

No. 39368-9-II

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

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STATE OF WASHINGTON,  
Respondent,  
v.  
MARTIN GOMEZ-VILLA,  
Appellant.

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STATE OF WASHINGTON  
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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Susan K. Serko, Judge

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in holding that the only issue whenever a defendant raises a presentencing challenge to the validity of Alford<sup>1</sup> pleas is whether the plea colloquy was complete.

2. Appellant Martin Gomez-Villa was deprived of his state and federal due process rights when the trial court refused to hear testimony or evidence in support of his presentencing motion to withdraw the Alford pleas.

3. The trial court should have allowed withdrawal of the Alford pleas, because Gomez-Villa did not receive effective assistance of counsel in entering those pleas.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

After his Alford pleas were entered but before sentencing, Martin Gomez-Villa moved to withdraw the pleas, arguing, *inter alia*, that he had received ineffective assistance of counsel in the entry of the pleas.

1. The trial court held that an Alford plea is always valid so long as the plea colloquy was complete. Did the trial court err as a matter of law in making this ruling where controlling precedent makes it clear that the adequacy of the plea colloquy is only part of the inquiry and not conclusive on the issue of the validity of the plea?

Further, did the court err in considering only the plea colloquy in deciding whether the Alford pleas were valid?

2. When a defendant moves to withdraw a plea prior to

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<sup>1</sup>North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

sentencing, he is entitled to due process at the hearing on that motion. Due process includes the right to present evidence and to have meaningful consideration of the motion. Were Gomez-Villa's due process rights violated by the trial court's refusal to hear testimony or consider evidence in support of his motion to withdraw his Alford pleas where that motion was based upon a claim of ineffective assistance of counsel and thus could not properly be considered without hearing that testimony and evidence?

3. Defendants are entitled to effective assistance of counsel in deciding whether to enter a plea or go to trial. Part of counsel's duty is to investigate potential defenses and be aware of the strengths and weaknesses of the state's case before advising his client whether to give up his constitutional rights related to trial. Further, because an Alford plea does not amount to an admission of guilt by the defendant but only a decision that his best option given the circumstances is to accept a deal offered by the prosecutor, it is especially important that an attorney recommending that his client enter such a plea is aware of all potential defenses and the actual strength of the case against his client.

With his motion to withdraw his Alford pleas, Gomez-Villa presented sworn declarations establishing that counsel, *inter alia*, 1) failed to secure a store security videotape which would have showed that Gomez-Villa was in the store rather than with the perpetrators at the time and place of the crimes, 2) failed to interview the store's owner, who would have testified that Gomez-Villa was with her at the time of the crimes and thus had an alibi defense and 3) advised Gomez-Villa that he would face a sentence of life in prison if he did not enter the Alford pleas.

Was Gomez-Villa deprived of his state and federal constitutional rights to effective assistance of counsel in entering the plea where counsel failed to conduct reasonable investigation into the potential alibi defense?

Further, was counsel ineffective in misadvising Gomez-Villa about the potential consequences of going to trial where the sentence which would have been possible was not a "life" sentence?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Martin Gomez-Villa was charged by information with four counts of first-degree assault, each with a firearm enhancement, and four counts of drive-by shooting. CP 1-5; RCW 9A.36.011(1)(a), RCW 9A.36.045(1), RCW 9.94A.310, RCW 9.94A.370, RCW 9.94A.510, RCW 9.94A.530. On October 23, 2008, in front of the Honorable Susan K. Serko, Gomez-Villa entered Alford pleas to an amended information which charged only one count of first-degree assault with a firearm enhancement and one count of drive-by shooting. CP 6-14, 52-54; 1RP 1-13.<sup>2</sup>

Before sentencing, Gomez-Villa moved to withdraw his pleas. CP 15-23, 54-56. On May 21, 2009, Judge Serko denied the motion and sentenced Gomez-Villa to a total of 171 months in custody. CP 32-45; 2RP 17.

