

NO. 68959-2-1

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

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STATE OF WASHINGTON,

Respondent,

v.

JULRAR JACOB SANTOS GOLVEO,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1) Prior to entry of defendant's guilty plea, counsel had reviewed over 800 pages of discovery, including transcripts of police interviews with witnesses, and discussed the case with defendant on several occasions. When discussing the State's plea offer counsel recommended continuing the proceeding because he had not interviewed witnesses. Defendant instead chose to accept the offer and plead guilty. Did the trial court abuse its discretion in denying defendant's motion to withdrawal his guilty plea?

2) Did the trial court abuse its discretion in declining to hold an evidentiary hearing regarding the general experience of defendant's prior counsel?

## **II. STATEMENT OF THE CASE**

### **A. FACTS OF THE CRIME.**

At the entry of his guilty plea, Julrar<sup>1</sup> Jacob Santos Golveo, defendant, agreed that the court could review the Affidavit of Probable Cause to establish a factual basis for the plea. CP 54; 3/15/11 RP 5. The following facts of the crime are from the Affidavit of Probable Cause. CP 109-112.

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<sup>1</sup> Defendant's brothers, Julmar and Julvic Golveo, were also involved in this matter; first names are used for clarity.

On July 8, 2009, Charles Osborne and Jay Ott stole a car. They called Chris Foster in hopes of using his garage to strip the car. Foster told them that the stolen car belonged to Julmar Golveo and that he was the wrong person to steal from. Foster facilitated the return of the car. After Julmar got the car back he felt entitled to some compensation. Osborne and Ott tried to accommodate him but were unsuccessful in stealing the parts Julmar wanted for compensation. Osborne made it know that he was not going to meet Julmar's demands. Julmar was put off by Osborne's attitude. Osborne agreed to meet Julmar on July 10, 2009, outside the WalMart, in Everett, to settle the matter.

On July 10, 2009, Osborne and Ott were at WalMart when defendant, Julrar Golveo, his brothers, Julmar and Julvic Golveo, along with Jacob Vance and Altan Od Nyam-Ochir entered the parking lot. They stopped their cars and ran up to Osborne and Ott. Witnesses described Osborne being attacked by several men with bats and sticks. Two witnesses saw Vance stomping on Osborne as he lay on the ground. One of the witnesses saw defendant swing a bat, and saw Nyam-Ochir hitting Osborne and stabbing at him with a stick. Ott was also attacked with a bat receiving blows to his head, back and arms before he was able to

run away from the attackers. The attack on Osborne ended when another witness displayed a gun and yelled at the attackers to stop.

Osborne was transported to Harborview Medical Center where it was determined that he had three separate areas of hemorrhaging on his brain, bleeding on his brain stem, multiple broken bones in his face, severe eye damage and a compression fracture on his spine. Osborne nearly died from the assault; he remained in a coma for several days and was hospitalized for over a month in a rehabilitation facility. Ott was treated at Providence Hospital where he received stitches to his head. Ott identified defendant, Vance and Nyam-Ochir as being involved in the assault of Osborne. Three other witnesses identified defendant as being involved in the assault.

On July 22, 2009, Vance was interviewed by police and admitted participating in the assault of Osborne along with defendant, Julmar and Julvic Golveo, and Nyam-Ochir. Vance stated that he had gone with the others to fight Osborne because he was not going to give Julmar anything. Vance said he was the first person to hit Osborne, that Nyam-Ochir was carrying a bat and he saw a bat hit Osborne in the head, that Julvic used a stick to hit Osborne. Vance stated that he saw defendant punching Osborne

in the head and that defendant later told him that he used brass knuckles on Osborne. Vance agreed to testify against the others. Nyam-Ochir admitted hitting Osborne with an aluminum bat and also going after Ott with the bat.

