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NO. 35738-1-II

Amn

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NORMAN FLOYD WHITTIER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Sergio Armijo

No. 05-1-04496-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant receive adequate assistance of counsel for the purposes of his motion for substitute counsel, motion to withdraw his plea, and sentencing hearing?

B. STATEMENT OF THE CASE.

1. Procedure

On September 14, 2005, the Pierce County Prosecutor's Office filed an information charging NORMAN FLOYD WHITTIER, hereinafter "defendant," with one count of first degree assault, one count of intimidating a witness, and one count of felony harassment. CP 1-4. Defendant had two past convictions for most serious offenses. RP 182; CP 1-4, 19-20, 34-36. If he had been convicted of the first degree assault charge, he would then have three most serious offenses and be sentenced to life imprisonment. RP 182; CP 1-4, 19-20, 34-36.

On October 18, 2005, defense counsel Jack McNeish was disqualified from representing defendant, and Barbara Corey was appointed as substitute counsel. CP 5. The court held a CrR 3.5 hearing on October 31, 2006, and proceeded to trial on November 2, 2006. RP 2,

88.¹ After hearing some of the State's witnesses on November 2, 2006, defendant decided to accept a plea offer from the State. RP 169. The State amended the information to charge defendant with felony harassment and intimidating a witness. RP 169-170; CP 37-38. Defendant entered an Alford/Newton plea of guilty to those charges. CP 40-47. In explaining the decision to plead guilty, defense counsel said,

We have had an offer from the prosecutor that has been under consideration for some time. Mr. Whittier has decided it's in his best interest to take that offer. We maintain that this did not happen and so he's pleading in the nature of a Newton, Alford plea. The state has agreed to amend the Information to charge him with felony harassment and the intimidating a witness

I've explained to Mr. Whittier that the intimidating a witness is a B felony and that the harassment is a C felony. And that what the State has offered is a stipulation. And what we have accepted is a stipulation to the statutory maximum of ten years on the one, five years on the other, 15 years, for which he will receive a third off.

I have gone over the plea form with him, you know, line by line. I believe he understands it. He's a high school graduate. He has written to me in the past. I know that he reads and writes English. You know, he is not, of course, happy to be in this position before the court. On the other hand, you

¹ The Verbatim Report of Proceedings appears in five volumes. The first volume, dated July 27, 2007, is not paginated consecutively with the other volumes. Citations to the July 27, 2007, proceedings will be preceded by "RP(7/27)." Citations to the other volumes will be preceded by "RP."

know, when he weighs life imprisonment without the possibility of parole versus a ten year sentence, of which he's served 14 months approximately, you know, he understands that it's in his best interest for there to be a light at the end of the tunnel.

I believe from my extensive discussions with him that Mr. Whittier fully understands what he's doing today. He understands the benefits to him of accepting this plea. He understands the important constitutional rights he's giving up. We have gone through those one by one. He understands, without a doubt, the terms of his sentence.

RP 169-170. The court then questioned the defendant in part as follows:

THE COURT: By pleading guilty, there's no trial, you don't defend yourself. Those and other rights, you're giving them up. Do you understand?

THE DEFENDANT: Yeah. I couldn't say nothing anyhow.

THE COURT:...Are you pleading guilty freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: Is anyone forcing you to plead guilty?

THE DEFENDANT: Myself, yes.

THE COURT: Has anyone made any promises to you, to plead guilty?

THE DEFENDANT: No.

RP 172-173. The court scheduled a sentencing hearing for November 6, 2006. RP 177.

At sentencing, defendant claimed that he wanted to fire his attorney and withdraw his plea. RP 177, 178. Defendant felt uncomfortable voicing his argument, so he explained his position in a note which he presented to the court. RP 177-178; CP 67-69. Defendant claimed that defense counsel had not appeared in court to represent him because she had something else to do, that defense counsel informed the prosecutor that a potential witness, Kerri Connelly, was in jail. CP 67-69. He claimed that he had asked someone to find defense counsel at one time, and that he believed that defense counsel had made a deal with that person to turn him in to the police. RP 178. In addition to these claims, defendant complained that the prosecutor in court at the sentencing hearing was not the prosecutor who had been on his case from the beginning, and that defendant was upset that the sentencing judge was a “harder” judge than he wanted. CP 67-69. Defendant concluded the note by asking to withdraw his plea and go to trial. CP 67-69.

