

FILED
Court of Appeals
Division III
State of Washington
12/1/2017 2:59 PM

NO. 34651-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

STATE OF WASHINGTON, RESPONDENT

v.

DUSTIN J. EGUIRES, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

RESPONDENT'S BRIEF

MICHAEL J. ELLIS, WSBA #50393
Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. 2nd Street, Room 233
Yakima, WA 98901-2621
(509) 574-1218

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I. ISSUES PRESENTED FOR REVIEW

1. Unlike CrR 7.8(c)(1), CrR 4.2(f) does not require that a defendant support their application for relief with sworn affidavits. Here, the trial court denied Eguires' CrR 4.2(f) motion to withdraw plea based on a general lack of supporting information. Did the trial court act within its discretion by noting, among other omitted evidence, the absence of a sworn statement from Eguires when denying Eguires' CrR 4.2(f) motion?
2. In order to prevail on an ineffective assistance of counsel claim, Eguires must demonstrate a reasonable probability that the outcome of his CrR 4.2(f) motion would have been different but for counsel's allegedly deficient performance. As Eguires cannot show a reasonable probability that his proposed *Franks v. Delaware* suppression motion would have been successful, has Eguires failed to establish prejudice arising from counsel's failure to file such a motion?

II. STATEMENT OF THE CASE

Eguires was charged with twelve counts of second degree identity theft and one count of carrying a firearm onto school premises in Yakima County Superior Court cause number 15-1-01517-1. Clerk's Papers (CP)

at 4–6. The charges were based on September 29, 2015, events at both White Swan High School and Eguires’ residence in Yakima County, Washington. *Id.* at 2.

A school bus driver observed Eguires take a black rifle out of a truck and place it into a sedan on high school premises. *Id.* at 18. The high school was placed on lockdown. *Id.* Yakama Nation Tribal Police officers arrived and located a truck belonging to Eguires. *Id.* The bus driver told Yakima County Sheriff’s Office deputies that Eguires had left with the rifle in the sedan. *Id.*

Yakama Nation Tribal Police officers responded to Eguires’ residence and spotted Eguires with the rifle. VRP 9/29/15 at 6; CP at 75 (noting that “[a] short time later we were notified that a YNPD officer had spotted the blue car at Dustin’s house”). Yakima County Sheriff’s Office deputies arrived and found Eguires rummaging through a blue duffle bag. CP at 18. Deputies handcuffed Eguires and advised him of his *Miranda* rights. *Id.* Eguires first told the affiant deputy that he did not have a rifle. *Id.* While the affiant was filling out the search warrant, Eguires informed him that “the gun was on the table.” *Id.*

Deputies obtained a search warrant for Eguires’ house and property. *Id.* at 18–19. During the execution of the search warrant, deputies found a .22 Savage rifle on a bench outside of the residence. *Id.*

at 18. They also observed a variety of identification cards inside of the duffle bag. *Id.* at 18–19.

Deputies re-contacted the judge and asked to amend the search warrant to allow a search of the cards and paperwork found inside the duffle bag. *Id.* at 19. After the judge authorized the amendment, deputies uncovered a variety of documents belonging to third parties including five drivers' licenses, a tribal enrollment card, a social security card, and a W-2 form. *Id.* Eguires claimed that a person known as “Cricket” had brought the bag to his residence three weeks earlier. *Id.*

In addition to cause number 15-1-01517-1, Eguires had two other cases pending before the Yakima County Superior Court—15-1-01771-39 and 16-1-00019-39. VRP 6/17/16 at 21. Two attorneys represented Eguires in the three cases. VRP 5/17/16 at 4, 7.

On 15-1-01517-1, Eguires faced a standard range sentence of 43 to 57 months for each count of second degree identity theft and up to 364 days in jail for carrying a firearm onto school premises. CP at 9. Eguires' counsel (hereinafter “plea counsel”) negotiated a plea deal with the State in which Eguires would plead guilty to each count in cause number 15-1-01517-1 in return for an exceptional sentence of eighteen months and dismissal of the other two cases in their entirety. *Id.* at 11.

