

NO. 34651-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN EGUIRES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable David Eloffson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's pre-judgment motion to withdraw his Alford¹ plea.

2. Counsel's deficient performance violated appellant's constitutional right to effective assistance of counsel for his pre-judgment motion to withdraw his plea.

Issues Pertaining to Assignments of Error

1. Under CrR 4.2, may a defendant present sufficient evidence of a manifest injustice warranting withdrawal of a guilty plea by presenting offers of proof through his attorney, rather than sworn affidavits?

2. Alternatively, is a defendant deprived of his Sixth Amendment right to effective assistance of counsel on a pre-judgment motion to withdraw a guilty plea when (1) his attorney fails to cite or argue applicable legal standards and presents evidence in the form of offers of proof rather than sworn affidavits or testimony and (2) the court denies the motion citing the lack of sworn testimony and direct evidence?

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (Washington adopted the Alford holding in State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976)).

B. STATEMENT OF THE CASE

The Yakima County prosecutor charged appellant Dustin Eguires with one count of carrying a rifle onto public school premises, a gross misdemeanor, and 12 felony counts of second-degree identity theft. CP 4-6. Eguires entered an Alford plea, admitting there was a substantial likelihood the trier of fact would find him guilty. CP 7-16. His standard range on the identity theft counts was 43 to 57 months, but the prosecutor agreed to recommend a downward departure of 18 months and dismiss charges under two other cause numbers. CP 11.

The statement of defendant on plea of guilty set forth the elements of the offenses and the constitutional rights that would be forfeited by pleading guilty. CP 7-9. At the plea hearing, Eguires confirmed his desire to enter the Alford plea and told the court he had gone over the paperwork with his attorney and understood he would be waiving his rights to trial and appeal. RP 6-8. He understood the court did not have to follow the State's recommendation, a fact that scared him. RP 10. He stated that the only threat or promise made to him was that he faced "a lot more time" if he did not plead guilty. RP 12.

He pleaded guilty, and the court clarified that he was doing so under Alford. RP 14-16. The court reviewed the police reports and found a

factual basis for the plea. RP 16. The court then found Eguires guilty and set a date for sentencing. RP 16.

Approximately one month later, Eguires (via new counsel) moved to withdraw his plea, arguing the information provided in the application for the search warrant did not match the information in the police or computer aided dispatch reports. CP 20. The police reports showed Eguires was seen at the school with a rifle. CP 36. According to the search warrant application, police sought the warrant to search Eguires' premises for the gun because Eguires told them it was on the property but he would not say where it was. CP 31. While searching for the gun, they glanced inside a backpack and noticed identification documents. CP 37. An amended search warrant authorized them to search for evidence of identity theft. CP 19. A search of the backpack revealed the documents that formed the basis for the 12 counts of identity theft. CP 19.

The focus of the motion to withdraw the plea was that police already knew where the gun was, and thus had no basis for the search warrants that led to the evidence of identity theft. Eguires argued the reports indicating police already knew where the gun contained material fact that were intentionally omitted from the search warrant application in violation of Franks v. Delaware, 438 U.S. 154, 156, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667 (1978). When police arrived, according to their report,

Eguires at first said he did not have a gun, but subsequently told them it was on the table. CP 21. The computer aided dispatch report indicates police saw the rifle before even approaching Eguires. CP 21. According to Eguires' attorney, these facts were not included in the application for the search warrant. CP 31. Attached to Eguires' motion were the police reports and the search warrant. CP 24-28. The telephonic application for the search warrant was not attached, but counsel made representations as an officer of the court that he had listened to the recording and was accurately representing its contents. CP 31.

Eguires argued the significance of the missing information, and the possibility of suppressing the evidence of identity theft, was not discussed with him before his plea. CP 20. He asked the court to allow him to withdraw the plea to conduct further discovery and potentially prepare a suppression motion under Franks. CP 22.

At the first hearing on Eguires' motion, the State argued the new attorney was not yet counsel of record and there had been no showing of manifest injustice to warrant withdrawal of the plea. RP 26. Eguires argued the documents he submitted conclusively showed the search warrant was invalid. RP 29. The court allowed substitution of new counsel and set a briefing schedule. RP 31-33.

