

FILED  
Court of Appeals  
Division II  
State of Washington  
3/25/2020 10:28 AM  
NO. 53610-2-II

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

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STATE OF WASHINGTON, Respondent

v.

JORGE LUIS DOMINGUEZ VERA, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-01634-7

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Counsel was not ineffective for failing to interview witnesses.**
- II. **Dominguez Vera was informed of all direct consequences of his plea.**

### STATEMENT OF THE CASE

E.G.G. reported in May 2018 that the defendant, Jorge Dominguez Vera (hereafter ‘Dominguez Vera’) had molested her on multiple occasions. CP 3. The State charged Dominguez Vera with two counts of Child Molestation in the First Degree based on these allegations. CP 4-5. At Dominguez Vera’s first appearance in court, an attorney, Louis Byrd, was appointed to represent him. RP 5.

The State made an offer of settlement to Dominguez Vera. *See* Ex. 2, pp. 17-22. The offer was set to expire on September 10, 2018. *Id.* The offer contemplated that the State would allow Dominguez Vera to enter a guilty plea to one count of Attempted Child Molestation in the First Degree in exchange for reducing the original charges from two Counts of Child Molestation in the First Degree. *Id.* In exchange for that plea, the State would recommend 40 months prison, to life, as an ISRB offense. *Id.* In this pre-trial offer of settlement, it is noted in two separate locations that this is an ISRB offense. *Id.* First the offer indicates that “yes” this is an

offense involving the “indeterminate sentencing review board authority.”  
*Id.* Then the offer specifically states, “[t]he court shall sentence the defendant to community custody under the supervision of the Department of Corrections (DOC) and the authority of the Indeterminate Sentence Review Board for any period of time the person is released from total confinement before the expiration of the maximum sentence. RCW 9.94A.507(5).” *Id.* A portion of the offer of settlement states “I have reviewed and fully discussed the terms of this offer of settlement with my attorney and I understand all of the terms and above paragraphs. I accept the terms of this offer.” *Id.* Dominguez Vera then signed the offer of settlement. *Id.*

When Mr. Byrd has a client who wants to plead guilty, he first ascertains whether the client really wants to enter a guilty plea. Ex. 1, p. 1. As he stated, “I don’t prepare plea forms because I want to prepare them. I prepare a plea form because I have talked over the case, gone through the discovery with the client and the client wants to accept the State’s offer.” *Id.* Dominguez Vera indicated to Mr. Byrd that he wanted to plead guilty. Ex. 1, p. 2. Mr. Byrd discussed the case with Dominguez Vera and went through all the discovery together, including what the witnesses were saying. Ex. 1, p. 3. Dominguez Vera still wanted to plead guilty. *Id.* Dominguez Vera made it very clear to his attorney that he did not want to

go to trial. *Id.* At no point did Dominguez Vera ask his attorney to interview witnesses. Ex. 1, p. 4. Mr. Byrd did not interview any witnesses prior to Dominguez Vera entering a guilty plea. *Id.*

On October 10, 2018, Dominguez Vera entered a guilty plea in Clark County Superior Court. RP 20. The trial court engaged Dominguez Vera in a colloquy about his rights, and the consequences of pleading guilty. *Id.* at 20-26. The Court explained it was an ISRB offense. RP 23-24. Dominguez Vera did not ask any questions or in any way indicate he did not understand what the judge was saying. RP 20-31. In fact, the trial court asked Dominguez Vera if he had any questions and Dominguez Vera said “no.” RP 26. The trial court found Dominguez Vera entered a knowing, intelligent and voluntary plea, understanding the charges and the consequences of the plea. RP 29. The court set sentencing over. RP 29-30.

However, instead of proceeding to sentencing, Dominguez Vera asked the court to provide him with a new attorney. RP 34-35. The trial court gave Dominguez Vera a new attorney, relieving Mr. Byrd of his position, and set the matter over for new counsel to look into things. RP 39. Through new counsel, Dominguez Vera filed a motion to withdraw his guilty plea. CP 74-80. The trial court held a hearing on this motion on May 21, 2019, considering Dominguez Vera’s statement of plea of guilty,

admitted as exhibit 2, and the interview with Mr. Byrd, admitted as exhibit

1. Dominguez Vera also testified at the hearing. RP 70-90.

The trial court denied Dominguez Vera's motion to withdraw his guilty plea, finding that Dominguez Vera was adequately informed about the ISRB sentence, that counsel was effective, and that Dominguez Vera's plea was voluntary. RP 114-17.

