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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GARRETT ANTHONY WILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson and Stephanie Arend, Judge

No. 16-1-02116-8

Brief of Respondent

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

1. Did the trial court deny counsel of choice when it denied the defendant's request to replace counsel when the ruling was manifestly reasonable considering the age of the case, the needs of the minor victim and that the defendant had not shown eligibility for appointed counsel?
2. Did the trial court properly deny a sentencing continuance where there has been no showing of ineffective assistance of counsel, nor a manifest injustice?

B. STATEMENT OF THE CASE.

On May 26, 2016, the State charged Garrett Anthony Williams, hereinafter "defendant," with one count of felony Communication with a Minor for Immoral Purposes. CP 3. Defendant was accused of exchanging sexually explicit text messages, including photographs, with 12-year-old victim, T.B. CP 1-2.

The case was mutually continued for several months due to both counsels' trial schedules and two failures to appear by defendant.

01/19/17 RP 2-3; 1 RP 3-4.¹ The Court scheduled a trial readiness hearing for August 18, 2017 and trial to begin on September 5, 2017. 1 RP 9.

On August 1, 2017, defense counsel filed a motion to withdraw from the case. Counsel explained that he was having difficulty reaching the defendant and it was impeding on his ability to prepare for trial. CP 19-22. This request was sent to prosecutors in both Pierce and King Counties, as defendant has a Rape of a Child in the First Degree charge pending in King County. *Id.*

The Court addressed the motion on August 7, 2017. During this hearing, defense counsel reiterated the information in his affidavit. 2 RP 15. The Court addressed the defendant and asked him to explain his perspective. Defendant disagreed with counsel's statements and explained that he returned the calls he received, and that he was worried about payment to counsel. 2 RP 15-16. Defendant told the Court that he would like counsel to still represent him. 2 RP 15. Counsel reiterated that payment was not his primary concern. 2 RP 16.

After applying eleven factors from *State v. Hampton*², and considering RCW 10.46.085, the Court decided the inherent continuance

¹ The verbatim report of proceedings are contained in both numbered and dated volumes. The volumes labeled by date will be referred to by date. The volumes labeled by volume number will be referred to by volume number.

² *State v. Hampton*, 184 Wn. 2d 656, 662, 361 P.3d 734 (2015).

that would result from counsel withdrawing would be detrimental to the minor victim in the already 413-day old case. 2RP 17-23.

At the trial readiness hearing on August 18, 2017, defendant requested to plead guilty on the first day of trial in front of a substitute presiding judge. 08/18/2017 RP 1. The Court refused to set a plea date but indicated the defendant could plead guilty on the first day of trial. The State reiterated that no plea deal was offered and that the State intended to add two felony bail jumping charges before trial. 08/18/2017 RP 3. After a break in proceedings, the parties re-appeared before the Court. The defendant entered a factual guilty plea to the original charge of Felony Communicating with a Minor for Immoral Purposes. 08/18/2017 RP 5. Defendant engaged in a plea colloquy with the Court where he answered affirmatively when asked if the plea, charges and consequences had been explained to him by his attorney. 08/18/2017 RP 6-11.

Two months later, on October 13, 2017, defendant filed a request for a sentencing continuance and to have new appointed counsel replace his private counsel. CP 35-37. Defendant claimed that he felt he did not have adequate time with counsel to discuss his case. *Id.* Counsel represented defendant for over a year against the same charge. CP 19-22. Defendant claimed he was appointed counsel in his King County case, but

did not submit an Affidavit of Indigency for Pierce County until November of 2017, after his sentencing date. *Id*; CP 95-100.

The Court heard the motion on the sentencing date on October 20, 2017. The Court did not find good cause to allow defense counsel to withdraw at that stage of the case, citing defendant's factual statement in his guilty plea and stating that "[they were] just here for sentencing." 10/20/2017 RP 2-3. Subsequently, defendant asked defense counsel to speak for him during the sentencing hearing. Counsel asked the Court to follow the State's recommendation. 10/20/2017 RP 5-6. Defendant was subsequently sentenced to a standard range of one to three months with credit for time served, so defendant was ultimately released the day he was sentenced. 10/20/2017 RP 7-8.

Defense counsel then withdrew from representation at any future restitution hearing. 10/20/2017 RP 9. Defendant filed a timely Notice of Appeal. CP 75.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT’S REQUEST TO REPLACE COUNSEL BECAUSE THE RULING WAS MANIFESTLY REASONABLE, CONSIDERING THE NEEDS OF THE MINOR VICTIM, THE AGE OF THE CASE, AND THAT THE DEFENDANT HAD NOT ESTABLISHED ELIGIBILITY FOR APPOINTED COUNSEL.

