

64238-3

642383

No. 64238-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

EMORY BERUBE,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Before advising his client, Emory Berube, to plead guilty to a most serious offense, defense counsel conducted no factual investigation; did not interview any of the State's witnesses, including the alleged victim; did not attempt to contact any of the witnesses Berube identified, although some of them might have corroborated Berube's assertion that he was not present during the assault; and did not review the State's evidence with Berube, ask him his side of the story, or discuss any possible defenses with him. Because a defense attorney cannot adequately evaluate the merits of a plea offer without understanding the strength of the State's evidence or the possible defenses, counsel's utter failure to investigate before advising Mr. Berube to plead guilty amounted to deficient performance.

Moreover, because counsel completely failed to subject the prosecution's case to meaningful adversarial testing, prejudice is presumed without a need to inquire into the actual effects of counsel's deficient performance. Alternatively, counsel's deficient performance led to actual prejudice, where counsel's failure to investigate caused him to ignore a possible defense to the charge. Berube should therefore be permitted to withdraw his guilty plea.

**B. ASSIGNMENT OF ERROR**

The trial court erred in denying Mr. Berube's motion to withdraw his guilty plea.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A criminal defense attorney cannot adequately evaluate the merits of a plea offer without understanding the strength of the State's evidence or the possible defenses. An attorney's failure to perform a factual investigation before advising a client to plead guilty can amount to objectively deficient performance. Did counsel perform deficiently where he advised Mr. Berube to plead guilty to a most serious offense, but had interviewed no witnesses and had not investigated any possible defenses?

2. Counsel's deficient performance is prejudicial per se, where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. By failing to investigate and ascertain the strength of the State's evidence, as well as any possible defenses, did counsel entirely fail to subject the prosecution's case to meaningful adversarial testing, resulting in prejudice per se?

3. Counsel's deficient performance results in actual prejudice, where counsel's failure to investigate causes counsel to

overlook a possible defense. Did counsel's deficient performance result in actual prejudice, where his failure to investigate caused him to overlook a possible defense?

D. STATEMENT OF THE CASE

Emory Berube was charged with one count of first degree assault, one count of first degree unlawful possession of a firearm, and two counts of possession of a controlled substance. CP 17-18. The charges arose from an incident in Seattle in the early morning of July 12, 2008. According to the Certification for Determination of Probable Cause, Tanisha Barquet told police that, on that night, she and a girlfriend went to "Thompson's Point of View," a restaurant located in the 2300 block of East Union Street. CP 31.

As Ms. Barquet was standing outside the restaurant, a man she later identified as Emory Berube approached her and asked if she was "Tanisha Barquet." CP 31. When she said she was, he accused her of being involved in an incident one month earlier, during which one of his friends was shot in the arm. CP 31. He stated he should "kick her ass" and that he would call his brother so the two of them could do "some serious harm" to her. CP 31. He then placed a call on his cell phone and a short time later his brother, Ivory Berube, arrived. CP 31.

According to Ms. Barquet, the two men continued to yell at her, threatening to assault and "harm" her. CP 31. Ivory then walked to a nearby car, took out an object and placed it in the front of his pants. CP 31. As he walked back toward her, she could discern the outline of a gun. CP 32. Ms. Barquet and her girlfriend returned to their car and left the area. CP 32.

Later that night, Ms. Barquet and her friend went to "Waid's," a lounge in the 1200 block of East Jefferson Street. CP 32. Ms. Barquet told police that as she stood outside the lounge, Ivory Berube approached her, pointed a gun at her, and fired. CP 32. The first round struck her ear and grazed her neck, and when she turned to flee, another round struck her in the leg. CP 32. She ran into a yard and hid under several bushes as three to four black men came into the yard looking for her. CP 32.

