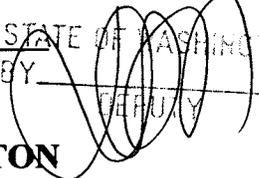


Court of Appeals No. 38149-4-II

FILED
COURT OF APPEALS
DIVISION II

09 FEB 23 PM 12:16

STATE OF WASHINGTON
BY  DEPUTY

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

BOB ANDREW PUGH,

Defendant/Appellant.

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 06-1-00431-2
The Honorable Sergio Armijo, Presiding Judge**

**Sheri Arnold
Attorney for Appellant
WSBA No. 18760**

**Post Office Box 7718
Tacoma, Washington 98417
email: SLARNOLD2002@yahoo.com
(253)759-5940**

TABLE OF CONTENTS

Page(s)

A. ASSIGNMENT OF ERROR.....1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....1

C. STATEMENT OF THE CASE.....1-10

1. Procedural History.....1-4

2. Factual Summary.....4-10

a. *The Charges*.....4-5

b. *Appellant’s Psychological History*.....5-7

c. *Appellant’s Pro Se Motion to Withdraw Guilty Plea*.....7-10

D. ARGUMENT.....10-20

MR. PUGH WAS DENIED MEANINGFUL SELF- REPRESENTATION AND THE EFFECTIVE ASSISTANCE OF STANDBY COUNSEL FOR HIS MOTION TO WITHDRAW HIS GUILTY PLEA.....10-20

a. *Mr. Pugh had a colorable claim for the withdrawal of his guilty plea*.....11-13

i. *Ineffective Assistance of Counsel*.....13-16

ii. *Involuntary Plea*.....16-18

TABLE OF CONTENTS (continued)

| | <u>Page(s)</u> |
|--|----------------|
| b. <u>Standby counsel's failure to properly aid Mr. Pugh in preparing his motion to withdraw his guilty plea prejudiced Mr. Pugh</u> | 18-20 |
| E. CONCLUSION | 21 |

TABLE OF AUTHORITIES

Page(s)

Washington Cases

State v. Bebb, 108 Wn.2d 515,525,740 P.2d 829 (1987).....19

State v. Breedlove, 79 Wn. App. 101,106,900 P.2d 586 (1995).....11

State v. Cameron, 30 Wn.App. 229,231,833 P.2d 901,
review denied 96 Wn.2d 1023 (1981).....17

State v. Davis, 125 Wash.App.59,104 P.3d 11 (2004).....12

State v. Frederick, 100 Wn.2d 550,556,674 P.2d 136 (1983).....17

State v. Garcia, 57 Wn.App. 927,791 P.2d 244 (1990).....13

State v. Jones, 89 Wn.2d 735,740,664 P.2d 1216 (1983).....10

State v. Jury, 19 Wn.App. 256,263,576 P.2d 1302 (1978).....14

State v. McCollum, 88 Wn.App. 977,947 P.2d 1235(1997).....13

State v. McDonald, 143 Wn.2d 512,513, 22 P.3d 791 (2001).....19

State v. Newton, 87 Wn.2d 363,552 P.2d 682 (1976).....2

State v. Osborne, 102 Wn.2d 87,96-97,684 P.2d 683 (1984).....16

State v. Silva, 107 Wn.App. 605,618, P.3d 729 (2001).....11,18,19

State v. Stowe, 71 Wn.App. 182,186,858 P.2d 267 (1993).....13

State v. Swindell, 93 Wn.2d 192,198-99,607 P.2d 852 (1980).....17

TABLE OF AUTHORITIES (continued)

Page(s)

Washington Cases (continued)

State v. Taylor, 83 Wn.2d 594,598,521 P.2d 699 (1974).....12

State v. Wakefield, 130 Wn.2d 464,472,925 P.2d 183 (1996).....12

State v. Williams, 117 Wn.App. 390,398,71 P.3d 686 (2003),
review denied, 151 Wn.2d 1011 (2004).....16,18