On May 17, 2016, Eguires entered an *Alford* plea to each count in 15-1-01517-1. VRP 5/17/16 at 6; CP at 7–16. Sentencing was scheduled for June 8, 2016. VRP 5/17/16 at 18. The sentencing hearing was later reset to June 17, 2016. VRP 6/17/16 at 22. On June 8, 2016, a new attorney (hereinafter “motion counsel”) contacted the State and plea counsel about substituting into the case. *Id.* On June 16, 2016, motion counsel filed a CrR 4.2(f) motion to withdraw Eguires’ plea. CP at 20–22.

The State requested that the trial court proceed with the sentencing hearing. VRP 6/17/16 at 29. Motion counsel argued that *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), and *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), provided a basis for Eguires to withdraw his plea. VRP 6/17/16 at 24; *see also* CP 20–22. The court reset the sentencing hearing for June 29, 2016, as the court had not had an opportunity to review motion counsel’s filings. VRP 6/17/16 at 30. The court allowed motion counsel to substitute in on 15-1-01517-1. *Id.* at 33. On June 21, 2016, motion counsel filed additional briefing in support of Eguires’ motion to withdraw his guilty plea. CP at 30–34.

On June 29, 2016, the court heard Eguires’ motion to withdraw his guilty plea. VRP 6/29/16 at 43. Motion counsel argued that the court should allow Eguires to withdraw his plea in order to adjudicate a *Franks*

suppression motion. *Id.* at 51. Motion counsel explained that Eguire's

basis for being able to withdraw his plea was twofold:

It's both – I can't show a *Strickland v. Washington* issue, an effective issue unless I show there was an issue, and therefore, I had to demonstrate preliminarily, right, a *Franks* issue. And my point is, it's demonstrated right in the CAD printout. And what I know from talking to my client, it never got discussed in the plea bargain.

This whole idea of the benefit of the bargain in the package, you're not – you're not bargaining with what the other side has. It never was an effective plea bargain. It was never an effective discussion of the issue on resolution of the cases. That's where it goes back to *Strickland*.

Id. at 51–52. Motion counsel further argued that

Once again, I don't see a countereffect other than, ironically, the very thing that's attorney-client privilege, what was discussed with my client or not. I can only relate that – to you, as an officer of the court, that the issues of the strength or weakness of a suppression motion which would kill all of the property offspring were not discussed with my client. So it's ironic they make that assertion. But that's right where the attorney-client privilege is. It's not something that's on the record. Like I said, if they are confusing it, it's not something that's analyzed in the plea colloquy.

Once again, we are right back to the hard facts of, can I make a preliminary showing of an issue with this warrant? And I do not hear

them contesting that the warrant is for the gun, the warrant is to get inside property. And the state's own CAD printout indicates that they see the gun outside. That needs to be explored and can become – and I think this preliminary showing has been established that this is a significant potential *Franks* issue.

I – the questioning has to occur from the officers, but that hasn't occurred. The CAD printout indicates its presence. What stronger evidence can we present to you that there's an issue here about whether they did or did not need to go inside the real property? I think it's the strongest evidence we can get for a *Franks* issue of this kind.

Id. at 60–61.

After hearing argument from counsel, the court ruled that:

The analysis is – I think that Mr. Mason has gone through is – is a great description of the analysis one would go through in preparing and dealing with a client during the course of the investigation, but we're in a somewhat different posture today. I believe I'm doing the plea docket tomorrow, and I think there are 13 cases set, roughly. My concern, in part, is that if I were to accept Mr. Mason's argument today, each and every one of the cases that are set for tomorrow would be subject to an argument that, well, we didn't discuss this, so we didn't discuss that.