**B. PROCEDURAL HISTORY.**

On June 8, 2010, defendant was charged by information with First Degree Assault. CP 63-64. On December 9, 2010, defendant was advised that if the State's plea offer was not accepted by the February 3, 2011 deadline, the State may add a deadly weapon allegation to the charge and file additional charges of Second Degree Assault with a deadly weapon allegation and Conspiracy to Commit First Degree Assault. CP 107-108. On February 4, 2011, the State filed charges of First Degree Assault, armed with a deadly weapon other than a firearm, and Second Degree Assault, armed with a deadly weapon other than a firearm. CP 105-106.

On March 15, 2011, defendant entered a guilty plea to an amended information charging Attempted First Degree Assault. CP 48-62, 103-104.

On June 23, 2011, defendant filed a motion to withdraw his guilty plea along with defendant's declaration and a memorandum of authorities. CP 33-47. The State filed a memorandum in

response to the motion. CP 92-102. Attached to the State's Response were declarations of defendant's prior counsel, John Molitoris, and of the prosecutor assigned to handle defendant's case. CP 98-102. Defendant based his motion on ineffective assistance of counsel due to his prior counsel's inexperience and lack of investigation. CP 33-43.

On September 7, 2011, the trial court heard defendant's motion to withdraw his guilty plea. 9/7/11 RP 16-38. Because his prior counsel had refused to answer a set of interrogatories, defendant had served Molitoris with a subpoena duces tecum for the hearing. Molitoris filed a Motion in Opposition. CP 78-91. Defendant requested an evidentiary hearing to obtain further information regarding his prior counsel's level of experience and competence to evaluate the case. 9/7/11 RP 18, 20-23, 25. The State argued against having an evidentiary hearing on the basis that, since defendant had not presented anything that could have been uncovered by additional investigation that would have changed defendant's mind about pleading guilty, defendant had not made a showing of prejudice. 9/7/11 RP 16-19.

The following facts were not contested at the hearing:

Defendant's prior counsel had reviewed the 855 pages of discovery, including transcripts of the police interviews with the witnesses that ranged from 40 to 60 pages per interview. CP 96, 99, 101-102; 9/7/11 RP 35. Defendant had met with his prior counsel on several occasions to discuss the case and review the discovery. CP 44-46, 98-99. It was conceded by the parties that counsel had not hired an investigator and that while efforts to interview witnesses had begun none had taken place prior to the entry of the guilty plea. 9/7/11 RP 23. Defendant discussed the State's plea offer with his prior counsel for 30 minutes prior to the entry of his guilty plea. CP 44-46, 98-99. Counsel recommended continuing the proceeding because he had not yet interviewed the State's witnesses. CP 98-99. Defendant disregarded this advice and chose to accept the State's offer and plead guilty to attempted first degree assault. CP 48-62.

The court found that there were no contested issues of fact and declined to hold an evidentiary hearing regarding the general experience of counsel without some affirmative representation that defendant was misinformed on some material aspect or there was some deficiency in the entry of the plea. 9/7/11 RP 23-26.

Regarding defendant's motion to withdraw his guilty plea the court found that defendant had not made any allegation of misrepresentation by counsel, but rather, argued "that Mr. Molitoris was an inexperienced attorney, that he hadn't yet hired an investigator, and that his preparation had consisted only of the review of the prosecutor's evidence, which is some 800-plus pages of discovery." 9/7/11 RP 38. The court concluded that defendant had not shown actual prejudice to support finding ineffective assistance of counsel and denied defendant's motion to withdraw his guilty plea. CP 29; 9/7/11 RP 38-39.

Defendant was sentenced on June 4, 2012, to 81 months confinement. CP 1-11. On June 26, 2012, defendant filed this appeal. CP 65-77.

### **III. ARGUMENT**

Defendant argues that the trial court erred in denying his motion to withdraw his guilty plea. Appellant's Brief 26-33. Defendant also argues that it was an abuse of discretion for the trial court to decline to hold an evidentiary hearing regarding the general experience of his prior counsel. Appellant's Brief 13-26.