The defendant has assigned error to the trial court’s denial of his motion for new counsel which was brought after his guilty plea and before sentencing. He has not assigned error to a previous motion in which his retained attorney sought to withdraw primarily for communication and financial reasons. Because the defendant’s argument includes discussion of both motions, and because both motions were properly denied, the State’s responsive argument below will discuss both motions.

The Sixth Amendment and Washington’s constitution both guarantee a criminal defendant the right to counsel. Sixth Amendment, United States Constitution, Article 1, Section 22, Washington State Constitution. *State v. Estes*, 188 Wn. 2d 450, 458, 395 P.3d 1045 (2017). The right to counsel includes the right to counsel of choice when a defendant seeks to retain private counsel. *State v. Hampton*, 184 Wn. 2d 656, 662, 361 P.3d 734 (2015). However, the right to counsel of choice is limited when the choice affects “the public’s interest in the prompt and

efficient administration of justice.” *Id* at 663, quoting *State v. Aguirre*, 168 Wn. 2d 350, 365, 229 P.3d 669 (2010).

Indigent defendants with appointed counsel generally do not have the right to counsel of their choice. *State v. Price*, 126 Wn. App. 617, 631-32, 109 P.3d 27 (2005), citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L.Ed.2d 140 (1988), and *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994). An exception is where there is an irreconcilable conflict between defendant and appointed counsel. *In re Personal Restraint Petition of Stenson*, 142 Wn. 2d 710, 722, 16 P.3d 1 (2001), citing *United States v. Moore*, 18 F.3d 1154, 1158 (9th Cir. 1998).

In *Hampton*, the Supreme Court held that Washington courts should consider eleven factors when determining whether to grant or deny a request to change counsel that also involves a continuance. *State v. Hampton*, 184 Wn. 2d at 669-70, citing 3 WAYNE R. LAFACE ET AL., CRIMINAL PROCEDURE § 11.4, at 718-20 (3d ed. 2007), 2RP 15, 19-23. A trial court should consider all relevant information in these types of motions because “these situations are highly fact dependent and there are no mechanical tests that can be used.” *State v. Hampton*, 184 Wn. 2d at 669, quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d. 921 (1964).

This Court reviews a decision concerning choice of counsel for an abuse of discretion. *State v. Hampton*, 184 Wn. 2d at 662. An abuse of discretion occurs only when the decision of the court is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.3d 32 (2009). “A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003), quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). “A decision is manifestly unreasonable’ if the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take,’ and arrives at a decision ‘outside the range of acceptable choices.’” *Id*, quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990); *State v. Rundquist*, 79 Wn. App at 793.

In the case before the Court, private defense counsel moved to withdraw well before the defendant’s guilty plea. CP 19-22; 2RP 15. The Court heard from the defendant who said:

“I would like to have Adrian, Mr. Pimentel, still represent me. The problem is coming up with the money for it. I mean, I paid him a lot of money so far, but I still owe him a lot more before even trial comes up.”

2RP 15-16. The court then denied the motion and the defendant subsequently accepted a plea bargain and entered a guilty plea.

The trial court applied the eleven *Hampton* factors. 2RP 19-23. See *State v. Hampton*, 184 Wn. 2d at 669, citing 3 WAYNE R. LAFACE ET AL., CRIMINAL PROCEDURE § 11.4, at 718-20 (3d ed. 2007). The only distinction between *Hampton* and this case is that in *Hampton*, the defendant was seeking to remove counsel rather than counsel moving to withdraw. As to the application of the factors, the defendant has not assigned error to the trial court's ruling.

The trial court properly determined it would be inappropriate and detrimental to the victim to allow Mr. Pimentel to withdraw with less than a month left before trial. 2RP 23. The case had already been delayed over a year, and defendant expressed his desire to still be represented by counsel to the Court.

In the post-guilty plea motion, the defendant invoked the right to counsel of choice. The defendant's desire to choose new counsel is limited when the choice affects "the public's interest in the prompt and efficient administration of justice." *State v. Aguirre*, 168 Wn.2d at 365. The balancing of this right and time interest falls "squarely within the discretion of the trial court." *Id.*

Indigent defendants with appointed counsel generally do not have the right to counsel of their choice. *State v. Price*, 126 Wn. App. at 631-32, citing *Wheat v. United States*, 486 U.S. at 159, and *State v. Roth*, 75 Wn. App. at 824. An exception is where there is an irreconcilable conflict between defendant and appointed counsel. *In re Personal Restraint Petition of Stenson*, 142 Wn.2d at 722, citing *United States v. Moore*, 18 F.3d at 1158.