Thompson v. Department of Licensing, 138 Wn.2d 783,
982 P.2d 601 (1999).17

Washington Statutes and Court Rules

RCW 9A.36.031 (1)(g).....1

RCW 9A.76.040 (1).....1

CrR 4.2.....11,12,18

CrR 7.8.....12

Federal Cases

Bouchillon v. Collins, 907 F.2d. 589, 595-98 (5th Cir. 1990).....15

Bounds v. Smith, 430 U.S. 817,824-25,97 S.Ct. 1491,
52 L.Ed.2d 72 (1977).....18

Harris v. Blodgett, 853 F.Supp. 1239,1260 (W.D. Wash. 1994).....15

Hill v. Lockhart, 474 U.S. 52,106 S.Ct. 366 (1985).....13

TABLE OF AUTHORITIES(continued)

Page(s)

Federal Cases (continued)

| | |
|--|----|
| <i>McKaskle v. Wiggins</i> , 465 U.S. 168,184,104 S.Ct. 944,79 L.Ed.2d 122 (1984)..... | 18 |
| <i>Milton v. Morris</i> , 767 F.2d 1443,1446, (9 th cir. 1985)..... | 11 |
| <i>North Carolina v. Alford</i> , 400 U.S. 25,91 S.Ct. 160,27 L.Ed.2d 162 (1970),..... | 2 |
| <i>United States v. Fessell</i> , 531 F.2d 1275,1279 (5 th Cir. 1976)..... | 15 |
| <i>United States v. Franzen</i> , 594 Supp. 198, 200-04 (N.D., Ill 1984)..... | 15 |

Constitutional Provisions

| | |
|--------------------------------|-------|
| Wash. Const. Art. 1, § 22..... | 11 |
| U.S. Const. Amend 6..... | 10,11 |
| U.S. Const. Amend. 14..... | 11 |

A. ASSIGNMENT OF ERROR

The trial Court committed reversible error when it summarily denied Mr. Pugh's motion to withdraw his guilty plea where Mr. Pugh's standby counsel failed to adequately aid him in presenting the motion.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial Court err when it summarily denied Mr. Pugh's motion to withdraw his guilty plea where Mr. Pugh's standby counsel had failed to aid Mr. Pugh in obtaining the necessary affidavits and/or subpoenaing the witnesses required to present his claim in a meaningful manner?

C. STATEMENT OF THE CASE

1. Procedural History

On January 27, 2006, the defendant/appellant, Bob Andrew Pugh, was charged by Information with one count of third degree assault and one count of resisting arrest. ¹ CP 1-3. On April 19,

1

RCW 9A.36.031 (1)(g), RCW 9A.76.040 (1).

2006, an order, prepared by the State, was signed by the trial judge for the examination of Mr. Pugh by Western State Hospital. CP 5-8, 9-12. A corrected order for exam was entered, which required the examiner to qualify as a developmental disabilities professional, due to Mr. Pugh's apparent disabilities. CP 14-17. The purpose of the order for the exam was to determine Mr. Pugh's competency, sanity, and mental state. CP 5-8, 9-12, 14-17. Mr. Pugh was (and continues to be) incarcerated in the Special Commitment Center at McNeil Island. CP 87-88.

A forensic psychological evaluation prepared by Western State Hospital psychologist, George Nelson, was filed on August 8, 2006. CP 89-102. On the same date an uncontested order determining Mr. Pugh's competency to stand trial was signed by the Honorable Vicki L. Hogan. CP 103-104.

On December 6, 2006, counsel for Mr. Pugh filed a Notice of Self Defense. CP 25.

On February 26, 2007, Mr. Pugh entered an *Alford/Newton*²

2

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

plea to the charge of third degree assault, which was filed by Amended Information. CP 31, 33-36. Pursuant to the plea agreement Mr. Pugh's sentencing was to be continued for twelve (12) months. CP 33-36; RP 2-26-07, 2-7.