Every case would be completed on the most tenuous of grounds. It is – and I accept, Mr. Mason, your comment that this is not about the colloquy; this is about the – whether or not Mr. Eguire's decision was a knowing,

intelligent, and voluntary decision. 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. Perhaps they did occur. Perhaps you didn't like the conversation, didn't like the odds that were given to him. And at the end of the day, this is what a lot of this is, is that I think my odds would be better.

I don't have the search warrant. I can't make findings that would allow me to reopen the case, because I don't have enough information.

I – whether or not your theory of the case is accurate is one that, during the active portion of the case, we could have litigated. Certainly you may have lost, you may have won. I can't – I don't have enough information to make a – a reasoned analysis and say, I think you would have won. I can't say that the results from Mr. Eguires today would have been any different, because I don't know who would have won. You have raised some questions, but that's the extent of it.

I don't – frankly, I think the foundation – the denial of your motion is I simply don't have enough information with which to make a decision. You indicate there is a huge and significant issue. It could be. I don't find there is a manifest injustice. I don't – I cannot find that the statements did or didn't occur. I don't have enough information. And I can't

make a finding that you would have won the motion to suppress, because I don't have any information really with which to analyze that, other than to say you might have, you might not have.

Id. at 62–64.

At a reset sentencing hearing on July 5, 2016, Eguires was sentenced in accordance with the plea deal—a downward departure of eighteen months served concurrently, no community custody, and legal financial obligations. CP at 44–50.

III. ARGUMENT

A. The trial court acted within its discretion in denying Eguires' CrR 4.2(f) motion based on a general lack of supporting evidence, not on the form in which evidence may have been presented.

Eguires claims that the trial court “erred in applying the affidavit requirement of CrR 7.8 to Eguires’ pre-judgment motion to withdraw his plea.” Br. of Appellant at 8.

As Eguires moved to withdraw his plea pre-judgment, CrR 4.2(f) controls. *Compare* CrR 7.8(c)(1) (governing post-judgment motions to withdraw a guilty plea). Under CrR 4.2(f),

[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. 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.

CrR 4.2(f).

A trial court's decision regarding a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. A.N.J.*, 168 Wn.2d 91, 106, 225 P.3d 956 (2010). "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); *see also State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (describing "manifestly unreasonable" as a decision which "falls 'outside the range of acceptable choices, given the facts and the applicable legal standard'" (internal citation omitted)).

In order to prevail under CrR 4.2(f), Eguires bore the burden of proving a manifest injustice. *State v. Quy Dinh Nguyen*, 179 Wn. App. 271, 282–83, 319 P.3d 53 (2013). Under CrR 4.2(f), a manifest injustice may arise when (1) the defendant did not ratify the plea; (2) the plea was not voluntary; (3) the defendant received ineffective assistance of counsel; or (4) the plea agreement was not kept by the prosecution. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

Eguires argues that the trial court incorrectly applied the CrR 7.8(c)(1) affidavit requirement to his CrR 4.2(f) motion. Br. of Appellant at 8; *see also* CrR 7.8(c)(1) (“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.”). It is uncontested that CrR 4.2(f) does not contain a similar requirement. *Compare* CrR 4.2(f) *with* CrR 7.8(c)(1).

Although the trial court did note the lack of a sworn statement from Eguires, the trial court based the denial of Eguires’ motion on additional grounds. As the court noted, “I don’t have the search warrant. I can’t make findings that would allow me to reopen the case, because I don’t have enough information.” VRP 6/29/16 at 63. The court concluded that “the denial of your motion is I simply don’t have enough information with which to make a decision.” *Id.*

The record demonstrates that the trial court’s decision was based on the general lack of information, not the form in which that information may have been presented. Accordingly, the trial court did not deny Eguires’ motion due to the lack of filed affidavits—the trial court simply concluded that Eguires presented insufficient evidence to support a manifest injustice finding. As Eguires cannot show that the trial court’s

decision was manifestly unreasonable, the trial court's denial of Eguires' CrR 4.2(f) motion to withdraw plea should be affirmed.

