

TABLE OF CONTENTS

	Page
I. ISSUES IN REPLY	1
II. ARGUMENT IN REPLY	1
III. CONCLUSION	9

TABLE OF AUTHORITIES

Page

Washington Cases

In Re Matter Of Pirtle,
136 Wn.2d 467, 967 P.2d 593 (1998)..... 5

Ryan v. State,
112 Wn. App. 899, 51 P.3d 175 (2002) 3

State v. A.N.J.,
168 Wn.2d 91, 225 P.3d 956 (2010) 6

State v. Frederick,
100 Wn.2d 550, 674 P.2d 136 (1983),
overruled on different grounds in
Thompson v. DOL, 138 Wn.2d 783, 982 P.2d 601 (1999)..... 3

State v. Haddock,
141 Wn.2d 103, 110, 3 P.3d 377 (2000)..... 3

State v. Hardy,
133 Wn.2d 7801, 946 P.2d 1175 (1997) 6-7

State v. Kimp,
87 Wn. App. 281, 941 P.2d 714 (1997) 7

State v. Lubers,
81 Wn. App. 614, 623, 915 P.2d 1157 (1996) 7

State v. Osborne,
102 Wn.2d 87, 684 P.2d 683 (1984) 3

I. ISSUES IN REPLY

1. The State failed to address in its response brief the argument that the trial court misapplied the law. Appellant's opening brief alleged that the trial court applied the wrong test in denying the motion to withdraw guilty plea. The State did not respond to this argument in its opening brief. Where the trial court erroneously concluded that a motion to withdraw a guilty plea required evidence other than the defendant's testimony, should this Court reverse the trial court's ruling based upon a misunderstanding of the law?

2. The State attempts to justify the lack of meaningful investigation on the basis that this was not the type of case that required investigation. Where the only eyewitness was a drug addict and a thief, and the corroborating witness was also a thief, was defense counsel required to conduct some meaningful investigation before advising his client to plead guilty?

II. ARGUMENT IN REPLY

There was no suggestion, and certainly no finding, that Jesus Escobar was unbelievable. To the contrary, the court necessarily found Escobar's claims to be credible. This was apparent when the court ordered a show cause hearing for the State to produce evidence

as to why the motion to withdraw the guilty plea should not be granted. Had the court found the claims to be lacking in credibility, the trial court would have either denied the motion or set a factual hearing to determine the validity of those allegations. The court did not elect either option.

Why then did the trial court rule as it did? The answer lies in the State's argument to the trial court. At the hearing, the State claimed that the court could not grant the motion unless there was independent evidence to support the claim. CP 167-189. The State cited to a number of cases that seemed to reach that holding. The trial court appeared to accept the State's argument that something more was required, and denied the defense motion to set aside the guilty plea. CP 209-210 ("The defense claims of the defense attorney's inadequacies are based solely on the defendant's assertions without sufficient evidence in support of the claims.")

On appeal, Escobar pointed out that those cases all dealt with claims of involuntariness, rather than ineffective assistance of counsel. AOB at 17-19. Specifically, when a defendant makes a claim of involuntariness, the defendant bears a particularly heavy burden of overcoming his earlier statements during the guilty plea colloquy that

the plea was voluntary. See State v. Osborne, 102 Wn.2d 87, 684 P.2d 683 (1984) and State v. Frederick, 100 Wn.2d 550, 674 P.2d 136 (1983), overruled on different grounds in Thompson v. DOL, 138 Wn.2d 783, 982 P.2d 601 (1999). As pointed out in the opening brief, a different standard is used when the defense moves for withdrawal of the guilty plea based on ineffective assistance of counsel. The trial court's mistaken belief that something beyond the defendant's testimony is required was an error of law requiring reversal.

The State did not respond to this argument. Instead, the State simply put forth various reasons why defense counsel's failure to conduct meaningful investigation did not constitute ineffective assistance of counsel. In doing so, the State forgets that an error of law as to the applicable test or standard constitutes an abuse of discretion. Ryan v. State, 112 Wn. App. 899, 51 P.3d 175 (2002) (discretion is abused where a court bases its decision on an incorrect understanding of the law); State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 377 (2000) (The trial court must apply the correct law and when it does not do so, the courts discretion has been abused.) For this reason alone, the trial court's ruling should be reversed.

In the normal course of proceedings, the case might be remanded to the trial court for the court to apply the correct standard of law. Here, however, remand for additional proceedings is inappropriate, as it is readily apparent that Escobar has more than met his burden of proof in establishing ineffective assistance of counsel.

As an initial matter, the State approaches the facts in the police report as if this were a challenge to the sufficiency of the evidence, where all inferences are drawn in favor of the State. The State cites to the allegations made by each of its unsavory witnesses as if they were the sacred words of a lost scripture. And indeed, that would be the correct approach if we were challenging the sufficiency of the evidence. But that is not the challenge raised in this case. Instead, this court must evaluate the reasonableness of the attorney's actions. It is the job of a defense attorney to assess and challenge those claims. And in determining whether defense counsel should have conducted some investigation before telling his client to plead guilty, it is important to take a closer look at those witnesses.