Police obtained security video footage from Waid's, recorded at the time of the incident. The picture quality is poor and does not show the faces of the people involved. 9/18/09RP 76. The video shows Ms. Barquet arriving with another woman. CP 32. After they park their car and begin to walk across the street, a group of black men standing in front of the lounge begins to yell at them. CP 32. One of the men in the group motions at the two women with his

hands as though he is racking a slide on a semi-automatic pistol and then points it toward Ms. Barquet. CP 32. A second man walks into the street and begins to yell at Ms. Barquet, apparently trying to distract her, and she focuses her attention on him. CP 32. The first man then walks out of the view of the camera and, soon afterward, Ms. Barquet walks to the same area. CP 32-33. Seconds later, she reappears in the picture running in the opposite direction. CP 33. The first man also reappears on the screen, with his right hand extended with an object in it, pointing at Ms. Barquet's back. CP 33. Soon after, police arrive. CP 33.

A witness at the scene told police that both Berube brothers were at Waid's that night, that there was an argument between them and Ms. Barquet, and that Ivory was wearing a white baseball cap, white T-shirt, dark jeans, and glasses, just like the first man in the video, who apparently shot Ms. Barquet. CP 33. But the witness did not identify Emory Berube as the second man in the video, and it is impossible to identify him from the video itself. CP 33; 9/18/09RP 76.

Police apprehended Emory Berube several days later. CP 33. When they searched him, they found heroin and crack cocaine on his person. CP 33. Emory admitted being at Thompson's Point

of View on the night of the incident but denied arguing with Ms. Barquet. CP 33-34. He also admitted being in front of Waid's when the shooting happened, but denied yelling at Ms. Barquet or being involved in the shooting. CP 33-34.

On March 3, 2009, a hearing was held before the Honorable Sharon Armstrong. Defense counsel Brian Todd moved to withdraw as Emory Berube's attorney, on the basis that he had earlier represented Tanisha Barquet's sister, Crystal, on another matter. 3/03/09RP 3-5. The court denied the motion to withdraw but ordered counsel to have no further contact with Crystal. 3/03/09RP 10. Mr. Berube then requested a new attorney, informing the court that Todd had come to see him only two times, that he had not interviewed any of the witnesses, and that he had done no work on the case. 3/03/09RP 6, 9. The court denied the motion based on its assumption that Berube would have the same problems with any attorney. 3/03/09RP 12-13.

On April 9, 2009, a pretrial hearing was held before the Honorable Jeffrey Ramsdell. Mr. Berube again requested new counsel on the basis that Todd was unprepared for trial. Berube informed the court that Todd had not contacted him since the hearing in March; that Todd had talked to him only once about the

case, several months earlier; that Berube had given Todd a list of three or four witnesses who would state he had been down the street at the time of the shooting and not involved in the assault, but Todd had not contacted any of them, even though some were incarcerated and would be easy to find; and that Berube was not even aware it was time for trial until he arrived in court that day. 4/09/09RP 13-14. Berube explained he had been in jail for nine months but still had not seen the discovery or had any discussion with his attorney about a possible defense. 4/09/09RP 19-20.

Despite Mr. Berube's concerns, the court denied the motion to dismiss counsel. 4/09/09RP 20-21. The court stated to Mr. Todd:

you answered ready to go to trial. I assume that means that in your mind you've done the due diligence necessary to adequately represent your client. If there are witnesses out there that remain to be interviewed, you're still going to have time to interview them if indeed they are easy to locate in prison.

The parties and the court then proceeded to pretrial motions.

Four days later, Mr. Berube agreed to plead guilty in exchange for the State's agreement to amend the charge to one count of second degree assault, down from first degree assault.<sup>1</sup>

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<sup>1</sup> Berube also agreed to plead guilty to the two counts of possession of a controlled substance as originally charged. 4/13/09RP 2, 9; CP 19.

4/13/09RP 2. Mr. Berube entered an Alford<sup>2</sup> plea, acknowledging that "the video demonstrates my actions and when viewed at trial I think there is a substantial likelihood that a jury would find me guilty as an accomplice to the shooter." CP 30; 4/13/09RP 8-9. But Mr. Berube refused to admit guilt and insisted in the plea document that he "did not see [his] brother Ivory Berube or anyone else shoot the victim." CP 30; 4/13/09RP 8. The court accepted the plea as knowing, intelligent, and voluntary and found there was a factual basis for it. 4/13/09RP 18.