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<sup>2</sup>The verbatim report of proceedings consists of 2 volumes, which will be referred to as follows:

October 23, 2008, as "1RP;"  
May 21, 2009, as "2RP."

Gomez-Villa appealed and this pleading follows. See CP 61-75.

2. Facts relating to incident

The charges against Gomez-Villa were based upon allegations that he was involved in an incident where shots were fired at a residence. See CP 50-51. In his Statement of Defendant, entered when he entered his Alford pleas, Gomez-Villa made the following declaration:

I believe I am innocent; however, after reviewing the discovery with my attorney, I believe there is a substantial likelihood I could be convicted at trial. Therefore I wish to take advantage of the State's recommendation. I have no objection to the court reviewing the Declaration of Probable Cause and/or police reports to find a factual basis for my plea.

CP 13.

D. ARGUMENT

THE COURT ERRED IN DENYING THE MOTION TO WITHDRAW THE ALFORD PLEAS

Under the state and federal due process clauses, all guilty pleas must be "knowing, voluntary and intelligent." State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); Fourteenth Amend.; Art. I, § 3. CrR 4.2 reflects the requirements of due process and further mandates that a court must allow withdrawal of a plea before sentencing if that withdrawal is necessary in order to "correct a manifest injustice." Mendoza, 157 Wn.2d at 587; CrR 4.2(f). A manifest justice exists when, *inter alia*, the defendant was deprived of effective assistance of counsel in entering the plea or when the plea was not voluntary. See State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

In this case, the trial court erred in denying Mr. Gomez-Villa's motion to withdraw his pleas, in several ways. First, the court erred as a

matter of law when it declared that the only question before it was whether the plea colloquy was thorough. Second, the court erred and violated Gomez-Villa's due process rights in refusing to hear testimony or consider evidence in support of Gomez-Villa's motion. And finally, the court erred in denying the motion, because Gomez-Villa was entitled to effective assistance of counsel in deciding whether to enter the pleas and was deprived of that assistance by counsel's unprofessional failures.

a. Relevant facts

At the plea hearing, counsel told the court he had gone over the Statement of Defendant on Plea of Guilty with Mr. Gomez-Villa and thought he understood it. 1RP 4-5. The court then engaged in a colloquy with Gomez-Villa, asking such questions as whether Gomez-Villa understood all of the elements of the crimes, whether he had gone over the Statement with his attorney, whether counsel had answered any questions Gomez-Villa had, and whether Gomez-Villa was aware of the relevant sentences. 1RP 6-8. The court also asked if Gomez-Villa was entering his plea freely and voluntarily and Gomez-Villa said, "yes." 1RP 10-11. To the question of whether anyone had forced him to enter the plea, Gomez-Villa responded, "no." 1RP 11.

Shortly thereafter, Gomez-Villa wrote to the judge, asking to withdraw his pleas based on several grounds. CP 54-56. Counsel moved to withdraw and new counsel was appointed on December 12, 2008, to assist Mr. Gomez-Villa with his motion. CP 57. New counsel filed a formal motion to withdraw the Alford pleas on May 12, 2009, along with a request that the court hold an evidentiary hearing on the motion. CP 15-

23.

In the written motion to withdraw the pleas, Gomez-Villa detailed his concerns about prior counsel's performance. CP 15-19. One of his major concerns was that counsel had failed to conduct proper investigation into Gomez-Villa's defense prior to telling Gomez-Villa to enter the pleas. CP 16-19. Gomez-Villa had given counsel several names of potential alibi witnesses and had asked counsel to secure a videotape from a store which would have showed that Gomez-Villa was there at the time of the crimes, which occurred elsewhere. CP 16-18. While prior counsel had said he would contact the witnesses, Gomez-Villa did not know if that had occurred. Id.

Regarding the tape, counsel apparently never sought it and, by the time Gomez-Villa had someone else independently try to get it, it had been destroyed. CP 16-19.

