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COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON, RESPONDENT

v.

PATRICK ARTHUR PICCOLO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson and D. Gary Steiner

No. 05-1-03870-7

BRIEF OF RESPONDENT

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

1. Has defendant failed to show that a manifest injustice has occurred such that he should be able to withdraw his guilty plea?

1a. Did the trial court err in accepting defendant's guilty plea after determining that the plea was knowing, intelligently and voluntarily made and was under no obligation to advise defendant on self-defense?

1b. Did the trial court abuse its discretion in ordering defendant to undergo a competency evaluation when the issue of competency had been raised? Did the trial court abuse its discretion in finding defendant competent and denying the motion to withdraw his plea after conducting an evidentiary hearing?

2. Did defendant receive constitutionally effective assistance of counsel where there is no evidence of deficient performance or prejudice?

B. STATEMENT OF THE CASE.

On August 8, 2005, the State charged defendant Patrick Piccolo with two counts of aggravated murder in the first degree with a firearm enhancement, and one count of arson in the second degree. CP 1-4.

On August 14, 2006, defendant appeared before the Honorable Gary Steiner and entered a plea of guilty. CP 26-33, 67-73. The case had originally been assigned to the Honorable Brian Tollefson, but as he was on vacation, the parties held the plea hearing in front of Judge Steiner. CP 67-73 (page 2). The State filed an amended information which dismissed the arson count, amended the murder counts to one count of murder in the first degree, and one count of murder in the second degree, and eliminated the firearm enhancements. CP 23-24.

The court engaged in a colloquy on the record with defendant and his counsel. CP 67-73. The court accepted defendant's pleas of guilty to both counts after finding the pleas to be knowing, intelligent and voluntary. CP 67-73 (page 5-6).

Sentencing was set for September 11, 2008, in front of the Judge Tollefson. However, a second defense attorney associated onto the case on September 8, 2008, for the sole purpose of filing a motion to withdraw defendant's guilty plea. CP 39, 40, 2RP 1. At the sentencing hearing, counsel had not filed a motion to withdraw but anticipated doing so on the grounds that defendant was incompetent at the time of the plea. 2RP 5. The State made a motion for defendant to be evaluated at Western State pursuant to RCW 10.77, and *State v. Marshall*, 144 Wn.2d 266, 27 P.3d 192 (2001), and the court granted the motion. 2RP 5-6, 10, 11, CP 35-38.

The report from Western State Hospital found defendant competent and was noted on the record on December 8, 2006. CP 129-144. A motion and/or sentencing date was then set before Judge Steiner. 4RP 1-3.

Defendant's motion to withdraw his guilty plea commenced on January 26, 2007. RP 4. Defendant's sole basis for the motion was defendant's competence at the time of the plea. RP 4-5. Counsel for defense stated they, as the moving party, would bear the burden in the motion under CrR 4.2. RP 4. The Court then clarified with the parties that the defense bears the burden of showing the plea is involuntary and as the basis for the involuntary plea was that defendant was not competent at the time of the plea, defendant's competency and the motion to withdraw would be addressed at the hearing. RP 5. The hearing then proceeded with both the State and the defense calling witnesses. RP 5-8. At the end of the two and half days of testimony, the court made an oral finding that defendant was competent at the time he entered his plea. RP 393- 395. The court also denied defendant's motion to withdraw his guilty plea. RP 395.

Sentencing followed on May 11, 2007. RP 398. Defendant's offender score was zero and his sentencing range was 123-220 months on count I, and 240-320 months on count II. CP 112-123. The defendant was given a chance to address the court. RP 405-6. The court sentenced

defendant to the low end of 123 months on count I, and 240 months on count II. RP 408, CP 112-123.

Defendant filed this timely appeal. CP 97-109.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT A MANIFEST INJUSTICE HAS OCCURRED SUCH THAT HE SHOULD BE ALLOWED TO WITHDRAW HIS GUILTY PLEA.