Mr. Berube obtained a new attorney and, prior to sentencing, filed a motion to withdraw his guilty plea on the basis of ineffective assistance of counsel. CP 56-155; 7/17/09RP 10. He argued Brian Todd's representation was deficient, because he failed to interview the key witnesses in the case; failed to retain an investigator or conduct any investigation; and failed to review the State's evidence, including the videotape of the incident, with Berube. CP 59-66. Berube argued his guilty plea was not knowing, intelligent and voluntary, because it was not an informed choice among practicable alternatives. Because Berube was not aware of the State's evidence against him, or his possible defenses, he could not

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<sup>2</sup> North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

make an informed choice of whether to proceed to trial. Further, if he had proceeded to trial, he would be unlikely to prevail, as his attorney was not prepared to defend him. 9/18/09RP 73, 89.

The declarations submitted along with the motion to withdraw the guilty plea established that Todd had interviewed no witnesses, not even the alleged victim Tanisha Barquet, the only witness the State intended to call at trial. CP 59. Barquet had been detained on a material witness warrant in February 2009, and counsel for co-defendant Ivory Berube interviewed her then. CP 59-60, 74. Todd acknowledged he was aware that Ms. Barquet was in custody at that time and that he did not try to interview her then. CP 156-58. He also acknowledged that he never contacted or interviewed Barquet. CP 60, 156-58. He stated he tried to contact her several times "by calling phone numbers of the former clients that I had who knew how to contact Tanisha Barquet," but "[b]y the time we went to trial, I had not been able to contact Tanisha Barquet." CP 158.

Mr. Todd's claim that Tanisha Barquet was difficult to locate was belied by the declaration of Mr. Berube's new investigator, who was retained for purposes of the motion to withdraw the guilty plea. The new investigator was able to contact Ms. Barquet easily by

telephone. CP 156. He contacted Tanisha's sister Crystal, who gave him Tanisha's phone number. CP 156. The investigator sent Tanisha a text message and she called him back "immediately." CP 156. Tanisha told him that Todd had never contacted her. CP 156.

Mr. Todd also failed to interview other key witnesses in the case. For instance, Alysha Johnson told police she was with Ms. Barquet at the time of the incident and was an eyewitness to the actions of the group of people standing in front of Waid's. CP 60. But Todd never attempted to contact or interview her. The video shows 10-20 other potential eyewitnesses, including three employees of Waid's, all of whom saw the entire incident, but Todd never attempted to contact any of them. CP 61. Todd acknowledged he did not attempt to contact any of those witnesses. CP 158. But he explained that, from his review of the evidence and the certification for determination of probable cause, "there were very few witnesses who came forward at the scene and therefore based on my analysis of the case, there were not any other interviews that needed to be done." CP 158.

In addition, Mr. Berube himself provided Todd with the names of several witnesses, including one man who would

corroborate his account that he was not involved in the assault but was in a bar next door at the time. CP 61; 7/17/09RP 9; 9/18/09RP 43, 64-65. He did not have the witnesses' telephone numbers but told Todd that at least some of the witnesses were currently incarcerated and therefore would be easy to find. 9/18/09RP 35-36. But Todd never attempted to contact or interview any of those witnesses. CP 61; 7/17/09RP 9; 9/18/09RP 43, 64-65.

Again, the declarations established that contacting the witnesses would not have been difficult. Mr. Berube gave the new investigator a list of four possible witnesses; that same day, the investigator located three of the witnesses, all of whom were indeed incarcerated. CP 156.

Todd never retained an investigator, although he told Mr. Berube that he had. CP 62, 70; 9/18/09RP 31, 34-35. He also told Mr. Berube that the investigator would interview Mr. Berube's witnesses, but that never occurred. Id.

Todd had very little contact with Mr. Berube. CP 69-71; 9/18/09RP 30-33. He did not provide Mr. Berube with the discovery despite Berube's requests. CP 70; 9/18/09RP 32. He did not review the video with Mr. Berube and did not ask Berube about his

version of events.<sup>3</sup> CP 61-62; 9/18/09RP 36. Therefore, Mr. Berube could not imagine how Todd could be ready for trial. Mr. Berube was compelled to plead guilty because he felt he had no choice. He "could either go ahead to trial and lose and not have a fair trial or plea to the Alford and do less jail time for a crime I never even did." CP 71; see 9/18/09RP 40-41, 43, 53, 57. He thought he would be found guilty as an accomplice if he went to trial, because he was on the videotape, but in fact he had nothing to do with the shooting. 9/18/09RP 57.

