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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY ROOSEVELT BAUGH,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 18-1-01156-8  
The Honorable Stanley Rumbaugh, Judge

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OPENING BRIEF OF APPELLANT

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STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it denied Appellant's motion to withdraw his guilty plea.
2. Appellant was denied his constitutional right to effective assistance of counsel.
3. Defense counsel provided ineffective assistance by failing to conduct an adequate investigation into Appellant's case before assisting Appellant in determining whether to plead guilty.
4. Appellant's guilty plea was not knowing, intelligent and voluntary.
5. Appellant's Judgment and Sentence contains an interest accrual provision that is no longer authorized by the legal financial obligation statutes.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did defense counsel provide ineffective assistance by failing to investigate and interview the alleged victim before assisting Appellant in determining whether to plead guilty, where doing so would have revealed that the victim's recollection differed from the facts alleged by the State.  
(Assignments of Error 1, 2, 3, & 4)

2. Did trial counsel's failure to adequately investigate the case and interview the key witness before advising Appellant to plead guilty render Appellant's guilty plea invalid since Appellant was unable to make an informed decision as to whether to plead guilty or to proceed to trial? (Assignments of Error 1, 2, 3, & 4)
3. Should Appellant's case be remanded to the trial court to amend the Judgement and Sentence by striking an interest accrual provision that violates a recent amendment to the legal financial obligation statutes? (Assignment of Error 5)

### **III. STATEMENT OF THE CASE**

The State charged Timothy Roosevelt Baugh by Information with three counts of second degree theft (RCW 9A.56.020 and .040), and alleged that all three offenses were aggravated because the victim was particularly vulnerable (RCW 9.94A.535(3)(b)). (CP 3-4)

According to the declaration for probable cause, Baugh contacted the 90-year old victim, Betty Grimes, at her residence and offered to clean her gutters and do some yard work for \$900. (CP 1) Baugh asked Grimes to pay the \$900 upfront, and she wrote Baugh a check for \$900. (CP 1) Baugh later returned and

told Grimes that he needed a second check for \$900 because he locked the check and his keys in his vehicle. (CP 1) Baugh indicated that if Grimes gave him a second check for \$900 he would not cash the first one. (CP 1) Over the next few days, Baugh obtained two additional checks, one for \$900 and one for \$950. (CP 1) The declaration also states that:

Grimes could not recall how the defendant convinced her to write the checks but remembered him standing very close to her (in an intimidating fashion) and at least one time getting down on his knee and staring at her intently as she wrote a check. She said that she felt almost hypnotized into giving him the money he demanded. The defendant never did any work for Mrs. Grimes and she eventually realized that he was not going to complete the work.

(CP 1-2) Grimes went to her bank and learned that the four checks she wrote to Baugh, totaling \$3,650, had been cashed. (CP 2)

Baugh eventually agreed to plead guilty to an Amended Information charging two counts of second degree theft without the particularly vulnerable aggravator. (CP 12-13, 14, 15-24; 09/06/18 RP 4)<sup>1</sup> Baugh also agreed to pay \$3,650.00 in restitution to Grimes, and in fact did so prior to the plea hearing. (CP 18, 39; 09/16/18 RP 14)

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<sup>1</sup> The transcripts will be referred to by the date of the proceeding.

In the Statement of Defendant on Plea of Guilty, Baugh's written factual statement reads: "In Pierce County, WA, on/about 3.5.18 [and] 3.6.18, I feloniously and wrongfully obtained control over property/money belonging to another in a value exceeding \$750.00 but less than \$5,000.00, with the intent to deprive the owner of the same." (CP 23) The trial court found that the facts alleged in the declaration for probable cause supported the charges contained in the Amended Information, and found Baugh's plea to be knowing and intelligent and voluntary. (09/06/18 RP 5, 13)

