

NO. 41217-9-II

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

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

STATE OF WASHINGTON, RESPONDENT

v.

JACOB LEON HADLEY, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Susan K. Serko

No. 09-1-00581-0

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**BRIEF OF RESPONDENT**

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. ..... 1

    1. Did the trial court properly deny defendant's motion to withdraw guilty plea when defendant failed to prove the existence of a manifest injustice? ..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 4

    1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA BECAUSE DEFENDANT FAILED TO DEMONSTRATE THAT A MANIFEST INJUSTICE OCCURRED. .... 4

D. CONCLUSION..... 16

## Table of Authorities

### State Cases

<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990) .....	7
<i>State v. Cameron</i> , 20 Wn. App. 229, 232, 633 P.2d 901 (1981).....	6, 13
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987).....	7
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	7
<i>State v. Garcia</i> , 57 Wn. App. 927, 932, 791 P.2d 244 (1990).....	5, 6, 13, 15
<i>State v. Malone</i> , 138 Wn. App. 587, 592 n.3, 157 P.3d 909 (2007) .....	5
<i>State v. Marshall</i> , 144 Wn.2d 266, 280, 27 P.3d 192 (2001).....	7
<i>State v. Newton</i> , 87 Wn.2d 266, 27 P.3d 192 (2001) .....	2, 4, 11
<i>State v. Perez</i> , 33 Wn. App. 258, 261, 654 P.2d 708 (1982).....	8
<i>State v. Smith</i> , 134 Wn.2d 849, 852, 953 P.2d 810 (1998).....	8
<i>State v. Taylor</i> , 83 Wn.2d 594, 596, 521 P.2d 699 (1974).....	5
<i>State v. Zhao</i> , 157 Wn.2d 188, 197, 137 P.3d 835 (2006).....	7

### Federal and Other Jurisdictions

<i>Harrington v. Richter</i> , 131 S. Ct. 770, 788 (2011).....	5, 7
<i>Hill v. Lockhart</i> , 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).....	6, 13
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S. Ct. 160 (1970).....	2, 4
<i>Padilla v. Kentucky</i> , 130 S. Ct. 1473, 1485 (2010).....	5
<i>Premo v. Moore</i> , 131 S. Ct. 733, 739 (2011) .....	5, 6, 13

*Strickland v. Washington*, 466 U.S. 668, 687,  
104 S. Ct. 2052 (1984)..... 5, 13, 15

**Rules and Regulations**

CrR 4.2(d) ..... 8  
CrR 4.2 (f)..... 5

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

1. Did the trial court properly deny defendant's motion to withdraw guilty plea when defendant failed to prove the existence of a manifest injustice?

B. STATEMENT OF THE CASE.

On February 3, 2009, the Pierce County Prosecuting Attorney's Office ("State") charged appellant, Jacob Leon Hadley ("defendant") with murder in the first degree with a firearm enhancement, murder in the second degree with a firearm enhancement, assault in the first degree with a deadly weapon enhancement, assault in the second degree with a deadly weapon enhancement, and unlawful possession of a firearm. CP 1–3.

The declaration for determination of probable cause alleges that defendant and his codefendant, Christopher Randon, were attending a birthday party when they became involved in a physical altercation with Octavier Bushnell. CP 4. During the scuffle, one of them shot Mr. Bushnell with a 9mm handgun. CP 4. Defendant then used a .44-caliber revolver to shoot and kill John Stratton, who was a resident where the party was located. CP 4; RP 30.

Pursuant to defendant's entering a guilty plea, the State amended and lessened the charges to murder in the second degree with a deadly weapon enhancement, assault in the second degree with a deadly weapon

enhancement, and unlawful possession of a firearm in the second degree. CP 6–7; RP 3–4, 22.

Defendant pleaded guilty to his charges on March 3, 2010. RP 21–32; *see also* CP 9–18. The Honorable Susan K. Serko conducted the plea proceedings for both defendant and the codefendant. RP 3–51. Defendant entered a guilty plea to the murder and unlawful possession charges, admitting his guilt to both of the charges, and entered an *Alford/Newton*<sup>1</sup> plea to the assault charge. CP 9–18, *see par.* 11; RP 29–32. The court engaged in a colloquy with defendant to ensure his plea was made knowingly, voluntarily, and intelligently before accepting his plea of guilty. RP 21–32.