In this case, the defendant wished to be appointed new counsel at public expense. CP 35-37. This request was brought for the first time at sentencing. Defendant claimed that he could no longer afford a private attorney and wished to be appointed a public defense attorney. *Id.* However, defendant made no showing that he was eligible for a defense attorney at the public's expense other than claiming he was appointed counsel in his pending King County case. *Id.* His Affidavit of Indigency was filed nearly a month after his sentencing hearing. CP 76-79. Nothing was presented to the trial court that showed that the defendant was eligible for appointed counsel. Defendant raised this issue for the first time at the sentencing hearing without any factual basis to support his assertions. Because defendant still had private counsel, it was within the Court's discretion to determine whether to allow defendant new counsel balancing

against the court's interest in a prompt and efficient administration of justice. *State v. Aguirre*, 168 Wn.2d at 365.

Analysis of the *Hampton* factors supports the trial court's decision. Although the Court did not go through each factor, the impact of a continuance had not changed. Replacing counsel before sentencing was improper for the same reasons the earlier request to withdraw was improper.

The defendant's argument includes an ineffective assistance of counsel allegation. Appellants Opening Brief 7-9. That argument is no more valid than the choice of counsel argument. Defendant has failed to meet the burden of demonstrating he received ineffective counsel.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015). The test for ineffective assistance of counsel is whether the defense counsel's performance fell below an objective standard of reasonableness, and 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). Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). 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 v. Lockhart*, 474 U.S. at 57-59, *In re 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 v. Washington*, 466 U.S. at 689, *In re Peters*, 50 Wn. App. at 704, 750 P.2d 643.

In this case, after the trial court denied counsel’s motion to withdraw, a trial readiness hearing was scheduled for August 18, 2017. The parties appeared before a temporary presiding judge. The defense notified the Court that defendant intended to plead guilty on the first day of trial, September 5, 2017. 08/18/17 RP 2. The Court explained that this practice was generally frowned upon, and suggested the defense set a plea hearing date prior to the beginning of trial. *Id.* Defense counsel notified the Court that vacation plans would not permit setting a separate plea date.

Id. Defense counsel also informed the Court that defendant wanted time before pleading guilty to consult with defense counsel in his King County case about the ramifications of pleading guilty in this case. *Id.*

The Court refused to set a plea date for the day of trial but advised defendant that he could still plead guilty on that day in front of the regular presiding judge. 08/18/17 RP 2-3. The State also notified the Court of its intent to add two bail jumping charges. 08/18/17 RP 5. The Court then asked counsel if he was “otherwise ready on the fifth?” To which counsel responded affirmatively. The Court reiterated: “...Again, I am not suggesting that I’m precluding Mr. Williams from pleading guilty on the day of trial, I’m just not setting a plea for the day of trial.” 08/18/2017 RP 5.

The parties re-appeared before the substitute presiding judge later the same day. The State informed the Court that “defendant has consulted with his attorney and he would like to plead guilty this afternoon ...” *Id.*

Defense counsel then stated:

“We went over the plea together, we discussed the ramifications of it. I told him the Court doesn’t have to go along with the plea. We discussed other things and the impact that this is going to have on his life, and he has decided to plead guilty, and I believe he is entering into this plea knowingly, voluntarily and intelligently.”

08/18/17 RP 6. During the plea colloquy with the Court, defendant answered affirmatively when asked if he “had the opportunity to discuss this plea with Mr. Pimentel,” if he understood the rights he was giving up, and if counsel explained the legal definition of the crime to him as well as sex offender registration requirements. 08/18/17 RP 6-8.

Defendant then submitted a factual guilty plea to the original charge of felony Communicating with a Minor for Immoral Purposes.

08/18/17 RP 9-10. On the plea paperwork, defendant wrote:

“On March 26, 2016, in Pierce County, Washington, I sent photos of genitalia to T.B., a minor, and communicated with that person over text message suggesting that we would have sex.”

The statement was signed by defendant. CP 23-34; 08/18/17 RP 9.

Defendant did not express dissatisfaction with counsel’s performance until the week before sentencing. CP 35-37. Defendant brought his claim before the trial court for the first time at his sentencing hearing, where he attempted to request a continuance to facilitate appointment of new counsel. 10/20/2017 RP 2. The trial court had no reason to grant his request at that time, and explained that it was too late in the process without good cause to do so. *Id.*

The record in this case does not satisfy the first prong of the *Strickland* test. The defendant must show that counsel failed to “actually

and substantially” assist him in deciding whether to plead guilty. He claims that he had inadequate time to consult with his attorney. CP 35-37. However, the record shows that he was represented by the same attorney for more than a year. CP 3, 19-22. The record also shows that the attorney went over the plea with him, and that they had the opportunity to discuss all relevant plea consequences. 08/18/2017 RP 6-8. In fact, at sentencing after the defendant filed his motion for new counsel, the defendant displayed the ultimate satisfaction with his attorney’s representation by requesting that the attorney represent him through the sentencing hearing. 10/20/2017 RP 4-6. In short, the record offers little support for the claim that the defendant’s attorney did not actually and substantially assist him.