Before the next hearing, Eguires filed a second motion to withdraw the plea, specifically arguing prior counsel had been ineffective in failing to discuss these issues with Eguires and that failure was instrumental to the plea. CP 33. Counsel asserted that he knew from Eguires personally, and declared as an officer of the court, that this issue was never discussed with Eguires. RP 52. At the hearing, counsel explained that a challenge to the search warrant would have led to suppression of the evidence and dismissal of the identity theft charges or, at a minimum better bargaining power in the plea negotiations. RP 48. He argued there should be a Franks hearing or at least a new opportunity to negotiate the plea in light of the Franks issue. RP 51.

The court concluded that, without a sworn statement from Eguires, it could not determine whether he had been advised on this issue. RP 62-63. The court also concluded there was not enough information to conclude whether Eguires would have won the Franks issue, noting the search warrant application was not before the court. RP 63. The court did not find a manifest injustice and denied Eguires' motion to withdraw his plea. RP 64; CP 43. Notice of appeal was timely filed. CP 53.

C. ARGUMENT

1. THE COURT ERRED IN DENYING EGUIRES' MOTION TO WITHDRAW HIS ALFORD PLEA.

The superior court erred in denying Eguires' motion to withdraw his Alford plea because the court required a heightened standard of evidence not required by the criminal rules. Eguires' attorney presented offers of proof showing that (1) a challenge to the search warrant would likely have resulted in suppression of all the evidence of the 12 felony counts of identity theft, and (2) Eguires' prior attorney did not discuss this issue with him before he plead guilty to all 12 counts of identity theft. The court rejected the evidence and denied the motion because the evidence was not in the form of sworn affidavits or testimony or original documents, but instead was in the form of representations by counsel as to his investigations. RP 62-63. This was a misapplication of the law that requires reversal. Interpretation of a court rule is a question of law reviewed de novo on appeal. Nevers v. Fireside, Inc., 133 W.2d 804, 809, 947 P.2d 721 (1997). A court abuses its discretion when its decision is based on an erroneous view of the relevant law. City of Kennewick v. Day, 142 Wn.2d 1, 8, 11 P.3d 304 (2000).

CrR 4.2² governs motions to withdraw a guilty plea, and requires a showing that withdrawal is necessary to correct a manifest injustice. This

² CrR 4.2(f) provides in relevant part:

substantive standard is the same whether the motion is brought before or after judgment. State v. A.N.J., 168 Wn.2d 91, 107, 225 P.3d 956 (2010). However, the court rule imposes an additional requirement on post-judgment motions. CrR 4.2; State v. Lamb, 175 Wn.2d 121, 128, 285 P.3d 27 (2012). Post-judgment motions to withdraw a plea must, in addition to the requirements of CrR 4.2, also meet the requirements of CrR 7.8³ for motions for relief from judgment. CrR 4.2; Lamb, 175 Wn.2d at 128. Under CrR 7.8, the motion must be supported by sworn affidavits.

CrR 4.2 does not impose such a requirement for pre-judgment motions like the one in this case. The fact that the additional requirements of CrR 7.8 are mentioned only in the context of post-judgment motions indicates the requirement for affidavits does not apply to pre-judgment motions. It makes sense to require heightened evidentiary standards in a post-judgment motion because in a post-judgment motion, there is no right to counsel without a preliminary showing that the motion is not frivolous. State

Withdrawal of Plea. 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.431 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.401-.411, 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.

³ CrR 7.8(c) provides in relevant part, "Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based."

v. Robinson, 153 Wn.2d 689, 694-95, 107 P.3d 90 (2005). Most motions are, therefore, brought by defendants acting pro se. By contrast, pre-judgment motions are brought during a critical stage of the proceedings, when the accused enjoys a constitutional right to the assistance of counsel. State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996). Thus, the motions are generally brought by attorneys with a duty of candor to the court. RPC 3.3.

Nothing in CrR 4.2 indicates that an attorney's offer of proof, made as an officer of the court, should be automatically insufficient. This is not a question of the superior court making a credibility determination; the court here expressly noted it was unable to make a credibility determination. CP 62-63. The superior court erred in applying the affidavit requirement of CrR 7.8 to Eguire's pre-judgment motion to withdraw his plea. The order denying the motion should be reversed.