The State responded to defendant’s motion to withdraw his plea, arguing that it was not properly before the court and that defendant could move to withdraw his plea in the proper manner if he wished to do so after sentencing. RP 178-179. Defendant tried to interrupt the State’s response, but the Court admonished him to let the State finish. RP 178. The court then asked defense counsel for her position in the matter, to which she responded,

[DEFENSE COUNSEL]: I understand that my client doesn't wish me to represent him and that he wants to, you know, try to withdraw his plea. I think the Court was here, obviously, last Thursday and took a plea from him that was made after he and I had extensively discussed the State's offer and the benefit to him of that offer. He did sign the plea paperwork and assure the Court his plea was knowing, intelligent, and voluntary.

With regard to his criticism of me, I want to put this on the record: One, I did go see him many times. I received numerous mail from him, all of which was read. I interviewed Kerri Connelly. He's apparently angry with some idea that at one point when she was in jail I told the prosecutor she was in jail. The Court obviously knows that the prosecutor knows who's in jail far better than a defense attorney.

DEFENDANT: He was looking back and he didn't say nothing, you told him.

[DEFENSE COUNSEL]: I'm speaking. He was very angry that Mr. Blinn was not the prosecutor throughout time. Mr. Blinn has been on the case as long as I've been on the case.

He also said I didn't talk to his friends. His friends called, they proposed names of witnesses. I gave them to our investigator. Bob Crow talked to everybody. We have thoroughly worked up the case. I interviewed all the witnesses, wrote motions on his behalf.

It was my opinion last Thursday that his plea was knowing, intelligent, and voluntary. That's my opinion today. I think he regrets having entered into the plea but the plea is not defective.

THE COURT: Okay. Let's proceed to sentencing.

RP 179-180. Defense counsel continued to represent defendant throughout the sentencing hearing. RP 180-187. After the State made its recommendation for sentencing, defense counsel noted that the recommendation was an agreed one. RP 182. She made sure that the court gave defendant credit for 419 days served. RP 182. She urged the court to adhere to the minimal legal financial obligations to which the State had agreed because of defendant's age and lack of financial resources. RP 182. She explained that the defense accepted the plea agreement because it provided "a light at the end of the tunnel for Mr. Whittier." RP 182.

After defense counsel urged the court to accept the recommended sentence, defendant began arguing the merits of the case and again asked the court for permission to withdraw his plea. RP 182. A corrections officer had to prevent defendant from standing up to talk to the court. RP 182. Defendant also reiterated his complaint about the prosecutor, which

the court said did not matter. RP 183-184. Defendant then complained that he wanted to withdraw his guilty plea to restore the rights he had waived by pleading guilty. RP 185.

The court followed the recommendation of the defense and the State and sentenced defendant to serve ten years' confinement for Count I of the amended information, and a consecutive five years' confinement for Count II. RP 185. It also ordered defendant to pay monetary penalties. RP 185. At the end of the hearing, the court asked defense counsel if she needed the court to sign a withdrawal for her. RP 186. Defense counsel said that that was not necessary at the time. RP 186.

2. Facts

In the early morning hours of September 12, 2005, defendant attacked his roommate, Kerri Connelly, when Ms. Connelly refused to begin an intimate relationship with him. CP 1-4. Defendant punched Ms. Connelly repeatedly in the face, choked her, and threatened to kill her. CP 1-4. Ms. Connelly fled to a friend's house, and defendant followed. Defendant entered the friend's house, found Ms. Connelly, and held her to the ground by her throat. CP 1-4. Defendant punched her in the face, breaking and dislodging her teeth. Defendant threatened to kill the people in the house before fleeing in his truck. CP 1-4.