Gomez-Villa also explained that counsel had hardly met with him and had not let him see any of the discovery or discussed it with him. CP 15-19. Gomez-Villa said that counsel had repeatedly told him and his family that the state had "virtually no case" against him and that counsel expected the charges to be dismissed or for Gomez-Villa to be allowed to plead to a much lesser offense. CP 16-17. Gomez-Villa was therefore shocked when, the day before trial, his attorney met with him and told him the state had offered a plea which would result in 11-17 years in custody. CP 16-18. After Gomez-Villa refused that offer, the next day, counsel confronted him about taking the deal, telling Gomez-Villa if he did not do so he would end up serving a life sentence. CP 16-19.

Gomez-Villa was upset and surprised and asked counsel why he was suddenly saying these things when he had been saying the case was going to be dismissed. Id. Counsel said someone had agreed to testify against Gomez-Villa but did not explain who or what that person was going to say. CP 16-19. Instead, counsel simply arranged for Gomez-Villa's mother and pastor to visit him and urge for him to take the plea. CP 18-19.

Gomez-Villa stated that the last-minute pressure and sudden change by counsel about the strength of the state's case, coupled with Gomez-Villa's understanding about counsel's lack of investigation and the threat of facing a sentence of life in prison, are what led him to enter the pleas. CP 18-19. Gomez-Villa reiterated his innocence, as he had in his Alford pleas, and asked to be allowed to withdraw those pleas and go to trial. CP 15-19.

Gomez-Villa's motion was supported by sworn declarations from two potential witnesses. CP 28-31. In one of those declarations, Seong Kim, the owner of a small market in Tacoma, indicated that Gomez-Villa had been in her store helping her close up on the night of and at the time that the crimes occurred. CP 28-29. Kim had written a letter to that effect, which Gomez-Villa's sister said she was going to give to Gomez-Villa's attorney. CP 28-29. However, Kim was never contacted by Gomez-Villa's counsel or any investigator about this important potential alibi. CP 28-29.

Kim's store has a security videotaping machine and Kim could have provided the video for the night in question. CP 28-29.

Unfortunately, no one asked her for it until it had been a long time since the incident. CP 28-29. By then, the tape from the relevant date had been recorded over. CP 28-29.

In her sworn declaration, Carmen Benson, Gomez-Villa's sister, detailed her contacts with Kim, her brother and Gomez-Villa's attorney. CP 30-31. She talked about getting Kim's statement, which indicated that Gomez-Villa had been "some 60 blocks" away from the place of the crimes at the time they occurred. CP 30-31. Benson also said she had given Kim's declaration directly to prior counsel but was never contacted regarding that declaration or anything else Benson knew about the case. CP 30-31.

Benson's declaration described Gomez-Villa telling her about the video from Kim's store and what it contained. CP 30-31. Gomez-Villa had told Benson that he had repeatedly asked his prior counsel to get the video as evidence but, when counsel did not do so, had asked Benson to secure that evidence. CP 30-31. Benson had immediately contacted Kim to get the tape but by that time the tape had been recorded over. CP 30-31.

When the parties appeared on May 21, 2009, for the hearing on the motion to withdraw the Alford pleas, Judge Serko said she had read the motions and declarations but wanted Gomez-Villa to "make a case as to why an evidentiary hearing is necessary" in order to decide the issues. 2RP 3-4. Counsel responded that, although declarations had been filed, it was easier to make a record with testimony. 2RP 5. The prosecutor then stated his opinion that, because there was no declaration submitted from

prior defense counsel about the allegations, no evidentiary hearing was necessary. 2RP 5-6. Counsel responded that it was not his role to present evidence from prior counsel about what had happened because it was the state who usually does that if it thinks prior counsel would dispute his client's characterization of events. 2RP 11.