B. Eguires cannot demonstrate either deficient performance on the part of motion counsel or prejudice resulting from any alleged ineffectiveness.

Eguires alternately argues that he received ineffective assistance of counsel during the CrR 4.2(f) motion hearing. Br. of Appellant at 8.

Eguires contends that motion counsel was ineffective in failing "to cite the law or present the evidence in support of the motion to withdraw the guilty plea." *Id.* at 9.

Strickland controls when evaluating ineffective assistance of counsel claims. In order to prevail, Eguires must demonstrate that defense counsel's performance was deficient and that he, as a result, suffered prejudice. *Strickland*, 466 U.S. at 687; *see also State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Deficient performance occurs when defense counsel's representation falls below an objective standard of reasonableness. *In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). A defendant challenging the effectiveness of counsel must overcome the strong presumption that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Prejudice occurs when there is a reasonable probability that, but for defense counsel's deficient performance, the outcome of the proceedings

would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To demonstrate that he was prejudiced by motion counsel's alleged ineffectiveness, Eguires must show that there is a reasonable probability that the outcome of the CrR 4.2(f) motion would have been different if he had received effective assistance of counsel. Accordingly, as Eguires' purported CrR 4.2(f) manifest injustice was focused on plea counsel's alleged ineffectiveness, *see* CP at 30–34, Eguires must establish that there is a reasonable probability that plea counsel performed deficiently by failing to both (1) bring a *Franks* motion to challenge the search warrant and (2) discuss the *Franks* motion's merits with Eguires. Further, Eguires must demonstrate a reasonable probability that the trial court likely would have granted the *Franks* motion if brought. *See McFarland*, 127 Wn.2d at 333–34. As such, any prejudice arising from motion counsel's alleged deficiency depends upon the *Franks* motion's likelihood of success. As Eguires cannot demonstrate either that his attorneys were ineffective or that there is a reasonable probability the trial court would have granted his proposed *Franks* motion, Eguires has failed to establish a reasonable probability that he suffered a manifest injustice that tainted his *Alford* plea.

1. Eguires cannot show that motion counsel's representation fell below an objective standard of reasonableness.

Eguires argues that “[c]ounsel’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 evidence necessary to provide a factual basis for the motion.” Br. of Appellant at 9.

a. Motion counsel accounted for the legal principles underlying Eguires’ CrR 4.2(f) motion.

Eguires states that “neither of counsel’s two motions to withdraw Eguires’ plea even mentioned the manifest injustice standard or CrR 4.2” *Id.* at 10. As noted above, one way of demonstrating a manifest injustice under CrR 4.2(f) is to show that the defendant received ineffective assistance of counsel prior to entering a guilty plea. *See Wakefield*, 130 Wn.2d at 472. Motion counsel, in the first motion to withdraw plea, listed “*Strickland v. Washington*” in the caption. *See* CP at 20. The second motion to withdraw plea repeated the caption citation to *Strickland*, *see id.* at 30, and went into considerably more detail regarding the ineffective assistance of counsel standard. *See id.* at 33. Further, motion counsel directly alleged that plea counsel had been ineffective by failing to challenge the search warrant during oral argument. *See* VRP 6/17/16 at 24 (noting that “I do believe there’s a basis under *Franks v. Delaware* and

Strickland v. Washington”); *see also* VRP 6/29/16 at 52 (“It never was an effective plea bargain. It was never an effective discussion of the issue on resolution of the cases. That’s where it goes back to *Strickland*.”).

Although motion counsel never mentioned the manifest injustice standard by name, Eguire has not demonstrated that motion counsel’s performance fell below an objective standard of reasonableness. Given the theory underlying Eguire’s motion to withdraw plea, the analysis would inevitably have turned to whether Eguire received effective assistance of counsel during the plea bargaining process. *See* CP at 30–34. Accordingly, motion counsel’s argument went to the heart of the matter before the trial court—whether plea counsel had been ineffective in allegedly failing to both inform Eguire of the potential *Franks* issue and file a *Franks* suppression motion. As motion counsel’s argument touched on the pertinent legal principles, Eguire has failed to demonstrate that motion counsel’s failure to use specific phrases fell below an objective standard of reasonableness.

b. Motion counsel placed the relevant facts before the trial court.

