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DIVISION ONE

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No. 63672-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON

Respondent

v.

MARTHA C. TORRES

Appellant

APPEAL FROM THE KING COUNTY SUPERIOR COURT

THE HONORABLE JAMES CAYCE

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. ASSIGNMENT OF ERROR

1. The trial court erred when it denied the Motion to Withdraw Guilty Plea.

B. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court error when it denied the Motion to Withdraw Guilty Plea, when the State failed to rebut the Appellant's claim of ineffective assistance of counsel?

II. STATEMENT OF THE CASE

A. Statement of Proceedings

On January 6, 2009, Ms. Torres plead guilty to Theft in the Second Degree in King County Superior Court. (CP 5-23) On March 20, 2009, she moved to withdraw her guilty plea. (CP 24) On May 22, 2009, without hearing testimony, the trial court denied the request. (CP33) On May 29, 2009, the trial court sentenced Ms. Torres. (CP 34) Notice of Appeal was timely filed. (CP 42)

Ms. Torres maintains that she was provided ineffective assistance of counsel and that the plea was not entered into in a knowingly and intelligent manner. She further maintains that she was coerced into entering the plea. She maintains that the Court erred when it denied the request to withdraw her guilty plea.

III. ARGUMENT

A. The Trial Court erred when it denied the Motion to Withdraw Guilty Plea.

We review a trial court's denial of a defendant's motion to withdraw a guilty plea for abuse of discretion. State v. Moon, 108 Wn. App. 59, 62, 29 P.3d

734 (2001). A decision based on clearly untenable or manifestly unreasonable grounds constitutes an abuse of discretion. State v. Moon, 108 Wn. App. 59, 62, 29 P.3d 734 (2001).

CrR 4.2(f) states:

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the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant the guilty plea may be withdrawn and a plea of not guilty entered.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

“Manifest injustice” is an injustice that is obvious, directly observable, overt and not obscure. State v. Smith, 74 Wn. App. 844, __ P.2d __ (1994); State v. Saas, 118 Wn.2d 37, 820 P.2d 505 (1991); State v. Tylor, 83 Wn. 2d 594, 596 521 P.2d 699 (1974) Situations that can result in instances of “manifest injustice” include but are not limited to: (1) denial of effective counsel; (2) plea not ratified by the defendant or authorized by the defendant; (3) plea was involuntary; (4) plea agreement was not kept by the prosecutor. *Supra*, at 42.

CrR 4.2(d) addresses the voluntaries of pleas. CrR 4.2(d) states:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequence of

the plea. The court shall not enter a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The voluntariness of a plea is determined by considering the relevant circumstances surrounding it. Brady v. United States, 397 U.S. 742, 749, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). A guilty plea is involuntary and invalid if it is obtained by mental coercion overbearing the will of the defendant. *Id.* at 750 The trial court has a duty to ascertain that a guilty plea is voluntary before accepting it. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Because a guilty plea constitutes a waiver of constitutional rights, the inquiry into voluntariness is constitutionally mandated. *Id.* at 243

It is Ms. Torres's position that the plea that she entered did not comply with the requirements of CrR 4.2(d), in that the defendant did not fully comprehend the nature of her case or the sentence that could be imposed. She was also pressured to plead guilty. Therefore since Ms. Torres did not understand the plea or the consequences, and she was pressured into it, the plea was not voluntary.

A defendant must be fully informed of all the direct consequences of pleading guilty before the court accepts his plea of guilty. Personal Restraint of Ness, 70 Wn. App. 817, ___ P.2d ___, (1993); State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980) In addition a defendant must understand the sentencing

consequences for a guilty plea to be valid. Wood v. Morris, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976). Ms. Torres filed an affidavit with the Court that supports her claim that her case was not investigated nor was she properly informed of the fact that no investigation was completed. The State provided no evidence to rebut the claim.

When a defendant pleads guilty pursuant to misrepresentations or false promise, then a conviction will not stand. Mabry v. Johnson, 467 U.S. 504, 81 L. Ed. 2d 437. 104 S.Ct. 2543, 2547 (1984). Unfulfilled or unfulfillable promises can be misrepresentations in the context of a plea agreement. Mabry 104 S.Ct. at 2547.

Trial counsel has an ethical obligation to discuss plea negotiations with a client. State v. James, 48 Wn. App. 353, 739 p.2d 1161 (1987) This duty includes also keeping the defendant apprised of the developments of the negotiations and providing sufficient information to enable a defendant to make an informed judgment to proceed with a trial or to plead guilty. State v. Holm, 90 Wn. App. ___, ___, P.2d ___, (1998)

In Beckam v. Wainwright, 639 F.2d 262 (5th Cir.1981), held that although an attorney need not "obtain defendant's consent to every trial decision," where the issue is whether to advise the client to plead or not "the attorney has the duty to

advise the defendant of the available options and possible consequences" and failure to do so constitutes ineffective assistance of counsel. *Id.* at 267.

In the case at bar, Ms. Torres established that she was coerced into entering a plea as well as not being fully informed. Furthermore, the record reflected that Ms. Torres was not provided with a clear understanding of the case as her witnesses were never interviewed. Finally, the circumstances which lead to the plea clearly showed that Ms. Torres was involved in a coercive environment when she plead guilty.

Finally, in reviewing Ms. Torres' claim of ineffective assistance of counsel, the Court must look to whether "(1) defense counsel's performance fell below an objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant." State v. Stow, 71 Wn. App. 182, 858 P.2d 267 (1993) (citing Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)); State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).

The Strickland test applies to claims of ineffective assistance of counsel in the plea process. Hill v. Lockhart, 474 U.S. 52, 57, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985). During plea bargaining, counsel has a duty to assist the defendant "actually and substantially" in determining 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, review denied, 96 Wn.2d 1023 (1981)). A

guilty plea must be knowing, intelligent, and voluntary in order to satisfy due process requirements. Henderson v. Morgan, 426 U.S. 637, 644-45, 49 L. Ed. 2d 108, 96 S. Ct. 2253 (1976); In re Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); In re Montoya, 109 Wn.2d 270, 277, 744 P.2d 340 (1987). Counsel has an obligation to inform a defendant of all "direct" consequences of a guilty plea. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

The attorneys for Ms. Torres never contacted her witnesses. Clearly had this action been taken the attorneys would have been informed that the alleged victims were coercing the defendant to plead guilty. Also it appears that the victims were never interviewed. Given this lack of investigation and information, it is clear that the plea was not knowingly and intelligently made and therefore on this independent ground, the denial of the motion by the trial court was in error.

Finally, at the hearing on the Motion to Withdraw the Plea, the trial court did not hear testimony. It merely stated that it had reviewed the pleadings and denied the request. However, the State failed to produce any evidence that would rebut Mr. Torres claim for ineffective assistance of counsel. Therefore, the trial court erred and abused its discretion when it denied the request.

IV. CONCLUSION

For the reasons stated herein it is respectfully requested that the Order denying the Motion to Withdraw Guilty Plea be reversed and that the Motion be granted. It is further requested that this matter be remanded to the trial court to proceed with a new trial.

DATED this 7th day of January 2010.

Respectfully Submitted,



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MARTHA TORRES

CERTIFICATE OF SERVICE BY MAIL

I, Nicholas Marchi, Attorney for the Appellant, hereby certify that I have mailed, on 1/7/2010, via postage prepaid, a true copy of the Brief of the Appellant attached hereto to the following individuals:

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DATED this 7th day of January, 2010.



Nicholas Marchi, WSBA 19982