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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY CA
DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL) NO. 34879-9-II
RESTRAINT PETITION OF) SUPPLEMENTAL RESPONSE
MICHAEL JOHN REISE) TO PERSONAL RESTRAINT
) PETITION

Comes now Edward G. Holm, Prosecuting Attorney
in and for Thurston County, State of Washington, by
and through James C. Powers, Deputy Prosecuting
Attorney, and files this supplemental response to
petitioner's personal restraint petition pursuant
to Order of the Court of Appeals in this cause,
dated November 28, 2006.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Petitioner is currently in the custody of the
Washington Department of Corrections pursuant to a
sentence of 180 months for murder in the second
degree, RCW 9A.32.050(1)(a), imposed in Thurston
County Superior Court Cause No. 04-1-01962-5 on May
12, 2005, based upon the defendant's plea of

guilty. See Appendix D to State's Response to Personal Restraint Petition (hereinafter referred to as State's Response.)

II. STATEMENT OF PROCEEDINGS

A statement of the prior proceedings in this case was set forth in the State's Response to the defendant's petition, and that Statement is incorporated herein by reference.

III. RESPONSE TO SUPPLEMENTAL ISSUE

3.1. The defendant made a voluntary and knowing guilty plea to murder in the second degree, in the course of which he admitted to having committed all the essential elements of that offense, and the facts acknowledged by the defense at sentencing show there was an independent evidentiary basis for the defendant's guilty plea, and therefore the defendant's claim of newly discovered evidence does not satisfy the defendant's burden to show that withdrawal of his guilty plea is necessary to correct a manifest injustice.

The defendant in this case entered a plea of guilty in this case. In return for that plea, the State amended the charge from murder in the first degree to second-degree murder and agreed not to

seek a sentence enhancement on the basis that the defendant was armed with a firearm at the time he committed the offense. See Appendices A and B to State's Response.

In the defendant's Statement on Plea of guilty, he fully admitted his guilt. That Statement contained the following entry:

The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: On October 26, 2004, in Thurston County, Washington, I intentionally shot, and caused the death of, Austin G. Hardison.

See Appendix C to State's Response at 6.

At the change of plea hearing on April 29, 2005, the defendant confirmed his admission to this offense.

THE COURT: You were asked to state in your own words what you did that caused you to be guilty of this charge, and the handwritten response is as follows: On October 26, 2004, in Thurston County, Washington, I intentionally shot and caused the death of Austin G. Hardeson (phonetic). Is that a true statement?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I'll find that your plea of guilty is made freely and voluntarily. It's made with an understanding of the charge against you and the possible consequences of entering this plea.

Mr. Straume, are you satisfied that the defendant's response to the question of what he did satisfies the elements of the charge to which he's pleading guilty?

THE DEFENDANT (sic): Yes I do, Your Honor.

THE COURT: I find that there is a sufficient factual basis for me to accept this plea; and accordingly, Mr. Reise, I find that you are guilty of the crime of murder in the second degree.

4-29-05 Hearing RP 12-13 in Appendix A to this Supplemental Response.

In his personal restraint petition, the defendant seeks to withdraw his guilty plea to second-degree murder. He has accused his trial counsel of having rendered ineffective assistance of counsel, and the State has responded to his claims in that regard in its original Response to the defendant's petition. As a further basis to

withdraw his guilty plea, the defendant has argued there is new evidence in the form of a Declaration from Kenneth B. Gilaspie, who claims to be a previously unknown witness to the incident in which the defendant shot and killed Hardison. This Supplemental Response of the State focuses on that claim, and specifically whether the circumstances of the defendant's guilty plea in this case bar the relief he seeks on the basis of newly discovered evidence.

In order to obtain relief through a personal restraint petition, the defendant must bear the burden of proving by a preponderance of the evidence that there was an error of constitutional magnitude that has given rise to actual prejudice. In re Personal Restraint of Cook, 114 Wn.2d 802, 813-814, 792 P.2d 506 (1990). Since the defendant is seeking to withdraw his guilty plea, he must also show that such withdrawal is necessary to

correct a manifest injustice. CrR 4.2(f). To meet the latter burden, he must show that he has suffered an injustice that is obvious, directly observable, overt, and not obscure. State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996). The defendant's two burdens are closely related. In re Personal Restraint of Clements, 125 Wn. App. 634, 640, 106 P.3d 244 (2005).