Eguire argues that motion counsel did not (1) “present a sworn affidavit or sworn testimony by Eguire” concerning any discussion of the *Franks* issue; (2) “present testimony or an affidavit from plea counsel

regarding what conversations had occurred before the plea”; or
(3) “present the telephonic search warrant application.” Br. of Appellant at 12–13.

The record reflects that, in both filings, motion counsel argued that “[n]either the evidence nor its significance were revealed to Mr. Eguires before his plea was entered.” CP at 20, 30. Further, during oral argument motion counsel stated that “I can only relate that – to you, as an officer of the court, that the issues of the strength or weakness of a suppression motion which would kill all of the property offspring were not discussed with my client.” VRP 6/29/16 at 60–61; *see also id.* at 52 (motion counsel claiming that the *Franks* issue “never got discussed in the plea bargain”).

Additionally, motion counsel, in the first motion to withdraw plea, relayed the contents of the search warrant affidavit as follows: “[c]ounsel, as an officer of the court, has reviewed the audio file of the telephonic warrant. During his request, the deputy told the issuing court that after Miranda, Dustin said he did have a rifle but would not tell him where.” CP at 21. In the second motion to withdraw plea, motion counsel relayed, although not verbatim, the relevant language from the telephonic search warrant application. *See id.* at 31 (noting that “the deputy told the court the following: I arrived with two other deputies [and] we placed Dustin into custody. After Miranda, he told me that he had a rifle. He set it somewhere

on the property. He did not tell me where. I'm requesting permission to go onto his property to retrieve the rifle."); *compare* VRP 9/29/15 at 6.

The crux of Eguires' *Franks* issue revolves around an alleged discrepancy between the facts relayed to the judge during the search warrant application and the information contained in both the affiant's report and the Computer Aided Dispatch (hereinafter "CAD") log. *See* CP at 32. Motion counsel, through an offer of proof, furnished the relevant information regarding the claimed lack of communication between Eguires and plea counsel in both written filings and verbally during oral argument. Additionally, although not verbatim, motion counsel provided the court with the relevant part of the affidavit as it pertained to the *Franks* argument.

Eguires has offered no authority mandating either that (1) counsel, unless otherwise required by law, provides ineffective assistance by presenting the same information to the court in one form as opposed to another; or (2) counsel must put forth a full search warrant transcription as part of a CrR 4.2(f) offer of proof. *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.") (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193

(1962)). Accordingly, as motion counsel provided the relevant information to the trial court, Eguires has failed to establish that motion counsel's representation fell below an objection standard of reasonableness.

2. As Eguires has failed to establish a reasonable probability that a manifest injustice tainted his *Alford* plea, Eguires cannot demonstrate that he was prejudiced by motion counsel's allegedly deficient performance.

In order to show that he was prejudiced by motion counsel's alleged ineffectiveness, Eguires must demonstrate a reasonable probability that, but for the deficient performance of counsel, the outcome of the proceedings would have been different. *See McFarland*, 127 Wn.2d at 335. As such, Eguires, based on the theory underlying his CrR 4.2(f) motion to withdraw plea, must show a reasonable probability that plea counsel provided Eguires with deficient representation during the plea bargaining process. *See* CP at 30–34.

a. Given Eguires' favorable plea offer and the likely denial of the Franks motion if brought, Eguires cannot demonstrate that plea counsel's decisions were not tactical or strategic.

Eguires argues that plea counsel failed to (1) raise a “meritorious *Franks* issue that would likely have led to suppression of the evidence of all 12 felony counts of identity theft”; and (2) “discuss that issue with Eguires before he pleaded guilty to all 12 felony counts.” *See* Br. of

Appellant at 18. Eguires, however, cannot demonstrate that either alleged omission was not a reasonable, strategic decision made to take advantage of a favorable plea offer.

