

NO. 67903-1-1

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

REC'D
JAN 24 2012
 King County Prosecutor
 Appellate Unit

STATE OF WASHINGTON,
 Respondent,
 v.
 FAIVAFLE TIMALI,
 Appellant.

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

The Honorable Hollis Hill, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
 1908 E Madison Street
 Seattle, WA 98112
 (206) 623-2373

FILED
 COURT OF APPEALS DIV I
 STATE OF WASHINGTON
 2012 JAN 23 2:43 PM
 4: 29

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issues Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	5
THE COURT ERRED WHEN IT DENIED TIMALI'S MOTION TO WITHDRAW HIS PLEAS WITHOUT APPOINTING NEW COUNSEL TO REPRESENT HIM.	5
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Montoya</u> 109 Wn.2d 270, 744 P. 2d 340 (1987)	5
<u>McClintock v. Rhay</u> 52 Wn.2d 615, 328 P.2d 369 (1958)	7
<u>State ex rel. Juckett v. Evergreen Dist. Ct.</u> 100 Wn.2d 824, 675 P.2d 599 (1984)	7
<u>State v. Garcia</u> 57 Wn. App. 927, 791 P.2d 244 <u>review denied</u> , 115 Wn.2d 1010 (1990)	6
<u>State v. Harell</u> 80 Wn. App. 802, 911 P.2d 1034 (1996)	7, 8, 9
<u>State v. Marshall</u> 144 Wn.2d 266, 27 P.3d 192 (2001)	6
<u>State v. McCollom</u> 88 Wn. App. 977, 947 P.2d 1235 (1997) <u>review denied</u> , 137 Wn.2d 1035 (1999)	6
<u>State v. Osborne</u> 102 Wn.2d 87, 684 P.2d 683 (1984)	6
<u>State v. Ross</u> 129 Wn.2d 279, 916 P.2d 405 (1996)	5
<u>State v. Rupe</u> 108 Wn.2d 734, 743 P.2d 210 (1987) <u>cert. denied</u> , 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988)	7
<u>State v. Winston</u> 105 Wn. App. 318, 19 P.3d 495 (2001)	7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>FEDERAL CASES</u>	
<u>Boykin v. Alabama</u> 395 U.S. 238, 23 L. Ed. 2d 274 (1969)	5
<u>North Carolina v. Alford</u> 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)	3, 5
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 4.2	6
U.S. Const. amend VI	7
U.S. Const. amend. XIV	5
Wash. Const. art. 1, § 3	5
Wash. Const. art. 1, § 22	7

A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to representation on his motion to withdraw his pleas.

Issue Pertaining to Assignment of Error

Prior to entry of judgment, every criminal defendant has the right to legal representation on a motion to withdraw plea. Did the Superior Court deny appellant this right when it failed to appoint conflict-free counsel to assist him with his motion?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged appellant Faivafale Timali with (count 1) felony violation of a court order, (count 2) felony harassment, and (count 3) assault in the second degree. CP 24-26. Attorney Brent Hart represented Timali. RP 5.

The State alleged that on March 20, 2011, Timali – in violation of no-contact order – contacted Tashara Hutton at her Tukwila apartment. When Hutton reminded Timali he could not be there, Timali allegedly pointed a handgun at her and threatened to kill her before leaving the premises. CP 4.

The parties and the trial court were aware Timali has a history of mental health issues. He has received counseling at Seattle Mental Health and requires daily medication. RP 5-6, 13, 16-17, 207;

see also CP 74-79 (letter and documents discussing Timali's mental health issues).