The codefendant pleaded guilty to lesser crimes including attempted assault in the first degree and assault in the third degree. RP 33. Although the court proceeded to sentence codefendant, it delayed defendant’s sentencing because many of the murder victim’s family were unable to attend the proceeding. RP 6, 60. Defendant was present for the codefendant’s sentencing. *See* RP 49. During codefendant’s sentencing, the murder victim’s sister, Rachel Stratton, briefly expressed frustration to the court claiming that she saw codefendant shoot her brother and that the State had charged the wrong person with murder. RP 39–40. The victim’s

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<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970); *State v. Newton*, 87 Wn.2d 266, 27 P.3d 192 (2001).

mother made a similar statement to the court although she did not claim to be an eyewitness. RP 38–39.

When defendant was back before the court for sentencing on July 30, 2010, defendant made a motion to withdraw guilty plea on the basis that he did not know Ms. Stratton was willing to identify a different person as the shooter prior to entering his plea. RP 144. He claimed that defense counsel failed to inform him of Ms. Stratton's account of the events, thus affecting his decision to plead guilty. RP 144. He also argued that he was pressured into the decision before the plea proceeding and did not understand the terms of his plea. RP 113–14. He alleged ineffective assistance of counsel and requested to withdraw his plea. RP 114.

Defendant's original counsel, Gary Clower, had withdrawn from the case and had been replaced with David Gehrke. RP 60, 63. Because defendant waived his attorney/client privilege by alleging ineffective assistance of counsel, the court permitted the State to examine Mr. Clower. RP 63, 66.

Defendant did not testify during the hearing and presented no evidence to support his claims. *See* RP 60–118.

Mr. Clower testified that he had thoroughly reviewed all of the discovery materials with defendant prior to the plea proceeding. RP 69. He stated that Ms. Stratton's potential testimony on the identity of the shooter as being someone else was a part of his discussions with defendant during the entire plea-bargain process. RP 80. He stated that although he and

defendant originally intended defendant to enter *Alford/Newton* pleas to all of the charges, he discovered on the morning of the plea proceeding that the State actually required a straight plea to the murder charge. RP 86–87. Counsel informed defendant about this before the plea proceeding, discussing all of the consequences of entering a straight plea. RP 86–87. He testified that defendant understood all of the terms of the plea offer when he pleaded guilty, and as defendant’s counsel would not have proceeded with the plea if he thought defendant did not fully understand its terms. RP 89–91.

After Mr. Clower’s testimony, the court stated that it had reviewed its plea colloquy with defendant several times and determined that no manifest injustice had occurred. RP 114–18. The court denied defendant’s motion to withdraw guilty plea and sentenced the defendant to 154 months in custody, with two 12-month enhancements, totaling 178 months. RP 125.

This appeal timely follows. CP 102.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION TO WITHDRAW GUILTY PLEA BECAUSE DEFENDANT FAILED TO DEMONSTRATE THAT A MANIFEST INJUSTICE OCCURRED.

“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.” CrR 4.2(f). The defense must demonstrate that withdrawal of the plea is necessary to correct a manifest injustice. *See State v. Malone*, 138 Wn. App. 587, 592 n.3, 157 P.3d 909 (2007).

Withdrawal of guilty plea is a demanding standard that requires an injustice that is “obvious, directly observable, overt, [and] not obscure.”

*Id.*, quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

Manifest injustice does not exist unless the defendant can prove (1) the plea was not ratified by the defendant, (2) the plea was not voluntary, (3) effective counsel was denied, or (4) the plea agreement was not kept.

*Malone*, 138 Wn. App. at 592 n.3.

In order to establish a claim of ineffective assistance of counsel, defendant must show (1) that counsel’s performance was deficient, and (2) the deficient performance prejudiced the defense. *State v. Garcia*, 57 Wn. App. 927, 932, 791 P.2d 244 (1990) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984)). “Surmounting *Strickland*’s high bar is never an easy task.” *Premo v. Moore*, 131 S. Ct. 733, 739 (2011) (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010)); *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citation omitted).