CrR 4.2(f) states, “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.” Case law has clarified manifest injustice to mean an injustice that is, “obvious, directly observable, overt, not obscure.” *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). “CrR 4.2(f) imposes a demanding standard on a defendant who seeks to withdraw a guilty plea.” *Saas*, 118 Wn.2d at 42, *Taylor*, 83 Wn.2d at 597. The court then lists the four instances that can constitute manifest injustice. The first is denial of effective counsel. The second instance is a plea not authorized by the defendant. The third instance, and the one that applies in this case, is that the plea was involuntary. Finally, the plea agreement was not kept by the prosecution. *Saas*, 118 Wn.2d at 42,

Taylor, 83 Wn.2d at 597. The appellate courts will only reverse the trial court's decision to deny a motion to withdraw a guilty plea if the trial court abused its discretion. *State v. Bao Sheng Zhao*, 157 Wn.2d 188, 137 P.3d 835 (2006); *Marshall*, 144 Wn.2d at 281.

In the instant case, there is nothing that rises to this level of an obvious or overt injustice. The court did not abuse its discretion in denying defendant's request to withdraw his plea after engaging in a lengthy evidentiary hearing. Defendant's plea was knowing, voluntary and intelligently made. The court ensured defendant's due process by following the procedures of RCW 10.77.060 in ordering a mental health evaluation, and then holding an evidentiary hearing. Defendant has failed to show why this court should overturn the trial court's ruling denying the motion to withdraw that guilty plea.

- a. The court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea as the plea was knowing, intelligent and voluntary, and the court was not required to instruct defendant on a defense not supported by the facts.

A "court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). The State bears the burden of proving the validity of a guilty plea. *Wood v. Morris*, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976). The record from the

plea hearing must establish that the plea was entered voluntarily and intelligently. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (citing *Wood*, 87 Wn.2d at 511). 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) (citing *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982)). 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). “A defendant’s signature on the plea form is strong evidence of a plea’s voluntariness.” *Branch*, 129 Wn.2d, at 642. If the trial court orally inquires into a matter that is on this plea statement, the presumption that the defendant understands this matter becomes “well nigh irrefutable.” *Branch*, 129 Wn.2d at 642 n.2; *State v. Stephan*, 35 Wn. App. 889, 894, 671 P.2d 780 (1983). After a defendant has orally confirmed statements in this written plea form, that defendant “will not now be heard to deny these facts.” *In re Keene*, 95 Wn.2d 203, 207, 622 P.2d 13 (1981).

In the instant case, the record supports that defendant made a knowing, voluntary and intelligent plea. Defendant completed a written plea of guilty and the court also orally inquired about that statement. CP 26-33, 67-73. Defendant signed the statement that read, “My lawyer has

explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this ‘Statement of Defendant on Plea of Guilty.’ I have no further questions to ask the judge.” CP 26-33 (page 7). Defendant did not express any confusion, and in fact when asked by the judge if he has gone over the plea from carefully with his attorney, defendant answered, “Yes. My attorney has been very thorough.” CP 67-73 (page 3). The written plea agreement, as well as the oral colloquy between the judge, defendant, and his counsel, supports a knowing, intelligent and voluntary entry into a plea of guilty.

In addition, the court went over the rights defendant was giving up, and advised defendant of the sentencing range for murder in the first and second degree. CP 67-73 (page 3-4). At the end of the colloquy, the court asked the defendant, “Sir, I’m going to ask you—and if you say ‘guilty,’ you cannot change your mind. If there’s any doubt, any ambiguity, you say something and the matter goes out to trial. Do you understand that?” CP 67-73 (page 6). Defendant answered yes. CP 67-73 (page 6).

Defendant was represented by counsel. Defendant filled out a written plea statement as well as engaged in a colloquy on the record before the judge. Defendant never indicated any confusion, and in fact repeatedly indicated that he understood what he was pleading to. Defendant never asked any questions. Defendant has failed to show that his plea was anything but voluntary.

