

NO. 45735-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW MITTELSTAEDT

Appellant.

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

The Honorable John A. McCarthy, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to representation on his motion to withdraw his pleas.

Issue Pertaining to Assignment of Error

Prior to entry of judgment, every criminal defendant has the right to legal representation on a motion to withdraw plea. Did the superior court deny appellant this right when it failed to appoint conflict-free counsel to assist him with his motion?

B. STATEMENT OF THE CASE

On August 17, 2012, the Pierce County Prosecutor's Office charged appellant Matthew L. Mittelstaedt with first degree child rape. CP 1. The prosecution alleged Mittelstaedt raped his six-year old daughter. CP 2.

Attorney Mark Quigley represented Mittelstaedt. 1RP<sup>1</sup> 1; 2RP 1; CP 83. On December 16, 2012, Mittelstaedt submitted a letter to the "Chief Judge" of the Pierce County Superior Court expressing his dissatisfaction with Quigley's representation. CP 84-87. Mittelstaedt complained that Quigley was not communicating with him enough and failing to file motions Mittelstaedt considered important. Id. The minutes from a hearing held December 21, 2012, indicate Mittelstaedt informed the court "J.R. Robinson

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<sup>1</sup> There are two volumes of verbatim report of proceedings referenced as follows: 1RP - November 8, 2013 (plea hearing); and 2RP - December 20, 2013 (motion to withdraw guilty plea hearing & sentencing).

will be his new attorney and he wishes to dismiss Attorney Quigley." (Court Minutes, 12/21/12). The minutes state, "The Court denies the request until a Notice of Appearance is filed." Id.

In April 2013, Mittelstaedt's mother, father and brother submitted letters to the superior court complaining of Quigley's representation of Mittelstaedt. CP 88-89. Mittelstaedt's parents complained it was apparent from the beginning that Quigley believed their son was guilty and was acting more like a second prosecutor than a defense attorney. Id. Like his parents, Mittelstaedt's brother complained that Quigley was not affording his client the presumption of innocence to which he was entitled, was failing to adequately communicate, was unprepared at hearings and that it was apparent Quigley and Mittelstaedt had a strained relationship at best. Id.

Minutes from a hearing held May 10, 2013, provide; "The Court hears a motion from the Defendant to go change counsel. . . . The Court denies the motion." CP 94-95. Similarly, minutes from a hearing held November 7, 2013, provide:

Defendant cautioned by counsel regarding addressing court directly. Defendant continued to address the court directly regarding lack of communication w/counsel. Defendant indicates his case has not been adequately prepared for trial and he does not trust his attorney. Court denies defendant's request for new counsel.

CP 96-98.

The following day (the eve of trial), Mittelstaedt pled guilty to amended charges of six counts of third degree assault and one count of third degree child rape. CP 11-28; 1RP 2-12. According to the plea statement, Mittelstaedt was pleading guilty "to avoid a third strike."<sup>2</sup> Sentencing was set for December 20, 2013.

On December 5, 2013, Mittelstaedt filed a pro se "Motion to Withdraw Plea." CP 33-35. The motion notes Mittelstaedt's prior complaints about his counsel. CP 33-34. It also asserts Quigley pressured and gave him less time than was appropriate to decide whether to accept the State's plea offer. CP 34-35. Mittelstaedt asserted that but for Quigley pressuring him, "Defendant would have decided to continue to trial so as to prove his innocence, facing his accuser(s), and retaining his right to appeal." CP 35.

In a written response, the prosecutor urged the court not to consider the pro se motion because Quigley was not "endorsing" it. CP 99-102. In the alternative, the prosecution urged the court to deny the motion because Mittelstaedt failed to show withdrawal was necessary to correct a manifest injustice. Id.

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<sup>2</sup> Mittelstaedt's criminal history includes second degree assault (2009), second degree child molestation (1997), and first degree child molestation (1988). CP 60.

