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NO. 70036-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
JAMEL OMARI FIELDS,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JUDGE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The defendant was charged with three felony offenses under two separate cause numbers (12-1-01355-8 & 12-1-01470-8). After trial had commenced on one charge, he entered into a negotiated plea involving all three charges. Prior to sentencing, he attempted to withdraw one of his pleas, and failed. Before this Court, the defendant contends that the trial court erred in failing to let him withdraw one of his pleas.

1. Should this Court reject the defendant's claim because he specifically agreed that his pleas were indivisible and therefore his requested remedy is unavailable?

2. Should this Court reject the defendant's claim because he cannot show that the trial court abused its discretion in denying his request to withdraw his plea?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On February 29, 2012, the defendant was charged with First-Degree Robbery under King County Superior Court cause number 12-1-01355-8. CP 1-4. On March 14, 2012, longtime defense attorney George Sjursen entered a notice of appearance to

represent the defendant.¹ CP 309-15. Trial was initially set for May 7, 2012. CP 316. Sjursen employed a defense investigator to help locate and interview the many expected witnesses. CP 317-20.

On March 13, 2012, the defendant was charged with Forgery (count I) and Possession of Cocaine (count II) under King County Superior Court cause number 12-1-01470-8. CP 366-71. On March 26, 2012, Sjursen entered a notice of appearance to represent the defendant on this case as well. CP 372-78. The cases tracked together on the trial calendar for negotiation purposes. CP 321-24, 379.

On July 23, 2012, the robbery case was assigned out to trial before the Honorable Judge Catherine Schaffer. CP 336. After two days of trial (pretrial motions and voir dire), the defendant entered into a negotiated plea involving both cases.

On cause number 12-1-01355-8, in part, "pursuant to plea negotiations," the State agreed to reduce the charge of first-degree robbery to second-degree robbery, and allow the defendant to enter a plea of guilty. CP 12, 337-38. The defendant then entered a plea of guilty by way of an Alford Plea to second-degree robbery.

¹ <https://www.mywsba.org/LawyerDirectory>. Sjursen has been an attorney for 15 years, is currently in private practice, has a case load of solely criminal cases, and worked for many years as a public defender. 2/8/13 RP 7-8.

CP 13-26. With a standard range of 22 to 29 months, the State agreed to recommend a low-end sentence of 22 months, concurrent with the sentence recommended under cause number 12-1-01470-8. CP 13-26. The defendant's standard range calculation -- with an offender score of five, included a point for his plea of guilty on cause number 12-1-01470-8. CP 362-64. As part of the plea agreement, the defendant specifically agreed that "[t]his is part of an indivisible agreement that includes cause number(s) 12-1-01470-8." CP 361.

On cause number 12-1-01470-8, the State agreed to dismiss the charge of possession of cocaine upon a plea of guilty to the forgery count and the robbery count. CP 384. The defendant then entered a plea of guilty to felony forgery. CP 380-92. With a standard range of 3 to 8 months, the State agreed to recommend a low-end sentence of 3 months, concurrent with 12-1-01355-8. Id. The defendant's standard range calculation -- with an offender score of four, included two points for his plea of guilty on cause number 12-1-01355-8. CP 400-02. As part of the plea agreement, the defendant specifically agreed that "[t]his is part of an indivisible agreement that includes cause number(s) 12-1-01355-8." CP 399.

On February 8, 2013, the defendant was sentenced to a low-end standard range sentence on each count (22 months and 3 months, respectively), concurrent to each other. CP 295-303, 406-12.

2. SUBSTANTIVE FACTS

Prior to sentencing, the defendant retained James Womack as new counsel, and moved to withdraw his plea of guilty on a single count, the second-degree robbery count. CP 28-183. The primary contention was that no reasonable attorney would have failed to pursue the trial tactic that the case was a case of mistaken identity based on the fact that the victim was of a different race than the defendant, i.e., it was a cross-racial identification. Id. Thus, according to the defendant, counsel was constitutionally ineffective for failing to discuss this trial tactic with him, and therefore his decision to plead guilty was not fully informed and this constitutes a manifest injustice under CrR 4.2(f). Id.