Defendant claims that he should have been advised that the defense of self-defense was available to him in this situation. A defendant should be made aware of possible defenses before pleading guilty. *State v. Haydel*, 122 Wn. App. 365, 370 95 P.3d 760 (2004). However, self-defense is not an issue until the defendant raises the issue and presents credible evidence to support his theory. *State v. Montoya*, 109 Wn.2d 270, 279, 744 P.2d 340 (1987); *Haydel*, 122 Wn. App. at 370. No case holds that the statement of defendant on plea of guilty, or the colloquy with the judge must address self-defense if there is no evidence of self-defense. *Haydel*, 122 Wn. App. at 369.

In this case, defendant entered into an *Alford/Newton*¹ plea, although he did acknowledge that he killed the two victims. CP 26-33 (page 7). This plea then incorporated the facts contained in the probable cause statement that has already been filed with the court. CP 26-33. The probable cause statement contained defendant's changing version of events wherein he did ultimately admit that he had the gun and shot the two victims: Janine Piccolo (his wife) and Kenneth DeBord. CP 1-4. Defendant claimed that his wife had the gun in her sweatshirt pocket and her feet up on the dashboard as she tried to rob him of the truck while he

¹ See *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970), and *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

was driving it. CP 1-4. He first claimed that they struggled for the gun while he was driving and that it went off, shooting the victims. CP 1-4. When the police told him that his story was not plausible, defendant admitted he alone had the gun. CP 1-4. Defendant's wife was shot above and behind her left ear. CP 1-4. Mr. DeBord was shot several times, including in the hand, his neck and in his back. CP 1-4. Defendant then told a third story to a friend that he "snapped" when he learned that his wife and Mr. DeBord were going to go on a crime spree. CP 1-4. The physical evidence of how the victims were shot and where they were shot does not support a theory of self-defense. CP 1-4. The court was under no obligation to advise the defendant on self-defense.

Even though the court was not required to inform defendant about self-defense, defendant was made aware of the existence of self-defense early on in the case. Defendant signed the omnibus paperwork that indicated that he and his attorney planned to present the defense of self-defense. CP Supp. (Order on Omnibus Hearing). Defendant signed this paperwork. CP Supp. (Order on Omnibus Hearing).

Defendant's plea was knowing, intelligent and voluntary. The court did not abuse its discretion in denying defendant's motion to withdraw his plea.

- b. The court did not abuse its discretion in ordering an evaluation of defendant under RCW 10.77 when the issue of competency was raised, and did not abuse its discretion in finding that defendant was competent after holding an evidentiary hearing.

In Washington, “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050. In *Marshall*, the Supreme Court of Washington stated in very clear terms that “a competency hearing is mandatory whenever a legitimate question of competency arises.” *Marshall*, 144 Wn.2d at 279. Once there is a reason to doubt a defendant's competency, the court must follow the procedures set forth in RCW 10.77 to determine defendant's competency to stand trial. *Id.*, citing *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982). The trial court's determination of whether a competency examination should be ordered rests within its broad discretion and will not be overturned absent an abuse of that discretion. *In re Personal Restraint of Fleming*, 142 Wn.2d 853, 16 P.3d 610 (2001).

“Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.” *Fleming*, 142 Wn.2d at 862 (citing *Godinez v. Moran*, 509 U.S. 389, 402, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993)). The standard for competence to plead guilty is the same as that to

stand trial, that is: whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *Godinez*, 509 U.S. at 396. A claim that a defendant was not competent to enter his plea is equivalent to claiming the plea was not voluntary. *State v. Osborne*, 102 Wn.2d 87, 98, 684 P.2d 683 (1984).

In determining the mental condition of the defendant, "[t]he critical period is the time of the entry of the guilty plea." *State v. Ashley*, 16 Wn. App. 413, 416, 558 P.2d 302 (1976). The trial court is vested with broad discretion in judging a defendant's mental capacity to enter a plea of guilty. *Osborne*, 102 Wn.2d at 98. In making such a determination the court can consider the defendant's demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and the statements of counsel. *Id.*; *State v. Calvert*, 79 Wn. App. 569, 575 576, 903 P.2d 1003 (1995). Because the trial court is in the unique position of judging the defendant's demeanor and his behavior, the court reviews the trial court's determination of competency for abuse of discretion. *State v. Swain*, 93 Wn. App. 1, 9, 968 P.2d 412 (1998).

i. The court did not abuse its discretion in ordering an evaluation pursuant to RCW 10.77.060.