There are some cases in which it may be reasonable for defense counsel not to interview a witness, such as when the witness

is someone unlikely to fabricate. See In re Pirtle, 136 Wn.2d 467, 965 P.2d 593 (1998). In Pirtle, relied upon by the State in our case, defense counsel did not formally interview four police officers in a homicide case. He did, however, spend considerable time with two of them reviewing the evidence and obtaining answers to various questions. Id. at 488. The court found that given all of the circumstances, this was not legally defective. The officers were not the type of witnesses where an interview was necessary.

Such is not the case here. To the contrary, these were the type of witnesses where some investigation most certainly was required. As detailed in the opening brief, shortly before this alleged burglary by Escobar, his accuser had stolen from his employer. Not only had he committed this crime of dishonesty, but he had done so in a particularly devious way. It is not hard to see how a “victim” who had engaged in this type of criminally deceptive behavior, would not hesitate to lie or pull a phone out of the wall in order to get back at someone with whom he had a grudge.

As the Supreme Court recently stated, the scope of an investigation is dependent in part upon the surrounding circumstances:

The degree and extent of investigation required will vary depending upon the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.

State v. A.N.I., 168 Wn.2d at 111-112 (2010). In the present case, our facts unquestionably required defense counsel to conduct additional investigation. Given the extremely dubious nature of the State's witnesses, defense counsel was obligated to do more than read the police report before advising his client to plead guilty.

The State's response is to argue that Gill's forgery conviction occurred after Escobar's conviction. But appellant had not relied upon the forgery conviction; appellant relied upon Gill's theft from his employer to show that his testimony was untrustworthy. This theft was unquestionably committed prior to Escobar's alleged burglary. Simply put, Gill was unworthy of belief. Yet it appears that defense counsel was unaware of that recent conviction. At the very least, he did not discuss this potential attack on the State's case with his client.

The State also argues that the drug conviction would not be admissible against Gill. Generally speaking, the State is correct that drug convictions are generally inadmissible under ER 609. See State

v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997). But ER 609 is hardly the only basis for admitting this evidence. In the present case, the drug arrest was relevant because it was Jesus Escobar who had called the police about the drug use at the house. Mr. Gill was arrested as a result of Escobar's call. As such, William Gill's drug arrest was relevant to establish his bias against Escobar. See State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996) ("Extrinsic evidence of bias is therefore admissible where it is relevant to a witness's credibility.")

Gill was the only witness present at the time of this alleged crime and who claimed to have personal knowledge of what happened. But even assuming, as does the State, that Tracy Kepner could be considered a witness against Escobar, her credibility was equally suspect. Had counsel conducted meaningful investigation, he would have discovered that she had been charged with theft as well. Although she had not been convicted yet, her criminal activity would be admissible under ER 608. While the State argues that this evidence would never have been admissible, the court of appeals has held that this type of evidence is admissible. See State v. Kimp, 87 Wn. App. 281, 941 P.2d 714 (1997) (defendant's recent theft from employer admitted under ER 608). Indeed, if the crime is admissible against

the defendant, as it was in Kimp, the crime would certainly be admissible against the State's witness where the concerns of propensity evidence are lessened.

The State's brief refers to Escobar's "admissions." BOR at 14. But again, the State overstates its case. There were no "admissions" by Escobar. To the contrary, he explained that he had a right to be at the house, that he did not assault Gill, and he did not pull the phone out of the wall. It is difficult to understand how these exculpatory statements can now be viewed as "admissions." If this case had gone forward to trial, it is the defense who would have been seeking to admit the statements, and the State no doubt seeking to exclude them as "self-serving hearsay."

Finally, the State relies upon the threat of incarceration in prison as the holy talisman that somehow justifies any lack of due diligence on the part of defense counsel. But for many people living here in Washington, a felony conviction, particularly one involving dishonesty, represents just as fearsome an outcome.

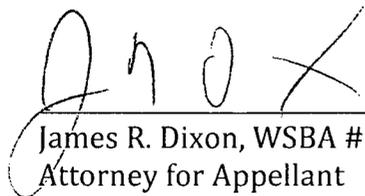
The unconverted evidence in this motion established that the attorney did not bring an interpreter with him for the one time he conferred with his client, did not interview any witnesses, and did not

present any meaningful alternatives to his client other than pleading guilty. Given these facts, the evidence of ineffective assistance is overwhelming.

III. CONCLUSION

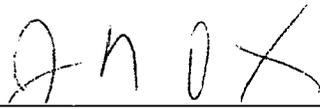
For the reasons stated above and in appellant's opening brief, appellant asks this Court to reverse the trial court, vacate the conviction, and remand for further proceedings if the State believes it has sufficient evidence to proceed to trial.

Respectfully Submitted on this 30th day of March, 2012


James R. Dixon, WSBA #18014
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing Reply Brief of Appellant to Randall Avery Sutton, Kitsap County Prosecutor's Office, 614 Division Street, MS-35, Port Orchard, WA 98366, postage prepaid, on March 30, 2012.



James R. Dixon
Attorney for Jesus Escobar

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