The trial court held a hearing on the matter that included the testimony of defense counsel George Sjursen. 2/8/12 RP 3-61. The court denied the defendant's motion to withdraw his plea. 2/8/13 RP 61-67; CP 304. The court noted that based on the facts of the case, it was not a good case for pursuing a cross-racial

identification defense, and that had the defense sought to admit expert testimony on the issue at a trial, the court likely would have denied the motion.² Id. The court held that the defendant was constitutionally entitled to an attorney who competently determined how to attack the State's case, and the defendant received such an attorney. The court found that the defendant had not met his burden of proving his plea of guilty should be withdrawn to correct a manifest injustice. Id.

Additional facts are included in the sections below.

C. ARGUMENT

1. THE DEFENDANT'S PLEAS ARE INDIVISIBLE

Before the trial court, the defendant moved to withdraw a plea of guilty to a single plea that was part of an indivisible plea involving multiple counts. The defendant challenges the trial court's ruling rejecting his motion to withdraw his plea. This Court should

² The decision to admit expert testimony is within the sound discretion of the trial court. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). In Cheatam, a rape case in which the State relied mainly on the victim's eyewitness identification, the trial court excluded the defendant's expert testimony about the unreliability of eyewitness identification. The expert would have testified about the difficulties of cross-racial identifications and the effects of stress and violence, weapon focus, and lighting on witnesses' perceptions and memories. Cheatam, at 644. The Supreme Court noted that a defendant has a constitutional right to present a defense and that expert testimony on the fallibility of eyewitness identification is admissible in certain cases; nonetheless, the Court concluded that "whether the expert testimony proffered here was both relevant and helpful is debatable and, therefore, [we] hold that the trial court's decision not to admit [the expert witness's] testimony under the facts of this case was a tenable exercise of discretion." Id. at 652.

reject the defendant's arguments because he seeks to withdraw one plea of an indivisible global plea and thus the remedy he seeks is unavailable.

"A plea agreement is essentially a contract made between a defendant and the State." State v. Chambers, 176 Wn.2d 573, 580, 293 P.3d 1185 (2013) (citing State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003)). The question of whether a plea agreement involving multiple counts or cases is divisible or indivisible is dependent upon the intent of the parties, i.e., the intent of the contracting participants. Id. It is the objective manifestations of intent that control. Id. "Where pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding, the pleas are indivisible from one another." In re Bradley, 165 Wn.2d 934, 941-42, 205 P.3d 123 (2009). Where the agreement is indivisible, a defendant cannot withdraw his plea to only one of the charges. Turley, 149 Wn.2d at 398, 402; Chambers, 176 Wn.2d at 580-83.

Here, there is irrefutable evidence that the defendant agreed that his plea of guilty to second-degree robbery was part of an indivisible plea agreement involving his plea of guilty to felony forgery. Not only were the pleas entered at the same time, and the

sentence recommendation and offender scores reference and include the other case, but in both plea agreements, the defendant specifically agreed that the plea on each cause number was part of an indivisible plea involving the other cause number. Thus, the defendant cannot withdraw his plea on only a single count.

2. THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA OF GUILTY TO SECOND-DEGREE ROBBERY

The defendant's motion to withdraw his plea of guilty was made pursuant to CrR 4.2(f). CP 28. Under this rule, the court shall allow a defendant to withdraw his plea of guilty when it appears "that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). It is the defendant who bears the burden of establishing manifest injustice. State v. Ross, 129 Wn.2d 279, 283, 916 P.2d 405 (1996). Such injustice must be "obvious, overt, directly observable and not obscure." Id. at 284 (other citations omitted). Examples of manifest injustice include ineffective counsel, nonratification of a plea by a defendant, involuntary pleas or failure by the prosecutor to keep a plea agreement. State v. Weaver, 46 Wn. App. 35, 46, 729 P.2d 64 (1986), rev. denied, 107 Wn.2d 1031 (1987).

