

71493-7

71493-7

REC'D

JUN 11 2014

King County Prosecutor
Appellate Unit

NO. 71493-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GLASS,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2014 JUN 11 PM 4:10

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

The Honorable Theresa B. Doyle, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	5
1. THE COURT ERRED WHEN IT DENIED GLASS' MOTION TO WITHDRAW HIS PLEAS WITHOUT APPOINTING NEW COUNSEL TO REPRESENT HIM....	5
2. THE FINDING IN THE JUDGMENT CONCERNING AN ONGOING PATTERN OF ABUSE MUST BE VACATED.....	11
D. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Clements</u> 125 Wn. App. 634, 106 P.3d 244 <u>review denied</u> , 154 Wn.2d 1020, 120 P.3d 548 (2005).....	9
<u>State v. A.N.J.</u> 168 Wn.2d 91, 225 P.3d 956 (2010).....	8
<u>State v. Early</u> 70 Wn. App. 452, 853 P.2d 964, 868 P.2d 872 (1993) <u>review denied</u> , 123 Wn.2d 1004 (1994)	9
<u>State v. Garcia</u> 57 Wn. App. 927, 791 P.2d 244 <u>review denied</u> , 115 Wn.2d 1010 (1990)	7
<u>State v. Harell</u> 80 Wn. App. 802, 911 P.2d 1034 (1996).....	5
<u>State v. Jury</u> 19 Wn. App. 256, 576 P.2d 1302 <u>review denied</u> , 90 Wn.2d 1006 (1978)	9
<u>State v. Marshall</u> 144 Wn.2d 266, 27 P.3d 192 (2001).....	6
<u>State v. McCollom</u> 88 Wn. App. 977, 947 P.2d 1235 (1997) <u>review denied</u> , 137 Wn.2d 1035 (1999)	7, 10
<u>State v. Osborne</u> 102 Wn.2d 87, 684 P.2d 683 (1984).....	6
<u>State v. Sisouvanh</u> 175 Wn.2d 607, 290 P.3d 942 (2012).....	6

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Stark</u> 48 Wn. App. 245, 738 P.2d 684 <u>review denied</u> , 109 Wn.2d 1003 (1987).....	6
<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997).....	7
<u>State v. Visitacion</u> 55 Wn. App. 166, 776 P.2d 986 (1989).....	9
<u>State v. Yates</u> 111 Wn.2d 793, 765 P.2d 291 (1988)	10
<u>State v. Young</u> 62 Wn. App. 895, 802 P.2d 829 (1991).....	6
 <u>FEDERAL CASES</u>	
<u>Smith v. Lockhart</u> 923 F.2d 1314 (8 th Cir. 1991) <u>cert. denied</u> , 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998).....	7
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	8
<u>United States v. Nguyen</u> 262 F.3d 998 (9 th Cir. 2001).....	3, 7
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
American Bar Association Standards for Criminal Justice, Standard 4-4.1(a), Duty to Investigate (3d ed. 1993).....	8
Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West ed. 1971)	10
CrR 4.2	6

TABLE OF AUTHORITIES (CONT'D)

	Page
CrR 4.7	9
U.S.Const. Amend. VI	5

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to withdraw his guilty pleas based on ineffective assistance of defense counsel without appointing new counsel to litigate his claims.

2. Pursuant to appellant's plea agreement with the State, the finding in the Judgment concerning an ongoing pattern of abuse must be vacated.

Issues Pertaining to Assignments of Error

1. Prior to entry of judgment, every criminal defendant has the right to legal representation on a motion to withdraw plea. Did the Superior Court deny appellant this right when it failed to appoint conflict-free counsel to assist him with his motion before denying the motion?

2. As part of the State's plea agreement with appellant, the State promised to dismiss an aggravating circumstance it had charged for two of the offenses – that the offense was part of an ongoing pattern of abuse over a prolonged period of time. Through apparent oversight, appellant's judgment indicates that the circumstance applies. Should this erroneous finding be vacated?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged appellant Michael Glass with two counts of Domestic Violence Felony Violation of a Court Order, two counts of Assault in the Fourth Degree, and one count of Unlawful Possession of Firearm in the First Degree. The two charges for Felony Violation of a Court Order included an aggravating sentencing circumstance: that the offense involved domestic violence and was part of an ongoing pattern of psychological, physical, or sexual abuse over a prolonged period. CP 11-13. Attorney Mark Flora represented Glass. RP 2.

Trial began the morning of September 26, 2013. RP 7. By the afternoon session, however, the parties had reached a plea deal. RP 36. In exchange for the State's dismissal of the aggravating sentencing circumstance, Glass would plead guilty to all five charges. RP 36. After colloquies between the prosecutor and Glass and the court and Glass, the Honorable Theresa B. Doyle accepted Glass' pleas as a knowing, intelligent, and voluntary waiver of his rights. RP 36-62.