At that point, the court stated its belief that an evidentiary hearing was not necessary in order to decide the motion to withdraw the plea, because all that was important was "whether or not the Court went through a complete, accurate colloquy with the defendant." 2RP 6-7. Because the same judge had handled the colloquy, she was sure it had been sufficient. 2RP 6-7. As the judge believed that "[a]ll that's relevant is what happened on the day of the plea" she did not see any reason to hear any testimony or consider any evidence. 2RP 6-7. The prosecutor concurred and said that all the court had to do was to say that the colloquy was not "cursory" and there had been "extensive discussion" with the defendant before the court had accepted the plea. 2RP 8-9. The prosecutor also argued that, if Gomez-Villa had been convicted as originally charged, he "was looking a[t] 886 months" in custody, so that it was not completely untrue that Gomez-Villa might end up being in prison for most of his life if he went to trial. 2RP 10, 18.

Counsel objected to the court's belief about the limit on the evidence relevant to the validity of the pleas. 2RP 10. He argued that the issue was not simply whether the plea colloquy was "procedurally sufficient." 2RP 10. Instead, he pointed out, Gomez-Villa was entitled to effective assistance of counsel in the context of making the decision to

enter the plea, which required counsel to be informed of the evidence against his client as well as potential defenses. 2RP 10. Counsel stated that prior counsel's failure to properly investigate the case was relevant to whether Gomez-Villa had received that effective assistance. 2RP 11-12. Counsel also argued that Gomez-Villa was misadvised that, if he did not enter the pleas, he would "get a life sentence," not that the standard ranges of the offenses were such that he would likely have served the rest of his life in prison, depending upon how he was sentenced or how "good time" credit occurred. 2RP 11.

Counsel concluded that it was not sufficient for the court to simply look at the plea colloquy because that inquiry ignored the problems which occurred in counsel's representation relating to the entry of that plea. 2RP 10.

Indeed, counsel argued, if the court did not hear additional evidence as Gomez-Villa was requesting, based upon the record before the court, it was undisputed that he was given incorrect information about the sentence he would face if he did not take a plea and that he was not adequately represented in entering the pleas. 2RP 12.

At that point, the prosecutor declared that prior counsel had not said anything to the prosecutor on the day of trial about not being prepared or needing more time to get prepared for Gomez-Villa's case. 2RP 14-15. Counsel objected that it was improper for the prosecutor to make representations about what prior counsel had told him and the court responded, "I'm not taking evidence." 2RP 14-15. Judge Serko then went on:

I am considering what happened in the courtroom, at the time of the plea from the - - what happened on the record, and I know that to have been a complete colloquy with the defendant, it was a knowing, intelligent and voluntary waiver for whatever reasons. And I'm not going to delve into reasons behind why somebody makes the decision they do. My role is to determine that they're going into it with their eyes open and I'm satisfied that that occurred. And for that reason, I am not going to take evidence and I am also not going to allow withdrawal of the plea.

2RP 15. The court denied the motion to withdraw the Alford pleas and then moved on to sentence Gomez-Villa. 2RP 17.

- b. The court erred and violated Gomez-Villa's due process rights and the motion should have been granted

The trial court erred in denying Gomez-Villa's motion to withdraw his Alford pleas, not only because it failed to properly consider the motion but also because that failure deprived Gomez-Villa of his due process rights and because the declarations Gomez-Villa presented established that he did not receive effective assistance of counsel in deciding whether to enter those pleas.

At the outset, it is important to distinguish between the motion Gomez-Villa brought and similar motions which are not brought until after sentencing. Presentencing motions such as the one here are governed by CrR 4.2(f), rather than CrR 7.8, and the two types of motions are substantively and procedurally quite different. See State v. Davis, 125 Wn. App. 59, 63, 104 P.3d 11 (2004). For example, CrR 7.8 motions are considered a collateral attack on a judgment, must be made in writing and must be supported by affidavits stating precise facts or errors justifying relief. Davis, 125 Wn. App. at 63. In contrast, a defendant making a CrR 4.2(f) motion need not even put it in writing, nor is he required to submit

affidavits or other evidence in order to be entitled to a hearing. Davis, 125 Wn. App. at 63.

