

NO. 45735-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW LLOYD MITTELSTAEDT, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John A. McCarthy

No. 12-1-03115-2

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**Brief of Respondent**

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

1. Did the trial court properly exercise its discretion in denying defendant's *pro se* motion to withdraw his guilty plea without appointing another attorney to litigate the underlying ineffective assistance of counsel claim when the motion was clearly established to be meritless by the record that proved defendant knowingly, intelligently, and voluntarily pleaded guilty to raping his eight year old daughter?
2. Has defendant failed to prove he endured an outright denial of counsel during a critical stage of the criminal prosecution when counsel advocated on defendant's behalf throughout the challenged proceeding despite determining he was ethically prohibited from endorsing defendant's meritless motion to dismiss?

B. STATEMENT OF THE CASE.

On August 17, 2012, the Pierce County Prosecuting Attorney (State) charged Matthew Mittelstaedt (defendant) for the first degree rape of his eight year old daughter after she disclosed that he "penetrated her buttocks with his penis" while they were "watching pornographic movies and playing...a game called 'happy ending massage.'" CP 1-2. She said they played that game "at least 22 times." CP 2.

The first degree child rape charge exposed defendant to a potential sentence of life without the possibility of release. 2RP 12.<sup>1</sup> He had previously been convicted of first degree child molestation (5/09/89); second degree child molestation (2/23/99); failure to register as a sex offender (3/20/06); unlawful possession of a controlled substance (1/22/07); second degree assault (12/02/09); possession of burglar tools (9/13/06); and making false statements (9/13/06). CP 60.

Defendant's case initially progressed toward trial. 2RP 12. He was present at preliminary hearings on child hearsay where his daughter and several other witnesses testified against him under oath. 2RP 12-13. Ongoing negotiations resulted in a plea offer that would provide him an opportunity for release in thirty years. 2RP 12-13. The trial court specifically accepted the amended information necessary to enter the agreement because it would spare defendant's then nine year old daughter from having to testify about the sexual abuse in open court. 1RP 3; CP 2.

The plea agreement was presented to the court on November 8, 2013. 1RP 3. It provides that defendant was a 36 year old man with an 11th grade education and a G.E.D. CP 15. Therein, defendant acknowledged understanding the rights he was giving up to enter the plea. CP 15-16. Defendant affirmed he "ma[d]e th[e] plea freely and voluntarily; that "no one...threatened harm of any kind...to cause [him] to

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<sup>1</sup> The State will refer to the verbatim report of proceedings as follows: 1RP-November 8, 2013 plea hearing; 2RP- December 20, 2013 sentencing.

make th[e] plea; and that "[n]o person has made promises of any kind to cause [him] to enter the[e] plea except as set forth in th[e] agreement. CP

24. He also affirmed:

My lawyer has explained to me, and we have fully discussed, all of the above paragraphs...I understand them all...I have no further questions to ask the judge.

CP 25. Directly beneath defendant's signature is his attorney's averment he "read and discussed th[e] statement with... defendant and believe[s]... defendant is competent and fully understands the statement." CP 25.

Defendant did not dispute any of those statements during his plea colloquy with the court. 1RP 4-10. The court in turn found:

[D]efendant signed the [plea] in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserte[d]: (a) [he] previously read the entire statement above and that ...[he] understood it in full; [and] (b) The defendant's lawyer had previously read to him...the entire statement above and that the defendant understood it in full...."

CP 25.

That information is confirmed by the verbatim transcript of the proceeding. *See e.g.*, 1RP 3-7. Without hesitation, equivocation, or questions, defendant affirmed he understood his plea, he had read over the plea himself and with his counsel, that no one forced him to plead guilty, and that he was "pleading guilty of [his] own free will and voluntarily."

1RP 4, 7, 9. At no point did defendant express his decision to plead guilty

was the product of a will overborne by time pressures and concerns about his lawyer's commitment to the case. 1RP 4-10.

On December 5, 2013, prior to sentencing, defendant filed a *pro se* motion to withdraw his guilty plea. CP 33-35. Defendant alleged ineffective assistance of counsel and argued that his counsel pressured him into accepting the State's plea offer. CP 33-35.