At the scheduled sentencing hearing, Baugh indicated he wished to withdraw his guilty plea. (10/26/18 RP 8) The trial court subsequently entered an order allowing Baugh's appointed counsel to withdraw and authorizing the appointment of new counsel for the purpose of investigating a motion to withdraw the plea. (CP 27; 11/16/18 RP 5)

Substitute counsel filed a written motion to withdraw the plea, asserting that prior defense counsel's representation was deficient. (CP 50-51) Baugh filed a supporting declaration stating that his plea was not knowing, voluntary and intelligent because: (1) at the last minute counsel contradicted his earlier advice about the plea agreement, resulting in Baugh not fully understanding the

terms of the agreement; and (2) counsel failed to interview the victim and this failure deprived Baugh of the knowledge necessary to make an informed decision. (CP 53-54)

Baugh attached notes from an interview conducted by a defense investigator after he entered his guilty plea. (CP 52) In the interview, Grimes' memory of events differs from the facts listed in the declaration of probable cause, and she has no recollection of Baugh telling her he would not cash a check that was locked in his truck. (CP 52)

The trial court heard argument but denied the motion. (01/04/19 RP 3-5) The trial court imposed a standard range sentence totaling 22 months of confinement. (CP 37, 40; 01/04/19 RP 11) The court found Baugh indigent and imposed only the mandatory \$500 crime victim assessment fee. (CP 38; 01/04/19 RP 11-12) Baugh filed a timely Notice of Appeal. (CP 58)

#### **IV. ARGUMENT & AUTHORITIES**

##### **A. TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND INTERVIEW THE ALLEGED VICTIM BEFORE ADVISING BAUGH TO PLEAD GUILTY WAS INEFFECTIVE REPRESENTATION AND RESULTED IN A PLEA THAT WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY.**

Defense counsel's deficient investigation prevented him from properly advising Baugh regarding his decision to plead guilty, such

that he entered a guilty plea that was not knowing, intelligent, and voluntary. Accordingly, the trial court erred in denying Baugh's motion to withdraw his guilty plea.

The denial of a motion to withdraw a guilty plea is reviewed for an abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006).

Due process guarantees in the federal and state constitutions require that a guilty plea be made intelligently and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *Matter of Montoya*, 109 Wn.2d 270, 277, 744 P.2d 340 (1987); U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. CrR 4.2 provides procedural safeguards to ensure the defendant's constitutional rights are protected. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Under CrR 4.2(d), the court cannot accept a defendant's guilty plea without first determining that the defendant has entered into the plea voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. Additionally, the court must be

satisfied that there is a factual basis for the plea. CrR 4.2(d).

Once the court accepts the guilty plea, it must allow the defendant to withdraw the guilty plea if withdrawal appears necessary to correct a “manifest injustice.” CrR 4.2(f). “A manifest injustice exists where (1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) effective counsel was denied; or (4) the plea agreement was not kept.” *Marshall*, 144 Wn.2d at 281. The defendant has the burden of showing that a manifest injustice has occurred. *State v. Turley*, 149 Wn.2d 395, 398, 69 P.3d 338 (2003).

Here, Baugh was denied effective assistance of counsel because his attorney failed to do the most basic investigation and interview the complaining victim. To establish ineffective assistance of counsel, Baugh must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel’s performance is deficient if it falls below an objective standard of reasonableness based on a consideration of all the circumstances. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). There is a strong presumption of effective representation.

“To provide constitutionally adequate assistance, ‘counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client.’” *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (alterations and emphasis in original) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994)).

Effective assistance of counsel also includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial. *State v. S.M.*, 100 Wn. App. 401, 413, 99 P.2d 1111 (2000). During plea bargaining, counsel has a duty to assist the defendant “actually and substantially” in determining whether to plead guilty. *State Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); *State v. Stowe*, 71 Wn. App. 182, 186, 858 P.2d 267 (1993). Evaluation of a plea offer requires an evaluation of the State’s evidence. See *State v. Bao Sheng Zhao*, 157 Wn.2d 188, 205, 137 P.3d 835 (2006) (Sanders, J., concurring). It is counsel’s responsibility to aid the defendant in evaluating the evidence against him and in discussing the possible direct consequences of a guilty plea. *State v. Holley*, 75 Wn. App. 191, 197, 876 P.2d 973 (1994).

