

**FILED**  
DEC 12, 2016  
Court of Appeals  
Division III  
State of Washington

NO. 34183-6-III  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**JESSE JAMES LUNA, JR.,**

Defendant/Appellant.

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**BRIEF OF APPELLANT**

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## **ASSIGNMENTS OF ERROR**

1. Jesse James Luna, Jr. did not receive effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22 when:

- a.) His first attorney failed to challenge untimely trial settings; and
- b.) His third attorney failed to file a motion to withdraw guilty plea as he requested.

2. The trial court's failure to schedule a hearing on Mr. Luna's oral motion to withdraw his guilty plea deprived him of the opportunity to fully present testimony and argument as to why that plea should be withdrawn.

3. The trial court abused its discretion when it did not consider Mr. Luna's *pro se* request for a "same criminal conduct" analysis during the course of his allocution at the sentencing hearing.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did Mr. Luna's first attorney's failure to object to untimely trial settings deprive him of effective assistance of counsel?

2. Did Mr. Luna's third attorney's failure to file a written motion to withdraw guilty plea deprive him of effective assistance of counsel?

3. Should Mr. Luna be entitled to a hearing in connection with his oral motion to withdraw guilty plea?

4. Did the trial court abuse its discretion when it failed to conduct a “same criminal conduct” analysis as requested by Mr. Luna during his allocution at the sentencing hearing?

### **STATEMENT OF THE CASE**

A robbery occurred on May 23, 2013 at the Zip Trip on 1023 West Wellesley in Spokane. Mr. Luna became a suspect in connection with the robbery and was subsequently arrested. (CP 1)

An information was filed on May 30, 2013 charging Mr. Luna with two (2) counts of second degree robbery and two (2) counts of intimidating a witness. (CP 7)

An Amended Information was filed on June 5, 2013 adding a count of bail jumping. (CP 12)

Mr. Luna was arraigned on June 11, 2013. A scheduling order was entered setting his trial for September 3, 2013. No defense attorney signature appears on the scheduling order. Mr. Luna was being held on \$100,000.00 bail. (CP 4; CP 15)

The State filed a most serious offense notice on June 12, 2013 which advised Mr. Luna that he faced potential life in prison without possibility of parole. (CP 16)

Numerous scheduling orders were subsequently entered continuing the trial date from September 3, 2013. The scheduling order of August 19, 2013 was entered sixty-nine (69) days after the original June 11, 2013 scheduling order. (CP 17; CP 18; CP 21; CP 22; CP 23)

A Second Amended Information was filed on February 10, 2014. It retained the two (2) counts of intimidating a witness and the bail jumping charge. The second degree robbery charges were deleted and a count of first degree robbery while displaying a weapon was added. (CP 24)

Mr. Luna challenged the photo montage used by the investigating officers. The trial court entered Findings of Fact and Conclusions of Law ruling that the photo montage was impermissibly suggestive. (CP 28)

A new attorney was appointed for Mr. Luna on February 28, 2014. A scheduling order was entered that date continuing the jury trial to May 19, 2014. (CP 27)

An order was entered directing Eastern State Hospital (ESH) to conduct a competency evaluation of Mr. Luna. ESH subsequently filed its report on August 22, 2014. (CP 93; CP 95)

An order lifting a prior stay was entered by the Court on September 2, 2014. A new scheduling order was entered that date setting Mr. Luna's trial for November 3, 2014. (CP 102; CP 104)

A subsequent scheduling order set the jury trial for March 2, 2015 at the defense attorney's request. (CP 105).

On the scheduled trial date a Third Amended Information was filed charging Mr. Luna with one (1) count of second degree burglary, one (1) count of first degree theft and one (1) count of intimidating a witness. (CP 130)

Mr. Luna pled guilty to the Third Amended Information. The trial court conducted a colloquy with regard to his understanding of the charges. Mr. Luna entered an *Alford*<sup>1</sup> plea to second degree burglary and intimidation of a witness. He entered an *In re Barr*<sup>2</sup> plea to first degree theft. There was a stipulation to an exceptional sentence of ten (10) years in prison on each count to run consecutively. (CP 136; RP 17, l. 6 to RP 26, l. 18; RP 27, l. 19 to RP 28, l. 12)

After entering his plea Mr. Luna decided he wanted to withdraw that plea. His attorney at that time filed a motion to withdraw on April 20,

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<sup>1</sup> *North Carolina v. Alford*, 40 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970)

<sup>2</sup> *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984)

2015. Mr. Luna's sentencing hearing was rescheduled to May 7, 2015. Another attorney was appointed to represent him. (CP 151; CP 154)