The parties reconvened on December 20, 2013, for sentencing. CP 33-35. At the sentencing hearing, defense counsel informed the court that defendant had contacted him shortly after pleading guilty and informed counsel that he wanted to withdraw his plea. 2RP 2. Defense counsel advised defendant to state in writing the reasons he wished to withdraw his plea. 2RP 2-3. After reading defendant's statement, counsel informed defendant that he did not perceive any sufficient legal or factual basis to warrant the plea withdrawal. 2RP 3. As a result, counsel informed the court that he did not feel he could ethically ask the court to withdraw defendant's plea. 2RP 3.

At sentencing, counsel worked to ensure defendant had an opportunity to explain his *pro se* motion within the confines of counsel's ethical responsibilities to the court. 2RP 3. Counsel advanced defendant's right to file a *pro se* motion by urging the court to receive it and to allow defendant to express the underlying claims by way of allocution despite the technical deficiencies in the briefing. 2RP 3. Specifically, counsel stated: "[defendant], on his own, has filed his motion to withdraw which is

certainly his right to do so." 2RP 3. Counsel went on to say that he viewed defendant's statements to the court at this time as a "form of allocution." 2RP 3.

The court allowed defendant to make a statement regarding his motion, stating: "[Your attorney] is not necessarily joining in your motion, and he is your attorney. Your 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.

Defendant addressed the court and reiterated that he felt pressured by defense counsel to accept the State's plea. 2RP 4-8. Defendant alleged that he did not have adequate time to make a rational decision. 2RP 6. Defendant further stated that he did not trust defense counsel after counsel informed defendant that he would "run a clean case" if they proceeded to trial. 2RP 8.

In response, counsel informed the court he was not previously made aware of the allegations regarding his representation. He then invited the court to hold a separate hearing with substitute counsel to assess the merits of defendant's claims. 2RP 11. The court summarily "den[ied] th[e] request" for such a hearing. 2RP 12. The court then addressed defendant, stating "...this was not a quick plea. I spent a lot of time with you....I recall specifically the full conversation we had, and I was satisfied that you were indeed knowingly, intelligently and voluntarily

entering a plea of guilty." 2RP 12-13. The court subsequently denied defendant's motion to withdraw the guilty plea, stating "even though it is -may be deficient in the manner you filed it, I am denying it at this time, as well." 2RP 13.

Pursuant to the plea agreement, the court imposed an exceptional sentence of 360 months confinement followed by 36 months community custody. CP 64-65; 2RP 22. The agreed upon sentence allowed defendant to avoid a sentence of life without the possibility of release while sparing his then nine year old daughter from having to testify about the abuse. CP 24. Defendant nevertheless filed a timely notice of appeal. CP 79.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S *PRO SE* MOTION TO WITHDRAW HIS GUILTY PLEA WITHOUT APPOINTING ANOTHER ATTORNEY TO LITIGATE THE UNDERLYING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BECAUSE THE MOTION WAS CLEARLY ESTABLISHED TO BE MERELESS BY THE RECORD THAT PROVED DEFENDANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY PLEADED GUILTY TO RAPING HIS EIGHT YEAR OLD DAUGHTER.

A trial court is not required to waste valuable time to hold special hearings to consider frivolous or unjustified CrR 4.2(f) motions. *State v. Davis*, 125 Wn. App. 59, 68, 104 P.3d 11 (2004). When a defendant completes a written plea statement and admits to reading, understanding,

and signing it, there is a strong presumption the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). That "presumption of voluntariness is well nigh irrefutable" when the trial judge personally questions the defendant regarding those matters. *State v. Perez*, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982)(citing *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996)).

Withdrawal of a guilty plea is only required when necessary to correct a manifest injustice. *State v. Watson*, 63 Wn. App. 854, 856, 822 P.2d 327 (1992); CrR 4.2(f). Denial of effective counsel is an indicia of manifest injustice; however, an indigent defendant with counsel cannot force the expenditure of scarce judicial resources on the appointment of auxiliary counsel to litigate unfounded ineffective assistance claims at a special hearing that is not reasonably likely to serve any purpose other than to confirm the previously established voluntariness of a plea. See *State v. Harell*, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996); *State v. Stark*, 48 Wn. App. 245, 253, 738 P.2d 684 (1987); *State v. Rosborough*, 62 Wn. App. 341, 346, 814 P.2d 679 (1991)).

