

FILED  
Court of Appeals  
Division II  
State of Washington  
3/7/2018 1:54 PM

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

STATE OF WASHINGTON,

Respondent,

vs.

SOPHEA SAR,

Appellant.

No. 50928-8-II

MOTION TO WITHDRAW AS  
COUNSEL PURSUANT TO  
*ANDERS v. CALIFORNIA*, RAP  
15.2(h) & RAP 18.3(a)

**I. IDENTITY OF MOVING PARTY**

STEPHANIE C. CUNNINGHAM, court-appointed counsel for Appellant SOPHEA SAR, is the moving party and seeks the relief designated in Part II.

**II. STATEMENT OF RELIEF SOUGHT**

Counsel has reviewed the trial record, reviewed the transcripts, researched potential issues, discussed the case with other attorneys, and sought Sar's input. After such actions, counsel has determined there are no non-frivolous issues to raise on appeal. Accordingly, counsel moves to withdraw from further representation of Sar.

**III. GROUNDS FOR RELIEF**

This motion is brought pursuant to the requirements of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1977), RAP 15.2(i) (allowing counsel to withdraw on appeal if counsel can find no basis for a good faith argument for review) and RAP 18.3(a).

This motion is based on the records and files herein.

**IV. ISSUES THAT COULD BE ARGUED**

1. Did the trial court err when it ruled that Sophea Sar's custodial statements were voluntary and not the product of coercion?
2. Was Sophea Sar's guilty plea made knowingly and voluntarily and with a full understanding of the offenses and consequences?
3. Did the trial court err when it denied Sophea Sar's motion to withdraw his guilty plea?
4. Did Sophea Sar establish that his defense counsel pressured and coerced him into pleading guilty?

**V. REFERENCES TO THE RECORD**

The State charged Sophea Sar with one count each of first degree robbery, first degree burglary, first degree kidnapping, and first degree trafficking in stolen property. (CP 8-10) The State alleged that Sar or an accomplice was armed with a firearm during the commission of the robbery and kidnapping offenses, and that the burglary offense was aggravated because the victim was present. (CP 8-10)

The State planned to introduce Sar's custodial statements at trial, so the court held a hearing pursuant to CrR 3.5. The investigating detectives testified that they interviewed Sar in jail while he was in custody on another

matter. (RP 46, 59) After being advised of his Miranda rights and signing an advice of rights form, Sar agreed to give a statement. (RP 48-49, 60-62; Exh. P1, P2) The detectives later asked Sar if he would allow them to make a recording of his statement, but Sar declined and ended the interview. (RP 52, 65)

Sar testified that the detectives told him that his wife, Setthey Srey, was in custody, and that they knew he and Srey were fighting to regain custody of their children. (RP 75) According to Sar, the officers told him they would release Srey if he agreed to talk to them. (RP 75) If he refused, Srey would be charged with first degree robbery and they would both get longer sentences. (RP 75) Sar felt he had no choice but to waive his rights and talk with the detectives. (RP 75)

The detectives testified that they did not threaten Sar or try to coerce him into making a statement. (RP 51-52, 66) Although the detectives mentioned that they had spoken to Srey, they denied telling Sar that they would not investigate or charge Srey if he agreed to talk to them. (RP 52-53, 55, 63, 66, 72)

The trial court found the detectives' testimony to be more credible. (RP 93-94) The court ruled that Sar's statements were not coerced and were made after a knowing and voluntary waiver of his rights. (RP 92-95) As a result of the ruling, Sar's counsel indicated that the defense would

need to reconsider its strategy and may want to resolve the case with a plea bargain. (RP 97)

Sar and the State did enter into a global plea agreement for this and two other pending criminal cases. (RP 101-02; CP 16-28) Pursuant to the agreement, the information in this case was amended to allege first degree robbery (RCW 9A.56.190, .200) while armed with a firearm (RCW 9.94A.533), first degree burglary (RCW 9A.52.020), and unlawful imprisonment (RCW 9A.40.040). (CP 14-15, 16-17) The parties stipulated to Sar's offender score and standard range. (RP 102; CP 17, 35-37) The State agreed to recommend concurrent sentences on all charges from this and the other cases, for a term of confinement totaling 137 months. (RP 102; CP 17, 35-37)

In his written plea statement, Sar acknowledged that he had been informed of and understood the elements of the crimes he was pleading to, the rights that he was giving up by pleading guilty, the sentencing and other consequences of a guilty plea, and the facts that would prove the charges. (CP 16-21)

At the plea hearing, Sar confirmed that he had discussed the plea agreement with his defense attorney, and that no threats were made to induce him to plead guilty. (RP 104) Sar also engaged in a colloquy in which he confirmed that he understood the constitutional rights he was

giving up by pleading guilty, the nature of the charges and factual allegations supporting the charge, and the standard range sentence and other sentencing consequences. (RP 103-07)

The trial court read out loud the factual statement from Sar's written plea agreement:

On November 22, 2015, in the State of Washington, I and another person, knowingly broke into the home of 67-year-old J. Chap, who was home at the time. We did so with the intent of robbing Chap and stealing his property. We found Chap in his bedroom and forced him to the ground. We demanded his property. And one of us remained with Chap holding him against his will while the other went through the home collecting belongings to steal. I understand that Mr. Chap maintains that we both had firearms that were brandished, including one of us placing a firearm to his head. I deny that I personally had a firearm, and maintain that only my accomplice was armed with a firearm. Our actions in the home placed Chap in reasonable and immediate apprehension of harm, and was designed to effectuate the theft of his property. We left the home with a large amount of his property, some of which we intended to turn around and sell to others.