On February 21, 2007, an order allowing the withdrawal of Mr. Pugh's appointed counsel, Linda King, was entered. The order also provided for the appointment of new counsel. CP 37.

On June 2, 2008, Mr. Pugh filed, pro se, a motion and affidavit to withdraw his guilty plea. CP 41-49.

On May 16, 2008, a hearing was held before the Honorable Sergio Armijo.³ RP 5-16-08, 2. Appointed attorney, James Schoenberger, who was present for Mr. Pugh, advised the Court that Mr. Pugh wished to proceed pro se. RP 5-16-08, p.3. The Court granted Mr. Pugh's pro se motion to proceed pro se. The Court appointed Mr. Schoenberger as stand-by counsel and continued the case. RP 5-16-08, 12.

On August 1, 2008, Mr. Pugh appeared pro se with Mr.

3

The VRPs are unnumbered. For purposes of appellant's brief, the VRPs will be referred to by the date of the proceeding followed by the page number.

Schoenberger as stand-by counsel. RP 8-1-08, 2. The trial Court denied Mr. Pugh's pro se motion to withdraw his guilty plea. CP 64. Mr. Pugh was then sentenced to a standard range term of nine (9) months. CP 65-73.

2. *Factual Summary*

a. The Charges

According to the Declaration for Determination of Probable Cause, on January 24, 2006, a King County Sheriff's Department officer arrived at the Steilacoom Ferry Dock to assist in the transport of Mr. Pugh to King County jail from the Special Commitment Center, where Mr. Pugh resides. Mr. Pugh had a scheduled court hearing that required his appearance. The State contends that Mr. Pugh became belligerent and uncooperative and that a scuffle ensued, during which Mr. Pugh attempted to kick the officer in the head, but missed. RP 1-3.

According to Dr. Nelson, the author of the forensic mental health report prepared on August 8, 2006, Mr. Pugh reported that he was defending himself. Mr. Pugh also claimed he was not mentally capable of committing the offense charged, and intended to pursue a diminished capacity defense. Mr. Pugh stated that he would not

consider a plea bargain and predicted a one hundred percent (100%) probability of not being found guilty. CP 89-102, 10. Dr. Nelson also wrote that Mr. Pugh has a “distorted recollection” of the events due to characteristics inherent with his personality disorder. CP 89-102, 12.

b. Appellant’s Psychological History

Mr. Pugh(s) clinical psychological history contains extensive childhood trauma, emotional, physical and sexual abuse, as well as developmental and medical problems including a seizure disorder. Mr. Pugh was hospitalized at a psychiatric hospital for children on at least one reported occasion, and spent many years in juvenile foster care and detention centers. CP 89-102, 4-5.

As an adult, Mr. Pugh has been hospitalized for psychiatric problems on both a voluntary and involuntary basis on numerous occasions. Documented hospitalizations include three admissions to Western State Hospital (WSH) in 1986, 1989, and 1992, and a stay at Providence Hospital in 1997. CP 89-102, 5-6. In 1992 a WSH evaluator described Mr. Pugh as “Gravely Disabled.” Mr. Pugh was experiencing auditory hallucinations. CP 89-102, 6.

Mr. Pugh's previous diagnoses have included Adjustment Disorder with Depressed Mood and Bipolar Disorder, Antisocial Personality Disorder, Pedophilia, Intermittent Explosive Disorder, Personality Disorder With Borderline and Narcissistic features, and possible Neurological Disorder. CP 89-102, 5-7.

Since Mr. Pugh's detention at the Special Commitment Center (SCC) in May of 2005, Mr. Pugh "has engaged in serious behavior such as cutting himself with a razor blade and even swallowing a razor blade." CP 89-102, 7. The SCC team's diagnoses includes Pedophilia, Mood Disorder, Borderline Intellectual Functioning, and Personality Disorder With Narcissistic Borderline, and Antisocial traits. Mr. Pugh's Full Sqaule IQ score is 88. He is prescribed the following medications: Paxil (an antidepressant), Phenytoin (an anti-convulsion and mood stabilizer), Buspar (an anti-anxiety medication), Vistaril (a sedative for agitation), and Klonopin (an anti-anxiety medication). CP 89-102, 7.

