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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

RICHARD LEFFLER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 15-1-00177-9

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1) Because Leffler conceded in the trial court that he has the ability to work and earn an income to pay the court-ordered LFOs, and because he did not object, and thus contributed to the court's finding, when the court found that he had the ability to pay LFOs, Leffler's appeal of the LFOs should be denied because he raises the claim for the first time on appeal.
- 2) Because Leffler's motion to withdraw his guilty plea was brought post-judgment, he must make a showing of manifest injustice and must fulfill the requirements of CrR 7.8(b) in order to withdraw his post-judgment guilty plea; however, because Leffler has not made either showing, this Court should affirm the trial court's denial of Leffler's post-judgment motion.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Leffler's statement of facts, except where the State provides additional or contrary facts as needed to develop the State's arguments below. RAP 10.3(b).

C. ARGUMENT

- 1) Because Leffler conceded in the trial court that he has the ability to work and earn an income to pay the court-ordered LFOs, and because he did not object, and thus contributed to the court's finding, when the court found that he had the ability to pay LFOs, Leffler's appeal of the LFOs should be denied because he raises the claim for the first time on appeal.

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When Leffler first appeared for sentencing in this case, on November 7, 2016, his attorney asked to continue the sentencing hearing for four weeks because Leffler had a job and wanted to make \$1,800.00 to pay his mortgage before beginning his sentence. RP 437-38. When Leffler next appeared for sentencing five weeks later, on December 12, 2016, the trial court addressed Leffler and asked him, “is there anything that keeps you from being able to work and pay your fines?” RP 445. Leffler answered, “[n]o, no.” RP 446. The trial court judge then addressed Leffler’s counsel and asked, “anything further?” RP 446. Counsel answered, “[n]othing further, your Honor.” RP 446.

The trial court judge then made a specific finding, on the record in open court, “that Mr. Leffler has the ability to meet his legal financial obligations[.]” RP 446. Throughout this process, there was no objection from Leffler or his counsel. The trial court ordered Leffler to pay \$2,626 in legal financial obligations (LFOs). This amount included non-discretionary LFOs of \$800, which included a \$500 victim assessment (RCW 7.68.035(1)(a)), a \$100 DNA fee (RCW 43.43.7541), and a \$200 filing fee (RCW 36.18.020(2)(h)). CP 17. The remaining costs represent the discretionary costs that are at issue in this case, as follows: \$976 for Sheriff’s service fees (RCW 10.01.160), a \$600 court-appointed attorney

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fee (RCW 9.94A.760), and a \$250 jury demand fee (RCW 36.18.016(3)(b)). CP 17. The total of the discretionary costs at issue is \$1,826. Neither Leffler nor his attorney voiced any objection when the court imposed these costs. RP 446-47.

In addition to the fees and costs, the trial court imposed 240 hours of community service in lieu of 30 days in jail. RP 446; CP 15. In a subsequent hearing, Leffler told the court that he had completed the community service. 2-RP 4. Leffler told the court that he'd been cutting firewood for seniors and that he had five cords of cut wood ready for delivery. 2-RP 11-15. Leffler told the court, "I've cut all the wood" and he said, "... the majority of the hours is cutting the wood." RP 16. Leffler's attorney informed the court that "Mr. Leffler had done some hours chopping wood for a community action program, but weren't able to confirm them with anybody or things like that, so he had to start with the Treasures." 2-RP 34.

Although he never voiced any objection while in the trial court, for the first time on appeal Leffler now contends that the trial court erred by not conducting an adequate inquiry into his ability to pay discretionary LFOs. Br. of Appellant at 3-10. The State contends that Leffler's challenge should fail because in the trial court he conceded his ability to

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pay discretionary LFOs, which amounted to only \$1,826 (CP 17), and because his ability to cut five cords of wood and to complete 240 hours of community service demonstrates his ability to pay the discretionary LFOs at issue here.

But in any event, the State contends that this court should decline review of this issue because Leffler did not preserve the alleged error by voicing an objection in the trial court. “[A] defendant has the obligation to properly preserve a claim of error” and “appellate courts normally decline to review issues raised for the first time on appeal.” *State v. Blazina*, 182 Wn.2d 827, 830, 834, 344 P.3d 680 (2015); RAP 2.5(a). Because Leffler conceded his ability to work and earn money to pay the LFOs, and because he did not object in the trial court, he contributed to the lack of detail in the record and contributed to the issue that he now seeks to raise for the first time on appeal. “Three requirements compose a claim fit for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008) (quoting *First United Methodist Church v. Hr'g Exam'r*, 129 Wn.2d 238, 255–56, 916 P.2d 374 (1996) (internal quotation marks omitted)).