2. ALTERNATIVELY, EGUIRES WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS PRE-JUDGMENT MOTION TO WITHDRAW HIS ALFORD PLEA.

If this court finds CrR 4.2 requires sworn testimony or affidavits in support of a motion to withdraw a guilty plea, counsel was ineffective in failing to offer evidence in the form required by law to support the motion. His attorney was also ineffective in failing to cite applicable law. The order denying the motion should be reversed because, without counsel's

unprofessional errors, there is a reasonable probability the motion would have been granted.

Eguires had a constitutional right to effective representation by counsel at the hearing on the motion to withdraw his guilty plea. Harell, 80 Wn. App. at 804. A pre-judgment to withdraw a plea is a critical stage of the proceedings, during which an accused person enjoys a Sixth Amendment right to effective assistance of counsel. Id. That constitutional right is violated when counsel's performance is unreasonably deficient and there is a reasonable probability that, without the errors, the outcome of the trial would have been different. State v. Ortiz, 196 Wn. App. 301, 306-07, 383 P.3d 586 (2016) (discussing Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

- a. Counsel failed to cite the law or present the evidence in support of the motion to withdraw the guilty plea.

Counsel's performance on the motion to withdraw the plea was unreasonably deficient because he failed to frame his argument in terms of applicable law and failed to present available evidence necessary to provide a factual basis for the motion.

To provide effective assistance, counsel must research relevant law. In re Pers. Restraint of Tsai, 183 Wn.2d 91,102, 351 P.3d 138 (2015). When the matter is at the heart of the case, failing to conduct research is objectively

unreasonable. State v. Kylo, 166 Wn.2d 856, 868, 215 P.3d 177 (2009). A defendant overcomes the presumption of effective representation by showing “counsel failed to conduct appropriate investigations.” State v. Thomas, 109 Wn.2d 222,230, 743 P.2d 816 (1987). In this case, the record indicates counsel failed to research the law applicable to motions to withdraw a guilty plea.

A defendant who seeks to withdraw a plea agreement bears a heavy burden under CrR 4.2 to show that withdrawing the plea is necessary to correct a manifest injustice. State v. Nguyen, 179 Wn. App. 271, 283, 319 P.3d 53 (2013) (describing the defendant’s burden as “demanding”). Here, neither of counsel’s two motions to withdraw Eguire’s plea even mentioned the manifest injustice standard or CrR 4.2. CP 20-42.

Washington law identifies four circumstances that may amount to a manifest injustice permitting a defendant to withdraw his plea: “(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 prosecution.” Nguyen, 179 Wn. App. at 282.

Counsel’s first motion to withdraw the plea does not allege ineffective assistance or that that the plea was involuntary or any other basis for withdrawal. CP 20-22. It was the prosecutor who, at the first hearing,

explained that it appeared counsel was attempting to argue ineffective assistance of counsel. RP 27.

Counsel's second motion to withdraw the plea recited the standard for ineffective assistance of counsel and argued that failure to discuss the possible suppression of the evidence under Franks was ineffective. CP 33. He argued that the fruit of the search was the only evidence of the 12 felony counts of identity theft, so the effect was significant. CP 33. Counsel argued there were "a number of other potential issues" and the issues could not be adequately explored without withdrawal of the plea and further discovery. CP 34.

Counsel appeared unaware of the burden on him to demonstrate manifest injustice at the hearing. He presented evidence suggesting reasonable defense counsel should have investigated the possibility of a motion to suppress under Franks. It appears he believed evidence suggesting a potential problem would be sufficient to withdraw the plea so that further evidence could be developed. CP 34; RP 49-50. He appears not to have understood that the plea could not be withdrawn without a conclusive showing of manifest injustice. Counsel's failure to understand and argue the applicable law and burden of proof was unreasonably deficient performance. Kyllo, 166 Wn.2d at 868.

Counsel also argued the documents presented (the search warrant and the police reports) conclusively demonstrated the invalidity of the search warrant due to material omissions under Franks. RP 49-50. Counsel appears to have been unaware that even conclusively establishing the invalidity of the warrant is not, by itself, a basis to withdraw the plea. By pleading guilty, a defendant waives all issues regarding suppression of the evidence. State v. Wilson, 162 Wn. App. 409, 415-16, 253 P.3d 1143 (2011). Counsel was required to conclusively demonstrate that this issue was not investigated or discussed and that that failure either constituted ineffective assistance or rendered the plea involuntary. CrR 4.2; Nguyen, 179 Wn. App. at 282.