Doctor Nelson described Mr. Pugh as a person who functions at a low average intellectual range, whose "insight clearly was impaired." CP 89-102, 8. Dr. Nelson also described impaired

perceptions of reality, e.g. Mr. Pugh believed that five (5) officers attacked him on the date of the incident, with one man weighing between 450-500 pounds. Dr. Nelson's diagnoses of Mr. Pugh included: Pedophilia, Mood Disorder, Cannabis Abuse, Alcohol Abuse, Personality Disorder With Antisocial, Borderline, and Narcissistic features. He did, however, determine that Mr. Pugh was competent, sane, and possessed the mental capacity to form intent.

Despite Dr. Nelson's observations of Mr. Pugh's distorted recollection, impaired insight, judgment, and perceptions, as well as Mr. Pugh's alarmingly extensive history (and predicted future) of psychological disorders, the State's expert reasoned that Mr. Pugh's mental condition was not of the category "that causes the type of impairment necessary to interfere with his perceptions." CP 89-102, 12.

c. Appellant's Pro Se Motion to Withdraw Guilty Plea

On June 2, 2008, Mr. Pugh filed, pro se, a Motion to Withdraw Guilty Plea with "Affidavit of Statement of Facts." CP 41-49. On June 11, 2008, Mr. Pugh filed, pro se, a second "Affidavit and Statement of Facts." CP 59. The basis of Mr. Pugh's motion was: 1)

ineffective assistance of counsel for failure to investigate a mental defense, and 2) the guilty plea was not made knowingly, voluntarily, and intelligently because Mr. Pugh was deprived of his necessary medications during the time his plea was entered, he is intellectually disabled, and “his plea was coerced due to the actions by the state’s agents.” CP 41-49.

Prior to the hearing on Mr. Pugh’s motion to withdraw his plea, the prosecutor advised that such hearings are, generally limited to pleadings rather than live testimony. RP 5-16-08, 8. Mr. Schoenberger had also advised Mr. Pugh “that all he needs to do is get an affidavit from the treatment folks at the SCC. . . .” and that the Court “would not likely entertain live testimony.” RP 5-16-08, 10. Mr. Schoenberger further stated that, at the motion hearing, he would “represent to the Court on Mr. Pugh’s behalf that he has told me he was off his medications at the time the plea was taken. . . .” RP 5-16-08, 10. The court directed Mr. Schoenberger to assist Mr. Pugh, admonishing him to: “File the appropriate paperwork, counsel otherwise this case will be dismissed.” RP 5-16-08, 12. The Court then scheduled deadlines for pleading filings, which Mr. Pugh met. Nothing was filed by Mr. Schoenberger.

Clearly frustrated throughout the proceedings, the prosecutor advised the court that he was "going insane trying to deal with this." RP 5-16-08, 15. He advised the Court of his vacation plans, and snapped at the court to find someone else to cover it if it so wished. RP 5-18-08, 15.

Meanwhile, Mr. Pugh pleaded for the Court's assistance in obtaining his medications and inhaler prior to his motion hearing. RP 5-16-08, 16.

At the hearing to withdraw Mr. Pugh's guilty plea, the prosecutor advised the court that he had only eighteen (18) minutes (to resolve the hearing). RP 8-1-08, 2.

Mr. Pugh expressed his concern because he believed his prior attorney, Ms. King would be present for testimony, and she was not. Mr. Pugh indicated that he needed either live testimony or affidavits, but was unable to obtain either on his own from jail. RP 8-1-08, 4-5. Additionally, Mr. Pugh had not been given his medication and reported he was having trouble concentrating. RP 8-1-08, 2.⁴

4

The record suggests that some type of medication was given to Mr. Pugh by the transport officers during the proceedings while the prosecutor was speaking. RP 8-1-08, 7.