The trial court did not abuse its discretion in ordering a formal competency evaluation after listening to input from both attorneys. The court has the discretion to order a formal competency hearing and may consider a number of factors in determining whether or not to order the examination. *Fleming*, 142 Wn.2d at 863. The court protects the defendant's right to due process by following the procedures as set forward in the statute. *Id.*

In ordering the formal competency evaluation, the court was acting to protect defendant's due process rights. Defendant's counsel was brought onto the case for the sole purpose of a motion to withdraw defendant's guilty plea. CP 39, 40, 2RP 1. Defense counsel stated that while he was not precluding himself from raising other arguments, the reason they would be seeking to withdraw the plea was based on defendant's competency at the time he entered the plea. 2RP 5. Defense counsel then asked for sentencing to be continued so he could obtain medical records and have defendant evaluated by his expert. 2RP 9-10. The State brought up the *Marshall* case and told the court that if competency is an issue, then *Marshall* indicates that the procedures of RCW 10.77 are mandatory. 2RP 6-8, 10. If defense counsel wasn't going

to bring a motion, then there was no reason not to proceed with sentencing. Defense counsel wanted to have his own expert evaluate defendant first, and then if the State wanted they could get him evaluated later. 2RP 9. However, defendant does not cite any authority for the proposition that a defense evaluation is a prerequisite to the procedures of RCW 10.77. The State argued that it wasn't discretionary, *Marshall* dictated that if competency was an issue, then the procedures must be followed. 2RP 10. The court weighed the varying points of view, determined that defendant could still be evaluated at Western State by the defense expert and signed the order. 2RP 11. The wording of "may be a reason" versus "a reason" is purely semantics. Defense counsel's sole reason for requesting to continue the sentencing hearing was to review defendant's records and get him evaluated for competency. The issue of competency had been raised. The State's concern in asking for the formal competency process to be started was to be in compliance with case law and the statute. Had the court not ordered the evaluation and started the formal competency process, the court would not have been in compliance with *Marshall*. Ordering the evaluation protected defendant's due process rights and was within the court's discretion.

ii. The evaluation complied with RCW 10.77.060.

The procedures of RCW 10.77 are mandatory. *Fleming*, 142 Wn.2d at 863. The statute requires that two experts examine the defendant

and report back to the court about the mental condition of the defendant. RCW 10.77.060(1)(a). The statute does not require that each expert prepare a report and actually contemplates a single report from the examining facility. RCW 10.77.065.

Defendant alleges that two experts were not appointed. This is a procedural argument and not a constitutional argument, and as such, cannot be raised for the first time on appeal. However, there was no violation of the statute in this case. Defendant was sent to Western State pursuant to the court's order under RCW 10.77. CP 35-38. A report was prepared and submitted to the court. CP 129-144. The report indicates that it was prepared in compliance with the provisions of RCW 10.77.060. CP 129-144. The report was prepared by one of the experts who examined defendant but indicated that a treatment team consisting of two experts examined the defendant and the observations of both experts were incorporated into the report. CP 129-144. In addition, two reports were prepared in this case because the defense expert also examined defendant and prepared a report. 4RP 1. Further, the State did not independently request defendant's medical records. The experts at Western State prepared the report, including obtaining defendant's medical history, in compliance with RCW 10.77.060. CP 129-144. There was no violation of defendant's privacy. The statute was followed.

iii. The court held an evidentiary hearing as to defendant's competency in compliance with the statute.

In *Marshall*, the court failed to follow the procedures of RCW 10.77.06. The court did not order a formal evaluation, and instead heard from a series of experts who had not done a formal evaluation of the defendant. See *Marshall*, 144 Wn.2d 266. The court then discounted all of the expert analysis and formed his own conclusions as to defendant's competency. *Id.* at 280. The court found it was an error not to order a formal competency proceeding. *Id.* at 281.