On September 13, 2005, defendant contacted the Pierce County Sheriff's Department and said he wanted to "turn himself in." CP 1-4. Defendant did so, and told the Deputy Decker of the Pierce County

Sheriff's Department that defendant was "suicidal because this [was] his third strike." CP 1-4.

C. ARGUMENT.

1. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT HIS PLEA AND SENTENCING HEARINGS, AND THE COURT PROPERLY DENIED HIS PRO SE MOTION FOR SUBSTITUTE COUNSEL AND MOTION TO WITHDRAW HIS PLEA.

a. The court did not abuse its discretion in denying defendant's motion for substitute counsel.

The Sixth Amendment "does not [grant a criminal defendant] a right to choose any advocate if the defendant wishes representation." State v. Deweese, 117 Wn.2d 369, 376-377, 816 P.2d 1 (1991) (citing Wheat v. United States, 486 U.S. 153, 159 n. 3, 108 S. Ct. 1692, 100 L.Ed.2d 140 (1988)). The general loss of confidence or trust alone is not sufficient to substitute new counsel. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). "When an indigent defendant fails to provide the court with legitimate reasons for the assignment of substitute counsel, the court may require the defendant to either continue with current appointed counsel or to represent himself." Id. A court's decision not to appoint new counsel is reviewed for an abuse of discretion. Deweese, 117 Wn.2d at 367-377.

Where a defendant claims to have an irreconcilable conflict with his counsel, the defendant is only deprived of the counsel's assistance if the relationship between the client and lawyer "completely collapses." In re Pers. Restraint of Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001) (citing United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998)); State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). There is a difference between a complete collapse and a lack of accord. Cross, 156 Wn.2d at 606. In determining whether this collapse occurred, a reviewing court considers: "(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." Stenson, 142 Wn.2d at 724 (citing Moore, 159 F.3d at 1158-1159). An inquiry is adequate where the defendant and counsel are permitted to express their concerns fully. See Stenson, 142 Wn.2d at 731.

i. The sentencing court did not abuse its discretion in denying the defendant's motion for substitution of counsel.

Defendant did not base his motion for substitute counsel on appropriate grounds. At sentencing, defendant told the court that defense counsel did not visit him in prison, that defense counsel told the State the location of a witness, and that defense counsel was too busy to attend one hearing. RP 177-178; CP 67-69. Defendant also made complaints about the judge and the prosecutor that had nothing to do with defendant's relationship with his attorney. CP 67-69.

Even assuming the truth of these claims, with one possible exception, they do not establish a conflict of interest between defendant and defense counsel, an irreconcilable conflict, or a complete breakdown in communications for the purposes of the motion for substitution. Defendant does not argue on appeal or cite any authority to suggest that these are proper grounds for moving to substitute counsel. Assuming, *arguendo*, that a defendant could move to substitute counsel if his attorney helped turn him in to the police, the court in this case had information that defense counsel had not turned defendant in to the police. Defendant turned himself in on September 13, 2005, and remained in custody until he was sentenced, and defense counsel was not appointed to represent defendant until October 18, 2005. CP 1-5, 40-47. It was impossible for defendant's claim to be true; the court did not abuse its discretion in denying the motion for substitute counsel.

- ii. The court did not abuse its discretion in denying the motion for substitute counsel when it could see that communication had not "completely collapsed" between defendant and his attorney.**

The court acted within its discretion when it refused to substitute new counsel when it could see that there had been no complete breakdown in communication between defendant and his attorney that would

effectively deprive defendant of counsel for purposes of the motion for substitute counsel. See Stenson, 142 Wn.2d at 731. Defense counsel accurately and adequately communicated defendant's desire to fire her and withdraw his plea. RP 179. She understood that defendant believed defense counsel should not have told the prosecutor that Ms. Connelly was in jail. She knew that defendant believed a different prosecutor had been assigned to the case, which seemed to upset defendant. RP179-180. She visited defendant many times and read much mail from him. RP 179. She also had an investigator interview all the witnesses defendant's friends mentioned so that she could "thoroughly work[] up the case." RP 180. Defense counsel was clearly well-apprised of defendant's concerns and communicated them well to the court.