“A defendant does not have a constitutional right to withdraw a plea of guilty.” State v. Olmsted, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). Rather, a motion to withdraw a plea is addressed to the sound discretion of the trial court. Id. On review, the trial court’s decision will be set aside “only upon a clear showing of abuse of discretion.” Id. (citing State v. Rose, 42 Wn.2d 509, 256 P.2d 493 (1953)). While reasonable minds might disagree with a trial court’s ruling, that is not sufficient to overturn a trial court ruling under an abuse of discretion standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, a defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

Essentially, the defendant's argument boils down to a claim that this case was all about the problems associated with cross-racial identification, that counsel was constitutionally ineffective for not consulting an expert or submitting more specific jury instructions on eyewitness identification, and that counsel's failure to inform the defendant that this avenue of attack was available meant that he did not make an informed decision when he pled guilty to the reduced charge of second-degree robbery. And this,

he claims, is an obvious, overt, directly observable and not obscure, manifest injustice.

To prevail on an ineffective assistance of counsel claim, a defendant must prove that (1) trial counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced him, i.e., that there is a reasonable probability that but for counsel's errors the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). To show deficient performance, the defendant has the "heavy burden of showing that his attorney made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. If either part of the test is not satisfied, the inquiry need go no further. Hendrickson, 129 Wn.2d at 78.

A reviewing court begins with the strong presumption that counsel has rendered adequate assistance. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "An attorney's action or inaction must be examined according to what was known and

reasonable at the time the attorney made his choices.” In re Elmore, 162 Wn.2d 236, 253, 172 P.3d 335 (2007). If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot substantiate an ineffective assistance claim. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). The right to effective counsel extends to the negotiation stage of a case and the consideration of plea offers. Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012).

To begin, the defendant’s premise he relies to support his argument is fatally flawed. The defendant asserts that this case was all about cross-racial identification and the only evidence the State had against the defendant was the victim’s identification. This is not correct. The facts presented to the trial court showed otherwise, that there was a plethora of circumstantial evidence that pointed directly at the defendant. This was not a case wherein the victim identified some random person from a photo montage or identified some random person who happened to be in the area and vaguely fit the suspect’s description.

The defendant, a black male, was part of a group of five people. CP 268-70. Described by witnesses as appearing drunk, he punched, kicked and robbed a Hispanic male, Francisco

Villegas, at 9:35 p.m. in downtown Seattle. CP 253, 269. Villegas had his backpack (with his paycheck inside) and his cellphone stolen. CP 268. The incident occurred at 2nd Avenue and University Street. CP 255.

Two civilian witnesses called 911 as the assault/robbery was occurring. CP 265. The two observed the incident from across the street. CP 258. They told the 911 operator that the suspect was a 20ish black male who was wearing baggy pants and a black leather jacket with logos or patches, akin to a NASCAR jacket. CP 258. The witnesses said that after the suspect assaulted and robbed Villegas, the group of five slowly walked northbound on 2nd Avenue, and that they observed the group at the corner of 2nd Avenue and Union Street (this is one block north of where the assault occurred). CP 269-70.

As one can imagine, at that time of night and in that area, there were a number of Seattle Police officers very near the scene. Two officers, Officers Kallis and Vaca, were on bike patrol on 2nd Avenue, just two blocks north of where the incident occurred. CP 258, 267. When the officers heard the initial broadcast, they proceeded south toward Union Street and observed the defendant and his companions at 2nd and Union. CP 267. The defendant was

wearing a black leather jacket with a Seahawks logo on it and baggy pants. CP 267. Hearing that the witnesses described the jacket as being more like a NASCAR jacket, the officers continued down towards University. CP 267. It was at this point that other responding officers were able to contact Villegas and were informed by Villegas that the suspect was wearing baggy pants and a black leather jacket with a Seahawks logo. CP 255, 267. Kallis and Vaca then proceeded back to where they had observed the defendant.

When Officer Kallis reached 2nd and Union, he observed Villegas' backpack on the ground, and the defendant and his companions at the bus stop just north of the intersection. CP 257-58, 267. The group was detained while officers transported Villegas the one plus block to the location. CP 259. Villegas identified his backpack, positively identified the defendant as the person who had assaulted and robbed him, and indicated that the others were the persons who were with the defendant during the assault. CP 268. Villegas stated that he was "absolutely positive" about his identification. CP 268. Another officer directing traffic recovered Villegas' cell phone. CP 257.