A court's finding that a defendant failed to allege facts sufficient to warrant a special evidentiary hearing on a CrR 4.2(f) motion will not be reversed absent a proven abuse of discretion. See *State v. Olmsted*, 70 Wn.2d 116, 119, 422 P.2d 312 (1966); *State v. Harell*, 80 Wn. App. at 804; *State v. Stark*, 48 Wn. App. at 253; *State v. Rosborough*, 62 Wn. App. at 346. Although evidentiary hearings held pursuant to CrR 4.2(f)

are critical stages to which the right to counsel attaches, the summary denial of such a motion based on evidence adduced when the plea was entered is not. See *State v. Harell*, 80 Wn. App. at 804; *State v. Winston*, 105 Wn. App. 318, 324-25, 19 P.3d 495 (2001).

Defendant erroneously relies on *State v. Harell*, to argue that he was denied his right to representation by not having substitute counsel appointed for him at sentencing. 80 Wn. App. 802, 911 P.2d 1034 (1996); App.Br. at 9. In *Harell*, the defendant moved to withdraw his guilty plea before sentencing, alleging ineffective assistance of counsel during the plea stage. *Id.* at 803. The trial court was persuaded that the defendant had alleged sufficient facts to warrant a hearing on the claim of ineffective assistance of counsel and motion to withdraw the plea. *Id.* at 804. That hearing was "a critical stage of the prosecution" requiring conflict-free counsel because defense counsel declined to assist the defendant, the attorney-client privilege was waived by order of the court, and counsel testified against the defendant as a witness for the State. *Id.*

The court ultimately ruled defense counsel was not ineffective and denied the defendant's motion to withdraw his plea. *Id.* at 803. The Court of Appeals reversed, applying the rule that a defendant has a constitutional right to appointed counsel at all critical stages of a criminal prosecution. *Id.* at 804-05.

Defendant argues that under *Harell*, remand is required in this case because the trial court did not appoint new counsel when defendant alleged ineffective assistance. App.Br. at 8. However, defendant overlooks the crucial difference between the facts in *Harell* and the proceedings in the present case. In *Harell*, the trial court concluded that the defendant had alleged sufficient facts to require an evidentiary hearing. *State v. Harell*, 80 Wn. App. at 803. The court erred in that case because it failed to appoint new counsel for the hearing that followed that determination. *Id.* at 805. Thus, *Harell* is entirely consistent with the well-established principle that a wholly conclusory claim of ineffective assistance is insufficient to require the appointment of substitute counsel. See *State v. Stark*, 48 Wn. App. 245, 253, 738 P.2d 684 (1987); *State v. Rosborough*, 62 Wn. App. 341, 346, 814 P.2d 679 (1991).

In this case, there was no hearing held regarding the alleged ineffective assistance of counsel or motion to withdraw because defendant did not present sufficient evidence to warrant one. The court noted as much before allowing defendant to allocute, stating "[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. Defendant incorrectly construes the court's decision to allow defendant to allocute before sentencing as an evidentiary hearing regarding defendant's unsubstantiated claims. In fact, defense counsel even invited the court to

hold an independent CrR 4.2(f) hearing to decide defendant's ineffective assistance of counsel allegations. 2RP 11. The court promptly interjected to reject that proposal, stating: "Okay. I think I've heard you...I am gonna [sic] deny that request." 2RP 12. The court then summarily denied defendant's motion because it was legally deficient and meritless on its face.

The decision was a proper exercise of the court's discretion because it was well grounded in its experience with the particular circumstances surrounding defendant's plea. The court's well founded reasoning was comprehensively explained to defendant on the record:

"[T]hrough the negotiations of your attorney and the State...you go...a recommendation of something less than life in prison without the possibility of parole...[T]his was not a quick plea. I spent a lot of time with you. And before that you had the opportunity to listen to several of the people that would testify against you, including the child who was sworn, testified under oath, and so you listened to her testimony" and the testimony of four other witnesses. "So over a one-day hearing on child hearsay issues, you heard the testimony of several people, a good part of the State's case. You had lots of opportunity to talk to your lawyer, confer with your lawyer. You had lots of opportunity to stop the plea process. And I am satisfied, even though I don't have a written copy of the colloquy, I recall specifically the full conversation we had, and I was satisfied that you were indeed knowingly, intelligently, and voluntarily entering a plea of guilty. So the motion to withdraw the guilty plea is denied."