In State v. Arnold, 81 Wn. App. 379, 914 P.2d 762 (1996), Arnold pled guilty to two counts of fourth-degree assault. He later moved to withdraw one of his guilty pleas on the basis of newly discovered evidence. The victim of that count had provided an affidavit indicating that her earlier statement implicating Arnold had been untrue. Arnold, 81 Wn. App. at 381.

The Court of Appeals noted that Arnold's choice to plead guilty had been a voluntary one with full knowledge of the consequences of his

plea. In addition, he had chosen to fully admit his crime and there was independent evidence of his guilt. On this basis, the appellate court found that the defendant had failed to show a manifest injustice justifying withdrawal of his plea. Arnold, 81 Wn. App. at 385-387.

In the case of In re Personal Restraint of Crabtree, 141 Wn.2d 577, 9 P.3d 814 (2000), Crabtree had pled guilty to rape of a child in the first degree and child molestation in the first degree in exchange for the State having dismissed two other felony counts. The Washington Supreme Court considered on discretionary review a personal restraint petition from Crabtree in which he sought to withdraw his guilty pleas, based in part on a claim of newly discovered evidence. The victim of one of the counts he had pled guilty to had provided an affidavit stating that Crabtree never had sexual intercourse with him. Crabtree, 141

Wn.2d at 580-581, 588.

The State Supreme Court affirmed the decision of the Court of Appeals finding that this affidavit failed to support a plea withdrawal, quoting the two bases for that Court of Appeals decision.

Crabtree also argues that his guilty plea on count V should be withdrawn due to newly discovered evidence, i.e., an October 7, 1998 affidavit from the victim stating Crabtree never had sexual intercourse with him. This claim is without merit, as the Court of Appeals stated in the Order Dismissing Personal Restraint Petition:

To obtain a new trial based on newly discovered evidence, a defendant must prove the evidence could not have been discovered before trial by the exercise of due diligence. Crabtree offers no reason for waiting 9 years to challenge his plea and to obtain this statement from the victim. He has thus failed to establish due diligence.

Furthermore, because he pleaded guilty, his argument is without merit. He does not complain he was tricked, coerced or threatened to plead guilty. The plea form, which Crabtree signed, states he was making the plea freely and voluntarily, without threats or promises. Finally, Crabtree provides no support for his bald assertion that the only evidence of sexual intercourse was the victim's

statement.

Pet'r's Supplemental Br. At A-69 (footnotes omitted) (citing State v. Macon, 128 Wn.2d 784, 803, 911 P.2d 1004 (1996); State v. Arnold, 81 Wn. App. 379, 386-387, 914 P.2d 762 (victim's recantation insufficient to grant new trial in part because he admitted guilt, rather than pleading not guilty or entering a plea under North Carolina v. Arnold, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), review denied 130 Wn.2d 1003, 925 P.2d 989 (1996)). Crabtree has not proven that this evidence could not be discovered before trial with the exercise of due diligence and therefore his claim to withdraw his guilty plea should be denied.

Crabtree, 141 Wn.2d at 588-589. Thus, while the State Supreme Court focused on the lack of due diligence in Crabtree, supra, there was also a recognition that the circumstances of the defendant's entry of a guilty plea were relevant factors in considering whether a claim of newly discovered evidence justified withdrawal of a guilty plea.

Determining whether a claim of newly discovered evidence demonstrates manifest injustice with regard to the defendant's guilty plea requires

consideration of the circumstances of that plea. Both Arnold, supra, and Crabtree, supra, indicate that a reviewing court should consider three factors in evaluating whether a guilty plea should be withdrawn based on newly discovered evidence: (1) whether the guilty plea was entered by the defendant voluntarily and with full knowledge of the consequences of his plea; (2) whether the defendant fully admitted his guilt to the charge as opposed to entering an Alford plea; and (3) whether, even considering the claim of newly discovered evidence, there is an independent basis for the conviction.

In the present case, the defendant has claimed his guilty plea was entered without a full understanding of the consequences due to the ineffective assistance of his counsel. The State has argued in the State's original Response to the defendant's Personal Restraint Petition why those

claims are refuted by the record before the Court of Appeals, including trial counsel's denials of the defendant's claims. Should this court find that the defendant has not proved these claims of ineffective assistance of counsel, as contended by the State, the conclusion should be that the defendant's guilty plea was voluntarily and knowingly entered.