The State filed a response to Mr. Luna's request to withdraw his guilty plea on May 5, 2015. No written motion to withdraw the plea was ever entered. (CP 155)

Mr. Luna and his new attorney appeared at the May 7, 2015 sentencing hearing. There was a discussion between the sentencing court and the attorney which included a request for a fact-finding hearing. The sentencing court declined to hold a hearing. (RP 33, l. 12 to RP 36, l. 23)

The State offered to let Mr. Luna withdraw his plea and proceed to trial on the original charges. Neither Mr. Luna nor his attorney accepted that offer. (RP 38, ll. 1-13)

Mr. Luna was given his right of allocution. He accused his second attorney of lying to him about whether or not he could argue for concurrent sentences at the time of sentencing. Mr. Luna also requested the sentencing court to conduct a "same criminal conduct" analysis. The Court proceeded to sentencing and advised Mr. Luna that the Court of Appeals would reverse the sentence if it was determined to be clearly too excessive. (RP 61, l. 13 to RP 65, l. 17)

Judgment and Sentence was entered on May 7, 2015 in accord with the guilty plea. A detention order was also entered directing that Mr. Luna

be detained in the Spokane County jail until Jun 15, 2015. This was to give his current attorney the opportunity to file a motion to withdraw guilty plea. (CP 160; CP 161)

Findings of Fact and Conclusions of Law relating to an exceptional sentence were entered on May 12, 2015. (CP 177)

Mr. Luna filed a Notice of Appeal on January 28, 2016 which the Superior Court forwarded to the Court of Appeals as a Personal Restraint Petition. (CP 179)

### **SUMMARY OF ARGUMENT**

The Sixth Amendment to the United States Constitution and Const. art. I, § 22 guarantee a criminal defendant the right to effective assistance of counsel.

Mr. Luna's first attorney failed to object to an erroneously set trial date. The trial court's scheduling order did not advise Mr. Luna that he only had ten (10) days to object to the trial date.

Mr. Luna's third attorney failed to comply with his request to file a motion to withdraw guilty plea. The attorney was given additional time by the Court to do so and ignored that opportunity.

The failure of the two (2) attorneys, either individually or in combination, to perform the duty owed to Mr. Luna under the respective facts and circumstances violated his constitutional right to effective assistance of counsel.

The sentencing court's failure to hold a hearing on the oral motion to withdraw plea precludes an effective analysis of his second attorney's performance.

The sentencing court abused its discretion by not engaging in a "same criminal conduct" analysis.

## **ARGUMENT**

### **I. INEFFECTIVE ASSISTANCE OF COUNSEL**

The Sixth Amendment to the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense."

Const. art. I, § 22 states, in part: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel ...."

The right to counsel includes the right to effective assistance of counsel.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all of the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Mr. Luna contends that he received ineffective assistance of counsel in two (2) instances.

The first instance involves violations of the time-for-trial rule.

CrR 3.3(a)(1) provides:

*Responsibility of Court.* It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

Initially, the trial court failed to comply with its responsibility. Documentation indicates that at Mr. Luna's arraignment the trial court entered a scheduling order which set a jury trial beyond the time-for-trial period. Arraignment occurred on June 11, 2013. The jury trial was scheduled for September 3, 2013. The trial date was eighty-four (84) days beyond the arraignment date.

CrR 3.3(c)(1) provides:

*Initial Commencement Date.* The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

CrR 3.3(b)(1) states:

*Defendant Detained in Jail.* A defendant who is detained in jail shall be brought to trial within the longer of

- (i) sixty days after the commencement date specified in this rule, or
- (ii) the time specified under subsection (b)(5).

CrR 3.3(b)(5) does not apply to Mr. Luna's argument. Sixty (60) days after June 11, 2013 was August 10, 2013. August 10, 2013 was a Saturday. Thus, the time-for-trial expiration occurred on Monday, August 12, 2013.

Sixty-nine (69) days had elapsed as of the time when a new scheduling order was entered on August 19, 2013. This does not cure the defect.

CrR 3.3(d)(1) provides:

*Initial Setting of Trial Date.* **The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The**

**notice shall set forth the proper date of the defendant's arraignment and the date set for trial.**

(Emphasis applied.)

No signature of a defense attorney appears on the original scheduling order. Mr. Luna's signature does appear on that scheduling order. The scheduling order indicates that he is "**In Custody**." Mr. Luna's signature line contains the following limitation "Required for CrR 3.3(f)(1) continuances."

There is no indication on the scheduling order that Mr. Luna was notified of the provisions of CrR 3.3(d)(1). No time-for-trial waiver appears of record as to this order.