The record in this case actually sheds additional insight into the defendant’s decision to plead guilty when he did. Both the trial court and the State were amenable to delaying the guilty plea hearing until the trial date but the State indicated that it might add two additional felonies in the event the plea agreement could not be completed. 08/18.2017 RP 5. By accepting the plea agreement and entering his plea before the substitute presiding judge, the defendant eliminated the risk of additional charges. He also avoided the possibility that the regular presiding judge might not allow a reduction of the charges on the trial date. Finally, defendant

secured his offender score at a lower number for his pending King County case. These reasons among many others constitute evidence of actual and substantial assistance from the defendant's trial counsel rather than ineffective assistance.

It is not ineffective assistance to not go over all possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction on a plea of guilty. *State v. McDermond*, 112 Wn. App. 239, 244–45, 47 P.3d 600 (2002), *overruled on other grounds* by *State v. Mendoza*, 157 Wn.2d 582, 590–91, 141 P.3d 49 (2006).

Defense counsel claimed to have gone over all plea consequences with defendant. 08/18/2017 RP 2. Since there is no evidence in the record to contradict that claim, it follows that the guilty plea was valid.

Defendant submitted the request for new counsel on his own. This shows that he had the ability to bring any dissatisfaction with counsel to the Court's attention at any time. Defendant, in fact, expressed confidence in his counsel when he stated that he wanted to keep his retained counsel and when he asked to have the same counsel represent him at sentencing. 2RP 15; 10/20/17 RP 4-6.

As to the second prong of the *Strickland* test, the defendant claimed he did not know he was pleading guilty to a felony. CP 36. However, the record plainly refutes this claim. Defendant's signature

appears on the Stipulation on Prior Record and Offender Score which clearly outlines the crime as a felony. CP 51-53. Furthermore, he was told by the court *directly prior* to pleading guilty that the charge was felony Communication with a Minor for Immoral Purposes. 08/18/2017 RP 5. The defendant's claim that he did not know this was a felony plea is not supported by the record, therefore he cannot show that he would not have pleaded guilty but for defendant counsel's conduct. Thus, he fails to satisfy the second prong of the *Strickland* test.

2. THERE IS NO REASON TO DOUBT
DEFENDANT'S GUILTY PLEA AND THERE ARE
NO GROUNDS FOR REVERSAL BECAUSE
DEFENDANT CANNOT DEMONSTRATE THE
MANIFEST INJUSTICE REVERSAL REQUIRES.

Although no error is assigned to the taking of defendant's guilty plea, the defendant tacitly argues that he had a valid basis to withdraw his plea. A trial court must allow a defendant to withdraw a guilty plea only when "it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f); *State v. Marshall*, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001). A manifest injustice exists where (1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) counsel was

ineffective; or (4) the plea agreement was not kept. *Marshall*, 144 Wn.2d at 281. The injustice must be “obvious, directly observable, overt [and] not obscure.” *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

For the above stated reasons, counsel effectively assisted defendant. Defendant has failed to show that counsel’s representation was deficient or that it prejudiced his case. Defendant has not provided any evidence to establish that but for counsel’s conduct, he would not have entered his factual guilty plea. His arguments are refuted by the record.

Defendant has not claimed that his plea was involuntary or unknowing. He pleaded guilty to original charges and was released the same day he was sentenced. Defendant has not attempted to establish any additional grounds to bring a motion to withdraw his guilty plea.

Defendant’s claims about counsel amount to regret. Defendant was offered time to consult with new counsel and decided to waive that opportunity. Defendant was effectively assisted in his decision to enter this guilty plea and there is no reason to doubt the validity of it.

D. CONCLUSION.

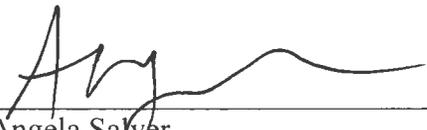
For the above stated reasons, the State respectfully requests this Court affirm the defendant's convictions.

DATED: July 6, 2018.

MARK LINDQUIST
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Angela Salyer
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ 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.

7.9.18 Therese Ke
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

July 09, 2018 - 12:11 PM

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