Sentencing was scheduled for November 1, 2013. RP 66. At that hearing, Glass submitted two letters to Judge Doyle indicating that Flora's representation had fallen short of constitutional

guarantees and he had a conflict of interest. Glass moved to withdraw his guilty pleas and sought the appointment of new counsel to pursue his motion. RP 66-72; CP 51-52, 58-60.

The first letter – dated September 12, 2013 (prior to the plea deal) – relied primarily on United States v. Nguyen, 262 F.3d 998 (9th Cir. 2001), and alleged a breakdown in communication with Flora. CP 51-52.

The second letter – written after entry of the guilty pleas – discussed Glass' difficult relationship with Flora and alleged that Glass had been coerced into taking the plea deal based on Flora's deficient representation. CP 58-59. Glass claimed that Flora had failed to sufficiently meet and consult with him (despite repeated requests) or keep him informed. CP 58. Flora also had failed to interview the alleged victim and other witnesses concerning the victim's motive to fabricate and other "mitigating factors." CP 58-59. According to Glass, these witnesses would have established that the victim had a history of harassing Glass' family, had made similar false allegations in the past, and had proclaimed that "if she could not have [Glass], no one could." CP 58-59. Finally, Glass claimed that Flora had failed to provide him with discovery despite a formal request. CP 58. In light of these circumstances, Glass argued he had been

coerced into taking a plea in the absence of any other viable option. CP 58-59.

Judge Doyle continued sentencing to November 22 to allow her time to consider whether Glass had established a prima facie case for withdrawal, whether his claims warranted an evidentiary hearing, and whether he should get new counsel. RP 72-75. Three days later, Judge Doyle issued a short written order denying withdrawal of the pleas and denying the appointment of new counsel. The order does not contain any analysis or findings. CP 53.

Glass filed a letter asking Judge Doyle to reconsider and providing additional details on his family's history with the victim and her prior false accusations. CP 63-66. At the November 22 sentencing hearing, Judge Doyle indicated that nothing in that letter changed her rulings. RP 77-78. Glass then filed an additional motion to withdraw his pleas and again alleged deficient performance based on Flora's failure to adequately investigate the charges, failure to interview the alleged victim, failure to formulate any trial strategies, and failure to use mitigating evidence. CP 84-86. When Glass attempted to read this additional pleading into the record, Judge Doyle stopped him and indicated the motion for reconsideration had already been denied. RP 78.

For Glass' three felony offenses, Judge Doyle imposed a prison-based Special Drug Offender Sentencing Alternative (DOSA), which requires 39 months in prison followed by 39 months on community custody. CP 73; RP 83-85. For the two misdemeanors, Judge Doyle imposed concurrent 364-day sentences. CP 73, 80; RP 82-83.

Despite the State's agreement to dismiss the charged aggravating sentencing circumstance, the felony Judgment indicates that, for the two counts of Felony Violation of a Court Order (counts 1 and 2), "The offense was part of an ongoing pattern of psychological, physical or sexual abuse of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time, under the authority of RCW 9.94A.535(3)(h)(i)." CP 71.

C. ARGUMENT

1. THE COURT ERRED WHEN IT DENIED GLASS' MOTION TO WITHDRAW HIS PLEAS WITHOUT APPOINTING NEW COUNSEL TO REPRESENT HIM.

Criminal defendants have a Sixth Amendment right to appointed counsel at all critical stages of a criminal prosecution, including a plea withdrawal hearing. State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996). While mere allegations of incompetence do not require substitute counsel, where a defendant

alleges sufficient facts that would establish ineffective assistance of counsel, the appointment of new counsel is necessary to avoid a conflict of interest. State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684, review denied, 109 Wn.2d 1003 (1987). New counsel is more likely necessary where “the allegations are based primarily on actions not reflected in the record[.]” State v. Young, 62 Wn. App. 895, 837, 802 P.2d 829 (1991). A court’s decision on the appointment of new counsel is reviewed for abuse of discretion. Stark, 48 Wn. App. at 252.

Glass sought new counsel in the context of a motion to withdraw his guilty pleas. A trial court must allow withdrawal of a guilty plea when necessary to correct a manifest injustice. CrR 4.2(f); State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001), abrogated on other grounds by State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012). There has been a manifest injustice where the defendant was denied effective assistance of counsel or his plea was not voluntary. Marshall, 144 Wn.2d at 281.