## **A. MOTION TO WITHDRAW GUILTY PLEA.**

Appellate courts review a decision denying the withdrawal of a guilty plea for abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001); State v. Olmsted, 70 Wn. App. 116, 118, 400 P.2d 312 (1966). Discretion is abused only where it can be said no reasonable person would take the view adopted by the trial court. State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977). “The court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f). Because of the many safeguards that precede a guilty plea, the manifest injustice standard for plea withdrawal is demanding. State v. Taylor, 83 Wn.2d 594, 596-597, 521 P.2d 699 (1974); State v. Pugh, 153 Wn. App. 569, 577, 222 P.3d 821 (2009). “Manifest injustice” means “an injustice that is obvious, directly observable, overt, [and] not obscure.” Taylor, 83 Wn.2d at 598; Pugh, 153 Wn. App. at 577. In Taylor the Supreme Court suggested four indicia of manifest injustice that would allow a defendant to withdraw his guilty plea: (1) the defendant received ineffective assistance of counsel, (2) the defendant did not ratify his plea, (3) the plea was involuntary, and

(4) the prosecution did not honor the plea agreement. Taylor, 83 Wn.2d at 597; Pugh, 153 Wn. App. at 577.

Here, as in the trial court, defendant argues that he should be allowed to withdraw his guilty plea based on ineffective assistance of counsel. Defendant claims that his prior counsel's representation was ineffective because counsel was inexperienced and did not thoroughly investigate the case by interviewing the witnesses.

## **B. INEFFECTIVE ASSISTANCE OF COUNSEL.**

### **1. Legal Standards.**

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); see U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v.

McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). If one of the two prongs of the test is absent, the court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007). Claims of ineffective assistance of counsel present mixed questions of law and fact and are reviewed de novo. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956, 965 (2010); In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

To avoid the distortion of hindsight, the court presumes that counsel effectively represented the defendant. Strickland, 466 U.S. at 689; In re Rice, 118 Wn.2d 876, 888-889, 828 P.2d 1086 (1992). “The burden is on the defendant to show from the record a sufficient basis to rebut the ‘strong presumption’ that counsel’s representation was effective.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226. Prejudice requires a showing that but for counsel’s performance it is reasonably probable that the result

would have been different. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); Thomas, 109 Wn.2d at 226.

## **2. Defendant Must Meet Both Prongs When Challenging A Guilty Plea On A Claim Of Ineffective Assistance Of Counsel.**

When a defendant challenges a guilty plea based on a claim of ineffective assistance of counsel, he must meet both prongs of the Strickland test. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); In re Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993); In re Reise, 146 Wn. App. 772, 787-788, 192 P.3d 949, 957 (2008). “The court may begin its review of defendant’s claim with an examination of either prong. If the prejudice prong is not proved by defendant then the court need not proceed to an examination of the performance prong.” In re Riley, 122 Wn.2d at 780. Requiring a showing of “prejudice” from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel serves the fundamental interest of the finality of guilty pleas. Hill v. Lockhart, 474 U.S. at 58, citing United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979). Therefore, defendant must demonstrate that his lawyer's “constitutionally ineffective performance affected the outcome of the plea process” by showing “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 v. Lockhart, 474 U.S. at 59; In re Riley, 122 Wn.2d at 780–781. "Generally, this is shown by demonstrating to the court some legal or factual matter which was not discovered by counsel or conveyed to the defendant himself before entry of the plea of guilty." State v. Garcia, 57 Wn. App. 927, 933, 791 P.2d 244, 248 (1990). The Supreme Court has explained:

[W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, 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.

Hill v. Lockhart, 474 U.S. at 59. A bare allegation that a petitioner would not have pleaded guilty if he had known all of the consequences of the plea is not sufficient to establish prejudice under the Strickland test. In re Riley, 122 Wn.2d at 782.