When adjudicating ineffective assistance of counsel claims, courts are highly deferential to counsel's decisions and will not find error when the actions of counsel can be attributed to a strategic or tactical decision. *See Strickland*, 466 U.S. at 689–91. *But see Reichenbach*, 153 Wn.2d at 130 (noting that “[h]owever, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance”). “Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons why a suppression hearing is not sought at trial.” *McFarland*, 127 Wn.2d at 336.

Defendants are “entitled to the effective assistance of competent counsel” during plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376 (2012) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441 (1970)). “Counsel must, at a minimum, ‘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. Estes*,

188 Wn.2d 450, 464, 395 P.3d 1045 (2017) (quoting *A.N.J.*, 168 Wn.2d at 111–12).

Eguire initially was charged in three separate cause numbers: 15-1-01517-1, 15-1-01771-39, and 16-1-00019-39. *See* VRP 6/17/16 at 21. As noted above, 15-1-01517-1 involved twelve counts of second degree identity theft and one count of carrying a firearm onto public school premises. CP at 4–6. Given Eguire's offender score, Eguire's standard range on each count of second degree identity theft was 43 to 57 months. *Id.* at 9. In return for pleading guilty to each count in 15-1-01517-1, the State offered to dismiss the other two felony cause numbers, 15-1-01771-39 and 16-1-00019-39, in their entirety. *Id.* at 11. The State also agreed to recommend a downward departure on the second degree identity theft charges of eighteen months—significantly less than Eguire's original standard range of 43 to 57 months. *Id.*

Eguire has failed to show that plea counsel's failure to raise the alleged *Franks* suppression issue was not a tactical decision in response to the State's highly favorable plea offer. Eguire received a substantial benefit from agreeing to enter a guilty plea to 15-1-01517-1—two other pending felony matters were dismissed and Eguire faced significantly less time in custody.

Further, Eguires cannot demonstrate that plea counsel was ineffective in allegedly failing to discuss the possible *Franks* suppression motion prior to entry of the guilty plea. As discussed below, Eguires' alleged *Franks* issue is neither as ironclad nor incontrovertible as both motion counsel and appellate counsel indicate. Eguires has presented no authority mandating that defense counsel must address every conceivable issue with a defendant, no matter the likelihood of success. *See Young*, 89 Wn.2d at 625.

As Eguires both received a highly favorable plea offer and cannot establish a reasonable probability that his *Franks* motion would have resulted in suppression, Eguires has failed to show that plea counsel acted below an objective standard of reasonableness when not filing or allegedly discussing the issue during Eguires' representation.

b. Eguires cannot establish a reasonable probability that adjudication of a Franks suppression motion would have altered the outcome of the proceedings.

Eguires boldly asserts that “[i]t appears from counsel’s representations in the motions that sufficient facts existed to show . . . 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.” Br. of Appellant at 18. However, as Eguires cannot demonstrate a reasonable

probability that a *Franks* motion would have resulted in suppression, Eguires has failed to demonstrate prejudice from either plea or motion counsel's allegedly deficient representation.

In order to show that he was actually prejudiced by any alleged ineffectiveness, Eguires "bears the burden of showing . . . that the result of the proceeding would have been different but for counsel's deficient representation." *McFarland*, 127 Wn.2d at 337. It is therefore Eguires' burden to demonstrate that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

"There is . . . a presumption of validity with respect to the affidavit supporting the search warrant." *Franks*, 438 U.S. at 171. Under *Franks*,