Defense 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). Consistent with this duty, to prevail on a claim of ineffective assistance of counsel, the

defendant must show (1) that his attorney failed to “actually and substantially” assist him in deciding whether to plead guilty and (2) that but for counsel’s failure, there is a reasonable probability he would not have pled guilty. State v. McCollom, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997), review denied, 137 Wn.2d 1035, 980 P.2d 1285 (1999); State v. Garcia, 57 Wn. App. 927, 933, 791 P.2d 244, review denied, 115 Wn.2d 1010, 797 P.2d 511 (1990). Glass’ allegations, if proved at an evidentiary hearing with the assistance of new counsel, would satisfy this standard.

Glass alleged a breakdown in communication (failure to visit him, consult with him, or otherwise keep him informed). Counsel cannot perform competently where there is a complete breakdown in communication with the client. And such a breakdown, by itself, is good cause for substitution of counsel. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997) (citing Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998); see also Nguyen, 262 F.3d at 1003 (“a serious breakdown in communications can result in an inadequate defense”).

Glass also alleged an inadequate investigation (failure to interview the alleged victim and potential witnesses concerning the victim's motive to fabricate and other "mitigating factors" involving the victim's past conduct). Every lawyer has a duty to conduct a sufficient investigation for his or her client:

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

American Bar Association Standards for Criminal Justice, Standard 4-4.1(a), Duty to Investigate (3d ed. 1993); see also Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.")

The need for adequate investigation prior to recommendation of a guilty plea is well established. See State v. A.N.J., 168 Wn.2d 91, 109-112, 225 P.3d 956 (2010). Counsel generally cannot perform competently without interviewing key witnesses, including the

victim. See State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964, 868 P.2d 872 (1993) (use of investigators to interview witnesses and victims is common practice; failure to conduct an appropriate investigation may indicate deficient performance), review denied, 123 Wn.2d 1004 (1994); State v. Visitacion, 55 Wn. App. 166, 173-174, 776 P.2d 986 (1989) (citing expert who could not “conceive of any reason, tactical or otherwise, for not contacting witnesses” and finding counsel’s conduct deficient); State v. Jury, 19 Wn. App. 256, 259, 264, 576 P.2d 1302 (although counsel analyzed police report, no competent counsel would have failed to interview the witnesses), review denied, 90 Wn.2d 1006 (1978). Compare In re Clements, 125 Wn. App. 634, 646-647, 106 P.3d 244 (counsel not deficient for failing to interview certain witnesses before recommending plea where witnesses did not see crime and counsel could reasonably conclude they had nothing helpful to offer at a trial), review denied, 154 Wn.2d 1020, 120 P.3d 548 (2005).

Finally, Glass alleged denial of his discovery. Competent counsel provides his client with discovery. The Criminal Rules specifically authorize defense attorneys to provide clients with copies of discovery. See CrR 4.7(h)(3). And discovery plays an important role in a defendant’s decision whether to plead guilty:

“In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security.”

State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988) (emphasis added) (quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West ed. 1971)).

Returning to the applicable standard under McCullom, Glass alleged sufficient facts to establish Flora’s failure to “actually and substantially” assist him in deciding whether to plead guilty. Glass also alleged sufficient facts to establish prejudice; *i.e.*, but for Flora’s failures, there is a reasonable probability he would not have pled guilty as charged. The record makes clear that it was Glass’ preference not to plead guilty. He encouraged Flora to interview potential trial witnesses. CP 58-59. And the case actually began with Glass exercising his right to trial. RP 7. As Glass explained, however, he ultimately pled guilty because he felt he had no other viable option under the circumstances created by Flora. CP 59-60, 84-86.

This Court should remand for the substitution of defense counsel and a hearing to decide the substantive merit of Glass' claims.

2. THE FINDING IN THE JUDGMENT CONCERNING AN ONGOING PATTERN OF ABUSE MUST BE VACATED.

As part of the State's plea agreement with Glass, it agreed to move for dismissal of the "Ongoing Pattern of Abuse" aggravating circumstance. RP 36. The prosecutor apparently forgot to do so, however, because the felony judgment indicates the circumstance applies to the two convictions for Felony Violation of Court Order (counts 1 and 2). CP 71. This finding should be vacated.

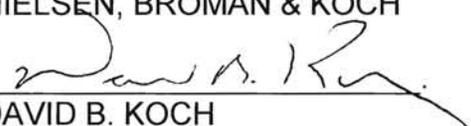
D. CONCLUSION

Glass' case should be remanded so that conflict-free counsel can advocate on his behalf at a hearing on his motion to withdraw his pleas. Moreover, Glass' felony judgment should not include the aggravating sentencing circumstance for counts 1 and 2.

DATED this 11th day of June, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 71493-7-1
)	
MICHAEL GLASS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL GLASS
DOC NO. 325406
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF JUNE 2014.

X *Patrick Mayovsky*