On December 20, 2013, prior to sentencing, the trial court held a hearing on Mittelstaedt pro se motion. 2RP 2-13. At Quigley's request, he was allowed to address the court before Mittelstaedt. 2RP 2. Quigley explained how Mittelstaedt had contacted him "[s]hortly after the plea" and said he wanted it withdrawn. Quigley said he asked Mittelstaedt to provide him with a list of all the reasons why he wanted to withdraw the plea. 2RP 2. Quigley explained that after looking over the list provided by Mittelstaedt, the content of his pro se motion, and the prosecution's response, he concluded there was no factual or legal basis to grant the motion. 2RP 3.

Before allowing Mittelstaedt to respond the court told him, "[y]our motion appears to be deficient legally for many of the reasons that the State has set forth in their response. Nonetheless, I will give you an opportunity to be heard, if you'd like." 2RP 4.

In response, Mittelstaedt began by noting that throughout the course of the case he had repeatedly expressed dissatisfaction with Quigley's representation, and that the lack of productive communication and preparation by Quigley had persisted all the way to the eve of trial. 2RP 4-6. Mittelstaedt recalled that on Thursday, November 7, 2013, when the plea offer was on the table, the court suggested he take the weekend to consider his options. 2RP 6. Mittelstaedt claimed Quigley, however, "countermanded" the court's suggestion and told him he had to make a

decision by the next day, Friday, November 8, 2013. Id. According to Mittelstaedt, the next day Quigley increased the pressure on him to plead guilty by telling him, "He (Quigley) would run a clean case, along with the judge and the prosecutor, that I [would] be convicted and sentenced to life in prison." 2RP 7. It was at this point Mittelstaedt claimed that he,

became completely petrified of the prospect of not having a chance in trial or on appeal to prove my innocence.

At that moment, I caved in to all he was saying to me and took the deal, but even that is not under the terms I stated I would accept.

2RP 8.

In response, the prosecutor reiterated its position that Mittelstaedt had failed to show a manifest injustice warranting withdrawal of the plea, and noted he had the benefit of sitting through a hearing on the admissibility of child hearsay before deciding to plead guilty to non-strike offenses. 2RP 9-10. The prosecutor urged the court to deny the motion because Mittelstaedt's plea was knowing, voluntary and intelligent. Id.

Following the prosecutor's comments, Quigley noted Mittelstaedt comments to the court included allegations regarding the quality of his representation that had not previously been raised, and suggested that the matter be continued so a different attorney could be appointed to represent Mittelstaedt regarding his claims of ineffective assistance of counsel. 2RP 10-12.

Despite Quigley suggestion, the court denied Mittelstaedt's motion. 2RP 12. The court emphasized that it was denying the motion as filed, and also denying the motion when considered in light of the additional facts presented by Mittelstaedt at the hearing. 2RP 13.

Thereafter the court imposed the sentence contemplated by the plea agreement, an aggravated exceptional sentence of six consecutive 60-month terms for the third degree assault convictions (30 years), and a mitigated exceptional sentence of no incarceration, but 36 months of community custody for the third degree child rape conviction. CP 59-72, 76-78; 2RP 21-22. Mittelstaedt appeals. CP 79.

C. ARGUMENT

THE COURT ERRED WHEN IT DENIED MITTELSTAEDT'S MOTION TO WITHDRAW HIS PLEAS WITHOUT APPOINTING NEW COUNSEL TO REPRESENT HIM.

Due Process requires that a defendant enter a guilty plea knowingly, intelligently, and voluntarily. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; Boykin v. Alabama, 395 U.S. 238, 243-44, 23 L. Ed. 2d 274 (1969); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). Criminal defendants have a constitutional right to the assistance of counsel during the plea process. Counsel has a duty to assist the defendant "actually and substantially" in determining whether to plead guilty. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

Consistent with this duty, to prevail on a claim of ineffective assistance of counsel, the defendant must show (1) that his attorney failed to “actually and substantially” assist him in deciding whether to plead guilty and (2) that but for counsel’s failure, there is a reasonable probability he would not have pled guilty. State v. McCollom, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997), review denied, 137 Wn.2d 1035 (1999); State v. Garcia, 57 Wn. App. 927, 933, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990).