[t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Id. “A tolerance for factual inaccuracy is inherent to the concept of probable cause.” *State v. Chenoweth*, 160 Wn.2d 454, 475, 158 P.3d 595 (2007). Courts give “great deference to the magistrate’s determination of probable cause and view the supporting affidavit for a search warrant in a commonsensical manner rather than hypertechnically.” *Id.* at 477. Doubts are resolved in “favor of the warrant’s validity” and “[t]he fact that the affiant’s information later turns out to be inaccurate or even false is of no consequence if the affiant had reason to believe those facts were true.” *State v. Olson*, 74 Wn. App. 126, 130, 132, 872 P.2d 64 (1994). “The *Franks* test for material misrepresentations has also been extended to material omissions of fact.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

In his motion to withdraw plea, Eguires claimed the following alleged inconsistencies as the bases of his proposed *Franks* motion: (1) why, given the information in the CAD log, did the affiant not reveal the location of the gun to the magistrate and (2) why the affiant failed to inform the magistrate that Eguires told him the gun was on a table. *See CP* at 32. As outlined below, Eguires cannot demonstrate that either alleged inconsistency between the search warrant affidavit and the affiant’s report was a “deliberate falsehood or [made in] reckless disregard for the truth.” *See Franks*, 438 U.S. at 171.

(1) Following a comparison of the CAD log and deputies' reports, Eguires cannot show that the affiant authored the CAD log notations.

In the search warrant affidavit, the affiant requested “permission to go onto his property and remove – and retrieve the rifle.” VRP 9/29/15 at 6. The affiant did not state that he saw the rifle prior to applying for the search warrant. *See generally id.* In his report, the affiant noted that, after being granted permission to search the property, he “could not locate the rifle inside the residence.” CP at 18. The affiant then stated that he “located the rifle outside on a bench.” *Id.*

The CAD log relays that “ofc are @ Dustin’s residence; he does have a rifle it is pointed out the window; pointing so/OK will let the deputy’s know.” CP at 40. As the log continues, “eye’s on them from a distance; 2 subj standing behind the house; put rifle down on table or something/they cleared.” *Id.* This is followed by “rifle on table.” *Id.* The log concludes with “they have 2 @ gun point” and “they have 2 in custody.” *Id.* at 41.

As noted in the search warrant affidavit, “[t]ribal police went to the house while I was giving the initial report. They located Dustin inside of the two-door Honda. They saw him with what looked like a rifle, they did containment . . . I arrived with a few other deputies, placed Dustin into

custody.” VRP 9/29/15 at 6; *see also* CP at 75 (noting that “[a] short time later we were notified that a YNPD officer had spotted the blue car at Dustin’s house”).

Based on a review of the affidavit, CAD log, and deputies’ reports, Appellant cannot show that the CAD log entries were authored by the affiant. The logs specifically note “OK will let the depty’s know” and discuss “they” taking Eguires into custody. *See* CP at 40–41; *compare* CP at 18 (affiant describing personally taking Eguires into custody); CP at 75 (Sergeant Splawn describing Yakima County Sheriff’s deputies taking Eguires into custody). The affiant is mentioned as an actor within the CAD log, as opposed to its author. This interpretation is consistent with the affiant’s report. *See* CP at 18 (noting that the affiant only found the rifle after executing the search warrant).

Further, Eguires asks the Court to assume the accuracy of the CAD log without providing any foundation for its reliability. A CAD log, as opposed to an officer’s incident report, is not intended to be relied upon at a later date as a fully accurate account of an event. Instead, CAD simply provides an interface allowing dispatchers an opportunity to handle emergency calls as efficiently as possible.

As Eguires cannot demonstrate that the affiant was aware of the information recorded in the CAD log, Eguires has failed to establish a

reasonable probability that the affiant omitted the CAD log information as a “deliberate falsehood” or in “reckless disregard for the truth.” *See McFarland*, 127 Wn.2d at 335; *Franks*, 438 U.S. at 171. Given the CAD log’s purpose, Eguires has additionally failed to show that the CAD log portrays a more accurate depiction of events than the affiant’s incident report. Accordingly, Eguires has not surmounted the burden necessary for this Court to find that he was prejudiced by plea counsel’s failure to bring a *Franks* motion premised on this alleged omission.

