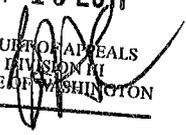




FILED

SEP 15 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By 

87297-0

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

STATE OF WASHINGTON,)
)
Respondent,)
)
vs.)
)
SIGIFREDO GARCIA-BUENO,)
)
Appellant.)
_____)

NO. 29400-5-III

MOTION ON THE MERITS

filed in lieu of Respondent's brief

I. IDENTITY OF MOVING PARTY.

The respondent, State of Washington, asks for the relief designated in Paragraph I

II. STATEMENT OF RELIEF SOUGHT.

The respondent requests that the Court of Appeals, Division III, grant the respondent's request as set forth in this Motion on the Merits affirming the actions of the Superior Court of the State of Washington in and for the County of Yakima pursuant to RAP 18.14(e)(1) and dismiss this appeal.

III. FACTS RELEVANT TO THE MOTION.

An outline of the facts of this trial have been set forth in appellants brief

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therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section as needed the State shall refer to specific areas of the record.

IV. ARGUMENT.

The transcript in this case fits within the general rule governing Motions on the Merit. The transcript is less than two hundred pages. The State shall address all allegations raised by Bueno in this motion; the actions questioned were factual in nature, were discretionary acts of the court or are allegations founded in well settled law.

The trial court filed a very detailed two page letter opinion after the motion to withdraw guilty plea was heard. This opinion is contained in the record at CP 73-74. Thereafter findings of fact and conclusions of law were filed which accurately reflect the letter opinion filed by the trial court. Those findings and conclusions were not objected to at the trial court level.

The actions of the trial court were based on facts, were well grounded on well settled case law and were discretionary in nature. Those acts should not be overturned by this court unless there is a finding that the court acted arbitrarily.

State v. Downing, 151 Wn.2d 265, 272-3 (2004); We will not disturb the trial court's decision unless the appellant or petitioner makes "a clear showing . . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v .Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959)).

The Court of Appeals should grant the State's Motion on the Merits and affirm

the actions of the trial court.

ASSIGNMENT OF ERROR.

1. Trial counsel for Bueno was ineffective.
2. Bueno's allegation is not time barred.

RESPONSE TO ASSIGNMENT OF ERROR.

1. Bueno's trial counsel was effective.
2. The motion to withdraw guilty plea is time barred.

1) COUNSEL FOR BUENA WAS EFFECTIVE.

State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982) discusses the standard with regard to the effectiveness of counsel in a trial setting; it is equally applicable in this case;

The test in Washington is whether "[a]fter considering the *entire record*, can it be said that the accused was afforded an *effective representation* and a *fair and impartial trial*". State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). This court has refused to find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics. State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980); see also State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961). While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error.

The parallel is clear because in this case this court has a rarity, the actual testimony of the attorney whose effectiveness is being challenged.

Bueno does not state that does not understand Spanish, just that he has trouble reading and writing. The Statement of defendant on plea of guilty states at the bottom has a declaration by a court certified interpreter. The very same interpreter who interpreted at the hearing where Bueno argued that he did not understand what was going on because this selfsame interpreter was going to fast. This declaration indicates she is a certified in Spanish, the language which the defendant understands and that she translated the entire Statement of Defendant on Plea of Guilty for the defendant. That the defendant acknowledged his understanding of both the translation and the subject matter of this document. There follows this declaration a second declaration for the court which states; "An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full." (CP 2-8) "We review a trial court's decision denying a motion to withdraw for an abuse of discretion." State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006) (citing State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001)).

The testimony of Mr. Jerry Talbott set forth facts which demonstrate that he discussed the entirety of this case with his client. There were numerous discussions regarding the possible outcome of a plea and the outcome if this matter were taken to trial with both a successful outcome as well as what would occur if appellant lost at trial. The testimony of trial counsel is not as appellant would have this court believe. It is very specific in supporting the States case, Bueno was told what would happen not once, not twice but apparently numerous times. It is clear from all of the testimony that Bueno and

his attorney were able to communicate. Bueno states that he consulted with his attorney on numerous occasions; this is supported by the testimony of his wife and his attorney. Conveniently the part that he did not understand was the part about what would happen if he was to plead guilty. He understood the discussion regarding what would occur if he lost at trial and he understood that if he plead guilty that he something could happen but he needed to have the conviction vacated later. It is convenient that both the appellant and his wife remember the information which was discussed except the part about being deported if he plead.

