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NO. 67745-4-I

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

REC'D  
APR 16 2012  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER S. CAHILL,

Appellant.

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

The Honorable James E. Rogers, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The appellant, Alexander S. Cahill, received ineffective assistance of counsel for his plea of guilty.

Issue Pertaining to Assignment of Error

Must the trial court's order denying Cahill's motion to withdraw his guilty plea be reversed because defense counsel was ineffective in failing to investigate or interview potential witnesses before Cahill entered his plea?

B. STATEMENT OF THE CASE

The State initially charged Alexander S. Cahill with second degree identity theft for being found in possession of another person's "name, date of birth, and social security number[.]" CP 1. Four months later, the State was permitted to amend the information to replace the identity theft charge with a charge of second degree possession of stolen property, alleging Cahill possessed a credit card issued to another person. CP 26. Cahill pleaded guilty to the amended charge. CP 6-17; 1RP 3-8.<sup>1</sup>

One month later, defense counsel announced Cahill wished to move for plea withdrawal based on ineffective assistance. 2RP 3-4. The

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<sup>1</sup> Cahill cites to the verbatim report of proceedings as follows: 1RP – 1/11/2011; 2RP – 2/11/2011; 3RP 9/16/2011; 4RP – 9/23/2011.

trial court entered an order permitting defense counsel to withdraw and appointing new counsel to assist Cahill with a motion to withdraw his plea. Supp. CP \_\_ (sub. no. 42, Order on Criminal Motion, filed 2/11/2011).

New counsel filed a motion to withdraw the guilty plea, arguing original counsel was ineffective because she failed to timely interview potential witnesses or conduct any investigation before Cahill entered his guilty plea. Counsel contended Cahill would have insisted on going to trial had original counsel properly evaluated and investigated the case. CP 28-32.

At the motion hearing, original counsel testified that Cahill wanted to present evidence that he found the credit card on the street near a bus stop and did not steal it, and that he intended to turn the card in. 3RP 5-6, 15. To do this, Cahill wanted counsel to interview certain people who worked at businesses near where he found the card to testify he frequented the area. 3RP 15.

Counsel acknowledged the information from the witnesses would have tended to make Cahill's version of events more believable but, because the State charged Cahill with possession of the card rather than theft, the potential evidence would not have gone to guilt or innocence.

3RP 5-6, 8-9, 15. Counsel explained to Cahill that the State had to prove only that a reasonable person in the same circumstances would have or should have known the card was stolen, not that he himself had to have such knowledge. 3RP 9.

According to counsel, Cahill's desire to go to trial appeared to diminish once he was remanded to secure confinement after having been on work release pending trial. 3RP 11. Cahill left counsel a telephone message indicating he wanted to accept the State's offer to plead guilty in exchange for a sentence of time served and immediate release. 3RP 11-12. Counsel responded to the message by visiting Cahill in jail and reviewing the plea offer, plea form, and consequences of pleading guilty. 3RP 12-13.

To that date, neither counsel nor a defense investigator went to the scene near the bus stop or spoke with potential witnesses. 3RP 14-15. Counsel, a public defender, testified any investigation would have to wait until after the omnibus hearing because limited resources required such efforts to be spent only on cases actually going to trial. 3RP 18-19.

Cahill pleaded guilty one week before the trial date. CP 6-17; Supp. CP \_\_ (sub. no. 29, Order on Omnibus Hearing, filed 1/7/2011). Before accepting the plea, the trial court engaged in a standard colloquy

that included an admonishment of the rights Cahill would be waiving by pleading guilty and the maximum possible punishment. 1RP 4-6.

The trial judge asked Cahill whether the following was a true statement: "[Y]ou knowingly possessed a debit card that you knew had been stolen belonging to Brian [Boutochis]; you had it on your person for less than 24 hours, which resulted in it being withheld from Mr. [Boutochis]." CP 15; 1RP 7. Cahill replied in the affirmative. The court asked whether it was "actually what you did[,]" to which Cahill replied, "I obtained the card, yes." 1RP 7. The court found the plea was knowingly, intelligently, and voluntarily made. 1RP 8.

Counsel testified Cahill "did not feel great about pleading guilty" and "disagreed with the charges in our discussions" 3RP 15. Cahill insisted on including the "less than 24 hours" language because it was important to him and better fit his version of events. 3RP 15-16.

Cahill testified he did not actually believe he was guilty. 3RP 21. He intended to return the card to the "DMV where you get your ID." 3RP 27. He called the information from his requested witnesses "very critical to the case." 3RP 22-23. Because counsel did not investigate, Cahill said he had "no hope." 3RP 23. He believed he would have lost at trial because of counsel's failure to investigate. Had counsel investigated, he

would have gone to trial rather than plead guilty. 3RP 25. As it was, he had "no choice." 3RP 27.

In his declaration in support of the motion to withdraw, new counsel said he investigated the area described by Cahill and spoke to the owner of one of the businesses Cahill told original counsel about. The owner said he occasionally found wallets, licenses, and access cards on the street near his business. The owner said did not know Cahill, but believed he might have been one of the several homeless individuals waiting for a bus in front of his business. CP 29-30.