Dominguez Vera was then sentenced to a standard range sentence of 40 months to life. CP 146-64. Dominguez Vera then timely appealed. CP 165.

#### **ARGUMENT**

##### **I. Dominguez Vera's Attorney was not ineffective for failing to interview witnesses**

Dominguez Vera appeals the trial court's denial of his motion to withdraw his guilty plea. He argues the trial court abused its discretion in failing to find that he received ineffective assistance of counsel for his attorney not interviewing witnesses prior to the entry of his plea and for not explaining that the charge carried a sentence governed by the Indeterminate Sentence Review Board (ISRB). The trial court did not abuse its discretion in finding the guilty plea was knowingly, intelligently, and voluntarily entered, that it was done so with effective assistance of counsel, and understanding important direct consequences of his plea.

This Court should deny Dominguez Vera's claim and affirm the trial court's decision below.

A defendant does not have a constitutional right to withdraw a guilty plea. *State v. Olmsted*, 70 Wn.2d 116, 118, 422 P.2d 312, 313-14 (1966). Such a motion is addressed in the sound discretion of the trial court. *Id.* Once the trial court has weighed in on the issue, this Court reviews a trial court's denial of a motion to withdraw a guilty plea 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 it bases its decision on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). Dominguez Vera moved to withdraw his plea prior to sentencing, therefore CrR 4.2(f) applies. *See State v. Pugh*, 153 Wn.App. 569, 577, 222 P.3d 821 (2009). CrR 4.2(f) states,

The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430 - .460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

CrR 4.2(f). As used in this rule, “manifest injustice” means “an injustice that is obvious, directly observable, overt, [and] not obscure.” *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974) (citing Webster’s Third International Dictionary (1966)). This is a demanding standard because many safeguards are in place when a defendant enters a guilty plea. *Id.*

A defendant has the right to effective assistance of counsel. To prove ineffective assistance of counsel, an appellant must show that counsel’s representation was deficient, and that the deficiency prejudiced him. *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237 (2001). “In the plea bargaining context, effective assistance of counsel means that counsel actually and substantially assisted his client in deciding whether to plead guilty.” *State v. Cameron*, 30 Wn.App. 229, 232, 633 P.2d 901 (1981) (citing *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974)). Dominguez Vera argues that his attorney was ineffective for failing to adequately investigate the case, specifically, for failing to interview two witnesses prior to Dominguez Vera’s entry of his guilty plea.

Counsel is presumed competent. *State v. Stowe*, 71 Wn.App. 182, 188, 858 P.2d 267 (1993). Performance is deficient if it falls below “an objective standard of reasonableness” under prevailing professional norms. *Id.* Further, in the context of a plea bargain, prejudice is shown when an appellant shows that but for counsel’s unprofessional errors, he

would have not pleaded guilty and would have insisted on going to trial. *Id.* In addition, “a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not ‘a reasonably competent attorney’ and the advice was not ‘within the range of competence demanded of attorneys in criminal cases.’” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). It is also important to “eliminate the distorting effects of hindsight,” and to evaluate the complained-of conduct based on the circumstances known to counsel at the time and from counsel’s perspective at the time. *Id.* at 689-91. A reviewing court must start with a strong presumption that counsel’s conduct was within the range of reasonable professional assistance. *Id.*

Dominguez Vera alleges his attorney was ineffective for failing to interview witnesses. “There is no absolute requirement that defense counsel interview witnesses before trial.” *In re Pirtle*, 136 Wn.2d 467, 488, 965 P.2d 593 (1998). There is especially no such requirement when a defendant chooses to forego trial and enters a plea of guilty. Our Supreme Court has previously held that “the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics ... [including], in some instances, whether to interview some witnesses before trial...” *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). Whether a failure to interview a particular witness constitutes deficient

performance depends on the reason for the trial lawyer's failure to interview. *State v. Jones*, 183 Wn.2d 327, 340, 352 P.3d 776 (2015). A defendant raising this claim also must show that "the investigation would have produced useful information not already known to defendant's trial counsel." *In re Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). Then, if there is additional information which would have been uncovered, the potential resulting prejudice "must be considered in light of the strength of the government's case." *Id.* (citing *Rios v. Rocha*, 299 F.3d 796, 808-09 (9th Cir. 2002)). "[A] particular decision not to investigate must be directly assessed for reasonableness, giving great deference to counsel's judgments." *State v. Elmore*, 162 Wn.2d 236, 252, 172 P.3d 335 (2007).