Counsel also failed to present available evidence to provide factual support for the motion. The Strickland standard required Eguires to show prior counsel's performance was deficient. 466 U.S. at 685-87. Counsel asserted, as an officer of the court, that he had spoken with Eguires and Eguires had told him his prior attorney never discussed with him the possibility of challenging the search warrant and suppressing the evidence of identity theft. CP 24, 30, 33; RP 52, 60. However, counsel did not present a sworn affidavit or sworn testimony by Eguires to that effect. Nor did he present testimony or an affidavit from prior counsel regarding what conversations had occurred before the plea. Instead, he appeared to believe it unnecessary to do so because such conversations were protected by the

attorney-client privilege. RP 60-61. Counsel appeared unaware that, by asserting ineffective assistance of counsel, a defendant waives attorney-client privilege for facts relating to that claim. RPC 1.6(b)(2); State v. Cloud, 95 Wn. App. 606, 613, 976 P.2d 649 (1999).

Counsel also failed to present convincing evidence of the contents of the telephonic search warrant application. Counsel attempted to show that there were material omissions or misrepresentations in the search warrant application. He attached as exhibits to the motion the search warrant itself, two police reports, and the computer aided dispatch report. CP 35-42. But he did not present the telephonic search warrant application. Instead, he asserted in his motion that, as an officer of the court, he had reviewed the application and reported what it contained. CP 21, 31. He did not make a recording of the application and offer it as an exhibit. Nor did he have it transcribed and offer a transcript as an exhibit.

To show ineffective assistance of previous counsel, counsel had to demonstrate, at a minimum, that prior counsel had failed to discuss with Eguire a meritorious Franks challenge to the search warrant. The success of that showing depended on a precise understanding of exactly what information was presented to the magistrate who granted the search warrant. See State v. Chenoweth, 160 Wn.2d 454, 462, 158 P.3d 595 (2007) (factual inaccuracies in warrant affidavit may invalidate warrant if made recklessly

or intentionally) (citing Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)). But counsel failed to present that information in an acceptable form, relying instead on something akin to hearsay or an offer of proof. CP 21, 24, 31. Counsel appears not to have understood that the time for offers of proof had passed. He bore the “demanding” burden at the hearing to show the existence of a manifest injustice, not just the suggestion of a problem. CrR 4.2; Nguyen, 179 Wn. App. at 283.

Reasonable defense counsel would have framed the motion to withdraw the guilty plea in terms of the applicable legal standards. Reasonable defense counsel would have presented available evidence necessary to support that motion, given the demanding burden placed on a defendant who desires to withdraw his plea. Counsel’s failure to do so undermines confidence in the outcome because the trial court relied on counsel’s errors in denying Eguires’ motion.

- b. Counsel’s failings caused prejudice because they formed the basis of the court’s denial of the motion to withdraw the plea.

Counsel’s deficient performance in presenting Eguires’ motion to withdraw his plea prejudiced Eguires and requires reversal of the order denying the motion. Prejudice is shown under the Strickland standard when, but for counsel’s errors, there is a reasonable probability the outcome of the

proceeding would have been different. Ortiz, 196 Wn. App. at 306-07 (citing Strickland, 466 U.S. at 685-87). A “reasonable probability” is less than a preponderance of the evidence. State v. Estes, ___ Wn.2d ___, ___ P.3d ___, 2017 WL 2483272, slip op. at 8 (no. 93143-7, filed June 8, 2017) (citing Strickland, 466 U.S. at 694). It suffices that confidence in the outcome is undermined. Id. Counsel’s errors in this case raise a reasonable probability that if he had understood the applicable law and burden of proof, the outcome would have been different because the court would likely have granted a properly presented and argued motion based on prior counsel’s ineffectiveness during plea negotiations.