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In summary, the State contends that the record shows that Leffler has the ability to pay the \$1,826 of discretionary LFOs at issue here, but this court should decline review of this issue because Leffler did not preserve it by objecting in the trial court where the error could have been easily cured with a more detailed record. To the extent that Leffler crafts his argument on this point as a claim of ineffective assistance of counsel because his counsel did not object to the imposition of LFOs, this claim, too, should fail. Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Here, Leffler has not shown, and cannot show, that there is any probability that the outcome of the sentencing hearing would have been different had his attorney objected to the imposition of discretionary LFOs. To the contrary, the

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record shows that Leffler has the ability to cut cords of wood, perform 240 hours of community service, and to earn \$1,800 in matter of weeks in order to pay his mortgage. RP 437-38, 445-47; 2-RP 4, 8-9, 11-16.

- 2) Because Leffler's motion to withdraw his guilty plea was brought post-judgment, he must make a showing of manifest injustice and must fulfill the requirements of CrR 7.8(b) in order to withdraw his post-judgment guilty plea; however, because Leffler has not made either showing, this Court should affirm the trial court's denial of Leffler's post-judgment motion.

Leffler contends that because he was dissatisfied with the performance of his trial attorney who represented him at a trial that ended in a mistrial, the trial court erred by denying his motion to withdraw his guilty plea that he entered with his attorney's assistance after his trial had ended in a mistrial. Br. of Appellant at 13. In the trial court, Leffler alleged ineffective assistance of counsel and moved to withdraw his guilty plea. CP 215-18. The trial court judge denied Leffler's motion. CP 214; 2-RP 28-31.

Where a defendant claims ineffective assistance of counsel as the basis for a motion to withdraw a pre-judgment guilty plea, the standard of review for claims of erroneous denial of the motion is de novo review by

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the appellate court. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956

(2010). However:

A motion to withdraw a plea of guilty after judgment and sentence has been entered is addressed to the sound discretion of the court, and will be treated as an application to vacate the judgment pursuant to RCW 4.72.010. In addition to establishing one of the statutory grounds as a basis for vacating the judgment, it is necessary to show a prima facie defense to the charge. *State v. Loux*, 69 Wn.2d 855, 420 P.2d 693 (1966).

State v. Mempa, 78 Wn.2d 530, 533, 477 P.2d 178 (1970).

To prevail on his claim of ineffective assistance of counsel in the context of a guilty plea, Leffler must meet the two-part test established by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and must show that his counsel's performance fell below an objective standard of reasonableness and that his counsel's performance prejudiced him. *Strickland* at 687; *State v. Stowe*, 71 Wn. App. 182, 186, 858 P.2d 267 (1993).

To show prejudice in this context, a defendant must show that there is a reasonable probability that but for his attorney's errors, he would not have pleaded guilty and would instead have demanded a trial. *State v. Garcia*, 57 Wn. App. 927, 933, 791 P.2d 244 (1990). A defendant seeking to withdraw a guilty plea bears the burden of proving a manifest injustice. *State v. Ross*, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996). However,

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because Leffler brought his motion post-judgment, to withdraw his guilty plea he was required to meet the requirements of both CrR 4.2(f) and CrR 7.8, and “meeting only the manifest injustice standard of CrR 4.2(f) is insufficient when considering a postjudgment motion to withdraw a guilty plea[.]” *State v. Lamb*, 175 Wn.2d 121, 129, 285 P.3d 27 (2012).

This case revolves around Leffler’s arrest for possession of a stolen quad on April 15, 2015. CP 80-81. Leffler told the investigating officer that he bought the quad for \$1,500. RP 316. Leffler said that in lieu of a title, the seller gave him some auction paperwork that showed that the seller had bought the quad at an auction in Elma. RP 316-17. The officer asked to see the paperwork, but Leffler never provided it. RP 317-18, 325.

Leffler testified at the trial on September 8, 2016, and said that he bought the quad from a man in Elma. RP 342. He said that the seller provided him with a bill of sale and a yellow receipt from an auction. RP 343. Leffler testified that although he had never been able to find the paperwork and provide it to the investigating officer, he “finally found the bill of sale” but “couldn’t find the receipt.” RP 346. He testified that he found it shortly before the trial started. RP 346. During his testimony, Leffler addressed his attorney and said, “I don’t have it.” RP 346. He

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then added, "I believe you have it." RP 346. On cross-examination Leffler was asked about the paperwork, and he answered, "I believe there's a copy of it in the file. I provided it to my attorney, so -- ." RP 354. Despite his claim of having found the paperwork recently before trial, Leffler still had no information about the seller, and at trial Leffler testified that when he saw the paperwork, he saw "some numbers on it, and a couple names, and what -- didn't pay much attention to it." RP 355.