### **3. Defendant Has Not Shown That He Was Prejudiced By Counsel's Representation.**

Here, as in the trial court, defendant has not indicated any potentially exculpatory evidence nor a potential affirmative defense

to the charged crimes that counsel failed to investigate or discover. Neither has defendant alleged that he relied on misinformation provided by his counsel in entering his guilty plea or that there was some deficiency in the entry of the plea. Defendant has not shown how he was prejudiced by counsel's representation prior to the entry of his plea.

Rather, defendant urges this court to conclude that his prior counsel's performance was prejudicial per se. Appellant's Brief 30. Prejudice can be presumed when there is an actual or constructive denial of counsel. United States v. Cronin, 466 U.S. 648, 659, n.25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The presumption of prejudice exception is limited to the complete denial of counsel, In re Davis, 152 Wn.2d 647, 674, 101 P.3d 1 (2004), or when "the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time." Wright v. Van Patten, 552 U.S. 120, 125, 128 S.Ct. 743, 169 L.Ed. 583 (2008); see Seattle v. Ratliff, 100 Wn.2d 212, 221, 667 P.2d 630 (1983) (holding the court did not need to inquire into the existence of prejudice when defendant was denied the right to counsel by the trial court preventing APR 9 intern from complying with the basic requirements of the rule). "Apart from circumstances of this nature

and magnitude, the Supreme Court has said “there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.” In re Davis, 152 Wn.2d at 674-675, quoting Cronin, 466 U.S. at 659-661.

This case does not present circumstances justifying a presumption of prejudice. To begin with, defendant's claim that his prior counsel did no factual investigation is inaccurate. Defendant's prior counsel spent a substantial amount of time reviewing the discovery, “including witness statements made to police, 911 audio files, medical reports, police interviews, police reports, forensic reports ....” CP 96, 99; 9/7/11 RP 35, 38. Additionally, counsel met with defendant several times for extended periods to discuss his case, communicated the State's plea offers, and discussed the pros and cons of the offer verses going to trial. CP 98-99. Prior to defendant accepting the State's plea offer counsel informed defendant that he had not yet interviewed the State's witnesses and recommended continuing the proceeding so he could conduct the interviews. CP 99. Counsel was in the processes of setting up the interviews. CP 99; 9/7/11 RP 23. Knowing that witnesses had not been interviewed, defendant disregarded counsel's advice to

continue the proceedings, accepted the plea offer and pleaded guilty. Finally, the results of the plea agreement negotiated by defendant's prior counsel were tremendously advantageous to defendant.<sup>2</sup> Defendant received a substantially lighter sentence for the attempted first degree assault charge than he would have faced if convicted of the more serious charges at trial. Counsel's conduct in this case did not constitute the type of "complete" failure that negates the need for an inquiry into actual prejudice. Bell v. Cone, 535 U.S. 685, 697-698, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

Defendant did not meet his burden in the trial court to show how he was prejudiced by his prior counsel's performance. Nor has he met his burden here. The trial court's denial of defendant's motion to withdraw his guilty plea was not an abuse of discretion.

#### **4. Counsel's Representation Was Competent.**

Defendant argues generally that his prior counsel performance was ineffective because counsel was inexperienced

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<sup>2</sup> Defendant's sentence range for attempted first degree assault was 69.75—92.25 months. CP 3, 49, 62. Had defendant be found guilty of the charges in the 2/4/11 amended information (CP 105-106) his standard range would have been 147—183 months: 111—147 months plus the 24 months deadly weapon enhancement for first degree assault, and 12—14 months plus the 12 month deadly weapon enhancement for second degree assault. Deadly weapon enhancements are added to the total period of confinement for all offenses. Had defendant plead guilty to the original charge of first degree assault his standard range would have been 93—123 months. RCW 9.94A.510, 9.94A.515, 9.94A.533(4).

and did not thoroughly investigate the case by interviewing the witnesses.