(2) Given the information known to the affiant, Eguires’ statement that the rifle was “on the table” was not material to the search warrant.

In his report, the affiant notes that Eguires “first told [him] that he did not have a rifle.” CP at 18. While filing out the search warrant, Eguires informed the affiant “that the gun was on the table.” *Id.* In the search warrant affidavit, the affiant stated that “[a]fter *Miranda*, [Eguires] told me that he did have a rifle, he set it somewhere on this – on his property, did not tell me where.” VRP 9/29/15 at 6.

As noted above, an alleged misrepresentation or omission must be material in order to support suppression under *Franks*. *See Cord*, 103 Wn.2d at 367. Here, Eguires points out an alleged inconsistency between the search warrant affidavit and the affiant’s report—whether Eguires told

the affiant the rifle was “on the table” or did not tell him where the rifle was located on the property. As discussed above, Eguires cannot demonstrate that the affiant was the officer who, as indicated in the CAD log, allegedly observed the rifle on a table prior to the arrest.

Eguires cannot show that the affiant knew the rifle was on a table *outside* the residence. It is both perfectly conceivable and an exercise of commonsense that the affiant thought Eguires was talking about a table inside the residence, necessitating a search warrant. The “table,” therefore, was not material from the affiant’s perspective—given the information known to the affiant, a “table” situated at an unknown location on the property does nothing to inform law enforcement where the rifle was actually to be found. Given the above, Eguires cannot show that the affiant’s alleged omission was a “deliberate falsehood or [made in] reckless disregard for the truth.” *See Franks*, 438 U.S. at 171. Eguires therefore has failed to demonstrate a reasonable probability that his purported *Franks* motion would be granted concerning Eguires’ statement, and accordingly cannot demonstrate any prejudice from plea counsel’s failure to raise the issue before the trial court.

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c. Eguires has failed to demonstrate prejudice arising from motion counsel's alleged deficient performance.

As discussed above, Eguires has failed to show either that plea counsel provided deficient representation or that Eguires suffered any prejudice arising from plea counsel's alleged ineffectiveness. Accordingly, Eguires has failed to demonstrate a reasonable probability that the outcome of his CrR 4.2(f) motion to withdraw plea would have been different had motion counsel not provided an allegedly deficient performance.

This Court should affirm the trial court's ruling on Eguires' CrR 4.2(f) motion to withdraw plea. In the event that this Court disagrees and finds that counsel was ineffective, the State requests that the matter be remanded to the trial court for a new motion hearing.

IV. CONCLUSION

This Court should affirm Eguires' conviction as the trial court did not abuse its discretion in denying Eguires' CrR 4.2(f) motion to withdraw plea. Further, Eguires cannot demonstrate that either counsel provided ineffective assistance both before and during the CrR 4.2(f) motion hearing.

Dated this 1st day of December, 2017.

STATE OF WASHINGTON

/s/Michael J. Ellis
MICHAEL J. ELLIS, WSBA # 50393
Deputy Prosecuting Attorney
Attorney for Respondent

DECLARATION OF SERVICE

I, Michael J. Ellis, state that on December 1, 2017, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Ms. Jennifer Sweigert at sweigertj@nwattorney.net.

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

DATED this 1st day of December, 2017, at Yakima, Washington.

_____/s/Michael J. Ellis_____
MICHAEL J. ELLIS
WSBA# 50393
Deputy Prosecuting Attorney
Yakima County, Washington
128 N. Second Street, Room 329
Yakima, WA 98901
Telephone: (509) 574-1204
Fax: (509) 574-1211
michael.ellis@co.yakima.wa.us

for Respondent

YAKIMA COUNTY PROSECUTING ATTORNEY'S OFFICE

December 01, 2017 - 2:59 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34651-0
Appellate Court Case Title: State of Washington v. Dustin J. Eguires
Superior Court Case Number: 15-1-01517-1

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