It is Mr. Luna's position that when counsel was finally appointed for him that that attorney was required to familiarize himself with the record and file an objection on his behalf in accord with the rule. Defense counsel entered a Notice of Appearance on June 13, 2013.

Defense counsel's failure to notice that the original trial date was improperly set, combined with the trial court's failure to comply with the rule, denied him his right to be brought to trial within sixty (60) days of his arraignment.

Mr. Luna recognizes that CrR 3.3(d)(4) impacts his argument:

*Loss of Right to Object.* If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to subsection (e) and subsection (b)(5).

Defense counsel's failure to object prior to the entry of the August 19, 2013 scheduling order further impacted Mr. Luna's time-for-trial. It resulted in a rule-based, non-knowing, involuntary waiver.

The second instance of ineffective assistance of counsel occurred when Mr. Luna's third court-appointed attorney failed to file a motion to withdraw guilty plea.

The complete failure of counsel to follow-up and file a motion to withdraw guilty plea falls squarely within the two (2) prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).

Defense counsel's failure to follow through on the oral motion falls well below the professional standards required of representation in criminal cases. It deprived Mr. Luna of any opportunity to adequately address and present the issue of a manifest injustice to the trial court.

When a motion to withdraw guilty plea is filed after sentencing it is subject to the provisions of CrR 7.8. CrR 7.8(b) contains five (5) subdivisions. The only subdivision that would have any application to a post-sentencing motion to withdraw guilty plea is subparagraph (5) which states: “[a]ny other reason justifying relief from the operation of the judgment.”

On the other hand, a pre-sentencing motion to withdraw guilty plea is governed by CrR 4.2(f) which provides, in part:

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. ...

The implications of the differing burdens for withdrawal of a guilty plea under the respective rules will be addressed in more detail in the following portion of Mr. Luna’s brief.

## **II. MANIFEST INJUSTICE**

CrR 4.2(f) provides in pertinent part that “[t]he 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.” Withdrawal may be necessary to correct a manifest injustice where the defendant establishes (1) he or she received ineffective assistance of counsel, (2) the plea was not ratified by the defendant or one authorized by him or her to do so, (3) the plea was involuntary, or (4) the plea agreement was not kept by the pros-

ecution. The defendant generally bears the burden of establishing the necessity for withdrawing the plea.

*State v. Quy Dinh Nguyen*, 179 Wn. App. 271, 282-83, 319 P.3d 53 (2013).

The difficulty in Mr. Luna's case is that no hearing was conducted to determine whether or not there was ineffective assistance of counsel at the guilty plea hearing. It must be remembered that the change of plea occurred as the first day of trial was to commence.

There was an extremely short time frame within which Mr. Luna was given the opportunity to consider whether or not to change his plea. Based upon the colloquy conducted at the sentencing hearing it appears that Mr. Luna was confused over the terms "consecutive" and "concurrent." The record reflects that he believed he could argue for a concurrent sentence at the time of sentencing. (RP 33, l. 12 to RP 36, l. 23)

Mr. Luna takes the position that in a right of allocution the defendant has the right to say anything whatsoever to the sentencing court.

The United States Supreme Court has said that the denial of the right of allocution is "an error which is neither jurisdictional nor constitutional," nor is it "a fundamental defect which inherently results in a complete miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed.2d 417 (1962). The right of allocution has its roots in common law. *Green v. Unit-*

*ed States*, 365 U.S. 301, 304, 91 S. Ct. 653,  
5 L. Ed.2d 670 (1961).

*State v. Canfield*, 154 Wn.2d 698, 702-03, 116 P.3d 391 (2005).

Mr. Luna recognizes he was given his right of allocution at the sentencing hearing. Nevertheless, the question becomes whether or not defense counsel, at the guilty plea hearing, provided correct advice to Mr. Luna concerning the “consecutive” versus “concurrent” conundrum.

In the absence of a hearing to determine what defense counsel actually said to Mr. Luna there is no way to gather the essential facts for establishing and/or arguing that a manifest injustice occurred.

RCW 9.94A.500(1) provides, in part:

...  
The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed. ...

As announced in *State v. Curtis*, 126 Wn. App. 459, 463, 108 P..3d  
1233 (2005):

Under the current allocution standard, the court must allow argument from the defendant “as to the sentence to be imposed.” RCW 9.94A.500(1). But “[a]llocution is a plea for mercy; it is not intended to advance

or dispute facts.” *State v. Lord*, 117 Wn.2d 829, 897, 822 P.2d 177 (1991). ...