A trial court must allow withdrawal of a guilty plea when necessary to correct a manifest injustice. CrR 4.2(f); State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001). There has been a manifest injustice where the defendant was denied effective assistance of counsel or his plea was not voluntary. Marshall, 144 Wn.2d at 281.

Mittelstaedt moved to withdraw his pleas based on involuntariness arising from ineffective assistance of counsel. He alleged Quigley's lack of trial preparation, poor communication skills and threats to work with the prosecutor and the court to ensure his conviction for a third strike offense, forced him into entering a plea he did not want to make. Rather than appoint new counsel to assist Mittelstaedt in presenting these claims, the court forced him to represent himself at the hearing and then denied the motion. By proceeding in this fashion, the court denied Mittelstaedt his right to the

assistance of counsel in presenting the motion.

The Sixth Amendment and article 1, § 22 of the Washington Constitution guarantee criminal defendants the right to representation at all critical stages of a criminal prosecution. State ex rel. Juckett v. Evergreen Dist. Ct., 100 Wn.2d 824, 828, 675 P.2d 599 (1984). A criminal defendant is merely considered an “accused person” – and therefore entitled to this right – until formal judgment and sentence have been entered. McClintock v. Rhay, 52 Wn.2d 615, 616, 328 P.2d 369 (1958); see also State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987) (right to counsel extends through sentencing), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988). The right extends to a hearing on a defendant’s motion to withdraw his pleas prior to entry of judgment. State v. Quy Dinh Nguyen, 178 Wn. App. 1027, 319 P.3d 53, 58 (2013); McClintock, 52 Wn.2d at 616; State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996); see also State v. Winston, 105 Wn. App. 318, 321-325, 19 P.3d 495 (2001) (distinguishing post-conviction proceedings).

Once Mittelstaedt alleged ineffective assistance of counsel against Quigley, and the trial court decided to hold a hearing on Mittelstaedt's claims, there was a conflict of interest in any further representation by Quigley. Clearly, Quigley could not advocate for Mittelstaedt at that point, and advised the court as much. 2RP 10-13.

In Harell, this Court held that when a defendant alleges ineffective assistance as grounds for withdrawing his plea, the defendant is entitled to conflict-free counsel at a hearing on the claim. Harell was denied this right because his attorney (against whom the claim was lodged) could not assist him and became a witness against him. Harell, 80 Wn. App. at 805. Such an outright denial of counsel is presumed prejudicial and warrants reversal without a harmless error analysis. Id.

In this case, Mittelstaedt, like Harell, was denied his constitutional right to representation when he was left without counsel to advocate on his behalf at the plea withdrawal hearing. He left on his own to battle against both the prosecutor and Quigley regarding his claim that Quigley had forced him into pleading guilty by being inadequately prepared for trial.

Nor did Mittelstaedt have the assistance of counsel to address the impact of Quigley's threats to ensure a conviction for a third strike offense on his ability to knowingly, intelligently, and voluntarily waive his trial rights. This issue was never addressed below despite Mittelstaedt alerting the court to these threats at the hearing.

Quigley correctly advised the court to appoint Mittelstaedt new counsel so his claims against Quigley could be properly investigated. 2RP 11. Unfortunately, the court declined to do so and instead simply denied the motion. As Harell makes clear, reversal is required.

D. CONCLUSION

Mittelstaedt's case should be remanded so that conflict-free counsel can be appointed to advocate on his behalf at a new hearing on his motion to withdraw his pleas. Harell, 80 Wn. App. at 805.

DATED this 30 day of April 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 45735-1-II
	)	
MATTHEW MITTELSTAEDT,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MATTHEW MITTELSTAEDT  
DOC NO. 791223  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF APRIL 2014.

x *Patrick Mayovsky*

**NIELSEN, BROMAN & KOCH, PLLC**

**April 30, 2014 - 2:12 PM**

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