The right to effective assistance of counsel applies in the plea bargaining context. Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); A.N.J., 168 Wn.2d at 111. Effective assistance during plea negotiations includes reasonably evaluating the evidence so the defendant can make an informed choice about whether or not to proceed to trial. Estes, ___ Wn.2d at ___, slip op. at 15-16 (citing A.N.J., 168 Wn.2d at 111-12, and State v. Edwards, 171 Wn. App. 379, 394, 294 P.3d 708 (2012)). The attorney must communicate to the client the strengths and weaknesses of the case. State v. James, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). Uncertainty about the outcome of negotiations should not prevent reversal when confidence in the outcome is undermined. Id.

Here, there was evidence that prior counsel failed to assess and discuss with Eguires the likelihood that evidence of 12 felony counts of identity theft would be suppressed. CP 30, 33; RP 52. As counsel pointed out, that assessment would be critical both to the decision to plead at all and could be used as leverage in the negotiations. RP 50. The failure to discuss this issue undermines confidence in the outcome because it undermines confidence in Eguires' ability to make a meaningful, informed decision about whether to take a plea deal. See Estes, ___ Wn.2d at ___, slip op. at 15-16 (attorney must evaluate evidence so client can make meaningful, informed decision about plea). Prior counsel's errors would, therefore, be a proper basis to withdraw the plea on the grounds of manifest injustice, if that claim were effectively presented.

But Eguires' motion to withdraw his plea was denied largely because the claim was not effectively presented. See RP 62-63. If counsel had understood the burden was on him to show the manifest injustice definitively, he could have presented sworn testimony, rather than an offer of proof. He asserted Eguires told him the suppression issue was not discussed, so it would have likely been rather simple to obtain and present a sworn declaration, or put Eguires on the stand to testify to that effect. CP 21, 31; RP 52. This would have made a far better factual record for the ineffective assistance claim.

The existence of a factual record would likely have changed the court's ruling because the court specifically relied on the lack of such a record in denying the motion. The court told them, "I don't have a sworn statement from Mr. Eguires describing anything. I have your representation. I am not given an opportunity to balance credibility as to whether or not conversations occurred. This is the time, day, and date set for this motion. I don't have any information that the conversations you allege didn't occur." RP 62-63.

If counsel had understood his burden, he also could have presented the contents of the telephonic search warrant application. According to his representations in the motions, he had access to and listened to the recording. CP 21, 31. Therefore, he could likely have offered the recording as an exhibit at the hearing or had it transcribed and offered the transcript as an exhibit at the hearing.

Offering competent evidence to support the suppression issue would also likely have altered the outcome because the superior court also relied on that deficiency in denying the motion. The court declared, "I don't have the search warrant."⁴ I can't make findings that would allow me to reopen the case because I don't have enough information. . . . I don't have enough

⁴ The court appears to have misspoken. The search warrant itself was attached to both motions to withdraw the guilty plea. CP 23, 35. It was the telephonic application for the search warrant that was not before the court except as recited by counsel in the motion. CP 21, 31.

information to make a --- a reasoned analysis and say, I think you would have won.” RP 63.

It appears from counsel’s representations in the motions that sufficient facts existed to show (1) the existence of a meritorious Franks issue that would likely have led to suppression of the evidence of all 12 felony counts of identity theft, drastically changing the landscape of the case; and (2) prior counsel’s failure to discuss that issue with Eguires before he pleaded guilty to all 12 felony counts. There is a reasonable probability that the existence of this issue and the failure to discuss it would be viewed as ineffective assistance, requiring withdrawal of the guilty plea to correct a manifest injustice. See Estes, ___ Wn.2d at ___, slip op. at 15-16 (failure to reasonably evaluate the evidence and the likelihood of conviction so the client can make a meaningful, informed decision about whether to take a plea deal is ineffective assistance). Withdrawal was not permitted because of counsel’s failure to understand the applicable law and present the relevant evidence. This was ineffective assistance that undermines confidence in the outcome of the hearing on the motion to withdraw the plea. This Court should reverse the order denying Eguires’ motion to withdraw his plea. There should be a new hearing at which Eguires may be represented by competent and prepared counsel.

D. CONCLUSION

For the foregoing reasons, the order denying Eguires' motion to withdraw his guilty plea should be reversed.

DATED this 12th day of June, 2017.

Respectfully submitted,

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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