Dominguez Vera claims that his attorney was ineffective for failing to interview the victim's mother, who would indicate that the victim denied at one point that the abuse occurred, and the victim's grandmother, who often slept in the same room as the victim. This information was already known to defense counsel through discovery; also, this information does not change the strength of the State's case. It is not infrequent that young victims deny abuse is occurring in order to protect the abuser or out of fear. Additionally, the abuse occurred when the victim and the defendant were alone; no statement from the grandmother that she usually, *but not always*, slept in the same room as

the victim would have undermined the State's evidence on this point. Therefore, Dominguez Vera cannot show that the investigation of interviewing these two witnesses would have "produced useful information not already known to defendant's trial counsel." *See Davis*, 152 Wn.2d at 739. And there's been absolutely no showing, that having interviewed these two witnesses, that the defendant would have made a different choice about pleading guilty at the time he entered his guilty plea. Thus, Dominguez Vera cannot show any prejudice.

In addition, it is not outside the norms of the profession to not interview witnesses if a defendant has expressed a desire and intention to plead guilty. Dominguez Vera told his attorney that he wanted to plead guilty. This is not a situation in which a defense attorney failed to interview witnesses prior to going to trial, but one in which a defense attorney did not interview witnesses, whose statements he already knew the gist of, after his client told him he was guilty and did not want to proceed to trial. It is simply standard practice, and within the realm of effective assistance, that an attorney will not interview all witnesses if a client is going to enter a guilty plea early on in the case to take advantage of the State's offer. It's likely the State's offer would not have been so generous had defense counsel insisted on interviewing all the state's witnesses, or if the interview process had uncovered better evidence for

the State. This is a reasonable tactic and one that defense counsel was reasonable for employing.

Dominguez Vera relies heavily on *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010) to support his claim of ineffective assistance of counsel. However, such reliance is misplaced. *A.N.J.* involved a juvenile defendant who pleaded guilty to first degree child molestation. There, his attorney only met with his client for a total of 55 minutes prior to the plea hearing, did not carefully review the plea agreement, did not contact any witnesses, did not request discovery, and did not file any motions. *Id.* at 100-02. Counsel in *A.N.J.* also misled the defendant about the consequences of the plea, including allowing him and his parents to have a misunderstanding that his juvenile sex conviction would be removed from his record, and also failed to adequately distinguish between the registration requirement and the defendant's criminal record. *Id.* at 101-03, 116. *A.N.J.* also involved a dysfunctional public defender contract and system that required payment of investigators and experts out of defense counsel's fee, thus encouraging defense attorneys not to use investigators and experts in their cases. *Id.* at 112. Furthermore, defense counsel in *A.N.J.* represented 263 clients under his contract the same year he represented *A.N.J.*, and carried an average of 30-40 active dependency and approximately 200 other cases at any one time, and only had his wife as an

assistant who was home with a sick child at the time he represented the defendant in the case. *Id.* at 100. None of these circumstances existed in Dominguez Vera's case.

A number of the circumstances in the *A.N.J.* case led to specific prejudice to the defendant; but Dominguez Vera has shown no prejudice here. Mr. Byrd's advice and case preparation was reasonable. Mr. Byrd received discovery and prepared the case, diligently going over the offer of settlement weeks ahead of the guilty plea hearing and diligently going over the statement on plea of guilty with Dominguez Vera. Defense counsel need not interview witnesses when those witnesses have been interviewed by police and their statements are contained within discovery, or those witnesses have little if anything useful to add to building a defense at trial. Furthermore, when a defendant waives his right to a trial, his attorney's investigation is bound to be less than had the attorney spent time preparing for trial. Dominguez Vera received a beneficial offer of settlement from the State, one which he would not have received had defense counsel done significant investigation or taken longer in preparing the case. Furthermore, Dominguez Vera had his own reasons for wanting to plead guilty, which had nothing to do with counsel's advice. Dominguez Vera made his own choice, it was informed and upon advice of counsel. The trial court did not abuse its discretion in finding that

counsel was not ineffective for failing to interview witnesses. The trial court made the proper decision here and its discretion should be honored.