(CP 25-26) Sar verbally acknowledged that this was an accurate statement of the facts. (RP 107-08)

The trial court found that Sar's plea was knowing and voluntary, found an adequate factual basis for the charges, and accepted Sar's guilty plea to all three counts. (RP 108-09)

Sar moved to withdraw his plea before sentencing. (RP 114, 112; CP 31-33) At a hearing on the motion, Sar told the court that his attorney,

Damon Burke, did not review the plea form with him and never gave him a copy to review before he entered the courtroom to enter his plea. (RP 124-25) Burke did not explain to Sar that he was waiving his constitutional rights and he did not explain the sentencing consequences. (RP 125) Sar testified that he did not write the factual statement and that he does not remember acknowledging its accuracy during the colloquy with the judge. (RP 126) He said he simply agreed with whatever the judge said because that is what his attorney told him to do. (RP 133-34, 135-36) According to Sar, Burke told him he was going to lose at trial and would end up with a life sentence. (RP 127, 129, 130, 137) Sar felt he had no choice but to plead guilty. (RP 128, 129, 139)

Burke testified that he believed Sar's chance of acquittal at trial was poor because of the strength of the State's evidence against him, and he did express that opinion to Sar. (RP 142-43, 144-45) Burke explained the details of the State's plea offer and the consequences of entering a guilty plea, though he did not go over the plea form line-by-line. (RP 143, 147-48) Burke believed they spoke about the plea offer for 45 minutes to one hour, and they discussed the crimes, the State's evidence and the potential sentencing consequences. (RP 142-43, 144, 147-48) He believed Sar understood the State's offer and that he was fully informed about its consequences. (RP 148, 149, 150) Burke said he gave Sar advice, but did

not tell him what to do. (RP 146-47) Burke left for the night not knowing what Sar would choose. (RP 143) The next morning, Sar told Burke that he had decided to accept the State's offer. (RP 143)

The trial court found no manifest injustice and denied Sar's motion to withdraw his plea. (RP 156-60) The court believed that the plea statement and colloquy "overwhelmingly" showed that Sar's decision to plead guilty was knowing, intelligent, and voluntary. (RP 158-59) The court believed that Sar was just suffering from "buyer's remorse." (RP 160)

The court adopted the agreed upon sentence recommendation and imposed a total of 137 months of incarceration followed by 18 months of community custody. (RP 165; CP 44-45) The court imposed only mandatory legal financial obligations and an agreed amount of restitution. (RP 165-66; CP 42-43, 52-53) Sar timely appealed. (CP 55)

## **VI. CITATIONS OF AUTHORITY RELEVANT TO THE ISSUES<sup>1</sup>**

1. DID THE TRIAL COURT ERR WHEN IT RULED THAT SAR'S CUSTODIAL STATEMENTS WERE VOLUNTARY AND NOT THE PRODUCT OF COERCION?

A defendant's confession is involuntary under the due process clause when it is the product of police coercion. See State v. Vannoy, 25 Wn. App. 464, 467-69, 610 P.2d 380 (1980); State v. Burkins, 94 Wn. App.

---

<sup>1</sup> This is presented "without argument" pursuant to RAP 18.3(a)(2).

677, 694, 973 P.2d 15 (1999). Factors considered in the determination of voluntariness include the defendant's physical condition, age, mental abilities, and physical experience. Burkins, 94 Wn. App. at 694. Police conduct is also a consideration when determining if the defendant's will was overborne. Burkins, 94 Wn. App. at 694.

The trial court's determination that the statements were voluntary will not be overturned if there is substantial evidence in the record from which the court could find voluntariness by a preponderance. Vannoy, 25 Wn. App. at 467. And the appellate court will not review a trial court's credibility determinations. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

"[A] guilty plea waives or renders irrelevant all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea or to the government's legal power to prosecute regardless of factual guilt." In re Bybee, 142 Wn. App. 260, 268, 175 P.3d 589 (2007) (citations omitted).

2. WAS SAR'S GUILTY PLEA MADE KNOWINGLY AND VOLUNTARILY AND WITH A FULL UNDERSTANDING OF THE OFFENSES AND CONSEQUENCES?

Washington's court rules set forth the requirements for the acceptance of a guilty plea:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the

consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d).