After jury selection but prior to opening statements, the King County Prosecutor's Office learned that cameras mounted on responding officers' patrol cars had recorded footage at the scene. The deputy prosecutor handling the case immediately informed Mr. Hart. RP 73-74, 77-83. Neither the prosecutor nor Hart was able to watch the videos until after opening statements and after the State began calling its witnesses. RP 83. The videotapes showed Hutton upset and making statements that supported the State's theory of the case. RP 85. Hart argued this discovery violation warranted dismissal under CrR 8.3(b), a mistrial, and/or suppression of the evidence. RP 86-88, 125-133; Supp CP ____ (sub no. 47, Motion to Dismiss for Discovery Violations Or In Alternative Suppress Evidence Or Declare Mistrial).

Judge Hollis Hill indicated she was "shocked" that counsel had decided to proceed with opening statements knowing the videotapes existed but without seeing them. RP 127. Hart agreed that he should have moved for a recess upon learning of the recordings. RP 127. Judge Hill denied the defense requests for suppression of the evidence or dismissal of the case, reserved on the motion for mistrial,

and offered the defense a recess to deal with the new evidence. RP 145-146, 152, 154-156.

Hutton testified that she loved Timali and was too overwhelmed to discuss what had happened. RP 77-79. She then asserted a Fifth Amendment right not to testify, and the court appointed counsel to represent her interests. RP 79-80.

After the State called a detective, a patrol officer, and a fingerprint examiner, the prosecution and defense reached a plea agreement. RP 95, 110, 160, 197-198. On August 29, 2011, Timali entered an Alford¹ plea to one count of unlawful possession of a firearm in the second degree and plead guilty to one count of misdemeanor violation of a court order. RP 198. After a colloquy between Judge Hill and Timali addressing the terms of the agreement, the maximum sentences, and the rights Timali would forfeit, Judge Hill accepted Timali's pleas. RP 199-209.

Prior to sentencing, Timali moved to withdraw his pleas. Among his claims, Timali argued that Hart had been ineffective for failing to explain the penalties he faced upon entering his pleas and for representing him at trial without the evidence from the patrol car

¹ North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

cameras. Supp. CP ____ (sub no. 72, Letter from Timali to Judge Hill). On September 20, 2011, Judge Hill held a hearing on the motion, where Timali reiterated his complaints. RP 211-214. Judge Hill denied the motion, indicating, "I don't at this point see a basis for a claim of ineffective assistance of counsel. I don't see that as a basis for withdrawing your guilty pleas either." RP 215; CP 58.

Later that same day, Timali wrote a letter, addressed to the Chief Judge of the King County Superior Court, in which he requested a new judge and new counsel to assist him. CP 59-61. Timali again alleged that Hart had failed to ensure he had all necessary discovery and failed to inform him of the consequences of his guilty pleas. Timali also alleged that his medication had made it impossible to knowingly and intelligently waive his rights. CP 61. A copy of the motion was forwarded to counsel. CP 59. It does not appear, however, that Hart or the court took any action in response to the letter.

At sentencing, Judge Hill imposed a standard range 25-month sentence on the firearm conviction and a consecutive suspended 364-day sentence on the misdemeanor, which included a requirement that Timali obtain a mental health evaluation and successfully complete treatment. RP 217-218, 222-224; CP 65, 70-

72. Timali timely filed a Notice of Appeal. CP 80-91.

C. ARGUMENT

THE COURT ERRED WHEN IT DENIED TIMALI'S MOTION TO WITHDRAW HIS PLEAS WITHOUT APPOINTING NEW COUNSEL TO REPRESENT HIM.

Due Process requires that a defendant enter a guilty plea knowingly, intelligently, and voluntarily. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; Boykin v. Alabama, 395 U.S. 238, 243-44, 23 L. Ed. 2d 274 (1969); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

Where, as here, the defendant has entered an Alford plea, trial courts are required to exercise extreme care to ensure that the plea satisfied these constitutional requirements. In re Montoya, 109 Wn.2d 270, 277-78, 744 P. 2d 340 (1987). "The basic standard for determining the validity of an Alford plea is whether it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Montoya, 109 Wn.2d at 280 (quoting Alford, 400 U.S. at 31).