Mr. Schoenberger represented that he had contacted Dr. Sziebert at the SCC, and asked him to provide an affidavit. Neither the doctor nor Mr. Schoenberger had followed up on this, however. RP 8-1-08, 8.

No testimony was provided at the motion hearing. Nor were any affidavits filed, aside from those of Mr. Pugh himself. The motion to withdraw plea was denied. CP 64.

D. ARGUMENT

I. MR. PUGH WAS DENIED MEANINGFUL SELF- REPRESENTATION AND THE EFFECTIVE ASSISTANCE OF STANDBY COUNSEL FOR HIS MOTION TO WITHDRAW HIS GUILTY PLEA.

The Sixth Amendment to the United States Constitution guarantees the right to meaningful self-representation. As accused person has the constitutional right to control his defense. *Faretta*, 622 U.S. at 819, *State v. Jones*, 89 Wn.2d 735,740,664 P.2d 1216 (1983). “The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to

make his defense.” *Faretta*, 622 at 819.

The Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel . . .”. Const. Art. 1 § 22. This is an explicit guaranty of the right to self-representation. *State v. Breedlove*, 79 Wn. App. 101,106,900 P.2d 586 (1995). (“The Washington State Constitution expressly guarantees one’s right to self-representation . . .”)

Additionally, the right of self-representation under *Faretta* necessarily includes the right to prepare a defense. *Milton v. Morris*, 767 f.2d 1443,1446, (9th cir. 1985); *State v. Silva*, 107 Wn.App. 605,618, P.3d 729 (2001) (hereinafter *Silva I*); U.S. Const. Amend 6; U.S. Const. Amend. 14; Wash. Const. Art. 1, section 22. The right of self-representation must be afforded to an accused person in a meaningful fashion, including access to available legal resources and a confidential relationship with standby counsel. *Milton*, 767 F.2d at 1446; *Silva I*, 107 Wn.App. at 618-21.

***a. Mr. Pugh had a colorable claim
for the withdrawal of his guilty plea.***

CrR 4.2 (f) provides for motions to withdraw guilty pleas prior

also State v. Wakefield, 130 Wn.2d 464,472,925 P.2d 183 (1996).

i. Ineffective Assistance of Counsel

In 1985, the United States Supreme Court held in Hill v. Lockhart, 474 U.S. 52,106 S.Ct. 366 (1985), that the two part test [of Strickland] should be applied to ineffective assistance of counsel challenges in the context of guilty pleas. *See also State v. Garcia*, 57 Wn.App .927,791 P.2d 244 (1990).

Counsel has an affirmative obligation to assist a defendant “actually and substantially” in determining whether to plead guilty. State v. Stowe, 71 Wn.App. 182,186,858 P.2d 267 (1993). When counsel fails to inform the defendant of the applicable law or affirmatively misrepresents a consequence of a plea that results in prejudice to the defendant, the defendant is denied effective assistance of counsel, which renders the plea involuntary. Stowe, 71 Wn.App. at 188-89. In the context of a guilty plea, the defendant must show that his counsel failed to “actually and substantially [assist] his client in deciding whether to plead guilty,” and that but for counsel’s failure to adequately advise him, he would not have pleaded guilty. State v. McCollum, 88 Wn.App. 977,947 P.2d 1235(1997).

The record shows that Mr. Pugh intended to present a defense to the charges by way of a mental defense and/or a self-defense claim. Prior to entering his guilty plea Mr. Pugh believed he had a one hundred percent (100%) probability of being found not guilty. Furthermore, he had adamantly rejected consideration of a plea bargain. CP 89-102, 10. When Mr. Pugh entered his guilty plea no discussion of his dramatically changed position concerning his intention to defend against the charges was recorded.

In his motion and affidavit to withdraw his guilty plea Mr. Pugh states that his counsel refused to investigate the availability of a mental defense. The record confirms that counsel did not seek to have an expert appointed to conduct the appropriate psychological examination on behalf of Mr. Pugh, rather than the State, to determine Mr. Pugh's ability to formulate the required intent for the offense(s).

