

NO. 46693-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL JACKSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00235-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
I. COUNTERSTATEMENT OF THE ISSUES.....	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT.....	2
A. THE PLEA OF GUILTY WAS VOLUNTARY.....	2
B. THE RECORD DOES NOT SUPOPRT MR. JACKSON'S CLAIM OF INEFFECTIVE ASSISTANCE.....	4
IV. CONCLUSION.....	7
CERTIFICATE OF DELIVERY.....	8

TABLE OF AUTHORITIES

Washington Cases

<i>In re Det. of Moore</i> , 167 Wn.2d 113, 216 P.3d 1015 (2009).....	5
<i>State v. Branch</i> , 129 Wn. 2d 635, 919 P.2d 1228 (1996).....	2
<i>State v. Byrd</i> , 30 Wn. App. 794, 638 P.2d 601 (1981).....	7
<i>State v. Johnson</i> , 180 Wn. App. 318, 327 P.3d 704 (2014).....	5
<i>State v. Jones</i> , No. 85236-7, 2015 WL 3646445, at *5 (Wash. June 11, 2015).....	4
<i>State v. Knotek</i> , 136 Wn. App. 412, 149 P.3d 676 (2006).....	2
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995), <i>as amended</i> (Sept. 13, 1995).....	7
<i>State v. Perez</i> , 33 Wn. App. 258, 654 P.2d 708 (1982).....	2
<i>State v. Sandoval</i> , 171 Wn.2d 163, 249 P.3d 1015 (2011).....	4
<i>Wood v. Morris</i> , 87 Wn.2d 501, 554 P.2d 1032 (1976).....	2
 <u>Washington Court Rules</u>	
CrR 4.2 (g).....	2

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the court erred in finding the guilty plea to be voluntary?
2. Whether Mr. Jackson's declaration provides a sufficient basis to review a claim of ineffective assistance of counsel?

II. STATEMENT OF THE CASE

The appellant, Daniel Jackson, pleaded guilty to Assault in the Fourth Degree on Aug. 7, 2014. RP 3 (Aug. 7, 2014).

Mr. Jackson signed a written statement on plea of guilty. CP 29–33. Mr. Jackson acknowledged that he read the statement, reviewed it with his attorney and had no questions about it, and that it was his signature on it. RP 2–3 (Aug. 7, 2014). Additionally, the court orally inquired of Mr. Jackson regarding whether Mr. Jackson was threatened or coerced or made any promises to get Mr. Jackson to plead guilty. Mr. Jackson stated no. RP 3 (Aug. 7, 2014). Then the court asked Mr. Jackson if he was doing it freely and voluntarily. *Id.* at 4. Mr. Jackson said yes. *Id.*

A month later, on Sept. 8, 2014, Mr. Jackson filed a notice of appeal. Then, on Oct. 1, 2014, Mr. Jackson filed a motion and declaration to withdraw the plea. CP 12, 14. The trial court denied the motion on Nov. 24, 2014 in a written memorandum opinion. CP 44. On appeal, Mr. Jackson argues that his change of plea on Aug. 7, 2014 was involuntary based upon the Oct. 1, 2014 declaration.

III. ARGUMENT

A. THE PLEA OF GUILTY WAS VOLUNTARY.

Mr. Jackson argues that the trial court erred in accepting his plea of guilty because it was not voluntary. *See* Appellant Br. at 5.

“The State bears the burden of proving the validity of a guilty plea,” including the defendant’s “[k]nowledge of the direct consequences” of the plea, which the State may prove from the record or by clear and convincing extrinsic evidence. *State v. Ross*, 129 Wash.2d 279, 287, 916 P.2d 405 (1996). A defendant, in contrast, bears the burden of proving “manifest injustice,” defined as “an injustice that is obvious, directly observable, overt, not obscure.” *State v. Saas*, 118 Wash.2d 37, 42, 820 P.2d 505 (1991) (quoting *State v. Taylor*, 83 Wash.2d 594, 596, 521 P.2d 699 (1974)).

State v. Knotek, 136 Wn. App. 412, 423, 149 P.3d 676 (2006).

Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances. *State v. Branch*, 129 Wn. 2d 635, 642, 919 P.2d 1228 (1996) (citing *Wood v. Morris*, 87 Wn.2d 501, 506, 554 P.2d 1032 (1976)). The record of the plea hearing must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea. *Wood v. Morris*, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976).

“When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea’s voluntariness.” *State v. Perez*, 33 Wn.

App. 258, 261–62, 654 P.2d 708 (1982) (citing *In re Keene*, 95 Wn.2d 203, 206–07, 622 P.2d 360 (1980)).

“When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.” *Perez*, 33 Wn. App. at 261–62 (citing *State v. Ridgley*, 28 Wn. App. 351, 623 P.2d 717 (1981)).

Here, the record shows that Mr. Jackson entered his plea voluntarily. Mr. Jackson also concedes that “the plea hearing did not raise significant issues of voluntariness.” *See* Appellant Br. at 5. Mr. Jackson filled out a written statement on plea of guilty in compliance with CrR 4.2 (g). CP 29–33. Mr. Jackson acknowledged that he read the statement, reviewed it with his attorney and had no questions about it, and that it was his signature on it. RP 2–3 (Aug. 7, 2014). Additionally, the court orally inquired of Mr. Jackson regarding whether Mr. Jackson was threatened or coerced or made any promises to get Mr. Jackson to plead guilty. Mr. Jackson stated no. RP 3 (Aug. 7, 2014). Then the court asked Mr. Jackson if he was doing it freely and voluntarily. *Id.* Mr. Jackson said yes.