On September 18, 2009, a hearing was held on the motion to withdraw the guilty plea. The court denied the motion, ruling that even if Todd had provided deficient representation, Mr. Berube's plea was knowing and voluntary and he suffered no prejudice.

9/18/09RP 90-93. The court explained:

Even accepting the deficiencies that are alleged in Mr. Todd's performance, I will be quite candid with you. My recollection of the plea process is Mr. Berube was a participant in the exercise. He seemed to understand exactly what we were doing.

9/18/09RP 91. The court further explained, the evidence was not sufficient to show that Todd would have give Mr. Berube different

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<sup>3</sup> Mr. Berube was eventually able to review the videotape with a different attorney, who was representing him on a separate matter. 9/18/09RP 59-61.

advice about whether to plead guilty even if had conducted a sufficient investigation. 9/18/09RP 93.

E. ARGUMENT

BERUBE IS ENTITLED TO WITHDRAW HIS GUILTY PLEA  
BASED ON COUNSEL'S DEFICIENT PERFORMANCE IN  
FAILING TO INVESTIGATE OR PURSUE A POSSIBLE  
DEFENSE

1. A criminal defendant may withdraw his guilty plea if he received ineffective assistance of counsel. Due process guarantees in the federal and state constitutions require that a guilty plea be made intelligently and voluntarily. Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); U.S. Const. amends. 5, 14; Const. art. I, § 3. In addition, a criminal defendant has a state and federal constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6; Const. art. I, § 22.

When a criminal defendant pleads guilty to a crime, courts must permit withdrawal of the plea whenever necessary to correct a "manifest injustice." CrR 4.2(4). Manifest injustice includes instances where the plea was not voluntary or the defendant

received ineffective assistance of counsel. State v. A.N.J., 2010 WL 314512, at \*13 (No. 81236-5; Jan. 28, 2010).

Ordinarily a court's decision to deny a motion to withdraw a guilty plea is reviewed for abuse of discretion, but "[b]ecause claims of ineffective assistance of counsel present mixed questions of law and fact," they are reviewed de novo. A.N.J., 2010 WL 314512, at \*8 (quoting In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001)).

The timing of a motion to withdraw a guilty plea may be considered by the court together with all other evidence bearing on the issue. A.N.J., 2010 WL 314512, at \*6. The timing of the motion should be given particular weight if made before any other benefit to the defendant or detriment to the State is known, and if grounded in concerns about the voluntariness of the plea. Id. Thus, a claim that a guilty plea was not knowing and intelligent may be more credible if made before sentencing than it would be if made after the defendant rolled the dice on a favorable sentence and was disappointed. Id.

Here, Mr. Berube moved to withdraw his plea prior to sentencing and before any other benefit to him or detriment to the

State was known. Therefore, the timing of the motion weighs in favor of establishing a manifest injustice.

2. Counsel's performance was objectively deficient, where he conducted no investigation before advising Berube to plead guilty. In order to establish ineffective assistance of counsel, Berube must demonstrate both that counsel's representation fell below an objective standard of reasonableness, and that prejudice resulted. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

A defense attorney's failure to conduct a factual investigation before advising a client to plead guilty may amount to objectively deficient performance. In State v. A.N.J., the Washington Supreme Court explained that "a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." State v. A.N.J., 2010 WL 314512, at \*8 (No. 81236-5; Jan. 28, 2010). A factual investigation is necessary in order to understand the strengths and weaknesses of the State's case. Therefore, the failure to conduct an adequate investigation before advising a client to plead guilty can amount to ineffective assistance of counsel. Id. at \*9.

In A.N.J., 12-year-old A.N.J. was charged with one count of first degree child molestation and assigned a public defender. State v. A.N.J., 2010 WL 314512 at \*3. Counsel met with his client and the client's parents once briefly before arraignment, at arraignment itself, and then not again until the pretrial conference, when he met with them for only 5 to 10 minutes. Id. at \*3. Counsel did little if any investigation or research into the case. Id. Counsel was given the names of witnesses who might have been able to testify that the victim had been abused by others, which could have provided an alternative explanation for the victim's report and knowledge, but counsel called these witnesses only once, did not reach them, and did not follow up. Id. Counsel never spoke to the investigating officer and made no requests for discovery and filed no motions. Id. Nonetheless, counsel advised A.N.J. to plead guilty, which he did. Id.