2RP 12-13. That careful analysis cannot be fairly characterized as manifestly unreasonable or based on untenable grounds for untenable reasoning, so the ruling it supports should be affirmed.

The court properly concluded that defendant failed to allege sufficient facts to warrant an evidentiary hearing. There is no evidence in the record to suggest that a "manifest injustice" occurred, and that withdrawal was necessary. CrR 4.2(f). Defendant informed the court at the plea hearing that he understood his rights to a trial, to remain silent, to confront witnesses, and his presumption of innocence. 1RP 4-5. Defendant stated that he understood that he gave up all of those rights by pleading guilty. 1RP 5. Defendant stated that he was pleading guilty freely and voluntarily. 1RP 9. He acknowledged as much when he entered his written statement on plea of guilt and signed that he read, discussed with his attorney, and understood the agreement, and that he was entering into it voluntarily. CP 24-25. Contrary to his statements at sentencing, defendant had also informed the court at the plea hearing that no one was "forcing" him to plead guilty. 1RP 9.

Defendant's unsubstantiated allegations in support of his motion to withdraw his guilty plea did not allege sufficient facts to require the court to hold an evidentiary hearing or appoint substitute counsel. Defendant's reliance on *Harell* is misplaced, and as such defendant fails to show that he was denied adequate representation.

2. DEFENDANT FAILED TO PROVE HE ENDURED AN OUTRIGHT DENIAL OF COUNSEL DURING A CRITICAL STAGE OF THE CRIMINAL PROSECUTION FOR COUNSEL ADVOCATED ON DEFENDANT'S BEHALF THROUGHOUT THE CHALLENGED PROCEEDING DESPITE DETERMINING HE WAS ETHICALLY PROHIBITED FROM ENDORSING DEFENDANT'S MERITLESS MOTION TO DISMISS.

A defendant is entitled to counsel at all critical stages of a criminal prosecution. *State v. Davis*, 125 Wn. App. at 63-64. But only an outright denial of the right can be presumed prejudicial. When a defendant fails to prove an outright denial of counsel, the success of an ineffective assistance claim turns on whether the defendant can prove (1) counsel's performance was deficient, in that it fell below an objective standard of reasonableness; and (2) counsel's deficient performance was prejudicial, in that there is a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)(citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); U.S. Const. amend. VI; Wash. Const. art. I § 22 (amend. X). Reviewing courts begin with the "strong presumption... counsel rendered adequate assistance and made all significant decisions

in the exercise of reasonable professional judgment." *State v. Glenn*, 86 Wn. App. 40, 45, 935 P.2d 679 (1997).

Defendant mistakenly relies on *Harell* to argue he endured an outright denial of counsel. The facts here differ significantly from those in *Harell*. In that case, the defendant was denied the right to counsel outright because his attorney declined to assist him with his motion to withdraw his guilty plea, and testified as a witness for the State at a full CrR 4.2(f) hearing. *State v. Harell*, 80 Wn. App. at 805. Here, in stark contrast, counsel assisted defendant with many aspects of presenting his CrR 4.2(f) motion and never testified<sup>2</sup> against defendant as a witness for the State.

Counsel first facilitated defendant's efforts to pursue the motion before the challenged proceeding by advising him to reduce his reasons for wanting to withdraw the plea to writing. 2RP 2. Counsel then opened at sentencing by alerting the court to defendant's desire to withdraw his plea. 2RP 2. Counsel directed the court to defendant's *pro se* briefing while advocating defendant's right to file it. 2RP 3. He forthrightly

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<sup>2</sup> Defendant confuses counsel's statements to the court as testimony against defendant. Testimony in the context of a court proceeding requires the party testifying to relate facts under oath, in open court, subject to cross-examination; or, to submit a written statement under oath under penalty of perjury. See *State v. Rohrich*, 132 Wn.2d 472, 477, 939 P.2d 697 (1997); *State v. Sua*, 115 Wn. App. 29, 45-46, 60 P.3d 1234 (2003). Here, counsel did not testify under oath either in court or through affidavit. Rather, counsel addressed the court for the purposes of alerting it to defendant's claim. Counsel advocated for his client to the best of his abilities within the confines of his ethical obligations by proposing a means of having defendant's claim heard on the merits in a separate evidentiary hearing, and further preserved the record on the matter for review.