In the context of a guilty plea, trial counsel cannot assist the

defendant in evaluating the evidence against him and discussing the possible direct consequences of a plea without first conducting an investigation into the case. The degree and extent of investigation required will vary depending upon the issues and facts of each case, but the courts have held that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

Baugh's defense counsel failed to interview the victim before Baugh agreed to plead guilty. (CP 50-51, 53-54; 01/04/19 RP 3-4) Without the information that would have been gathered from such a reasonable investigation, counsel could not possibly make informed decisions about how best to represent Baugh, and could not properly counsel Baugh on whether or not to accept the State's plea offer or go to trial. Counsel's failure to conduct this minimal amount of investigation fell below objective standards of reasonable representation.

Counsel's deficient representation was prejudicial. To prove prejudice, Baugh must show that but for counsel's deficient

performance, there is a reasonable probability the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Whether counsel's failure to investigate prejudiced the defendant depends on the likelihood that the evidence would have led counsel to change his plea recommendation. *In re Clements*, 125 Wn. App. 634, 646, 106 P.3d 244 (2005).

The subsequent interview conducted after the plea was taken revealed that Grimes' memory was vague and her recollection of events differed from the facts alleged by the State. (CP 52) Grimes' strength or weakness as a prosecution witness is extremely relevant when evaluating the strength of the State's case, and is critical when considering whether or not to accept a plea or go to trial. Counsel's failure to investigate and interview Grimes was clearly prejudicial because it deprived Baugh of the ability to properly evaluate the facts and the strength of the State's case against him when deciding whether to plead guilty or go to trial.

**B. BAUGH'S JUDGMENT AND SENTENCE CONTAINS AN INTEREST ACCRUAL PROVISION THAT IS NO LONGER AUTHORIZED BY THE LEGAL FINANCIAL OBLIGATION STATUTES.**

Baugh was sentenced on January 4, 2019. The trial court

found Baugh indigent, so the trial court imposed only the mandatory \$500.00 crime victim assessment fee. (01/04/19 RP 12; 38) The Judgment and Sentence also includes a boilerplate provision stating that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full[.]” (CP 39)

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783) amended the legal financial obligation (LFO) system in Washington State. As part of those amendments, House Bill 1783 eliminated interest accrual on the nonrestitution portions of LFOs. Laws of 2018, ch. 269, § 1; *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). House Bill 1783’s amendments were effective as of June 7, 2018.

The portion of the amendments pertaining to interest accrual amended RCW 10.82.090. That statute now provides, in relevant part, that “[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1). Baugh was sentenced after June 7, 2018, but the trial court failed to strike the improper interest accrual language. (CP 39) Baugh’s case should be remanded to the trial court to strike the interest accrual provision from the Judgement and Sentence.

## V. CONCLUSION

Baugh has established that his defense counsel provided deficient representation before and during the plea process. This deficient representation was prejudicial because it deprived Baugh of his right to make a fully informed, knowing, and voluntary plea. The trial court should have granted his motion to withdraw his plea, and this Court should reverse the trial court and vacate Baugh's convictions and plea. The trial court must also strike the interest provision from the Judgment and Sentence entered in this case.

DATED: May 31, 2019



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STEPHANIE C. CUNNINGHAM  
WSB #26436  
Attorney for Timothy R. Baugh

### CERTIFICATE OF MAILING

I certify that on 05/31/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Timothy R. Baugh Bk# 2018285027, Pierce County Jail, 910 Tacoma Ave. S., Tacoma, WA 98402.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

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