The five individuals were identified as Tiesha Turner, Mattie Sinclair, Sir Ronald Hicks, Tyrone Brownel Jr. and the defendant. CP 262. Brownel and Fields were on active DOC supervision. CP 262. Officers indicated that the defendant smelled of alcohol and his speech was slurred. CP 259. The defendant told the officers that he had not been in an altercation with anyone; that he was just waiting for a bus. CP 259. He said nothing about having observed an assault. CP 259. On the other hand, Sinclair told officers that she had been with the defendant and that he did not commit the robbery/assault. CP 259. She claimed that the assault was committed by another black male, with small braids, a Chicago Bulls baseball cap and a black and gray hoody with red stripes. CP 259. She claimed that she asked Villegas if he was okay and asked him whether he wanted her to call 911. CP 259. Sinclair's description of the event and suspect did not come close to matching any of the witnesses' descriptions of the event or suspect.

With these facts, presenting an "expert witness" on the potential problems of cross-racial identification and claiming that Villegas misidentified his assailant because he was of a different race would likely be highly offensive to many jurors and would likely fail miserably. Unless there just happened to have been another

group of five black individuals, with one 20ish male, intoxicated, wearing a black leather jacket with a Seahawks logo or similar looking jacket, who just happened to be at the exact same location and at the exact same time and who happened to have traveled the exact same route after the assault and where the backpack was discarded, any claim that the victim's identification was faulty because he was of a different race than the suspect would fail. Further, this other group of individuals would have had to have passed directly by Officers Kallis and Vaca unnoticed.

The trial court recognized the failings of the defense argument, finding that this was not a cross-racial identification type case and that defense counsel was not constitutionally ineffective for failing to hire or consult an expert on cross-racial identification.³ This fact alone is fatal to the defendant's claim.

Defense counsel did not consult an expert on eyewitness identification or cross-racial identification, although he did pursue a defense that would necessarily challenge Villegas' identification.

³ The defendant claims that the trial court stated that because Villegas and the defendant were both persons of color, cross-racial identification issues do not apply to them. Def. br. at 1. This is not what the trial court said. The court did note that Villegas and the defendant were both persons of color, but the court fully articulated that because of the facts of the case, this was not a good case for challenging the eyewitness identification in this manner. 2/8/13 RP 62-67. "This is not a great case for Mr. Fields to predicate an offense on hiring an eyewitness identification expert." Id. at 64.

At the motion's hearing, Sjursen testified that he met with the defendant on multiple occasions and that he would have gone over the discovery with him. 2/8/13 RP 8-10. He stated that the defendant helped form the defense theory, in this case, that another suspect, a named person, was the individual who committed the crime. 2/8/13 RP 10-11.

Washington regulates the admission of "other suspects" evidence. A criminal defendant may present evidence that another person committed the crime "when he can establish a train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party." State v. Hilton, 164 Wn. App. 81, 99, 261 P.3d 683 (2011). Before "other suspects" evidence can be offered, a defendant must provide proof that there is a sufficient nexus between the third party and the crime, circumstances that tend clearly to point out someone besides the accused is the guilty party. State v. Russell, 125 Wn.2d 24, 75, 882 P.2d 747 (1994).

Here, as trial commenced, defense counsel obtained a pretrial ruling that he had met Washington's standard for admission of "other suspect" evidence. 7/23/12 RP 6-12. The "other suspect" was a man named Gregory Hughes. 2/8/13 RP 11. Sjursen was

provided the name of the other suspect by the defendant, although not until June 21, 2013, just a month before trial. 2/8/13 RP 10-11.

Counsel indicated that he intended to present this other suspect evidence and, that he intended to cross-examine Villegas regarding his identification, who he claims said during a defense interview that he doubted whether he could identify the defendant at trial. 2/8/13 RP 12-17. Counsel stated that he fully explained the defense he was advocating to the defendant. 2/8/13 RP 12. Counsel even provided notes the defendant had written regarding identification questions he wanted counsel to ask in cross-examining Villegas. 2/8/13 RP 50.