alerted the court that he perceived his ethical duty not to advance untenable claims prevented him from endorsing the motion, but nevertheless urged the court to allow defendant to express his concerns through allocution. 2RP 3. Once it became clear defendant was advancing a theory of ineffective representation, counsel again attempted to advance defendant's interests by proposing the court give defendant an opportunity to pursue those claims at a special hearing with different counsel. 2RP 11. The court rejected that proposal without hearing testimony from defense counsel, or others. 2RP 12. Counsel then immediately transitioned into representing defendant at sentencing. 2RP 17-18. Once sentence was imposed, counsel safeguarded defendant's right to seek review of the court's denial of his motion by filing a notice of appeal on defendant's behalf before the hearing adjourned. 2RP 23. At no point did counsel abandon defendant or become antagonistic or adversarial toward his position on the issues. *Compare with Harell*, 80 Wn. App. 803-05.

Defendant failed to prove an outright denial of his right to counsel. A fair assessment of the entire record of counsel's conduct irrefutably demonstrates counsel continued to represent defendant and advocate on his behalf within the confines of counsel's ethical

responsibilities as an officer of the court. *See e.g.*, RPC 3.1,<sup>3</sup> RPC 3.3,<sup>4</sup> CR 11.<sup>5</sup>

Defendant likewise failed to show how counsel's representation at the proceeding was constitutently deficient. In fact, defendant concedes counsel appropriately responded to the issues raised at sentencing to support his claim of judicial error. App.Br. at 9. Defendant rightly does not independently raise ineffective assistance as an assignment of error, for counsel's observance of the ethical responsibilities that prevented him from endorsing defendant's motion to withdraw the plea cannot serve as legitimate proof of deficient performance. *See State v. Kirwin*, 137 Wn. App. 387, 394-95, 153 P.3d 883 (2007); *United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991); *State v. Hamilton*, 179 Wn. App. 870, 320 P.3d 142, 149 (2014). For the same reason, defendant's suggestion that counsel was somehow deficient for making it clear he intended to try a "clean case" is as disturbing as it is wrong. *See* 2RP 7; App.Br. at 5, 9.

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<sup>3</sup> Meretricious Clams and Contentions. "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue there, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law...."

<sup>4</sup> Candor Toward the Tribunal. "(a) A lawyer shall not knowingly...(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, [or] (4) offer evidence that the lawyer knows to be false...."

<sup>5</sup> Signing and Drafting of...Motions..."The signature of...an attorney constitutes a certificate by the...attorney that the...attorney has read the...motion...and that to the best of the...attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay..."

Defendant is similarly unable to meet the required showing of prejudice as there is no reason to believe the court would have granted defendant's motion to withdraw if it had been presented by different counsel at a subsequent proceeding. *See e.g.*, 2RP 12-13. The court was crystalline in its position that the plea was knowingly, voluntarily, and intelligently entered based on the totality of the court's personal experience with the defendant over the course of proceedings that culminated in the court's acceptance of his plea. That well reasoned assessment should not be second guessed because it is well supported by the written plea statement and defendant's colloquy with the court. 1RP 4-10; CP 24-25; *State v. Lindahl*, 114 Wn. App. 1, 18-19, 56 P.3d 589 (2002)(reviewing courts rightly defer to the credibility determinations made by a trial court during entry of guilty pleas and the imposition of sentence).

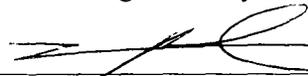
Defendant was not denied counsel for his motion to withdraw his guilty plea. Defendant's motion to withdraw his plea was groundless and his counsel had no obligation to advocate for a meritless motion. Nevertheless, defense counsel made sure that defendant had an opportunity to air his concerns to the court. Thus, counsel did not abandon his duty to represent his client.

D. CONCLUSION.

Defendant fails to show that his right to representation was denied where the court determined that defendant failed to allege sufficient facts to hold an evidentiary hearing regarding his *pro se* motion. Defense counsel was not obligated to argue a meritless motion. For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction and sentence.

DATED: June 30, 2014.

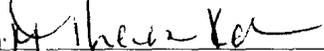
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\_\_\_\_\_  
Miryana Gerassimova  
Rule 9 Legal Intern

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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.

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# PIERCE COUNTY PROSECUTOR

**June 30, 2014 - 1:50 PM**

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