Another significant difference between the two types of motions is the rights of the defendant in each. Unlike a motion to set aside a plea brought under CrR 7.8 after sentencing, a CrR 4.2(f) motion is considered a critical stage of the criminal proceedings. State v. Harrell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996); see also, State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). Thus, while a defendant bringing a CrR 7.8 motion is not entitled to counsel at public expense, the contrary is true for a defendant bringing a motion under CrR 4.2(f). See State v. Winston, 105 Wn. App. 318, 321, 19 P.3d 495 (2001); see also, Harrell, 80 Wn. App. at 804; Robinson, 153 Wn.2d at 694.

Thus, a defendant like Gomez-Villa who brings a presentencing motion to withdraw pleas under CrR 4.2(f) is entitled to certain rights in the presentation of and hearing on that motion. He need not make any kind of threshold showing to be entitled to those rights, unlike a defendant bringing a CrR 7.8 motion. See, e.g., Robinson, 153 Wn.2d at 696 (a court may summarily deny a CrR 7.8 motion without a hearing on the merits if the affidavits and written pleadings do not establish grounds for relief; decided under former version of the rule); see also, State v. Smith, 144 Wn. App. 860, 863, 184 P.3d 666 (2008) (noting 2007 changes to CrR 7.8 which eliminate that provision and mandate transfer to the court of appeals in such cases).

Indeed, when a defendant files a CrR 4.2(f) motion, the trial court abuses its discretion if it fails to consider that motion on its merits. Davis,

125 Wn. App. at 64.

Here, that is effectively what the trial court did when it denied Gomez-Villa the opportunity to present testimony on his motion and limited the scope of its inquiry to whether the plea colloquy was complete. The question of whether to allow withdrawal of a plea requires consideration of whether such withdrawal is necessary to correct a “manifest injustice.” See State v. Taylor, 83 Wn.2d 594, 598, 521 P.2d 699 (1974). And ineffective assistance in entering the plea is a recognized ground upon which a manifest injustice can be found, as is that the plea was involuntary. See Taylor, 83 Wn.2d at 597; see also, Wakefield, 130 Wn.2d at 472.

Neither of those claims is answered *ipso facto*, however, by looking solely at the plea colloquy. In fact, the Supreme Court has held that, while a complete colloquy may be strong evidence of a valid plea, it is not conclusive on that point. See State v. Frederick, 100 Wn.2d 550, 557, 674 P.2d 136 (1983), overruled in part and on other grounds by, Thompson v. Department of Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999). Instead, the colloquy is only one part of the equation and even a complete, thorough colloquy will not be sufficient to establish the validity of a plea where there is other evidence indicating that plea was, in fact, invalid. See Wakefield, 130 Wn.2d at 474-76 (plea colloquy where defendant was told she could receive an exceptional sentence not dispositive because trial court had previously told defendant she would likely get a standard range sentence). Further, extrinsic evidence is admissible and relevant when it would prove the invalidity of a plea. See,

e.g., Frederick, 100 Wn.2d at 553-54.

Indeed, in Frederick, the Supreme Court specifically held that a defendant who denied coercion during the plea colloquy was not precluded from raising a claim of coercion later and “should not be denied the opportunity to at least present evidence on the issue.” 100 Wn.2d at 558.

This makes sense because, by definition, when a person moves to withdraw a plea based upon ineffective assistance, evidence other than the transcript of the plea colloquy will be required. In the context of a plea, counsel renders ineffective assistance when she fails to assist her client, actually and substantially, in deciding whether to enter the plea. State v. McCollum, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997), review denied, 137 Wn.2d 1035 (1999). Further, to show he was prejudiced by counsel’s failures, a defendant must establish that, but for those failures, he would not have entered the plea. Id. It is highly unlikely that the facts and circumstances relating to those claims will ever be established on the record at the plea colloquy. Indeed, if there was evidence of ineffective assistance at the time of the plea colloquy, it would be extremely improper for the judge to move forward and accept the plea anyway. See, e.g., Taylor, 83 Wn.2d at 597.