## **II. Dominguez Vera was informed of the ISRB consequence**

Dominguez Vera claims he was not informed that the crime he was pleading guilty to was an ISRB offense and that had he known, he would not have entered a guilty plea. The evidence shows that Dominguez Vera was adequately informed that the offense he pled guilty to would carry an ISRB sentence. Dominguez Vera did not make an adequate showing that he needed to withdraw his guilty plea in order to correct a manifest injustice, and the trial court did not abuse its discretion in denying Dominguez Vera's motion to withdraw his plea.

Before entering a guilty plea, a defendant must be advised of all the direct consequences of his plea. *State v. Barton*, 93 Wn.2d 301, 609 P.2d 1353 (1980). A direct consequence is one which has a definite, immediate, and largely automatic effect on the range of the defendant's punishment. *Id.*; *State v. Johnston*, 17 Wn.App. 486, 564 P.2d 1159 (1977) (citing *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364 (4th Cir. 1973)). The fact that a charge carries sentencing under the Indeterminate Sentence Review Board (ISRB) is considered a direct consequence of a guilty plea. *See In re Matthews*, 128 Wn.App. 267, 272, 115 P.3d 1043 (2005), *abrogated on other grounds by State v. Mendoza*, 157 Wn.2d 582, 141

P.3d 49 (2006). A sentence under the ISRB produces a definite, immediate, and automatic effect on a defendant's range of punishment. *See State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). Therefore, such a consequence of a plea is a direct consequence that a defendant must be informed of upon entering a guilty plea.

Dominguez Vera was informed that the ISRB applied to his case, in multiple different ways. Though on his guilty plea statement, the paragraph about the ISRB was initially crossed off with one slash mark through it, the statement then has an "applies" twice written next to it. EX. 2, p. 4. Mr. Byrd read through the entire statement on plea of guilty with Dominguez Vera. EX. 1, p. 2. Then, Dominguez Vera was informed via the pretrial offer of settlement. On two separate locations in that document it is noted that the offense is an ISRB offense. First the offer indicates that "yes" this is an offense involving the "indeterminate sentencing review board authority." Ex. 2, pp. 17-22. Then the offer specifically states, "[t]he court shall sentence the defendant to community custody under the supervision of the Department of Corrections (DOC) and the authority of the Indeterminate Sentence Review Board for any period of time the person is released from total confinement before the expiration of the maximum sentence. RCW 9.94A.507(5)." *Id.* A portion of the offer of settlement states "I have reviewed and fully discussed the terms of this

offer of settlement with my attorney and I understand all of the terms and above paragraphs. I accept the terms of this offer.” *Id.* Dominguez-Vera then signed the offer of settlement. *Id.* Additionally, the Court noted at the time of the change of plea colloquy that this was an ISRB offense. RP 23-24.

Dominguez Vera was adequately informed that the offense he was pleading guilty to was an ISRB offense. The trial court properly found that the evidence showed he was informed of this consequence and therefore it was not a basis to allow withdrawal of his plea. It is clear from the trial court’s ruling in this matter, that it did not find Dominguez Vera to be a credible witness and instead found Mr. Byrd more credible. This Court does not review credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court was not convinced by Dominguez Vera’s testimony that he did not know that it was an ISRB offense. Instead, the court was convinced by its own colloquy and the statements from Mr. Byrd that he went over the plea forms in their entirety, and the hand-written language that that section of the plea statement “applies.” The trial court was within its discretion to make this credibility determination and therefore made the appropriate ruling that Dominguez Vera had not made a strong showing that he was entitled to

withdraw his guilty plea. The trial court did not abuse its discretion and its holding should be affirmed.

#### CONCLUSION

The trial court properly exercised its discretion in denying Dominguez Vera's motion to withdraw his guilty plea. The trial court should be affirmed.

DATED this 25<sup>th</sup> day of March, 2020.

Respectfully submitted:

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**March 25, 2020 - 10:28 AM**

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**Appellate Court Case Title:** State of Washington, Respondent v. Jorge L. Dominguez Vera, Appellant  
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