Criminal defendants have a constitutional right to the assistance of counsel during the plea process. Counsel has a duty to assist the defendant "actually and substantially" in determining whether to plead guilty. State v. Osborne, 102 Wn.2d 87, 99, 684

P.2d 683 (1984). Consistent with this duty, to prevail on a claim of ineffective assistance of counsel, the defendant must show (1) that his attorney failed to “actually and substantially” assist him in deciding whether to plead guilty and (2) that but for counsel’s failure, there is a reasonable probability he would not have pled guilty. State v. McCollom, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997), review denied, 137 Wn.2d 1035 (1999); State v. Garcia, 57 Wn. App. 927, 933, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990).

A trial court must allow withdrawal of a guilty plea when necessary to correct a manifest injustice. CrR 4.2(f); State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001). There has been a manifest injustice where the defendant was denied effective assistance of counsel or his plea was not voluntary. Marshall, 144 Wn.2d at 281.

Timali moved to withdraw his pleas based, in part, on grounds of ineffective assistance of counsel. He alleged that Hart failed to adequately advise him concerning the consequences of his pleas and represented him without first obtaining all necessary discovery. Rather than appoint new counsel to assist Timali in presenting his claims, Judge Hill simply heard from Timali at the hearing and denied his motion. By proceeding in this fashion, Judge Hill denied Timali

his right to the assistance of counsel in presenting the motion.

The Sixth Amendment and article 1, § 22 of the Washington Constitution guarantee criminal defendants the right to representation at all critical stages of a criminal prosecution. State ex rel. Juckett v. Evergreen Dist. Ct., 100 Wn.2d 824, 828, 675 P.2d 599 (1984). A criminal defendant is merely considered an “accused person” – and therefore entitled to this right – until formal judgment and sentence have been entered. McClintock v. Rhay, 52 Wn.2d 615, 616, 328 P.2d 369 (1958); see also State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987) (right to counsel extends through sentencing), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988). The right extends to a hearing on a defendant’s motion to withdraw his pleas prior to entry of judgment. McClintock, 52 Wn.2d at 616; State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996); see also State v. Winston, 105 Wn. App. 318, 321-325, 19 P.3d 495 (2001) (distinguishing post-conviction proceedings).

Once Timali alleged ineffective assistance of counsel against Hart, and Judge Hill scheduled a hearing on Timali’s claims, there was a conflict of interest in any further representation. Clearly, counsel could not advocate for Timali at that point.

In Harell, this Court held that when a defendant alleges

ineffective assistance as grounds for withdrawing his plea, the defendant is entitled to conflict-free counsel at a hearing on the claim. Harell was denied this right because his attorney (against whom the claim was lodged) could not assist him and became a witness against him. Harell, 80 Wn. App. at 805. Such an outright denial of counsel is presumed prejudicial and warrants reversal without a harmless error analysis. Id.

In this case, Timali, like Harell, was denied his constitutional right to representation when he was left without counsel to advocate on his behalf at the plea withdrawal hearing. He did not have counsel to address whether Hart had failed to adequately inform him of the penalties he faced by pleading guilty or whether Hart was ineffective for proceeding in the case without first obtaining all discovery.

Nor did Timali have counsel to address the impact of his medications on his ability to knowingly, intelligently, and voluntarily waive his trial rights. This issue was never addressed below even though there can be no dispute Timali was taking medications for his mental illness when he entered his pleas.

As Harell makes clear, reversal is required.

D. CONCLUSION

Timali's case should be remanded so that conflict-free counsel can be appointed to advocate on his behalf at a new hearing on his motion to withdraw his pleas. Harell, 80 Wn. App. at 805.

DATED this 24th day of January, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)

Respondent,)

v.)

FAIVAFALE TIMALI,)

Appellant.)

COA NO. 67903-1-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF JANUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FAIVAFALE TIMALI
DOC NO. 744757
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF JANUARY 2012.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JAN 24 PM 4: 29