A.N.J. hired a new lawyer and within five weeks, prior to sentencing, moved to withdraw his guilty plea. Id. at \*5. The trial court denied the motion, finding that A.N.J. had acknowledged the facts as asserted by the State. Id. The Supreme Court reversed, holding that A.N.J. was entitled to withdraw his plea because he received ineffective assistance of counsel. Id. at \*14.

The A.N.J. court affirmed that "[c]ounsel has a duty to assist a defendant in evaluating a plea offer." Id. at \*9 (citing RPC 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires . . . thoroughness and preparation reasonably necessary for the representation"); RPC 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, *after consultation with the lawyer*, as to a plea.") (emphasis in A.N.J.); State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (citing State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)). "Effective assistance of counsel," the court explained, "includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." A.N.J., 2010 WL 314512, at \*9 (citing State v. S.M., 100 Wn. App. 401, 413, 996 P.2d 1111 (2000)).

Essential to the court's holding that counsel did not adequately assist A.N.J. in deciding whether to plead guilty, is the court's conclusion that counsel did not conduct an adequate investigation. The Washington Defender Association (WDA) recognizes that "[c]riminal investigation is an essential element of criminal defense." WDA, Standards for Public Defense Services,

std. 6 & cmt. at 52-53 (2006).<sup>4</sup> Although not binding, the WDA standards are useful to Washington courts in evaluating claims of ineffective assistance of counsel. A.N.J., 2010 WL 314512, at \*9. The WDA standards explicitly affirm that "the failure to provide adequate pre-trial investigation may be grounds for a finding of ineffective assistance of counsel." WDA, Standards for Public Defense Services, supra.

The American Bar Association's (ABA) standards for criminal defense services are even more emphatic that an attorney should not advise a client to plead guilty without first conducting a proper investigation. ABA, Standards for Criminal Justice, Defense Function.<sup>5</sup> Like the WDA, the ABA recognizes that criminal investigation is an essential component of the defense attorney's function:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's

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<sup>4</sup> The WDA standards are currently available at <http://www.defensenet.org/resources/publications-1/wda-standards-for-indigent-defense> (last accessed March 12, 2010).

<sup>5</sup> The ABA standards are currently available at [http://www.abanet.org/crimjust/standards/dfunc\\_toc.html](http://www.abanet.org/crimjust/standards/dfunc_toc.html) (last accessed March 12, 2010).

admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

ABA, Standards for Criminal Justice, Defense Function, std. 4-

4.1(a). The ABA also recognizes that an attorney cannot competently advise his client whether to plead guilty unless he first conducts a proper investigation:

Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

ABA, Standards for Criminal Justice, Defense Function, std. 4-

6.1(b).

Although the degree and extent of investigation required will depend upon the issues and facts of the case, "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." A.N.J., 2010 WL 314512, at \*9.

The duty to conduct an investigation does not depend upon whether the accused has made any admissions or appears willing to concede guilt. Id. False confessions and mistaken eyewitness identifications are well documented. Id. Thus, a client's admissions

do not excuse an attorney's duty to investigate weaknesses in the State's evidence and the chances of prevailing at trial. Id.

The presumption that counsel provided competent representation "can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial." State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (quoting State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)). Where a factual investigation is necessary to enable counsel to provide meaningful and well-informed advice to a client considering a guilty plea, the failure to perform an investigation cannot be deemed a reasonable tactic. See Jury, 19 Wn. App. at 265 n.1.