After the trial was completed, the jury deliberated and returned a guilty verdict for one count of bail jumping but was unable to return a verdict on the possession of stolen property charge. RP 418. The court then set the next hearing for October 10, 2016, with the retrial to occur on November 22, 2016. RP 420-22. When Leffler appeared at the next hearing on October 10, his attorney informed the court that the parties had reached a plea agreement and that Leffler would be pleading guilty to a reduced, amended charge of possession of stolen property in the third degree. RP 426. Leffler's counsel informed the court that he reviewed a statement of defendant on plea of guilty with Leffler and that Leffler was entering the plea knowingly, voluntarily and freely. RP 428. Leffler's counsel informed the court as follows:

Mr. Leffler has no problem understanding, reading or writing the English language. He obtained his GED. I'm confident that he

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understands what he's doing and the rights he's giving up, as well as the benefit of this plea bargain.

RP 430. The trial court judge then engaged in a colloquy with Leffler and confirmed with him that he understands the English language, that he'd had enough time to discuss the case with his lawyer, that he'd signed the plea form, and that he understood the amended charge to which he was pleading guilty. RP 431-32. The trial court confirmed that Leffler understood that he was giving up the right to a trial. RP 432. With full knowledge of the rights he was waiving, Leffler pled guilty. RP 433; CP 31-35. Leffler confirmed that he was pleading guilty freely and voluntarily and that no one had done anything to make him plead guilty. RP 434. The prosecutor provided the factual basis for Leffler's *Alford* plea, and the court accepted the plea. RP 434-35.

Leffler next appeared in court on November 7, 2016, for sentencing, but the sentencing hearing was set over to December 12, 2016. RP 437-40. There was no mention of the bill of sale paperwork or any desire to withdraw Leffler's plea. *Id.* Leffler next appeared on December 12, 2016. RP 441. The trial court completed the sentencing hearing, and there was no mention of any interest in withdrawing the plea. RP 441-50.

On March 14, 2017, the court called the case for a review of the community service condition of sentencing. 2-RP 1. Leffler did not

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appear at the hearing, and the court ordered a warrant for his arrest. 2-RP 1-2. The court next called the case on April 12, 2017, after the warrant was served and Leffler had been arrested. 2-RP 3. At this hearing, Leffler made no mention of a desire to withdraw his guilty plea. 2-RP 3-6. The court next called the case on April 17, 2017. 2-RP 7. The parties again discussed Leffler's community service obligations of sentencing and discussed his failure to comply, and again there was still no mention of a desire to withdraw the guilty plea. 2-RP 7-10.

On May 22, 2017, Leffler filed a motion to withdraw his guilty plea. CP 169. On May 23, 2017, the court called the case in open court, to once again review the community service requirement. 2-RP 11. The court noted the fact that Leffler had filed a motion to withdraw his guilty plea. 2-RP 11. The court set the matter over to June 6, 2017, to address community service and to also address Leffler's motion to withdraw his guilty plea. 2-RP 12.

At the June 6 hearing, Leffler told the court that he had discovered new evidence after he pled guilty. 2-RP 22. Leffler then outlined a number of complaints about his trial counsel. 2-RP 23-24. The trial court denied Leffler's motion to withdraw the guilty plea. 2-RP 28-31. No new evidence was presented or described. 2-RP 14-35.

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“Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily.” *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). Here, the trial court’s colloquy with Leffler, together with the written plea form, show that he entered his guilty plea knowingly, voluntarily and intelligently. RP 428-35; CP 31-35. To withdraw his plea post-judgment, Leffler was required to make the showing required “by CrR 7.8(b), which states that a court ‘may relieve a party from a final judgment’ for several reasons including misstate, newly discovered evidence, fraud, a void judgment, or any other reason justifying relief.” *In re Stockwell*, 179 Wn.2d 588, 595, 316 P.3d 1007 (2014). On the facts of this case, the trial court did not abuse its discretion by denying Leffler’s post-judgment motion to withdraw his guilty plea.

D. CONCLUSION

Because Leffler conceded that he had the ability to work and earn money to pay the LFOs ordered by the court, and because he did not object in the trial court when the court ordered LFOs, he should not be permitted to raise a claim against the LFOs for the first time on appeal.

Because Leffler has not shown that his plea of guilty constitutes a manifest injustice, the trial court did not abuse its discretion when it denied his post-judgment motion to withdraw his guilty plea.

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The State asks that this Court deny Leffler's appeal and affirm his conviction.

DATED: April 16, 2018.

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