Every lawyer has a duty to investigate all potential meritorious defenses for his or her client, and the failure to do so may constitute ineffective assistance of counsel. American Bar Association for Criminal Justice, Standard 4-4, 1, Duty to Investigate, at 4.53-4.55; *Strickland*, 466 U.S. at 691; *State v. Jury*, 19 Wn.App. 256,263,576

P.2d 1302 (1978).

Moreover, where the evidence indicates the necessity of investigating one or more mental defenses, any legally sufficient investigation must include an evaluation conducted by a professional mental health expert. *Bouchillon v. Collins*, 907 F.2d. 589, 595-98 (5th Cir. 1990) (concluding that once counsel learned of his client's prior institutionalization, he could not rely on his own evaluation of the client); *United States v. Fessell*, 531 F.2d 1275,1279 (5th Cir. 1976) (stressing the "particularly critical interrelation between expert psychiatric assistance and minimally effective representation" and finding counsel ineffective for failing to move for a psychiatric evaluation); *United States v. Franzen*, 594 Supp. 198m 200-04 (N.D., Ill 1984) (investigation insufficient without examination of client's mental history and an evaluation; "counsel cannot attempt to adopt the role of psychiatrist.") *Harris v. Blodgett*, 853 F.Supp. 1239,1260 (W.D. Wash. 1994) (counsel ineffective for failing to investigate client's mental health; Counsel erroneously substituted his personal judgment of [his client's] competency and mental state for the expertise of mental of mental health professionals.")

Given Mr. Pugh's extensive history of psychiatric problems, and his prior adamantness about raising a mental defense, counsel's failure to properly investigate such defense may have constituted ineffective assistance of counsel. Unfortunately, this issue was not fully litigated because of the summary denial of Mr. Pugh's motion to withdraw his guilty plea.

ii. *Involuntary Plea*

Mr. Pugh's motion and affidavit indicated that his guilty plea was not made knowingly, voluntarily, and intelligently because he was not provided his necessary medication on the day of the plea hearing and, consequently, was not thinking clearly. No evidence was presented to reasonably contest this claim. Additionally, Mr. Pugh believe he had been coerced into entering the plea.

If coerced, a plea of guilty is involuntary and constitutes a manifest injustice. *State v. Osborne*, 102 Wn.2d 87,96-97,684 P.2d 683 (1984); see *State v. Williams*, 117 Wn.App. 390,398,71 P.3d 686 (2003), review denied, 151 Wn.2d 1011 (2004) ("A guilty plea is involuntary and invalid if it is obtained by mental coercion overbearing the will of the defendant.") Subtle forms of coercion, including plea

bargaining pressures, may in certain circumstances render a plea involuntary. State v. Frederick, 100 Wn.2d 550,556,674 P.2d 136 (1983) overruled on other grounds, Thompson v. Department of Licensing, 138 Wn.2d 783,982 P.2d 601 (1999). Frederick, cited as examples State v. Swindell, 93 Wn.2d 192,198-99,607 P.2d 852 (1980), where a plea was deemed involuntary because the prosecutor threatened additional charges in the absence of defense counsel, and State v. Cameron, 30 Wn.App. 229,231,833 P.2d 901, review denied 96 Wn.2d 1023 (1981), holding reviewing courts should take special care in examining guilty pleas entered in exchange for a prosecutor's promise of lenient treatment of a third party.

Coercion renders a guilty plea involuntary whether or not the State was involved in or knew about the coercion. Frederick, 100 Wn.2d at 556-57. The interest in finality of judgments gives way in such cases. Frederick, 100 Wn.2d at 557.

Although a defendant may indicate in his plea statement that the plea is being made "freely and voluntarily," that statement is not conclusive evidence that the plea was in fact voluntary, and it does not preclude a later claim of coercion. Frederick, 100 Wn.2d at 557. A

Court determines the voluntariness of a plea by considering the relevant circumstances surrounding it. Williams, 117 Wn.App. at 398.