In this case, a factual investigation was necessary to understand and evaluate the strength of the State's evidence and any possible defenses. But, as in A.N.J., counsel performed no meaningful investigation and therefore his performance was objectively deficient. CP 56-155; 9/18/09RP 30-68; see A.N.J., 2010 WL 314512, at \*8. Counsel spent very little time with Mr. Berube before advising him to plead guilty. He never asked Berube

his side of the story and never reviewed the State's evidence or discussed possible defenses with him. Counsel did not retain an investigator. He interviewed no witnesses, not even the alleged victim, who was the only witness the State intended to call at trial. Ms. Barquet was detained at one point on a material witness warrant, but counsel made no attempt to interview her then, and did not contact her at any other time. As in A.N.J., counsel was given a list of witnesses, some of whom could possibly corroborate Mr. Berube's proposed defense, that he was not present in the crowd at the time of the assault but was instead in a bar next door. CP 61; 9/18/09RP 43, 64-65. But counsel made no attempt to contact any of those witnesses. Under these circumstances, given the standards set forth in A.N.J., this Court must conclude that counsel's performance fell below an objective standard of reasonableness.

3. Counsel's deficient performance was prejudicial per se, because he entirely failed to subject the prosecution's case to meaningful adversarial testing. Ordinarily, the two-prong Strickland test applies to claims of ineffective assistance of counsel during the plea hearing stage. Wright v. Van Patten, 552 U.S. 120, 124, 128 S.Ct. 743, 169 L.Ed.2d 583 (2008) (per curiam) (citing Hill v.

Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

That is, once counsel's deficient performance is established, the defendant must ordinarily also show that the deficient performance resulted in actual prejudice. Strickland, 466 U.S. at 687.

But under certain circumstances, involving the actual or constructive denial of the assistance of counsel altogether, prejudice is presumed. Strickland, 466 U.S. at 692 (citing United States v. Cronic, 466 U.S. 648, 659 & n.25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). Under those circumstances, the question is "whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time." Wright, 552 U.S. at 125.

The right to the effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." Cronic, 466 U.S. at 656-57. Thus,

[w]hen a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Id.

Some circumstances are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Id. at 658. Those circumstances include cases where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," which "makes the adversary process itself presumptively unreliable." Id. at 659. In order to presume prejudice based on counsel's failure to subject the prosecution's case to meaningful adversarial testing, "the attorney's failure must be complete." Bell v. Cone, 535 U.S. 685, 696-97, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

Here, defense counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. As discussed, counsel conducted no factual investigation and therefore made no attempt to assess the strengths and weaknesses of the State's evidence. Counsel did not investigate any possible defenses, even though his client suggested one and gave him a list of witnesses who could possibly testify in support of that defense. Counsel's lack of investigation and preparation compelled Mr. Berube to conclude he could not possibly receive a fair trial. 9/18/09RP 73, 89; CP 71. Berube therefore felt he had no choice but to plead guilty. Under these circumstances, the adversarial process broke

down and the resulting guilty plea is presumptively unreliable.

Counsel's deficient performance was prejudicial per se and Berube is entitled to withdraw the plea.

4. Alternatively, counsel's deficient performance prejudiced Berube, because the failure to investigate caused counsel to ignore a possible defense. As stated, ordinarily the two-prong Strickland test applies to claims of ineffective assistance of counsel during the plea hearing stage. Wright, 552 U.S. at 124 (citing Hill, 474 U.S. at 58). The second, or prejudice, prong of that test

focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Hill, 474 U.S. at 59. In particular, where the alleged error of counsel is a failure to investigate,

the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Id.

Prejudice is established where counsel's unpreparedness, due to an objectively unreasonable failure to investigate, causes counsel to ignore a potential defense. Jury, 19 Wn. App. at 266. The question is whether counsel had information casting doubt on the State's evidence, which counsel did not pursue. E.g., Dando v. Yukins, 461 F.3d 791 (6th Cir. 2006); Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984).

In Dando, Dando pled no contest to several charges arising from a crime spree that she committed along with her co-defendant boyfriend. Dando, 461 F.3d at 794. After her arrest she waived her Miranda rights and confessed to participating in the crimes. Id. Appointed counsel recommended that she plead no contest. Id. Dando told counsel that she had a long history of violent sexual and physical abuse and that her boyfriend and co-defendant beat her and threatened to kill her immediately before she participated in the robberies; she requested that counsel seek a mental health expert before she enter a no contest plea, but counsel refused explaining that an expert would cost too much money and continued to insist she enter a no contest plea. Id. The Sixth Circuit held Dando received ineffective assistance of counsel due to her attorney's failure to seek a mental health expert and to explore a possible

defense based on duress and Battered Women's Syndrome. Id. at 798. Counsel should have investigated the availability of a duress defense and the related possibility that Dando suffered from Battered Women's Syndrome, particularly since Dando herself told her attorney about her history of abuse, and even suggested the need for a mental health expert. Id. at 798-99.