Mr. Luna maintains that he had the right to ask for concurrent sentences as opposed to consecutive sentences. What is missing from the record is the discussion between Mr. Luna and his attorney. Mr. Luna did indicate to the Court that he had a discussion with his attorney and was given the understanding that he could argue for concurrent sentences. (RP 16, l. 13 to RP 17, l. 5)

In the context of a guilty plea, a defendant must show that his counsel failed to actually and substantially assist him in deciding whether to plead guilty and that, but for counsel’s failure to give adequate advice, he would not have pleaded guilty.

*State v. Blanks*, 139 Wn. App. 543, 551, 161 P.3d 455 (2007).

Mr. Luna contends that a hearing is a necessary predicate to sentencing under the facts and circumstances of his case. He submits that his case needs to be remanded to the sentencing court to conduct a hearing on whether or not he should be allowed to withdraw his guilty plea.

Moreover, Mr. Luna relies upon the language contained in the guilty plea statement under paragraph 4(i) which states, in part:

The judge does not have to follow anyone’s recommendation as to sentence. The judge must impose a sentence within the standard range unless the judge finds substantial and compelling reasons not to do so. I under-

stand the following regarding exceptional sentences:

...

- (iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.

The foregoing language further comports with Mr. Luna's position that the sentencing court could consider whatever alternative sentencing he may have been able to offer to the Court in contravention of the language of the guilty plea.

### **III. SAME CRIMINAL CONDUCT**

Mr. Luna pled guilty to second degree burglary and first degree theft as part of the plea agreement. The first degree theft occurred during the burglary. The purpose of the burglary was the theft. Both offenses occurred at the same time. The 7-11 was the victim in each case. Criminal intent was the same.

Mr. Luna recognizes the existence of the burglary anti-merger statute, RCW 9A.52.050, but maintains that the trial court did not exercise its

discretion when he presented his argument on “same criminal conduct” during his right of allocution.

[The] statute gives a trial judge discretion to punish a burglary separately, even where the burglary and another crime encompassed the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992). The trial court ... had authority under RCW 9A.52.050 to impose a separate sentence for ... [a] burglary conviction, regardless of whether the burglary constituted the same criminal conduct as any of [the] ... other convictions.

*State v. Knight*, 176 Wn. App. 936, 962, 309 P.3d 776 (2013).

Mr. Luna takes the position that the sentencing court did not exercise its discretion. The Court never conducted a “same criminal conduct” analysis.

...[T]he question of same criminal conduct is still a matter within the trial court’s discretion. *State v. Anderson*, 92 Wn. App. 54, 62, 960 P.2d 975 (1998). And **the court need not, indeed cannot, exercise that discretion unless it is given the chance to do so.** *State v. Nitsch*, 100 Wn. App. 512, 524-25, 997 P.2d 1000 (2000).

*State v. McDougall*, 132 Wn. App. 609, 612-13, 132 P.3d 786 (2006).

(Emphasis supplied.)

The sentencing court was given the opportunity to exercise its discretion. It did not do so.

## CONCLUSION

Mr. Luna's first attorney did not provide effective assistance of counsel. The failure to address the improper setting of the original trial date deprived him of the opportunity to schedule an early trial and place the State at a potential disadvantage in connection with its witnesses.

Defense counsel's failure to note an objection was compounded at a later date when the trial was again continued after the initial time-for-trial period had expired.

Mr. Luna's third attorney also was ineffective when he failed to file a motion to withdraw guilty. The lack of a written motion runs contrary to the provisions of CrR 7.8(c)(1).

Neither defense attorney acted reasonably under the facts and circumstances of Mr. Luna's case. As a result he suffered prejudice when he did not have a timely trial and again, when he was unable to have a hearing to present evidence of the reasoning behind his desire to withdraw his guilty plea.

Insofar as the motion to withdraw a guilty plea is concerned the proper remedy would be to send the matter back to the sentencing court to conduct an appropriate hearing.

If the combination of the ineffective assistance of counsel claims is accepted, then the appropriate remedy is reversal of the convictions and dismissal of the case.

Finally, the “same criminal conduct” argument requires a remand to the sentencing court to exercise its discretion in connection with what Mr. Luna presented in his allocution at the time of sentencing.

DATED this 12th day of December, 2016.

Respectfully submitted,

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**NO. 34183-6-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	SPOKANE COUNTY
Plaintiff,	)	NO. 13 1 01900 1
Respondent,	)	
	)	
v.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
JESSE JAMES LUNA, JR.,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

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I certify under penalty of perjury under the laws of the State of Washington that on this 12<sup>th</sup> day of December, 2016, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

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