant chosen not to accept the guilty plea. Mr. McGowan, however, did not show [McField] the police reports or provide him a copy for his own use. He did however convey the substance of the police reports and other discovery during their consultations.

The trial court found that McField did not meet his burden to establish a manifest injustice that would warrant the withdrawal of his guilty plea, concluding that the "defendant entered that plea knowingly, voluntarily, and intelligently. He made the

decision to plead guilty and forgo his trial after full consultation with his attorney. That attorney more than adequately assisted the defendant in the decision of whether to plead guilty." The court found McGowan and Kavanaugh's testimony to be credible.

McField appeals.

II.

McField first challenges the trial court's conclusion that he knowingly, intelligently, and voluntarily entered into his guilty plea. McField argues that he did not make a voluntary plea because his attorney placed him under undue duress by coercing him to accept the plea deal. He also argues that his plea was not knowing because he never reviewed the discovery and police reports for his case. We disagree.

A denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. State v. A.N.J., 168 Wn.2d 91, 106, 225 P.3d 956 (2010). The trial court must permit a defendant to withdraw a guilty plea when withdrawal is necessary to correct a manifest injustice. CrR 4.2(f). The Washington Supreme Court recognizes four nonexclusive criteria of manifest injustice which are (1) the denial of effective counsel, (2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea agreement was not kept by the prosecution. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). "A written statement on plea of guilty in compliance with CrR 4.2(g) provides prima facie verification of its constitutionality, and when the written plea is supported by a court's oral inquiry on the record, the presumption of voluntariness is well nigh irrefutable." State v. Davis, 125 Wn. App. 59, 68, 104 P.3d 11 (2004) (citing State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982)).

Here, McField acknowledges that he signed the statement of defendant for the guilty plea. When the trial court accepted McField's guilty plea, the court asked McField if he was entering into the plea knowingly, voluntarily, and intelligently, and McField affirmed that he was. The written evidence and oral testimony establish his voluntariness. Although McField testified that he was coerced into signing the plea, and that he did not think he was voluntarily entering into the plea, the court found that "[t]he defendant decided of his own accord to accept the State's plea offer."

Although McField testified that he did not see the police reports or discovery in his case, based on the testimony of counsel, the trial court found that McGowan conveyed the substance of the reports and other discovery to McField. While McField and McGowan presented conflicting evidence, the court ultimately found McGowan to be credible.

McField has not demonstrated that the trial court abused its discretion in denying his motion to withdraw his plea.

III.

McField next contends that he was denied effective assistance of counsel. McField argues that McGowan failed to investigate his case by failing to provide discovery to McField before he entered his guilty plea. We disagree.

Because claims of ineffective assistance of counsel present mixed questions of fact and law, the standard of review is de novo. A.N.J., 168 Wn.2d at 109. To demonstrate ineffective assistance of counsel, the defendant must show "(1) that his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." A.N.J., 168 Wn.2d at 109 (citing Strickland v.

Washington, 46 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The defendant must demonstrate both deficient performance and prejudice. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). To show prejudice, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. We presume that the defendant was properly represented. Hendrickson, 129 Wn.2d at 77-78.

The presumption of counsel's adequate representation can be overcome by a showing that counsel failed to conduct appropriate investigations. State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816 (1987). McField relies upon State v. Jones, 183 Wn.2d 327, 339-40, 352 P.3d 776 (2015), for his argument that his trial counsel was ineffective for failing to investigate his case. In Jones, trial counsel was found ineffective for failing to interview three key witnesses and offering "absolutely no reason" for failing to do so. Jones, 183 Wn.2d at 340.

McField argues that McGowan failed to investigate his case because he did not provide the police reports to McField before he entered his guilty plea. Not providing independent copies of police reports is not, however, the same as not investigating the case. McGowan estimated meeting with McField at least a dozen times. He brought in two additional attorneys to help investigate and consult on the case. Counsel then conducted witness interviews with "pretty much everyone who was on [McField's] side of the case." As the trial court found, counsel also met with McField and his father and conveyed the substance of the police reports and witness interviews.

Because McField has failed to demonstrate that McGowan's performance fell below an objective standard of reasonableness, McField's ineffective assistance of counsel claim fails.

IV.

In McField's statement of additional grounds he argues that McGowan did not obtain all of the discovery in his case, constituting ineffective assistance of counsel. Specifically, McField argues that McGowan did not obtain 250 photographs of the scene that were taken after the incident.

McField cites to the report of proceedings where McGowan discusses the photographs taken at the scene. McGowan confirmed that he reviewed the "scene photographs" with McField. He also testified that he had taken photos of "the house and where things would have fallen."

McField has not demonstrated that McGowan failed to investigate his case. His argument about McGowan's failure to obtain the photographs is disputed, and this claim does not appear to constitute McGowan's failure to investigate. For these reasons, McField's additional ineffective assistance of counsel claim fails.

We affirm.

Mann, ACJ

WE CONCUR:

Leach, J.

Dwyer, J.

HESTER LAW GROUP, INC., P.S.

December 24, 2019 - 10:48 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80105-8
Appellate Court Case Title:	State of Washington, Respondent v. Jerome McField, Appellant
Superior Court Case Number:	16-1-02651-8

The following documents have been uploaded:

- 801058_Petition_for_Review_20191224104745D1062704_6800.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- leeann@hesterlawgroup.com
- robin.sand@piercecountywa.gov

Comments:

Sender Name: LeeAnn Mathews - Email: leeann@hesterlawgroup.com
Filing on Behalf of: Brett Andrews Purtzer - Email: brett@hesterlawgroup.com (Alternate Email: brett@hesterlawgroup.com)

Address:
1008 South Yakima Avenue
Suite 302
Tacoma, WA, 98405
Phone: (253) 272-2157 EXT 253

Note: The Filing Id is 20191224104745D1062704