Counsel’s performance is deficient when it falls below an objective standard of reasonableness. *Premo*, 131 S. Ct. at 739 (citation omitted).

The attorney’s representation must amount to incompetence. *Id.* at 740. In

the plea bargaining context, counsel must actually and substantially assist his client when deciding to plead guilty. *State v. Cameron*, 20 Wn. App. 229, 232, 633 P.2d 901 (1981).

“When a challenge to a guilty plea is based on a claim of ineffective assistance of counsel, the prejudice prong is analyzed in terms of whether counsel’s performance affected the outcome of the plea process.” *Garcia*, 57 Wn. App. at 932–33 (citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). It is the defendant’s burden to prove that but for his counsel’s deficient performance, he would not have pleaded guilty and gone to trial. *Id.* When a factual matter is not conveyed to the defendant before he enters a plea of guilty, the court must determine whether the evidence would have led counsel to change his recommendation as to the plea—a prediction that “in large part” depends on whether the evidence would have changed the outcome of a trial. *Id.* (quoting *Hill*, 474 U.S. at 59).

The Supreme Court of the United States recently addressed the high degree of deference that should be afforded to counsel’s judgment during the plea-bargaining stage. *Premo*, 131 S. Ct. at 742. It stated, “[A]t different stages of the case [deference regarding counsel’s judgment] may be measured in different ways.” *Id.* at 742. It continued, “[T]he case of an early plea, . . . create[s] a risk that an after-the-fact assessment will run

counter to the deference that must be accorded counsel's judgment and perspective when the plea was negotiated, offered, and entered." *Premo*, 131 S. Ct. at 742; *see also Harrington*, 131 S. Ct. at 788 (stating that the trial attorney should be given deference because he observed the relevant proceedings, knew of materials outside of the record, and interacted with the defendant).

When reviewing a trial court's findings, the reviewing court must remember that "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). Specifically regarding witness credibility, the Supreme Court of Washington said, "Initially, we note the great deference that is to be given the trial court's factual findings. . . . It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity." *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

The court reviews a trial court's order on a defense motion to withdraw guilty plea under an abuse of discretion standard. *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006); *see also State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). To abuse its discretion, the record

must show that the trial court's discretion was predicated upon grounds clearly untenable or manifestly unreasonable. *Id.* at 119.

The trial court may properly accept a guilty plea if it determines that the plea "is made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). 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). When the trial judge personally interrogates the defendant regarding these matters, the "presumption of voluntariness is well nigh irrefutable." *Perez*, 33 Wn. App. at 261–62.

Defense counsel's performance during the plea-bargain stage satisfied an objective standard of reasonableness. Defense counsel's testimony regarding his performance during the plea-bargain stage is uncontested by the defendant; defendant neither testified nor offered any other evidence during his motion to withdraw guilty plea.

Defense counsel testified that when helping defendant determine whether to plead guilty, counsel evaluated all of the evidence, considered its legal effect, and informed defendant about his evaluation. RP 69. Specifically, counsel testified that prior to the plea hearing, he and

defendant knew about Ms. Stratton's potential testimony regarding the codefendant as the shooter. RP 75–76, 79. Counsel stated, “[O]nce we got the ballistics back, we knew that Rachel Stratton’s story couldn’t be accurate as she described the [codefendant] shooting both people and we knew we had two different calibers. *So we knew that – we knew all along that that wasn’t possible.*” RP 76 (emphasis added). This point was later reiterated several times during counsel’s testimony:

[Prosecutor]. Did you have a conversation with Mr. Hadley after your interview of Rachel Stratton, to address whether or not her confusion or her misidentification of the actual gunman who killed John Stratton was a magic point for a lack of a better word?

[Mr. Clower]. Well, we had had conversations all along and it had been known for a long time that she was inaccurate and probably once the ballistics came back. And the plea discussions went on for some time, this didn’t happen overnight, and they started in January in earnest.

...

[Prosecutor]. Mr. Hadley describes in his declaration that he was stunned and shocked and amazed when Rachel Stratton came into court at Christopher Randon’s sentencing, which was held right after Mr. Hadley and Mr. Randon entered their pleas. Did you read that portion of his declaration?