However, Mr. Jackson argues that he filed an affidavit with his motion to withdraw his plea on Oct. 10, 2012 stating that he would not have changed his plea but for his counsel’s failure to investigate. This declaration

was not before the court when Mr. Jackson entered his guilty plea on Aug. 7, 2014, so it is not a basis to show the court erred in finding the plea voluntary.

Mr. Jackson's argument is more appropriately analyzed as an ineffective assistance of counsel problem. Ineffective assistance of counsel can render a plea of guilty involuntary. *See State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011) (citing *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)).

B. THE RECORD DOES NOT SUPPORT MR. JACKSON'S CLAIM OF INEFFECTIVE ASSISTANCE.

A claim that counsel was ineffective is a mixed question of law and fact that we review de novo. *Strickland*, 466 U.S. at 698; *In re Pers. Restraint of Brett*, 142 Wash.2d 868, 873, 16 P.3d 601 (2001).

"A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wash.2d 631, 663, 845 P.2d 289 (1993) (emphasis omitted) (citing *Strickland*, 466 U.S. at 687–88). Thus, to prevail on a claim of ineffective assistance of trial counsel, an appellant must show both deficient performance and prejudice. *Strickland*, 466 U.S. at 687; *Hendrickson*, 129 Wash.2d at 77–78, 917 P.2d 563. To show prejudice, the appellant need not prove that the outcome would have been different but must show only a "reasonable probability"—by less than a more likely than not standard—that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wash.2d at 78, 917 P.2d 563.

State v. Jones, No. 85236-7, 2015 WL 3646445, at *5 (Wash. June 11, 2015).

“On direct appeal the scope of our review is limited to matters in the trial record.” *State v. Johnson*, 180 Wn. App. 318, 324, 327 P.3d 704 (2014) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

Here, Mr. Jackson has not established deficient performance. Mr. Jackson presents his declaration (CP 12) filed with his motion to withdraw his guilty plea as his only factual basis to establish ineffective assistance of counsel. Mr. Jackson’s declaration does not provide any facts from which the Court can determine whether or not counsel’s performance was deficient.

Mr. Jackson’s declaration contains no reference to any evidence showing the existence of a video favorable to Mr. Jackson or that counsel failed to interview witnesses. There is no reference to any evidence that counsel did not adequately prepare Mr. Jackson’s case. There is no evidence that Mr. Jackson was coerced by his attorney to plead guilty. The declaration merely declares Mr. Jackson’s belief and nothing more. This is insufficient to overcome a strong presumption of effective assistance. *See In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009).

Mr. Jackson argues that although his counsel Mr. Stalker never admitted his failure to obtain the Safeway video, the prosecutor in his argument to the court did reveal that no video was ever obtained. *See Appellant Br.* at 12 (referring to RP 7 (10-23-14)). This wording seems to suggest that there was a video . . . This also suggests the prosecutor and

defense counsel knew about it or should have and failed to obtain it. However, what the prosecutor argued was that Mr. Jackson's declaration does not present any information showing that a video even *exists*:

Well, Judge, one of the things that I noted about Mr. Jackson's declaration, I said it a couple times, its's 14 lines long. There's nothing attached to it, *theres's no information that a video exists*, there's no information that anything was not shown to him. There's no information that there are other witnesses. There's no information that he was prejudiced in any manner, so none of the information that would be necessary to begin to start presenting a motion on his behalf is not there . . .

RP 7 (Oct. 23, 2014).

It should also be pointed out that Mr. Jackson's defense counsel, Mr. Stalker, never admitted any failure to obtain the Safeway video only in so far as there was *no testimony* at Mr. Jackson's motion to withdraw his plea. Mr. Jackson's attorney for that motion, for whatever reason, apparently did not see a need for having a fact finding hearing and having Mr. Jackson and his counsel Mr. Stalker testify. *Id.* at 4–6. There was also no declaration by Mr. Stalker filed with Mr. Jackson's motion. There was only briefing and argument. CP 14, 6, RP 1–10 (Oct. 23, 2014).

The trial record and declaration itself contains no information to substantiate Mr. Jackson's beliefs that counsel's performance was deficient. Furthermore, there is nothing on the record establishing the contents of the assumed video which would exonerate Mr. Jackson. Therefore, Mr. Jackson

has not established prejudice from the alleged inexcusable failure to investigate the assumed video.

“If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995) (citing *State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981)). “A personal restraint petition is the appropriate procedure to raise a claim of ineffective assistance of counsel based upon matters outside the record on appeal.” *State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981) (citing *State v. Bugai*, 30 Wn. App. 156, 158, 632 P.2d 917 (1981)).

IV. CONCLUSION

Mr. Jackson’s declaration does not point to any evidence to substantiate his beliefs that his attorney’s did not adequately investigate his case. On the other hand, the record clearly shows Mr. Jackson’s plea was voluntary.

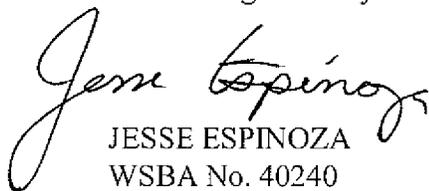
Therefore, Mr. Jackson’s argument that he was prejudiced by counsel’s deficient performance fails and the conviction should be affirmed.

//

Respectfully submitted this 28th day of July, 2015.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney

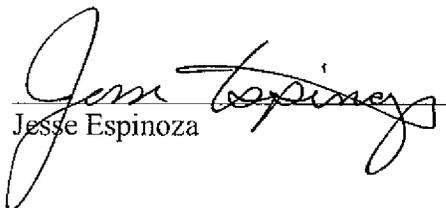


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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Lise Ellner on July 28, 2015.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

CLALLAM COUNTY PROSECUTOR

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