Moreover, the court did not create a conflict when it asked defense counsel her position on the substitution motion. The court was obligated to inquire into the matter to determine whether there was a conflict that would deprive defendant of effective representation. Stenson, 142 Wn.2d at 724. While conducting that inquiry, the court spoke to defendant, the prosecutor, and defense counsel. Defense counsel explained the circumstances of her representation of defendant:

[DEFENSE COUNSEL]: With regard to his criticism of me, I want to put this on the record: One, I did go see him many times. I received numerous mail from him, all of which was read. I interviewed Kerri Connelly. He's apparently angry with some

idea that at one point when she was in jail I told the prosecutor she was in jail. The Court obviously knows that the prosecutor knows who's in jail far better than a defense attorney.

DEFENDANT: He was looking back and he didn't say nothing, you told him.

[DEFENSE COUNSEL]: I'm speaking. He was very angry that Mr. Blinn was not the prosecutor throughout time. Mr. Blinn has been on the case as long as I've been on the case.

He also said I didn't talk to his friends. His friends called, they proposed names of witnesses. I gave them to our investigator. Bob Crow talked to everybody. We have thoroughly worked up the case. I interviewed all the witnesses, wrote motions on his behalf.

RP 179-180. These comments provided the court with the perspective it needed to determine whether the "relationship between lawyer and client [had] completely collapse[d]." Cross, 156 Wn.2d at 606. They revealed that any problem communicating with defense counsel originated with defendant, who was prone to interrupting the State, the court, and defense counsel. RP 178-1789, 183-184.

Second, the court's inquiry into defendant's motion was sufficient for the court to determine the severity of any breakdown between defendant and defense counsel. The court listened to defendant's verbal complaint and read his written complaint. RP 177-178; CP 67-69. The court then asked the prosecutor and defense counsel for their positions on

the matter. RP 178-180. After listening to all the parties involved, the court moved on to sentencing, which indicated that it did not feel that defendant had shown that there was sufficient breakdown between him and defense counsel to justify appointing new counsel. RP 180. During the court's inquiry, defense counsel accurately expressed her client's desire to fire her, explained that she and defendant were in constant communication while defendant was in custody, and that defendant was angry that Mr. Blinn was representing the State. RP 179-180. These were the same concerns that defendant had raised both verbally and in his letter to the court. RP 177-178; CP 67-69. The similarity between the statements indicates that defense counsel and defendant communicated well. Although the court interviewed every party involved in the matter, there was no evidence to suggest that there had been a communications breakdown between defense counsel and defendant. Defendant can point to nothing in the record that suggests defense counsel failed to communicate something that her client wanted to say to the court or that she failed to investigate the case. The court's inquiry was sufficiently searching to determine that there was no breakdown of communication between defense counsel and defendant.

Finally, the timing of defendant's motion for substitute counsel indicates that defendant had been satisfied with his representation. By the time defendant asked for a new attorney, defense counsel had investigated the case, the court had held a CrR 3.5 hearing, the court had heard motions

in limine, a jury had been empanelled, witnesses had testified on the merits, and defendant had pleaded guilty. RP 1-169, 179-180. Defendant did not express his desire for a new attorney until the day of his sentencing hearing. CP 67-69; RP 177-178. Courts have discretion to dismiss motions for substitute counsel when the request is made “during the trial or on the eve of the trial,” and this request came at a much later stage. Stenson, 142 Wn.2d at 732. Defendant’s motion was certainly untimely.

Defendant claims that the court should have held an *in camera* hearing to determine whether there was a conflict that would require the court to provide defendant new counsel. Br. of Appellant at 8. Defendant fails to explain, however, why an *in camera* hearing was necessary to determine whether the attorney-client relationship had completely collapsed. Neither defendant nor his attorney requested an *in camera* hearing.