[Mr. Clower]. Yes.

[Prosecutor]. When you read it, were you surprised to see that?

[Mr. Clower]. Well, as I say, we had known for quite some time that her statement was inaccurate, in error.

[Prosecutor]. Who is “we”?

[Mr. Clower]. Mr. Hadley and I. And so that wasn't surprising and we talked about it further right before going into the courtroom for the plea because it came up in connection with a discussion about Newton plea versus a straight plea to the murder charge.

...

[Prosecutor]. Did [defendant] agree to enter a factual statement that he fired the shot that killed John Stratton?

[Mr. Clower]. Yes.

[Prosecutor]. Do you believe he did that with full understanding that Rachel Stratton thought Christopher Randon was the gunman?

[Mr. Clower]. Yes.

RP 82, 86, 92.

Counsel further testified that he reviewed the rest of the discovery with defendant prior to the plea proceeding, including ballistic reports that pointed towards defendant as the shooter, the likely admissibility of defendant's statements to his friends that he had shot somebody, defendant's statement to the police regarding his ownership of a .40-plus-caliber revolver, and all of the witness interviews. RP 71–79. He also discussed with defendant the likelihood of being convicted at trial. RP 81–82. Counsel thoroughly informed defendant about the length of his potential sentence if he accepted a plea and even included defendant's family in the conversation. RP 82–83, 85.

Although defendant initially thought he would be entering a *Newton* plea to all of the charges, counsel informed him that he would have to enter a straight plea to the murder and unlawful possession charges prior to the pleading. RP 87. Counsel testified that defendant understood the difference between the two types of pleas because it had been part of their discussions while engaging with the State in plea negotiations for over a month. RP 70, 86. After evaluating all of the evidence, counsel advised that he had to take the deal or go to trial. RP 89.

When counsel was asked what his duties were when explaining a plea offer from the State to a defendant, he responded:

Well, it's to make sure he knows what the charge is, what the elements of the charge is, what the possible penalties are; some collateral consequences such as firearm rights, right to vote, things like that; make sure that he understands a recommendation to the Judge is only a recommendation; make sure he understands that he does have a right to go to trial and that he's giving up rights by doing that, and more specifically, that the rights include the right of cross-examination and so on, you know, the Paragraph 5 of the plea agreement. So my job is to make sure he understands all of that.

I usually explain that to clients that the whole purpose of this and the colloquy with the Judge is to make sure that he understands everything, make sure that you know the consequences, and make sure that you know what you're doing and this is what you want to do.

RP 90–91. Then he stated that he had done all of the above with defendant prior to the plea proceeding. RP 91.

Defendant's claim that defense counsel never informed him about Ms. Stratton's potential testimony, thereby rendering his counsel's assistance ineffective and affecting his decision to plead guilty, is unsubstantiated. Defendant failed to present any evidence to the court during his motion to withdraw guilty plea to support his claim.

Moreover, in addition to defense counsel's testimony, the record prior to defendant's plea shows there was a general understanding between the State and defense that Ms. Stratton had identified another as the shooter. At the very beginning of the plea proceeding, the prosecutor motioned the court to accept amended (lesser) charges pending the defendants' plea. RP 5. He explained that several of the victim's family members wanted to speak at sentencing to express their disagreement about both defendants' pleading to lesser charges. He stated, "I believe the primary problem for the victim's family is that they believe that the wrong person is being charged with or is pleading to murder versus assault." RP 5. The defendant proceeded with his plea even though it had been referenced in his presence that the very purpose for the victim's family's attendance at the plea hearing was to later express their concern that the wrong person had been identified as the shooter. RP 5.

Counsel's testimony shows that he revealed all pertinent discovery, including Ms. Stratton's testimony, to defendant in order for him to make

an intelligent decision regarding his plea. Defense counsel's performance satisfied an objective standard of reasonableness because he substantially assisted his client during the plea process. *Cameron*, 20 Wn. App. at 232. By no means did his performance amount to incompetence. *Premo*, 131 S. Ct. at 739. Defendant thus fails to satisfy the first prong of *Strickland*.