Again, this issue was not fully litigated because of the trial Court summary denial of Mr. Pugh's motion.

Under CrR 4.2 (f) however, either the denial of effective assistance of counsel or the acceptance of an involuntary or coerced plea constitutes the legal basis for withdrawal of a guilty plea.

b. Standby counsel's failure to properly aid Mr. Pugh in preparing his motion to withdraw his guilty plea prejudiced Mr. Pugh.

As part of the right to prepare and present a defense, under the Sixth Amendment the trial court may appoint standby counsel even if a pro se defendant objects. McKaskle v. Wiggins, 465 U.S. 168,184,104 S.Ct. 944,79 L.Ed.2d 122 (1984); Silva 1, 107 Wn.App. at 627. Standby counsel may serve the purpose of providing the pro se litigant with access to legal materials not otherwise available or with critical information not available to the accused person. Milton, 767 F.ed at 1446; see Bounds v. Smith, 430 U.S. 817,824-25,97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) (inmates right to meaningful access to courts includes right to legal resources and materials necessary for filing

documents).

In Silva I, the Court found standby counsel has two purposes, the first being the purpose for which the court delineates upon appointment and the second being an independent duty to the defendant. Id. at 628. If requested, “counsel must aid in the preparation of the defense” and “alert[] the accused to matters beneficial to him and provide the accused with legal advice or representation upon request.” Id. at 628-30. While standby counsel may refuse to conduct time-consuming research or decline to act as a paralegal serving papers, a pro se defendant has a right of access to the courts, which includes the right to legal assistance either independently or through counsel, which ever is available to the accused. Id.

A pro se defendant also has a right to a private and confidential relationship with standby counsel, if one is appointed, as well as a right to prepare his defense by accessing any means available for assistance. State v. McDonald, 143 Wn.2d 512,513, 22 P.3d 791 (2001) (once appointed, standby counsel has obligations and duties to serve accused including confidential relationship); State v. Bebb, 108 Wn.2d 515,525,740 P.2d 829 (1987) (attorney-client privilege attaches to

standby counsel and pro se litigant's relationship or pro se litigant is denied meaningful access to legal resources). Even a standby counsel whose role is limited to aiding the accused upon request, counsel still serves the role of bringing "to the attention of the accused matters beneficial to him." *Id.*, quoting American Bar Association Standard 4-3.9, *Obligations of Hybrid and Standby Counsel*.

In Mr. Pugh's case, the trial Court ordered standby counsel to aid Mr. Pugh in preparing his motion. RP 5-16-08, 12. Although counsel made at least one initial effort in this regard by contacting Dr. Sziebert, he did not complete his duty by following up with either obtaining the written affidavit from Dr. Sziebert or securing the doctor's presence by subpoena. Likewise, Mr. Pugh's former attorney, Linda King was not subpoenaed, or contacted by standby counsel. Mr. Pugh did not have the ability to complete these tasks.

Standby counsel failed to properly aid Mr. Pugh in establishing his claims. The prejudice to Mr. Pugh was that he was denied a meaningful hearing on his motion.

E. CONCLUSION

For all of the foregoing reasons and conclusions, Mr. Pugh respectfully requests that this Court reverse the trial Court's order denying Mr. Pugh's motion to withdraw his guilty plea, and remand his case for a new hearing on the motion to withdraw his guilty plea.

Respectfully Submitted this 23rd day of February, 2009.



Sheri L. Arnold
WSBA No. 18760
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II
09 FEB 23 PM 12:17
STATE OF WASHINGTON
BY _____
DEPUTY



CERTIFICATE OF SERVICE

The undersigned certifies that on February 23, 2009, I delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and by United States Postal Service to appellant, Bob A. Pugh, Special Commitment Center, McNeil Island Corrections Center, Post Office Box 88600, Steilacoom, Washington 98388, true and correct copies of this Brief. 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 February 23, 2009.



Norma Kinter