His attorney stated that he did discuss the fact that Bueno could stay in the country for some unknown period of time if he stayed out of trouble. That was one of the major reasons that the plea was a good solution. Bueno would not have to go back to jail were he would be subject to contact with Immigration and therefore more likely to be deported. This plea meant credit for time served and out the door. Counsel had been successful in arguing bail reduction and therefore Bueno was not in custody at the time of the plea.

State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2000):

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. State v. Rosborough, 62 Wn. App. 341, 348, 814 P.2d 679, review denied, 118 Wn.2d 1003, 822 P.2d 287 (1991). To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, a defendant must show that

but for counsel's performance, the result would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004, 868 P.2d 872 (1994). There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. Strickland, 466 U.S. at 689. **If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.** State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). (Emphasis mine.)

The allegation in this case is “ineffective” assistance on the part of trial counsel. Bueno plead guilty and the record is very clear that this particular defendant knowingly, intelligently, and voluntarily pleaded guilty and by that plea received a significant benefit by and through the effective actions of his counsel. This court need only read the verbatim transcript of the testimony of trial counsel, Mr. Talbott, who in a very rare occurrence testified at the hearing to withdraw guilty plea.

In this very unusual hearing trial counsel was a witness for the State and testified under court order as to what occurred between he and his client. This officer of the court, a licensed member of the Washington State Bar, testified under oath that the allegations made by Bueno were baseless. Rarely does this court have the benefit of actual testimony from the attorney accused of ineffective assistance. Mr. Talbott testified that he “specialized” in immigration law. (PR 30-31)

The trial court in its letter ruling and in the findings and conclusions indicated “the court specifically disbelieves Mr. Bueno-Garcia’s testimony and his sworn statement in which he asserts that he did not understand the plea statement, was ignorant of the

immigration consequences of the plea, wanted to go to trial, and only pleaded guilty because his attorney told him to. The Court further finds his assertions that he did not understand the Statement of Defendant on Plea of Guilty or the guilty plea process to be incredible.”

The “motivation” to lie on the part of Bueno is enormous; the possibility that an officer of the court, a member of the bar, would risk his livelihood, especially on who specialized in immigration law, with false testimony in a case of this nature is absurd.

Mr. Talbott’s testimony refutes both the allegation of ineffective counsel and the claim the plea was not voluntary. This is supported by the attestation at the end of the Statement of Defendant on Plea of Guilty that indicates a court authorized interpreter has read the entire document to Bueno and that he understood that document. It is interesting to note that the attestation includes the verbiage “That the defendant acknowledged his understanding of both the translation and the subject matter of this document.” This clearly indicates that this court authorize interpreter did not just read the words on the page but made sure and attested to the fact that Bueno understood the “subject matter” of the document. (CP 7)

CrR 4.2(f) Motion to Withdraw CrR 4.2(f), which governs the withdrawal of a guilty plea, 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. A "manifest injustice" is "an injustice that is obvious, directly observable, overt, not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699

(1974). In Taylor, the Supreme Court discussed four indicia, any one of which would independently establish manifest injustice: (1) the denial of effective assistance of counsel, (2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea was not honored by the prosecution. CrR 4.2(f) places a "demanding standard" on the defendant. Taylor, 83 Wn.2d at 597. See also State v. Watson, 63 Wn. App. 854, 856-57, 822 P.2d 327 (1992). We review a trial court's decision denying a motion to withdraw for an abuse of discretion. State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006) (citing State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001)).

It would appear that Bueno's claims fall under the first indicia. The test for effective assistance of counsel is whether, upon reviewing the entire record, the defendant received effective representation and a fair and impartial hearing. State v. Ermert, 94 Wn.2d 839, 849, 621 P.2d 121 (1980). See State v. Butler, 17 Wn. App. 666, 678, 564 P.2d 828 (1977) ("a serious dereliction of duty"); State v. Perez, 33 Wn. App. 258, 264, 654 P.2d 708 (1982) ("outside the range of competence required of attorneys representing criminal defendants"); State v. Stephan, 35 Wn. App. 889, 895, 671 P.2d 780 (1983) (counsel's erroneous reading of statute overcome by court's act of informing defendant of the correct interpretation). "In a plea bargaining context, 'effective assistance of counsel' merely requires that counsel 'actually and substantially [assist] his client in deciding whether to plead guilty.'" State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)).

Counsel for Bueno testified with regard to the consultation he had with his client and the client's wife. This testimony covers ten pages of transcript and it is abundantly clear that this lawyer who specializes in immigration law consulted with his client and as indicated above "In a plea bargaining context, 'effective assistance of counsel' merely requires that counsel 'actually and substantially [assist] his client in deciding whether to plead guilty.'" State v. Osborne, supra.