**a. Counsel's Experience.**

While the character of a particular lawyer's experience may shed light in an evaluation of his actual performance, it does not justify a presumption of ineffectiveness in the absence of such an evaluation. United States v. Cronin, 466 U.S. 648, 665, 104 S. Ct. 2039, 2050, 80 L. Ed. 2d 657 (1984). Every attorney is inexperienced when conducting a first trial. Admission to Practice Rule 9 interns acting in accordance with the rules satisfies the constitutional requirement of counsel. Seattle v. Ratliff, 100 Wn.2d at 216-217. The practical consequence of defendant's contention would be that any defendant convicted in a proceeding with inexperienced counsel is entitled to withdraw a guilty plea or be granted a new trial, even though defendant makes no showing that defendant received less than reasonably competent representation. People v. Perez, 24 Cal. 3d 133, 145, n.9, 594 P.2d 1 (1979) (representation by law student under State Bar rules). Defendant's claim that his prior counsel was inexperienced is not sufficient. Defendant has not shown how his prior counsel's *actual* performance was ineffective.

## **b. Investigating and Interviewing Witnesses**

“In a plea bargaining context, ‘effective assistance of counsel’ merely requires that counsel ‘actually and substantially assisted his client in deciding whether to plead guilty.’” State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984), quoting State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901 (1981). This includes communicating actual offers, discussing tentative plea negotiations, and discussing the strengths and weaknesses of the defendant’s case so that the defendant knows what to expect and makes an informed decision on whether to plead guilty. State v. James, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). The frequency or length of counsel’s meetings with defendant is not enough to demonstrate ineffective assistance of counsel. Cameron, 30 Wn. App. at 232; Brinkley v. Lefevre, 621 F.2d 45 (2d Cir. 1980). It is not unreasonable for a defense attorney to base his decision not to interview or call a witness solely on police reports, at least when those reports clearly reveal information that would be damaging to the defense. “[T]here is no absolute requirement that defense counsel interview witnesses before trial.” In re Pirtle, 136 Wn.2d 467, 488, 965 P.2d 593, 606 (1998). Without specific allegations which would, if believed, demonstrate resulting

prejudice, the plea is not vitiated nor is a hearing on the plea's voluntariness warranted. State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901, 904 (1981); United States v. Crook, 607 F.2d 670 (5th Cir. 1979).

In the present case, defendant's prior counsel reviewed police reports, medical reports, transcripts of witness interviews, and met with defendant on several occasions to discuss the case for extended periods. Counsel communicated the State's plea offers and discussed the pros and cons of pleading guilty or going to trial. Counsel recommended continuing the proceeding to interview witnesses. Knowing that the witnesses had not been interviewed, defendant accepted the offer and entered his guilty plea. The record as a whole establishes that defendant's prior counsel adequately assisted defendant in making an informed decision regarding the negotiated plea offer. Defendant knew that counsel had not interviewed witness when he pleaded guilty to the amended charge, taking advantage of a significantly reduced sentence range. Defendant has not met his burden of rebutting the strong presumption that counsel's representation was effective. The trial court did not err in denying defendant's motion to withdraw his guilty plea.

**C. THE TRIAL DID NOT ABUSE ITS DISCRETION IN DECLINING TO HOLD AN EVIDENTIARY HEARING REGARDING THE GENERAL EXPERIENCE OF DEFENDANT'S PRIOR COUNSEL.**

In the trial court, defendant failed to show how he was prejudiced by his prior counsel's performance in the entry of his guilty plea. Allegations, without more, are insufficient to warrant a hearing. Cameron, 30 Wn. App. at 232. Because defendant failed to allege the kind of "prejudice" necessary to satisfy the Strickland test for ineffective assistance of counsel, the trial court did not err in declining to hold an evidentiary hearing regarding the general experience of his prior counsel. Hill v. Lockhart, 474 U.S. 52, 60, 106 S. Ct. 366, 371, 88 L. Ed. 2d 203 (1985). The trial court did not abuse its discretion.

**IV. CONCLUSION**

For the reasons stated above, the appeal should be denied and defendant's conviction should be affirmed.

Respectfully submitted on December 20, 2012,

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