In the instant case, the court followed the procedures and ordered a formal examination under RCW 10.77.060. CP 35-38, 2RP 11. Defendant was examined in accordance with the statute and a report was prepared in accordance with the statute. CP 129-144. Further, defense counsel also had an expert evaluate defendant. 4RP 1. While the Western State report found defendant competent, defense counsel and their expert disagreed and a formal motion on the topic was commenced on January 26, 2007. RP 4-5, CP 48-51. As such, a formal evidentiary hearing was appropriate and was held. Given that competency was the basis for defendant saying that his plea was involuntary, it would have made no sense to hold two evidentiary hearings on the same issue. The question was the same: was defendant competent at the time he entered his pleas?

The competency hearing was held and the court's determination answered the question for both motions. The court complied with both the statute and *Marshall*.

iv. The court did not abuse its discretion in finding defendant competent at the time his pleas were accepted.

The court concluded defendant was competent at the time he entered his pleas after listening to 2 ½ days of testimony from expert witnesses, as well as staff that had observed defendant while in custody. RP 393-395. There was evidence that defendant had been carefully planning for his move to prison prior to pleading guilty. Defendant sent kites to jail staff that were clear and well written asking them to prepare his medication, glasses and information on his diet for when he went to prison. RP 20, 33 Ex. 1. Defendant himself had asked for the plea bargain. RP 26. Defendant's actions showed logical, rational thought.

Even defendant's own expert could not say with certainty that defendant was incompetent at the time he entered the pleas. Dr. Mark Whitehall evaluated defendant at the request of defense counsel. RP 39-40. Dr. Whitehall indicated that while in jail, efforts were made to provide defendant with appropriate medication and pain control. RP 46-7. Dr. Whitehall also indicated the defendant could have been experiencing mood disorders, pain and depression. RP 50-51. However, mood disorders are different than being incompetent, and there was no evidence

that defendant had suffered a breakdown as he had claimed. RP 50, 59. Further, while Dr. Whitehall reviewed much of defendant's medical history, both prior to defendant's incarceration and while in the jail, he did not review the kites defendant himself had written during the relevant time period. RP 58. Dr. Whitehall did indicate that defendant's responses during the plea hearing would indicate competency. RP 65. Dr. Whitehall could not say with definitiveness that defendant was incompetent at the time of the plea. RP 55. In fact, Dr. Whitehall indicated that while there may be questions as to defendant's ability to enter a knowing, voluntary and intelligent plea, the ultimate determination of competency was up to the trier of fact. RP 68-9.

The opinion of the experts at Western State was that defendant was competent at the time of the plea. Dr. Julie Gallagher authored the report. CP 129-144. Dr. Gallagher noted that defendant was not on any mood stabilizers, and there was no record of defendant being treated for being bipolar. RP 101-103, 134. Dr. Gallagher noted that defendant was pleasant, smiled and was preparing for his prison sentence. RP 109. It was noted that defendant's mood changed when he wanted to control the situation but that his thoughts were rational. RP 110, 347. Defendant was seen by jail mental health four days after the plea and was able to communicate clearly and understood the appeal process. RP 136-7. There was no evidence from the jail records that defendant had a mental disorder or defect. RP 332. While there was evidence of some sort of bipolar

diagnosis in 1993, there was no evidence of any treatment for it between 2003-2005, and bipolar disorder is not a self-healing disorder, nor does it make a person incompetent. RP 330, 343. Dr. Gallagher's expert opinion was that defendant was able to understand the nature of the proceedings and to work with his attorney at the time of the plea. RP 115, 130.

The court was also able to hear from people who had observed defendant around the time of the plea. Representatives of both the jail nursing and mental health staffs were able to testify about the medication given to defendant, as well as his behavior prior to the plea. RP 75-78, 79-88. Two corrections officer who accompanied defendant to the courtroom on the day of the plea indicated that defendant did not complain of pain, walked to the courtroom just fine, and was able to "chit chat" normally. RP 163, 165, 180. Officer Oltjen further indicated that defendant was not happy about taking the plea but that was not unusual. RP 168.