Even if the court considers defendant's claim, he still fails to satisfy the prejudice prong of *Strickland*. Pursuant to *Garcia* and *Hill*, the court must determine whether Ms. Stratton's testimony would have altered defense counsel's recommendation as to the plea. *Garcia*, 57 Wn. App. at 932–33; *Hill*, 474 U.S. at 59. Defense counsel was asked that very question during the hearing on defendant's motion. RP 79. The prosecutor asked, "Based on your interview of the witnesses and particularly Rachel Stratton, did you change your impression of the way this case would be defended?" RP 79. Counsel responded:

Not particularly, I'd say, because we knew all along that her testimony was wrong in the sense that she said the same person shot both people, and I thought that there was quite a bit of evidence putting a particular gun in [defendant's] hand and a particular caliber that had shot each individual.

RP 79–80.

Counsel's recommendation would not have changed because defendant's chances of succeeding at trial were unlikely. There was strong evidence that defendant was the shooter and that Ms. Stratton's statements

were impeachable on several reasons. Defense counsel testified that he reviewed that evidence—as listed below—with defendant prior to defendant’s plea proceeding:

- Ms. Stratton’s statements were inconsistent as to who she thought the shooter actually was. She stated that the shooter was wearing a turquoise shirt. RP 77. Several other people described the shooter as wearing a turquoise shirt. RP 75, 77. Photographs taken at the party show that defendant, not the codefendant, was wearing a turquoise shirt. RP 77–78. Even defendant had told the police that he was wearing a turquoise shirt on the night of the murder. RP 75–76.
- Ms. Stratton’s version of the story had the codefendant shooting both Mr. Bushnell and Mr. Stratton, when all the other witnesses stated that there were two shooters. RP 78.
- In support of there being two shooters, the ballistics report showed that Mr. Stratton was shot by a weapon with a .44-caliber, while Mr. Bushnell was shot by a 9mm. RP 72–73. Several witnesses identified the codefendant as owning a 9mm. RP 74. The codefendant himself acknowledged using it to pistol-whip Mr. Bushnell before it was fired. RP 74. Defendant, on the other hand, initially told police that he owned a revolver of similar caliber to

the .44 that killed Mr. Stratton. RP 74. He later changed his story to owning a 9mm, and then claiming he had no gun. RP 74.

Additionally, some of defendant's friends said that defendant indeed owned a .40-caliber plus type gun. RP 71.

- Other witnesses at the party described the shooter as having blue braces on his teeth. RP 77. Defendant at the time had "distinctive braces that had blue on them." RP 77–78.
- Defendant's girlfriend told police that the defendant admitting shooting his weapon and saying, "I don't know if I hit him" RP 72.
- After fleeing the party together, one of defendant's good friends said that defendant admitting to shooting someone. RP 71–72; CP 4–5.
- Defense counsel thought it was "highly likely" that defendant's statements to his friends, girlfriend, and the police would be admissible at trial. RP 72.

After considering all of the evidence, defendant and defense counsel knew that Ms. Stratton's testimony was inaccurate and would not improve defendant's chances at trial. RP 82.

Defendant does not satisfy *Strickland*'s prejudice prong because he has not proven that but for his counsel's performance he would have rejected the plea offer and gone to trial. *Garcia*, 57 Wn. App. at 932–33.

Accordingly, defendant fails both prongs of the ineffective assistance of counsel inquiry.

D. CONCLUSION.

The trial court properly determined that a manifest injustice did not occur because defendant failed to prove that his counsel's assistance was ineffective. Defendant offered no evidence during his motion to withdraw guilty plea that his counsel's performance was deficient. On the other hand, defense counsel's testimony reflected that he adequately assisted defendant during the plea-bargain stage. Defense counsel's testimony also showed that defendant knew about Ms. Stratton's version of the story prior to entering his voluntary plea. This court should affirm the trial court's denial of defendant's motion to withdraw guilty plea.

DATED: AUGUST 24, 2011

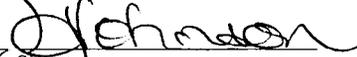
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Certificate of Service:

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.

8/25/11   
Date Signature

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