When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. In re Keene, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); In re Teems, 28 Wn. App. 631, 626 P.2d 13 (1981)]; State v. Ridgley, 28 Wn. App. 351, 623 P.2d 717 (1981). When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable. Perez, 33 Wn. App. at 261-62; State v. Hystad, 36 Wn. App. 42, 45, 671 P.2d 793 (1983).

Here, the trial court had before it Bueno's Statement of Defendant on Plea of Guilty. The court questioned Buena with regard to the actual document and determined that it had been read to Buena by an interpreter, whether he has discussed the plea with his attorney, questioned Bueno to determine if he understood his plea, the court asked him if he understood the sentencing possibilities. The court questioned Bueno about the constitutional rights he was giving up. The court questioned Bueno about whether he

understood the consequences of pleading guilty. And the court questioned Bueno about whether his pleas were freely given or the product of coercion. The court explained Buena was giving up his right to a trial and had the deputy prosecutor read the facts into the record. The court then asked Buena if those facts supported the charge against him. The court then specifically asked;

“THE COURT: There could be immigration consequences if you are not a citizen of the United States. ...You understand that?

THE DEFENDANT: Yes.” (RP 2005, pgs. 4-5)

How many times must the various parties in this case confirmed with Mr. Buena that he might be deported or that there could be consequences if he is not a citizen by taking the action he has decided to take. In this case we have written acknowledgement that he understood as well as verbal acknowledgment of the very same fact. This was all done using the very same interpreter who “passed muster” in the hearing to withdraw his plea but was ineffective at the plea hearing, a fact that is ironic to say the least.

State v. McLaughlin, 59 Wn.2d 865, 870, 371 P.2d 55 (1962);

'Whether, in this case, the plea of guilty was voluntarily, unequivocally, intelligently, and understandingly made, is a question of fact which the trial court resolved against appellant. That finding must stand unless it is contrary to the clear preponderance of the evidence.' State v. Taft, 49 Wash.2d 98, 100, 297 P.2d 1116, 1117 (1956).

In other words, the nature of this factual issue places its determination peculiarly within the province of the trial court, and, if the finding of the trial court is not manifestly erroneous, we will not overturn it. See, also, State v. Stacy, 43 Wash.2d 358, 261 P.2d 400 (1953); State v. Rose, 42 Wash.2d 509, 256 P.2d 493 (1953); State v. Hensley, 20 Wash.2d 95, 145 P.2d 1014 (1944); State v. Cimini, 53 Wash. 268, 101 P. 891 (1909). (Emphasis mine.)

There is no evidence justifying such a finding in this case.

Bueno also claims this case is “remarkably similar to State v. Sandoval, 171 Wn.2d 163, 171, 249 P.3d 1015 (2011) this is clearly incorrect. While in Sandoval as there the attorney stated that there might be some future “fix” for the plea, in this case before the Bar, trial counsel testified under oath that he informed his client of the ramifications of this plea; that if contacted again by Immigration he would be deported. Counsel explained that this would buy him time but would not prevent deportation nor would it allow him time to take corrective action. This is a correct statement of the law and also a correct statement of the reality of being in this country illegally. If you avoid detection you can stay forever. Unfortunately for Buena apparently he did not stay undetected.

2) THIS MATTER IS TIME BARRED.

RCW 10.73.090 mandates that matters such as this much be filed within a proscribed period after the entry of the judgment;

- 1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
- (2) For purposes of this section, "collateral attack" means any form of post-conviction relief other than a direct appeal. "Collateral attack" includes ... a motion to withdraw a guilty plea....

Bueno cites State v. Littlefair, 112 Wn. App. 749, 763, 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020, 72 P.3d 761 (2003) where the court “equitably tolled” RCW 10.73.090. In Littlefair the court found that a "bizarre series of events" and

mistakes made by others proved Littlefair lacked knowledge of possible immigration consequences at the time of his guilty plea. As is Bueno, Littlefair was a resident alien who moved to withdraw his guilty plea to a drug charge more than two years after the court entered his plea and sentence. *Id.* at 755, 51 P.3d 116. Littlefair signed a plea agreement form containing the required immigration consequences; he argued he did not receive the required advisement because of mistakes by his attorney, the court, and the Immigration. Littlefair at 762.