A review of defendant's medical history while in the jail showed that defendant was very up front and proactive in his medical care. Dr. Miguel Balderrama, a physician at the jail, went through a thorough examination of defendant's medical records which indicated that defendant's medications were monitored frequently. RP 185-242. Dr. Balderrama also indicated that the medical appointment for defendant in August was actually set up in April. RP 209. Defendant was not denied any prescriptions between August 3 and August 21, 2006. RP 234.

Defendant's mental health history while in jail was also reviewed. Dr. Vasant Halarnakar went through the reports of defendant's mental health records which also indicated that defendant had been monitored. RP 266-283. Dr. Halarnakar indicated defendant was articulate with no confusion or psychotic symptoms in July 2006. RP 277-8. He also saw defendant on August 15, 2006, four days after defendant had plead guilty. RP 280. Defendant did not exhibit any psychotic symptoms on August 15. RP 283.

The court carefully went through all of the evidence in addition to his own personal observations and determined that the defendant was competent at the time he entered his pleas. RP 393-395. The court was particularly struck by the testimony of Dr. Balderrama who had treated defendant on numerous occasions while in custody. RP 394-5. The court did not base its decision only on its own observations, but looked at the totality of the circumstances in determining that defendant was capable of assisting his attorney and of understanding the proceedings on the day of the plea. RP 393-4. The evidence presented during the hearing showed that defendant was competent at the time of hearing. Having held an exhaustive evidentiary hearing in compliance with the statute, there is no evidence that the court abused its discretion in making this determination.

- v. **There is a demanding burden placed on defendant's who seek to withdraw their guilty plea and defendant failed to meet that burden.**

Defendant claimed his plea was involuntary because he was incompetent at the time of the pleas. Defendant had the burden then to show that he was incompetent. See *Osborne*, 102 Wn.2d at 98. The defense presented no other theory for the withdrawal of the plea. Defendant was given plenty of opportunity to cross examine the State's witness, as well as to present his own witnesses. The court carefully considered all of the information, and found defendant was competent at the time of the plea and denied his motion to withdraw his guilty plea. The court was within its discretion in denying defendant's motion.

2. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE PLEA AND COMPETENCY PROCESS AS DEFENDANT CANNOT SHOW DEFICIENT PERFORMANCE OR PREJUDICE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to

survive the crucible of meaningful adversarial testing.” *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984).

When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also **State v. Walton**, 76 Wn. App. 364, 884 P.2d 1348 (1994), review denied, 126 Wn.2d 1024 (1995); **State v. Denison**, 78 Wn. App. 566, 897 P.2d 437, review denied, 128 Wn.2d 1006 (1995); **State v. McFarland**, 127 Wn.2d 322, 899 P.2d 1251 (1995); **State v. Foster**, 81 Wn. App. 508, 915 P.2d 567 (1996), review denied, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 56 (1992), further clarified the intended application of the **Strickland** test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing **Strickland**, 466 U.S. at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **Strickland**, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding

of lack of prejudice without determining if counsel's performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S., at 689.

Defendant claims his counsel was ineffective when he failed to move to withdraw the plea on the basis that defendant was not advised on self-defense, and when his counsel failed to demand a competency hearing. As defendant did not provide evidence to support a theory of self-defense and as a competency hearing was held, there is no evidence that counsel was ineffective. Defense counsel was thorough in going through the plea agreement, and an advocate for his client throughout the competency and motion to withdrawal procedures. Defendant cannot show that his counsel's performance was deficient or that he was prejudiced in anyway.

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D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction below.

DATED: December 2, 2008.

GERALD A. HORNE

Pierce County

Prosecuting Attorney

[Signature]

MELODY M. CRICK

Deputy Prosecuting Attorney

WSB # 35453

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.

12-30-08 [Signature]
Date Signature