Clearly, this defendant did not enter an Alford plea. Rather, he acknowledged his commission of the crime of second-degree murder, while denying that his actions constituted the original charge of first-degree murder. As defense counsel noted, arguing on behalf of his client at sentencing:

This is a person who from day one, at least from my meeting him, within days of his being arrested, has acknowledged to me that he did something wrong, and that he's going to accept responsibility for his actions. But he has been adamant that he did not act with any premeditation, and I don't think he did. I think it was just a series of very, very poor

and ultimately, fatal decisions made by Mr. Riese, and that's why he's here today.

5-12-05 Hearing RP 28-29 in Appendix B of this Supplemental Response.

Since it is the defendant's burden to show actual prejudice in maintaining his plea of guilty, given the newly discovered evidence he has presented, it is appropriate to consider the defendant's version of events put forward at sentencing by his counsel. Defense counsel noted that a scuffle had taken place between the defendant and Hardison, with Hardison ending up on top of the defendant, with a stick at the defendant's throat. A witness then persuaded Hardison to get up and back away from the defendant. There was no claim that the defendant had been injured. 5-12-05 Hearing RP at 23.

Defense counsel acknowledged that the defendant initially walked away from Hardison. However, less than a minute later the defendant

chose to go back and confront Hardison because the defendant was angry about what had just happened. The defendant was armed with a firearm at the time. 5-12-05 Hearing RP at 24-25.

According to defense counsel, Hardison walked toward Reise with a stick, taunting Reise. Defense counsel acknowledged that the forensic evidence showed that Hardison was still about 8 feet away from Reise at the point the defendant chose to shoot and kill Hardison. 5-12-05 Hearing RP at 25. Defense counsel admitted that the defendant's flight after firing the fatal shot and his other actions thereafter were not consistent with self defense. 5-12-05 Hearing RP at 25, 30.

Defense counsel expressed confidence that the above would be shown by the evidence, and on the basis of that evidence the defendant had decided, through discussions with his attorney, that the better course of action would be to admit guilt to

second-degree murder. 5-12-05 Hearing RP at 25-27,
30.

It should be noted that the declaration of Kenneth Gilaspie differs from this summary of evidence from the defense perspective on only one point. While Gilaspie claims the defendant pointed the gun at Hardison when Hardison was about 8 to 10 feet away, he claims that the defendant did not shoot until Hardison was close enough to strike the defendant with the stick. However, as shown by the autopsy report, that claim is completely refuted by the physical evidence. See Appendix H to State's Response. Other contradictions between Gilaspie's version and the physical evidence have been pointed out in the State's original Response to this petition, casting doubt on Gilaspie's ability to recall accurately, assuming he truly was a witness in this case.

Summarizing on the basis of the arguments

presented above and those presented in the State's original Response, the State respectfully requests that this court reach the following conclusions in this matter: (1) the defendant's claims of ineffective assistance are refuted by the record; (2) the defendant has not shown that he made anything less than a fully voluntary and knowing plea of guilt in this case; (2) in the course of his plea of guilt to second-degree murder, the defendant admitted all of the essential elements of second-degree murder; (3) even considering the declaration of Kenneth Gilaspie along with other evidence in this case, there is independent evidence supporting the defendant's plea to second-degree murder, and the existence of that independent evidence was acknowledged by the defense at sentencing; (4) on the basis of the above, Gilaspie's declaration does not prove that withdrawal of the defendant's guilty plea is

necessary to correct a manifest injustice and therefore the defendant's personal restraint petition should be denied; (5) in the alternative, a reference hearing should be ordered in which the defendant would have the burden to show that Gilaspie's testimony would be sufficient to probably change the result in a trial. State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996).

RESPECTFULLY SUBMITTED this 26th day of
February, 2007.

EDWARD G. HOLM
Prosecuting Attorney



JAMES C. POWERS/WSBA #12791
Deputy Prosecuting Attorney

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
MICHAEL JOHN REISE,)	
Petitioner)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

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DEPUTY

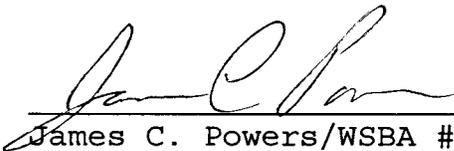
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 26th day of February, 2007, I caused to be mailed to the appellant, MICHAEL JOHN REISE, a copy of the Respondent's Supplemental Response to Personal Restraint Petition, addressing said envelope as follows:

Michael John Reise
#882766
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520-9504

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 26~~th~~ day of February, 2007 at Olympia,
WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney