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Court of Appeals
Division II
State of Washington
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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEROME J. McFIELD

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 16-1-02651-8

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied defendant's motion to withdraw his guilty plea when the plea was not knowingly and voluntarily entered.

2. Trial counsel provided ineffective assistant of counsel when he failed to provide defendant access to his police reports before defendant entered his guilty plea.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it denied defendant's motion to withdraw his guilty plea when defendant was rushed into making a decision without hearing all of the factual information regarding the charged offenses?

(Assignments of Error #1)

2. Whether defense counsel provided ineffective assistance of counsel when defendant was not provided the police reports to review before entering his guilty plea?

(Assignments of Error #2)

III. STATEMENT OF THE CASE

A. Procedural History

On June 28, 2016, the State charged Mr. McField with multiple criminal offenses for a shooting incident that occurred on or about June 19, 2016. CP 3-4. At the time of his arraignment, Mr. McField entered a plea of not guilty to all counts. CP 24. On July 24, 2017, Mr. McField entered a guilty plea on an Amended Information to one count of Assault in the First Degree with a firearm sentencing enhancement and one count of Unlawful Possession of a Firearm in the First Degree. CP 6-7; 8-20.

On February 22, 2018, Mr. McField filed a motion to withdraw his guilty plea, pursuant to CrR 4.2(f). CP 21-23. In support of said motion, Mr. McField filed a declaration. CP 24-25. On April 17, 2018, the trial court held a hearing on Mr. McField's motion to withdraw his guilty plea and, after hearing testimony, announced his findings of fact and conclusions of law, and denied the motion. The Findings and Conclusions were subsequently entered. CP ____.

On April 27, 2018, Mr. McField was sentenced to 180 months within the Department of Corrections, which included 60-months for the firearm weapon enhancement. CP 31-44. Mr. McField filed a notice of appeal on May 23, 2018. CP 45-61. This appeal follows.

B. Facts

On June 28, 2016, Mr. McField was charged with multiple criminal counts for a shooting incident that occurred on or about June 19, 2016. CP 3-4. He was represented by attorney Matthew McGowan, who began representing Mr.

McField shortly after he was charged. RP 9:25-10:8. During the time of Mr. McGowan's representation, Mr. McField met with Mr. McGowan, along with another attorney, Kelly Cavanaugh, as well as Mr. McField's father, and reviewed plea offers that had been provided to him. RP 13:3-25. But, with respect to the documents surrounding his case, the only documents Mr. McField reviewed were the charging documents and sentencing proposals. RP 14:8-10. Mr. McField never reviewed the police reports, photographs or any scientific evidence in his case, never reviewed any defense interviews, nor was he provided any copies of such documents. RP 14:11-16; 19:11-14. CP 24.

During the meetings that he had with Mr. McGowan, Mr. McField's father would typically be present. RP 14:17-24. When Mr. McField's father was present, he also did not review the discovery. RP 15:2-5; 64:19-65:11.

Mr. McField acknowledges that he was shown the Second Amended Information, which reduced the number of charges from six to two. RP 16:7-11. Mr. McField also acknowledges that he signed the statement of defendant on plea of guilty and recalls the day he actually entered his guilty plea. RP 16:12-18. Mr. McField acknowledges that although he reviewed the guilty plea document with Mr. McGowan and signed it, he reviewed it for only about ten minutes before he went into court. RP 16:25-17:8. Mr. McField stated that he was coerced into signing the document because trial was scheduled to start that day and Mr. McGowan told him that if he did not accept the offer, he would receive 60 to 80 years in prison because he had no defense to the crimes charged. RP 17:8-17.

Mr. McField was very emotional and crying at the time that he entered his plea and it was hard for him to answer the judge's questions. RP 19:3-10. Mr. McField did not believe that at the time he told the trial judge that he wanted to enter his plea that he did so intelligently, knowingly and with a full understanding of the facts and circumstances surrounding his case. RP 20:7-14. As such, Mr.

McField did not believe that he was voluntarily entering into a plea. RP 20:15-17.

Jerome McField, Sr., was authorized by his son to review the discovery in his son's case. RP 63:20-23. Although authorized to review this information, Mr. McField, Sr., never saw any of the police reports or any of the scientific evidence, or the photographs that were generated as part of the case. RP 63:24-64:4. The first time that he had reviewed the discovery was when he came to current appellate counsel's office prior to the hearing on the motion to withdraw the plea. RP 64:6-18. Mr. McField, Sr., continually contacted Mr. McGowan's office to review the police reports and documents associated with his son's case, but he was never provided an opportunity to do so. RP 64:19-65:11. Mr. McField, Sr., was not present at the time his son entered his guilty plea in this case. RP 65:13-15.

The day after he entered his guilty plea, Mr. McField contacted Mr. McGowan and told him he wanted to withdraw his guilty plea because he believed that he was forced into taking the deal and he believed he had a chance of defending himself in trial. RP 18:16-24. Mr. McGowan acknowledged that Mr. McField was not happy that he entered the guilty plea and, after that occurred, another attorney, Robert Quillian took over the case. RP 51:7-18.

IV. ARGUMENT

A. THE COURT ERRED WHEN IT DENIED MR. McFIELD'S MOTION TO WITHDRAW HIS GUILTY PLEA AS IT WAS NOT ENTERED KNOWINGLY AND VOLUNTARILY.

Mr. McField takes exception to the trial court's conclusion of law that he knowingly, intelligently and voluntarily entered his guilty plea after consulting with his attorney. CP ____.

Mr. McField urges that his guilty plea was not knowingly and intelligently entered because he was coerced into entering his plea based upon Mr.

McGowan’s threat of a potential sentence, if he went to trial, and because he did not have an opportunity to review the police reports outlining the facts of the case. Additionally, he did not have any opportunity to see any witness interviews before entering the plea. As such, he did not knowingly, intelligently and voluntarily enter his guilty plea.

CrR 4.2(f) states as follows:

The court shall allow a defendant to withdraw defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.

“A trial judge’s decision on whether to allow a defendant to withdraw a guilty plea is reviewed for abuse of discretion.” *State v. A.N.J.*, 168 Wn.2d 91, 107, 225 P.3d 956 (2010).

Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily. *State v. A.N.J.*, 168 Wash.2d 91, 117, 225 P.3d 956 (2010) (citing *In re Pers. Restraint of Mendoza Montoya*, 109 Wash.2d 270, 277, 744 P.2d 340 (1987); *Boykin v. Alabama*, 395 U.S. 238, 242.43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). A trial court may not accept a guilty plea without first determining that a criminal defendant has entered into the plea “voluntarily,” competently and with an understanding of the nature of the charge and the consequences of the plea.”

CrR 4.2(d).

...

However, we permit “a defendant to withdraw his plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.”

State v. Taylor, 83 Wash.2d 594, 595, 521 P.2d 699 (1974)(quoting CrR 4.2(f))

Here, based upon the testimony of Mr. McField, he did not make a knowing, intelligent and voluntary decision as to whether to plead guilty, despite his words at the plea hearing, because of undue duress being placed upon him by his lawyer and because he did not receive the discovery in his case before entering the plea. Based upon the lack of knowledge Mr. McField had about the facts of his case, he could not possibly enter a knowing, intelligent and voluntary plea because he never reviewed the evidence against him, despite consulting with his lawyer. Mr. McField's testimony is supported by that of his father who also never reviewed the discovery, despite continued requests to do so. As such, Mr. McField should be allowed to withdraw his plea to correct a manifest injustice.

B. MR. McFIELD'S COUNSEL WAS INEFFECTIVE FOR NOT PROVIDING THE DISCOVERY TO MR. McFIELD BEFORE HE ENTERED HIS GUILTY PLEA.

1. Ineffective Assistance of Counsel

To show ineffective assistance of counsel, a defendant must show that (1) his or her lawyer's representation was deficient and (2) the deficient performance prejudiced him/her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when but for counsel's deficient performance, the proceeding's result would have been different. *McFarland*, 127 Wn.2d at 335. If a party fails to satisfy one prong, this Court need not consider the other. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007 (2007).

Ineffective assistance of counsel is an exception from the actual and substantial prejudice standard: we presume prejudice where a petitioner successfully establishes ineffective assistance of counsel. *In Re Pers. Restraint of Lui*, No. 92816-9 WL 2691802, at *3 (Wash. June 22, 2017). Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *In Re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

A criminal defendant has a state and federal constitutional right to effective assistance of counsel. *Strickland*, 466 U.S. at 686; *State v. Tinkham*, 74 Wn.App. 102, 109, 871 P.2d 1127 (1994). To discharge this duty, trial counsel must investigate the case, and investigation includes witness interviews. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1992) (“Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may res.” (citing *State v. Visitacion*, 55 Wn.App. 166, 173-74, 776 P.2d 986 (1989))).

2. *Trial Counsel’s Failure to Provide the Discovery to Mr. McField before he entered his Guilty Plea Constitutes Ineffective Assistance of Counsel.*

As set forth above, the right to effective assistance of counsel includes the requirement that “trial counsel ... investigate the case”. See *State v. Jones*, 183 Wn.2d 327, 346, 352 P.2d 776 (2015). Trial counsel was deficient and ineffective for failing to provide the discovery to Mr. McField before he entered his guilty plea. Further, this failure prevented Mr. McField from making a knowing, intelligent and voluntary decision because he did not know all of the facts contained within the discovery.

Here, trial counsel's failure to allow Mr. McField to review all discovery before entering his guilty plea establishes counsel's ineffectiveness. During the motion to withdraw his guilty plea, Mr. McField and his father testified that neither had viewed the police reports, and Mr. McGowan acknowledged such as well. RP 43:12-44:19.

No trial tactic can include the failure to review evidence before trial with a client. "Failure to investigate ... is a recognized basis upon which a claim of ineffective assistance of counsel may rest." *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). *See also, State v. Tinkham*, 74 Wash.App. 102, 109, 871 P.2d 1127 (1994) (to discharge duty of effective assistance of counsel, counsel must investigate the case.)

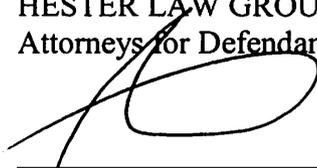
As such, trial counsel's performance was deficient and prejudicial as a reasonable likelihood exists that the decision of whether Mr. McField would have entered his guilty plea, had he been allowed to review the discovery, would have been different but for counsel's deficient performance in providing the discovery to Mr. McField.

V. CONCLUSION

Based upon the aforementioned, the trial court erred in denying Mr. McField's motion to withdraw his guilty plea as trial counsel was ineffective for failing to provide Mr. McField his discovery, which failure prevented MR. McField from entering a knowing, intelligent and voluntary guilty plea.

DATED this 28th day of September, 2018.

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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this brief to be served on the following in the manner indicated below:

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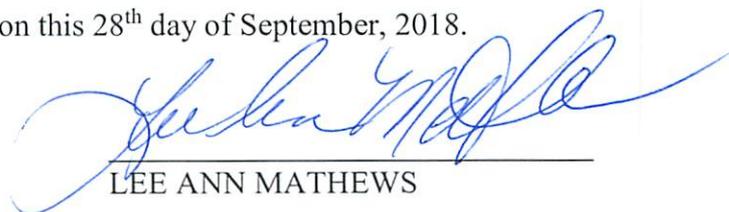
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