Moreover, counsel's deficient performance prejudiced Dando. Id. at 800-03. Evidence of Battered Women's Syndrome could explain why a reasonable person might have participated in the alleged crime spree, given Dando's history of violent abuse and the imminent violent threats made by her abuser and co-defendant. Id. at 801. For purposes of demonstrating prejudice, it was not necessary to show that a jury would have acquitted Dando based on a defense of duress. Id. at 803. Rather, the question was whether a favorable outcome at trial was sufficiently likely that Dando's counsel would not have provided the same advice to plead guilty. Id. Under that standard, prejudice was established and Dando was entitled to withdraw the plea. Id.

In Thomas, Thomas pled guilty to a charge of rape but several months later filed a motion to withdraw the plea based on ineffective assistance of counsel. 738 F.2d 304. Thomas had

supplied counsel with the names of three alibi witnesses but counsel did not attempt to contact them. Id. at 307. Counsel was aware Thomas had a history of mental problems, but did not investigate. Id. The Eighth Circuit concluded counsel's failure to investigate amounted to objectively unreasonable performance. Id. at 307-08. Further, counsel's deficient performance prejudiced Thomas. Id. at 308. By giving counsel the names of three alibi witnesses, "Thomas supplied [counsel] with information which was critical in order for [counsel] to assess intelligently whether Thomas committed the rape and whether there were any defenses." Id. Thus, just like Dando, the case was distinguishable from those where the defendant did not provide counsel with any information casting doubt on the events as portrayed by the government. Id.

Here, as in Dando and Thomas, Berube provided counsel with information casting doubt on the events as portrayed by the State, but counsel did not attempt to investigate or pursue the possible defense. Berube told counsel he was not involved in the assault but was instead in a bar next door at the time. CP 61; 4/09/09RP 13-14; 9/18/09RP 43, 64-65. Berube gave his attorney a list of three to four witnesses who, he claimed, could corroborate his version of events but Todd never attempted to contact any of

them. Id. Berube told Todd that some of the witnesses were incarcerated and therefore should be easy to locate, but Todd still made no attempt to contact them. CP 61; 9/18/09RP 35, 66-67. In September 2009, Berube's new attorney retained an investigator who was able to locate, within one day, three of the witnesses, all of whom were indeed incarcerated. CP 156.

The State's primary evidence against Mr. Berube was the security videotape, recorded outside Waid's at the time of the incident. But the picture quality is poor and does not show the faces of the people involved. 9/18/09RP 76. A witness at the scene told police that both Berube brothers were present at Waid's and argued with Ms. Barquet, and apparently identified Ivory as the man who shot Ms. Barquet, but the witness did not say that Emory was involved in the assault. CP 33.

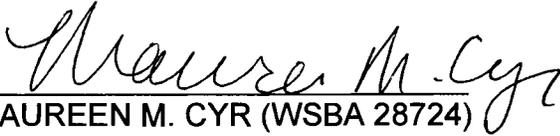
Mr. Berube gave counsel the names of three to four witnesses who could potentially cast doubt on the State's version of events and supply a viable defense. Had counsel contacted those witnesses and they corroborated Berube's account of what occurred, it is likely counsel would not have provided the same advice to plead guilty. Had counsel conducted an adequate investigation, there is a reasonable probability that the result of the

plea process would have been different. Therefore, Berube has established ineffective assistance of counsel, prejudicing him, and he is entitled to withdraw the plea.

E. CONCLUSION

Emory Berube's guilty plea was involuntary and entered without the effective assistance of counsel. This Court should therefore reverse the trial court's order denying his motion to withdraw the plea, and remand for further proceedings.

Respectfully submitted this 15th day of March 2010.

  
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Washington Appellate Project - 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64238-3-I
v.	)	
	)	
EMORY BERUBE,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE <sup>TH</sup> DAY OF MARCH, 2010, 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:

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