Defendant claims that this case is similar to United States v. Gonzalez, 113 F.3d 1026, 1029 (1997). Five months after Gonzalez pleaded guilty, and one week before sentencing, he wrote to the court and asked for substitute counsel. Id. at 1029. Gonzalez alleged that his counsel had threatened to “smack Gonzalez between the eyes” and told him to “take the plea” before Gonzalez pleaded guilty. Id. at 1028 n. 1. Gonzalez claimed that this threat had taken place in the presence of a probation officer, and the Government urged the court to conduct an evidentiary hearing to determine whether the allegation was true, but the

court refused to hold an evidentiary hearing. Id. at 1028-29. Instead, the court asked Gonzalez in court whether defendant's allegations were true and Gonzalez's attorney "denied it." Id. at 1028. The Ninth Circuit found that the court had failed to conduct an adequate inquiry and that statement that Gonzalez's allegations were not true "undermined [Gonzalez's] veracity" to the point that it denied him counsel for the substitution of counsel hearing. Id. at 1028-1029.

The present case is distinguishable from Gonzalez. Here, defendant waited until the day of sentencing to ask for new counsel. RP 177-178; CP 67-69. His request was not based on any legitimate grounds for substitution of counsel; Gonzalez's request was based on the legitimate ground that his counsel had coerced him to plead guilty. RP 177-178; CP 67-69. Defendant did not allege that there were any witnesses to the events that he claimed warranted the appointment of new counsel. RP 177-178; CP 67-69. There was no need for an evidentiary hearing in this case because the court conducted an inquiry of all the persons involved in this case: defendant, defense counsel, and the prosecutor. RP 177-180. Unlike the court in Gonzalez, the court in the present case conducted a thorough inquiry into the situation. Also, defendant had no legitimate grounds on which to withdraw his motion, so his credibility was never at issue for the purposes of that motion.

The court properly denied defendant's motion for substitute counsel. Defendant did not base his motion on legitimate grounds. Even

if he had based the motion on legitimate grounds, defendant has failed to establish that there was a complete breakdown in his relationship with counsel, the court conducted an adequate inquiry into the facts of this case, and defendant's motion for substitute counsel was untimely.

- b. Defendant was not denied adequate representation for the purposes of his request to withdraw his guilty plea.

Under CrR 4.2(f), a court must allow a guilty plea to be withdrawn whenever it appears withdrawal is necessary to correct a manifest injustice. This Court has always held that this rule imposes a demanding standard on the defendant to demonstrate a manifest injustice, i.e., "an injustice that is obvious, directly observable, overt, not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974), State v. Branch, 129 Wn.2d 635, 641-642, 919 P.2d 1228 (1996); State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). One of the following four criteria must be met for a showing of manifest injustice: 1) the plea was not ratified by the defendant, 2) the plea was not voluntary, 3) the denial of effective counsel, or 4) the plea agreement was not kept. State v. Wakefield, 130 Wn.2d 464, 925 P.2d 183 (1996). Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances. Wood v. Morris, 87 Wn.2d 501, 506, 554 P.2d 1032 (1976).

When a defendant completes a written plea statement, and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); In re Keene, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980). Furthermore, when a defendant, who has received the information, pleads guilty pursuant to a plea bargain, there is a presumption that the plea is knowing, intelligent and voluntary. In re Ness, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), review denied, 123 Wn.2d 1009, 869 P.2d 1085 (1994). When the judge verifies the various criteria of voluntariness in a colloquy with the defendant, the presumption of voluntariness is “well nigh irrefutable.” State v. Perez, 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982); Branch, 129 Wn.2d at 642. Finally, credibility determinations are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “Counsel's performance is not deficient for failing to file frivolous motions to suppress and a defendant is not prejudiced by his counsel's refusal or failure to file a meritless motion.” State v. Kirwin, 137 Wn. App. 387, 394, 153 P.3d 883 (2007).