Thus, in case after case where the defendant had made a presentencing motion to withdraw a plea, trial courts have heard evidence in support of that motion. See, e.g., State v. Teshome, 122 Wn. App. 705, 94 P.3d 1004 (2004), review denied, 153 Wn.2d 1028 (2005) (presentencing motion to withdraw plea; hearing at which evidence was

presented on whether non-native English speaking defendant understood the plea proceedings and had adequate interpreter services); State v. Williams, 117 Wn. App. 390, 71 P.3d 686 (2003), review denied, 151 Wn.2d 1011 (2004) (presentencing motion to withdraw plea; hearing was held at which evidence was allowed to be presented on whether defendant was subjected to undue threats or promises); State v. Smith, 74 Wn. App. 844, 875 P.2d 1249 (1994), review denied, 125 Wn.2d 1017 (1995) (trial court heard evidence on presentencing motion to withdraw pleas regarding, *inter alia*, whether counsel pressured defendant to accept pleas). In none of those cases was the inquiry limited to simply the colloquy itself.

The trial court erred as a matter of law in limiting its inquiry to the colloquy for the pleas.

Further, that limitation violated Gomez-Villa's due process rights. At a minimum, due process mandates that a defendant be afforded "the right to be heard at a meaningful time and in a meaningful manner." See, e.g., Lungu v. Department of Licensing, 146 Wn. App. 485, 488, 186 P.3d 1067 (2007), review denied, 163 Wn.2d 1051 (2008). Even in situations where, unlike here, the defendant has only limited, minimal due process rights, the ability to present relevant evidence is an important part of due process. See State v. C.D.C., 145 Wn. App. 621, 627-28, 186 P.3d 1166 (2008).

Here, Gomez-Villa was deprived of even the most minimal of due process protections by the trial court's refusal to hear witnesses or consider evidence on his motion to withdraw. By depriving him of the

opportunity to present witnesses who would have established the relevant facts in support of his motion and by limiting its consideration solely to the completeness of the plea colloquy, the court denied Gomez-Villa any kind of meaningful hearing of his claims. The court therefore effectively deprived Gomez–Villa of consideration of the merits of his motion, in violation of both CrR 4.2(f) and Gomez-Villa’s due process rights. See, e.g., Davis, 125 Wn. App. at 63. This Court should so hold and should reverse.

Finally, the court erred in denying Gomez-Villa’s motion to withdraw his Alford pleas, because the sworn declarations he presented were sufficient, undisputed evidence that he was deprived of his constitutional rights to effective assistance of counsel in entering those pleas. A court is required to allow withdrawal of a plea under CrR 4.2(f) in order to prevent a manifest injustice.

When a defendant is seeking to withdraw a plea based upon ineffective assistance, the Strickland v. Washington<sup>3</sup> standard for effective assistance applies. See, e.g., Hill v. Lockhard, 472 U.S. 52, 58-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); State v. Garcia, 57 Wn. App. 927, 933, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990). The question is whether counsel’s performance is deficient and that deficiency prejudiced his client. See, State v. Stowe, 71 Wn. App. 182, 186, 858 P.2d 267 (1993). Counsel’s performance is deficient in relation to assisting his client decide to enter a plea where counsel fails to “actually and

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<sup>3</sup>466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

substantially” provide such assistance. Stowe, 71 Wn. App. at 186. And that deficiency prejudices his client and compels reversal where the defendant establishes that, but for counsel’s inadequacy, he would not have entered the pleas. McCollum, 88 Wn. App. at 982.

Here, the sworn declarations submitted in support of Gomez-Villa’s motion established both prongs of the Strickland test. Part of providing a client with actual and substantial assistance in deciding whether to enter a plea is giving the defendant a fair evaluation of the strengths and weaknesses of the state’s case. See, e.g., State v. S.M., 100 Wn. App. 401, 411, 996 P.2d 1111 (2000). But, counsel could not possibly provide such analysis without conducting investigation into the potential defenses available to his client - something he had a duty to do. See, e.g., State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). Put simply, counsel has an ethical obligation to provide his client with sufficient information to make an informed decision on whether or not to enter a plea. See, State v. Holm, 91 Wn. App. 429, 435, 957 P.2d 1278 (1998), review denied, 137 Wn.2d 1011 (1999).