Part of the defense was predicated on the defendant's companions testifying on his behalf. However, as Sjursen testified, he hired two investigators to help locate and get into court the witnesses. 2/8/13 RP 14-15. However, Sjursen said that the defendant objected to any continuances of the trial date and he said that he was having difficulties locating and obtaining the cooperation of the defense witnesses. 2/8/13 RP 14-15.⁴ Counsel

⁴ Counsel provided the name of the other suspect to the State via e-mail. CP 272-79. While he hoped to be able to locate and require that the other suspect appear in court, counsel also obtained a booking photo of Hughes that he fully intended to show to Villegas and the other witnesses to test and challenge the identification. Id.; 2/8/13 RP 11, 21.

indicated that along with providing other suspect evidence, he fully intended to attack the weakness in the State's case, the identification of the defendant. 2/8/13 RP 31-32. Although counsel had hired an expert on eyewitness identification in another case, Doctor James Lofton, and had tried other identification cases, he did not hire an expert in this case. 2/8/13 RP 8, 14-15.

At trial, much of voir dire focused on the failings of eyewitness identification, with jurors volunteering that they had read studies that showed people get it wrong, can "misremember" things under stress, and that people have biases. 7/24/12 RP 59-61. At certain points during the first two days of trial, defense counsel informed the court that he was having difficulties finding and obtaining the cooperation of the defendant's companions, and that one witness he was able to locate, Tiesha Turner, was not going to testify to what he had been led to believe, that she saw the event and it was not the defendant who committed the crime. 7/23/13 RP 8-9, 13-14; 7/24/13 RP 22-24.

Sjursen testified that as trial progressed, it was the defendant who brought up the idea of pleading guilty. 2/8/13 RP 18. Sjursen stated that the defendant told him that his friends had let him down. 2/8/13 RP 20. This is when the defendant entered

into a plea agreement involving all three counts. At the time of the plea, the defendant told the court that his attorney had gone over the plea forms in their entirety and answered any questions he had. 7/24/12 RP 5. He stated that he understood the evidence that would be presented at trial. Id. at 26. He agreed that counsel had consulted with him regarding all the evidence and the case. Id.

Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial. State v. A.N.J., 168 Wn.2d 91, 111-12, 225 P.3d 956 (2010). 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. Id. This does not mean that a defense attorney must inform a defendant about every possible defense or every defense strategy that counsel decides not to pursue. For example, defense counsel could have pursued a voluntary intoxication defense or counsel could have hired a forensic DNA expert to test the victim's backpack to see if any of the defendant's DNA was on it.

The defendant has cited no case that says defense counsel must inform a defendant of counsel's strategic decisions to not

pursue certain trial tactics or defenses, or otherwise a subsequent plea of guilty is invalid. Still, assuming for purposes of argument that it can be constitutionally ineffective for counsel not to discuss all possible defenses and strategic decisions that could be made at trial with a client, there is no question that counsel's actions here would not be considered ineffective. Counsel made reasonable strategic decisions on how to proceed. Not only was the defendant informed on the tactics that would be used at trial, the defense was predicated on facts disclosed to counsel by the defendant. Reasonable strategic decisions cannot form the basis of an ineffective assistance of counsel claim. McNeal, 145 Wn.2d at 362. There was nothing unreasonable about counsel's decisions.

To prevail before the trial court, the defendant was required to prove that his plea had to be withdrawn in order to avoid a "manifest injustice," an injustice that is "obvious, overt, directly observable and not obscure." Ross, 129 Wn.2d at 283. To prevail before this Court, the defendant is required to prove that the trial court abused its discretion in denying his motion, a standard that requires this Court to find that no reasonable judge would have taken the position adopted by the trial court. Robtoy, 98 Wn.2d

at 42. Under the facts of this case, the defendant has failed to meet his burden.

D. CONCLUSION

For the reasons cited above, this Court should reject and deny the defendant's claim that he can withdraw his guilty plea to one of the two charges he pled guilty in a negotiated, indivisible plea.

DATED this 28 day of February, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

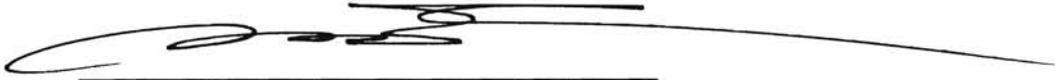
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. FIELDS, Cause No. 70036-7 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 28 day of February, 2014

A handwritten signature in black ink, appearing to be "Nancy Collins", written over a horizontal line.

Name
Done in Seattle, Washington