The court denied Cahill's motion to withdraw the plea. CP 45. The court found that at the time of the plea, original counsel had not done Cahill's requested investigation despite his repeated requests. 4RP 3. The court nevertheless concluded as follows:

While it is true [original counsel's] delay perhaps delayed the ability of Mr. Cahill to know whether or not he would have a witness who would present him a defense, given the fact that [original counsel] in her professional judgment believed that any such witness who might be found would not provide a complete defense, and given Mr. Cahill made an independent decision to take credit for time served for the reason he wanted to get out of jail as soon as possible, I conclude that Mr. Cahill has not met the burden, and the motion to withdraw the guilty plea is denied.

4RP 5.

C. ARGUMENT

INEFFECTIVE TRIAL PREPARATION BY COUNSEL  
RENDERED CAHILL'S GUILTY PLEA INVOLUNTARY.

CrR 4.2(f) provides that a trial court must permit the withdrawal of a guilty plea to correct a manifest injustice. Denial of effective counsel is one way to establish a manifest injustice. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). The trial judge's denial of a motion to withdraw is generally reviewed for abuse of discretion. But because an ineffective assistance claim presents mixed questions of law and fact, it is reviewed de novo. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

Article I, section 22 of the Washington Constitution and the Sixth Amendment guarantee criminal defendants effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). The right to effective assistance of counsel applies to the plea process as well as trial. State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011).

To establish ineffective assistance resulting in a guilty plea, the defendant must show (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced

him. Id. The prejudice prong requires a showing that but for counsel's errors, it is reasonably probable the defendant would not have pleaded guilty and would have insisted on going to trial. In re Personal Restraint of Riley, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993).

Cahill bases his claim of ineffective assistance on counsel's failure to investigate and interview possible witnesses. The degree and extent of investigation required varies depending on the case. A.N.J., 168 Wn.2d at 111-12. But counsel must at least "conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." In re Personal Restraint of Fleming, 142 Wn.2d 853, 866, 16 P.3d 610 (2001) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994); see United States v. Gray, 878 F.2d 702, 711-12 (3rd Cir. (1989) (counsel's failure to interview potential eyewitnesses, including four witnesses his client had identified, was deficient performance).

Cahill's original counsel did not speak with any of the potential witnesses. Those witnesses could have vouched for Cahill's assertion that he found the credit card lying on the street where he said it was. While it is true such evidence would not provide a complete defense, it would have supported a reasonable inference that Cahill was credible. This was critical to the jury's belief that Cahill had the card for only one day, did not

know the card was stolen, and planned to turn the card in. Original counsel acknowledged if jurors believed these assertions, they could have found Cahill not guilty. 3RP 17.

The decision whether to call a particular witness is generally presumed to be a matter of legitimate trial tactics. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). "This presumption of counsel's competence can be overcome, however, by showing counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses." In re Personal Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004).

Cahill's counsel cannot be presumed competent because she did no investigation and spoke to no witnesses. The decision to forgo the investigation without knowing what it would reveal was therefore not reasonable. See Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). Counsel's failure to follow through with an investigation was deficient performance.

The deficient performance prejudiced Cahill by, according to his own testimony, essentially forcing him to plead guilty against his wishes. Even after he had agreed to plead guilty, Cahill expressed demonstrable

reluctance to admit his guilt. Cahill insisted on including the phrase, "I had it [card] on my person for less than 24 hours" in the factual basis section of the plea form. CP 15. According to original counsel, "it was important to Mr. Cahill that everybody knew that he had it on his person for less than 24 hours" because it went to his lack of actual knowledge of it having been stolen. 3RP 16. Furthermore, when the trial court asked him whether the factual basis reflected what he had done, Cahill said only, "I obtained the card, yes." 1RP 7.

The State will likely counter this claim of prejudice by contending Cahill would have pleaded guilty anyway because he was motivated by the desire to get out of jail. Such a contention would make little sense. Cahill was aware the standard range for the offense was two months to five months. CP 6-7. He had been arrested on and in at least partial confinement since August 27, 2010. Supp. CP \_\_ (sub. no. 10, Disposition Report, filed 9/8/2010); Supp. CP \_\_ (sub. no. 13, Conditions of Release for Defendant, filed 9/27/10); Supp. CP \_\_ (sub. no. 14, Conditions of Conduct for Work Education Release, filed 9/27/10); Supp. CP \_\_ (sub. no. 15, Conditions of Conduct for Persons on CCAP, filed 9/27/2010). Cahill was entitled to credit for this presentence time served. RCW 9.94A.680(3).

When he pleaded guilty January 11, 2011, Cahill therefore had already served all or most of what his likely sentence would be upon a guilty verdict after trial. And trial was only a week away. Given that counsel had done no investigation to that point, Cahill had no legitimate reason to believe anything was going to change in that final week. Thus while he conveyed a strong desire to be quickly released, he had little if anything to lose by taking his chances with a jury. Under these circumstances, it is evident counsel's failure to investigate and interview witnesses that was the primary motivator behind Cahill's plea.

Cahill thus demonstrates he was prejudiced by counsel's inaction. Counsel was ineffective and Cahill should be entitled to withdraw his guilty plea.

D. CONCLUSION

For the aforesaid reasons, this Court should reverse and remand to the trial court with directions that Cahill be allowed to withdraw his plea.

A.N.J., 168 Wn.2d at 120.

DATED this 16 day of April, 2012.

Respectfully submitted,

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