Defendant received adequate representation for purposes of his motion to withdraw his plea. Defense counsel was under no obligation to bring forward defendant’s motion to withdraw his plea because the motion was meritless. See, Kirwin, 137 at 394. The only ground for withdrawal that defendant advanced was that he felt that he should not have to spend

ten years in prison because of his age. CP 67-69. Defendant has never challenged, and does not challenge on appeal, the court's finding that his initial plea was knowing, intelligent, and voluntary. RP 184-185; Wood, 87 Wn.2d at 506. The motion was untimely and had not been properly briefed because defendant raised the motion for the first time at sentencing. CP 67-69; RP 177-178. At the time of the plea, defense counsel had averred that she believed defendant was entering a knowing, voluntary, and intelligent plea. RP 169-170. There is nothing in the record that would suggest that her belief had changed between the time of the plea hearing and the time of the sentencing hearing. There is no evidence in the record that she in good faith could have supported a motion to withdraw that plea. RP 179-180. Defendant has not cited any authority that supports the claim that a defendant's age is a proper ground for withdrawing a guilty plea, and the fact that he failed to renew his motion after he was sentenced is evidence that he did not find his age to be a compelling ground for withdrawal.

Defense counsel acted in defendant's interest during the motion to withdraw defendant's plea. Although defense counsel was not required to bring defendant's motion before the court, she nonetheless expressed defendant's desires to the court, saying, "I understand that my client...wants to, you know, try to withdraw his plea." RP 179.²

² The record indicates that it was in defendant's best interest for the plea to stay in place.

Defendant is incorrect that the court created a conflict between defendant and his attorney when it asked defense counsel her opinion of the matter. The court had an obligation to inquire into defendant's motion for substitution, which defendant had included in the letter in which he asked to withdraw his plea. See Stenson, 142 Wn.2d at 724; CP 67-69. In response to the court's inquiry into her "position at [that] point," Defense counsel merely reiterated her belief that at the time of the plea, defendant had pleaded knowingly, intelligently, and voluntarily. RP 179-180. The record does not contain any evidence which would have changed defense counsel's opinion about defendant's plea, and defense counsel could not invent facts to support defendant's motion to withdraw that plea. Defense counsel did not make any argument about the motion to withdraw, she did not apply any legal analysis to that recitation of facts, and she did not ask the court to rule one way or the other on the motion to withdraw. RP 179-180. Thus, she did not "advocate for the plea," as defendant claims. Br. of Appellant at 8.

Defendant was not denied counsel for his motion to withdraw his guilty plea. Defendant's motion to withdraw his plea was groundless and

Defense counsel noted that during the evidentiary hearing, the State's witnesses "did a little better on the stand than we thought they would." RP 182. She noted that the plea provided "a light at the end of the tunnel for Mr. Whittier," because without the plea, he would be facing a third most serious offense and life in prison as a persistent offender. RP 182. In an earlier letter to the court, defendant recognized that without the plea he would be facing a third strike and life imprisonment. CP 19-23.

untimely, and his counsel had no obligation advocate for a meritless motion. Nevertheless, defense counsel made sure that defendant had an opportunity to air his concerns and for the court to consider his motions. Counsel did not abandon her duty to represent her client. This Court should not ignore the fact that defendant benefited from the plea because he avoided the risk of lifetime imprisonment. The fact that defendant did not renew his motion at a later time supports the conclusion that he had no grounds on which to move to bring such a motion.

- c. Defendant was not denied adequate assistance of counsel for purposes of his sentencing hearing.

Defense counsel adequately represented defendant's interests at sentencing. At sentencing, defense counsel that the agreed sentence was important to give defendant a "light at the end of the tunnel" by avoiding a third strike, and she urged the court to adhere to that beneficial bargain between defendant and the State. RP 182. She noted that defendant deserved 419 days' credit for time served. RP 182. She argued for minimal financial obligations because defendant was 66 years old and would not be able to afford higher financial obligations. RP 182. Defense counsel's relation of the facts as she perceived them and her unwillingness to invent facts to support defendant's meritless motion did not constitute "an abandonment of her role as counsel for Mr. Whittier [that] left him without counsel at the sentencing hearing." Br. of Appellant at 8.