Due process also requires that a guilty plea be knowing, intelligent and voluntary. In re PRP of Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). Before accepting a guilty plea, the court must ensure on the record that the defendant understands the nature of the charges against him and the consequences of the plea. State v. Walsh, 143 Wn.2d 1, 5-6, 17 P.3d 591 (2001). A defendant must understand the sentencing consequences for a guilty plea to be valid. Walsh, 143 Wn.2d at 8.

“Due process requires that a defendant be apprised of the nature of the offense in order for a guilty plea to be accepted as knowing, intelligent, and voluntary.” Osborne, 102 Wn.2d at 92-93. An accused must possess an understanding of the law in relation to the facts before he or she can intelligently plead guilty and waive the right to trial. In re Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)).

A defendant’s signature on a plea agreement is “strong evidence” that the plea is voluntary. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). And when the trial court has inquired into the voluntariness of

the plea on the record, the presumption of voluntariness is warranted. State v. Perez, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

3. DID THE TRIAL COURT ERR WHEN IT FOUND THAT SAR'S DEFENSE COUNSEL DID NOT PRESSURE OR COERCE HIM INTO PLEADING GUILTY AND WHEN IT DENIED SAR'S MOTION TO WITHDRAW HIS GUILTY PLEA?

A court shall allow a defendant to withdraw a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f); State v. Turley, 149 Wn.2d 395, 398, 69 P. 3d 338 (2003). Washington courts have set forth four nonexclusive instances of "manifest injustice" necessitating withdrawal: (1) ineffective assistance of counsel, (2) a plea not ratified or authorized by the defendant, (3) an involuntary plea, and (4) the prosecutor's failure to honor the plea agreement. State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991). The injustice must be "obvious, directly observable, overt, [and] not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

A trial court's order on a motion to withdraw a guilty plea or vacate a judgment is reviewed for abuse of discretion. State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (citing In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 879-80, 123 P.3d 456 (2006); State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001)). A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons."

State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court's decision "is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." Id. The "untenable grounds" basis applies "if the factual findings are unsupported by the record." Id.

The defendant's burden when seeking to withdraw a plea is demanding because ample safeguards exist to protect the defendant's rights before the trial court accepts the plea. Taylor, 83 Wn.2d at 596-97.

The test for ineffective assistance of counsel is whether (1) the defense counsel's performance fell below an objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)). The Strickland test applies to claims of ineffective assistance of counsel in the plea process. In re Peters, 50 Wn. App. 702, 703, 750 P.2d 643 (1988) (citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). In the context of a guilty plea, the defendant must show that his counsel failed to "actually and substantially [assist] his

client in deciding whether to plead guilty,” State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)), and that but for counsel’s failure to adequately advise him, he would not have pleaded guilty, Hill, 474 U.S. at 57-59; Peters, 50 Wn. App. at 708. The reviewing appellate court must indulge in a strong presumption that counsel’s performance is within the broad range of reasonable professional assistance. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Peters, 50 Wn. App. at 704.

A plea of guilty is not voluntary if it is the product of or induced by coercive threat, fear, persuasion, promise or deception. State v. Swindell, 22 Wn. App. 626, 630, 590 P.2d 1292 (1979). A claim that a defendant was coerced to plead guilty must be supported with more than self-serving allegations. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

## 7. CONCLUSION

Based on the above, Sophea Sar respectfully requests that this court independently review the record to determine whether this appeal is “wholly frivolous.” Anders, *supra*.

DATED: March 7, 2018



---

STEPHANIE C. CUNNINGHAM  
WSB #26436  
Attorney for Sophea Sar

**CERTIFICATE OF MAILING**

I certify that on 3/7/2018, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Sophea Sar, DOC# 402092, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.

*Stephanie Cunningham*

---

STEPHANIE C. CUNNINGHAM, WSBA #26436

**March 07, 2018 - 1:54 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50928-8  
**Appellate Court Case Title:** State of Washington, Respondent v. Sophea Sar, Appellant  
**Superior Court Case Number:** 16-1-01707-1

**The following documents have been uploaded:**

- 509288\_Briefs\_20180307135131D2107557\_5442.pdf  
This File Contains:  
Briefs - Anders  
*The Original File Name was SAR ANDERS.pdf*
- 509288\_Designation\_of\_Clerks\_Papers\_20180307135131D2107557\_3694.pdf  
This File Contains:  
Designation of Clerks Papers - Modifier: Supplemental  
*The Original File Name was SAR SupDCP.pdf*

**A copy of the uploaded files will be sent to:**

- PCpatcecf@co.pierce.wa.us

**Comments:**

---

Sender Name: Stephanie Cunningham - Email: sccattorney@yahoo.com  
Address:  
4616 25TH AVE NE # 552  
SEATTLE, WA, 98105-4183  
Phone: 206-526-5001

**Note: The Filing Id is 20180307135131D2107557**