This is especially true where, as here, the client entered Alford pleas. Such pleas are not admissions of guilt for the crimes charged but rather a weighing of the alternatives and a decision to accept a deal in light of the available alternatives. See In re Montoya, 109 Wn.2d 270, 280, 744 P.2d 340 (1987). A defendant entering such a plea has done so after engaging in a cost-benefit analysis of what he feels is best for him. See State v. D.T.M., 78 Wn. App. 216, 219, 896 P.2d 108 (1995).

As a result, an Alford plea is not constitutionally valid unless it is clearly the product of the defendant's free choice based upon full knowledge of the available alternatives. See, e.g., State v. Newton, 87 Wn.2d 363, 372, 552 P.2d 681 (1970).

Here, Gomez-Villa did not make such a free, knowing choice, because of counsel's ineffectiveness. The undisputed declarations establish that counsel failed evaluate the strengths and weaknesses of the state's case against his client because he failed to conduct any investigation into his client's potentially meritorious alibi defense or to secure the potentially exculpatory evidence of the tape before it was destroyed.

It is axiomatic that a defendant cannot make a proper choice between available alternatives if his attorney has utterly failed to conduct minimal investigation into potential defense and thus has failed to properly, fairly evaluate the strengths and weaknesses of the state's case.

Further, the undisputed evidence Gomez-Villa presented below established that counsel also misadvised him about the potential sentence he faced if he went to trial. Counsel told Gomez-Villa he would face a "life sentence." CP 16-19. But as the prosecutor himself admitted below, the sentence Gomez-Villa faced, while long, was not a "life sentence" but rather a sentence of 886 months, approximately 74 years, and quite possibly less, depending on "good time" reductions. 2RP 14. Gomez-Villa could not possibly make an informed choice about his options if he was not told the correct sentence he would face but was instead scared by the specter of a higher sentence, one he did not actually face.

Thus, counsel clearly failed to actually and substantially assist his client in making a reasoned decision about whether to enter the Alford pleas. Further, “[m]isinformation with respect to an Alford plea” is therefore “especially problematic.” Stowe, 71 Wn. App. at 187. Counsel’s performance in advising his client to enter the Alford pleas thus fell far short of the minimal standards required for effective assistance.

Finally, the undisputed evidence presented by Gomez-Villa below established that counsel’s unprofessional failures were prejudicial in relation to his client’s decision to enter the Alford pleas. Gomez-Villa specifically stated that it was his attorney’s failure to investigate his potential defense and the change in his attorney’s claim about the state’s case against him, as well as the potential life sentence he thought he faced, which all made Gomez-Villa enter the equivocal pleas. See CP 15-18. He therefore established that counsel’s deficiencies were the reason he accepted the plea deal. See McCollum, 88 Wn. App. at 982.

The Alford pleas in this case were not constitutionally valid. The trial court should have allowed Gomez-Villa to present testimony and should have considered his evidence on his CrR 4.2(f) motion. The denial of those opportunities deprived Gomez-Villa of his due process rights. Further, counsel was ineffective in failing to conduct proper investigation and misadvising his client in deciding whether to enter the pleas, so that allowing Gomez-Villa to withdraw his Alford pleas was required under CrR 4.2(f) in order to prevent a manifest injustice. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for further proceedings.

DATED this 15<sup>th</sup> day of January, 2010.

Respectfully submitted,



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CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S, Tacoma, WA. 98402;

TO: Martin Gomez-Villa, DOC 331170, WSP, 1313 N. 13<sup>th</sup> Ave., Walla Walla, WA. 99362.

DATED this 15<sup>th</sup> day of January, 2010.



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