Defendant is incorrect that defense counsel's reiteration of the facts of defendant's plea undermined his credibility for the purposes of the sentencing hearing. Br. of Appellant at 8. In relating the events of the guilty plea, defense counsel did not make any statements that contradicted defendant's statements about his motion to withdraw his plea. RP 177-180; CP 67-69. Defendant moved to withdraw his plea based on his age, and defense counsel related her beliefs as to defendant's state of mind at the time of the plea. CP 67-69; RP 179-180. These statements are not inconsistent. Neither of them said that the other was being untruthful about the motion. Defendant inflicted the only damage to his credibility by continually interrupting the State and Defense counsel, trying to argue the merits of his case during sentencing, and arguing irrelevant points like which prosecutor was assigned to the case. RP 178-179, 182-184. If anyone hurt defendant's credibility for the sentencing hearing, it was defendant.

Furthermore, where the parties make a joint recommendation as to the sentence and the court follows the recommendation, the defendant's credibility is not at issue. Thus, defendant cannot show any prejudicial effect from defense counsel's action at the hearing. Defendant and the State had previously agreed to the sentencing recommendation that they brought before the court. RP 180-182. Defendant did not assert any facts at sentencing that would have affected his sentence; he only argued about merits of his case and which prosecutor had been assigned to the case. RP

182-186. There is no evidence that the court took defendant's arguments into account when it sentenced defendant. It is unclear to the State how these statements, if believed, could have aided defendant in getting a more favorable sentence, and defendant does not argue on appeal that they would. Instead, defendant simply states that defendant's credibility was harmed and assumes that that fact alone warrants reversal. Br. of Appellant at 8-9. There is no authority for such a position.

Defendant cites United States v. Wadsworth, 830 F.2d 1500 (9th Cir. 1987), in support of his claim that defense counsel's statements during the motion for substitution tainted defendant's credibility for the sentencing hearing. The Ninth Circuit held that Wadsworth was denied counsel when the court denied him a continuance based in large part upon Wadsworth's counsel's claim that Wadsworth was uncooperative and hostile. Id. 1505-1506, 1510. Wadsworth dismissed his counsel the day before trial began because he believed that his counsel had not prepared an adequate defense. Id. at 1506. The court asked Wadsworth's counsel whether he had discussed these matters with his client, and his counsel responded, "Your Honor, they've been discussed. That's a bunch of hoey." Id. at 1507. Wadsworth's counsel also told the court that Wadsworth had been hostile and uncooperative to the point that Wadsworth's counsel had stopped preparing the case. Id. at 1508, 1510. At that point, the court dismissed Wadsworth's counsel, Wadsworth asked for new counsel, and the court denied Wadsworth's request. Id. at 1508.

Wadsworth then said he would need at least 30 days to prepare for trial, but the court denied that request for a continuance and trial commenced the next day. Id. at 1506. In denying this request, the court relied heavily on Wadsworth's counsel's claim that Wadsworth had been uncooperative and hostile. Id. at 1510.

The present case is distinguishable from Wadsworth. When the court asked defense counsel her opinion on the matter, she did not directly comment on defendant's veracity, but instead gave her version of events. RP 179-180. Defense counsel also did not comment on defendant's behavior during the court's inquiry. RP 179-180. Unlike Wadsworth, defense counsel did not force defendant to proceed to sentencing unprepared and without representation. RP 180. Most importantly, there is no evidence that the court's sentencing decision was influenced by defense counsel's statements during the motion for substitute counsel or motion to withdraw defendant's plea.

Defendant had assistance of counsel at the sentencing hearing. His attorney argued for reduced financial obligations and pursued the sentence to which he agreed in pleading guilty. His counsel did not undermine his credibility before the sentencing hearing, and even if she had, defendant's credibility was not at issue. There has been no showing of negative impact when defendant received precisely the sentence for which he had bargained.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm defendant's Judgment and Sentence.

DATED: December 6, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

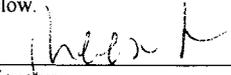


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Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/06/07 
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