In this case there is not a “bizarre series of events” and mistakes of others which caused Bueno to not comprehend the ramifications of his plea. Here we have the sworn testimony of his trial attorney, an officer of the court, who stated that he fully informed the defendant of all the ramifications of this plea. This is an attorney who “specialized” in immigration law. We have the Statement of Defendant on Plea of Guilty which is attested to by a court certified interpreter and we have the colloquy between Bueno and the court which all evidence that Bueno had full and complete knowledge of the ramification of the plea. Bueno and his wife’s testimony actually support the State’s case that he knew what could happen. They tailor their statements in an attempt to have them meet the requirement of equitable tolling. The problem with that was the trial court did not believe what they said in court nor in the affidavit which was filed.

The trial court stated in both the findings and the letter opinion that it “specifically” did not believe the testimony nor the affidavit of Bueno. Simpson v. Thorslund, 151 Wn.App. 276, 287, 211 P.3d 469 (2009) “The trial court’s decision is

more than adequately supported by the record from the five day trial and we will not second guess the trial court's determinations as to the credibility of witnesses and the persuasiveness of the evidence presented at trial.”

State v. Canning, 5 Wn. App. 426, 431, 487 P.2d 785 (1971).

The court chose to disbelieve Lanning when he said he did not remember hearing any recital of constitutional rights, and, particularly, the right to an attorney. When the testimony of witnesses differs, as is the case here, the credibility question is a matter for the trial court's determination. As stated in Cashaw, 4 Wn. App. at 247: No legislation requires that a trial court accept the testimony of a witness regardless of whether such testimony is believed. Accordingly, whether a defendant waives his constitutional rights must be determined on the basis of testimony accepted as correct by the trial court. [Citations omitted.]

Bueno says he lacked knowledge of possible immigration consequences at the time of his plea and that his attorney misinformed him about the immigration consequences of his guilty plea. This is wholly and totally incorrect. His attorney stated under oath, that he had completely informed his client of all of the immigration ramifications to include those if the matter was taken to trial and as occurred, a plea was taken.

Bueno took a chance that “Immigration” would not find him for years which appears to have happened. The advise of his original attorney would appear to have precise. The apparently did avoid the “ramifications” of this plea for years. And may

very well have done so for more if whatever he did not place him back on the radar of Immigration had not occurred.

The facts are that Bueno's testimony was not credible, that of this attorney was. Based on the evidence in front of the trier of fact, the court, there was not mistakes or errors which would match those set forth in Littlefair and therefore justify the "equitable tolling" of the statute of limitations set forth in RCW 10.73.090.

As the trial court stated in the letter opinion found at CP 74 and as is further set out in the findings and conclusion at CP 79:

The present case is significantly different from Mr. Littlefair's situation. Mr. Bueno-Garcia was fully aware of the immigration consequences at the time he entered his guilty plea. It may be that he was disappointed when he received notification of the removal proceedings which were being initiated by Homeland Security. But he cannot credibly claim surprise. Having been advised before and during the plea regarding its impact upon his legal residency, there is no basis upon which the Defendant can invoke equitable tolling. His motion to withdraw the plea is quite clearly time barred under RCW 10.73.090.

V. CONCLUSION

The actions of the trial court should be upheld, the State's Motion on the Merits should be granted and this appeal should be dismissed.

The trial court properly denied this same motion, the trial court judge reviewed this same case law; considered his personal observations of the testimony of the parties and the affidavits submitted at the hearing to withdraw the guilty plea. The trial court

then issued a letter opinion which then was followed by the findings and conclusions which are disputed by appellant.

Bueno now has what is commonly called "buyers remorse"; this is not enough to overturn this plea. This appeal should be dismissed.

Respectfully submitted this 15th day of September 2011,

A handwritten signature in black ink, appearing to read "David B. Trefry", with a large, sweeping flourish extending to the right.

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Yakima County, Washington

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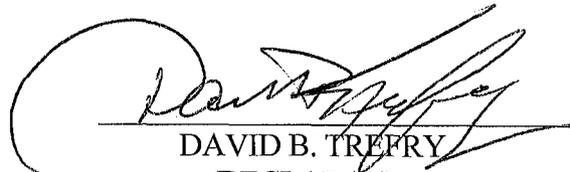
NO. 29400-5-III
DECLARATION OF SERVICE

SIGIFREDO GARCIA-BUENO,
Appellant

I, David B. Trefry state that on September 15, 2011, I emailed, by agreement of the parties a copy of the Motion for Extension of Time, to Mr. Dave Gasch, Gasch Law Office , gachlaw@msn.com and to Sigifredo G. Bueno, P.O. Box 464, Selah, WA 98942.

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

DATED this 15th day of September, 2011 at Spokane, Washington.


DAVID B. TREFRY
DECLARANT