

NO. 71493-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GLASS,

Appellant.

2014 AUG 27 PM 3:02  
COURT OF APPEALS  
STATE OF WASHINGTON  
R

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE

**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	4
a. Facts Of The Case .....	4
b. Facts Surrounding Glass' Guilty Plea And Motion To Withdraw His Plea .....	8
C. <u>ARGUMENT</u> .....	17
1. THE TRIAL COURT PROPERLY DENIED GLASS' MOTION TO WITHDRAW HIS PLEA AND FOR NEW COUNSEL BECAUSE GLASS DID NOT PRESENT A SUFFICIENT BASIS TO MERIT A HEARING .....	17
2. GLASS' CASE SHOULD BE REMANDED TO CORRECT A SCRIVENER'S ERROR ON THE JUDGMENT AND SENTENCE .....	31
D. <u>CONCLUSION</u> .....	32

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,  
108 S. Ct. 2052 (1984) ..... 11, 19

United States v Nguyen, 262 F.3d 998  
(9th Cir. 2001) ..... 11

Washington State:

In re Personal Restraint of Clements, 125 Wn. App. 634,  
106 P.3d 244, review denied,  
154 Wn.2d 1020 (2005)..... 18, 20

In re Personal Restraint of Pirtle, 136 Wn.2d 467,  
965 P.2d 593 (1998)..... 20, 24

In re Personal Restraint of Riley, 122 Wn.2d 772,  
863 P.2d 554 (1993)..... 20

State v. A.N.J., 168 Wn.2d 91,  
225 P.3d 956 (2010)..... 20

State v. Branch, 129 Wn.2d 635,  
P.2d 1228 (1996)..... 18

State v. Davis, 125 Wn. App. 59,  
104 P.3d 11 (2004)..... 18, 28, 30

State v. Dejarlais, 136 Wn.2d 939,  
969 P.2d 90 (1998)..... 25

State v. Garcia, 57 Wn. App. 927,  
791 P.2d 244, review denied,  
115 Wn.2d 1010 (1990)..... 19

State v. Grier, 171 Wn.2d 17,  
246 P.3d 1260 (2011)..... 18

<u>State v. Marshall</u> , 144 Wn.2d 266, 27 P.3d 192 (2001).....	17
<u>State v. McCollum</u> , 88 Wn. App. 977, 947 P.2d 1235 (1997), <u>review denied</u> , 137 Wn.2d 1035 (1999).....	29
<u>State v. Moen</u> , 150 Wn.2d 221, 76 P.3d 721 (2003).....	27
<u>State v. Osborne</u> , 102 Wn.2d 87, 684 P.2d 683 (1984).....	19, 21, 26
<u>State v. Sisouvanh</u> , 175 Wn.2d 607, 290 P.3d 942 (2012).....	17, 18
<u>State v. Stark</u> , 48 Wn. App. 245, 738 P.2d 684, <u>review denied</u> , 109 Wn.2d 1003 (1987).....	29, 30
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	29
<u>State v. Taylor</u> , 83 Wn.2d 594, 521 P.2d 699 (1974).....	18
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	19
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	17

### Statutes

#### Washington State:

RCW 9.94A.660 .....	3
RCW 9.94A.662 .....	3
RCW 26.50.035.....	25

## Rules and Regulations

### Washington State:

CrR 3.5.....	2
CrR 4.2.....	18, 28
ER 404 .....	15, 16, 25
ER 609 .....	12

**A. ISSUES**

1. A trial court must allow a defendant to withdraw his guilty plea only when it appears that the withdrawal is necessary to correct a manifest injustice, such as the denial of effective assistance of counsel. After Glass pled guilty, he moved *pro se* to withdraw his guilty plea because, he alleged, his counsel had not interviewed the victim about a certain statement she had made and failed to follow up on mitigating information. Defense counsel was not required to do either, as counsel would not have gained any additional information to assist him in his defense of Glass. Nor could Glass show that he was prejudiced, since he did not wish to proceed to trial and instead repeatedly expressed that he wanted to participate in the drug offender sentencing alternative, which his counsel had negotiated as part of Glass' plea bargain. Did the trial court properly exercise its discretion by denying Glass' motion to withdraw his guilty plea and appoint him new counsel?

2. As part of the plea agreement, the State agreed to dismiss the aggravating circumstance that counts 1 and 2 were part of an ongoing pattern of abuse of the same victim over a prolonged period of time. Due to a scrivener's error, the felony judgment and sentence included the aggravating circumstance for counts 1 and 2.

Should Glass' case be remanded so that the aggravating circumstance may be stricken?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Michael Anthony Glass with two counts of felony violation of a court order and two counts of fourth degree assault, each with a domestic violence designation, on April 16, 2013. CP 1-3. Glass' girlfriend of eight years, Makeba Winstead, was the victim of each of the charges. CP 1-3, 5. On September 20, 2013, the State amended the information, adding a charge of unlawful possession of a firearm in the first degree and adding the aggravating circumstance that counts 1 and 2 were part of an ongoing pattern of abuse of the same victim over a prolonged period of time. CP 11-13.

On September 26, 2013, Glass proceeded to trial before the Honorable Theresa Doyle. RP 7, 11.<sup>1</sup> The trial began with a CrR 3.5 hearing and other pretrial motions. RP 7-35. Glass' attorney, Mark Flora, alerted the trial court that though he had

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<sup>1</sup> The verbatim report of proceedings consists of a single volume dated September 26, 2013; November 1, 2013; and November 22, 2013.

interviewed Winstead, he had not been able to complete the interview. CP 47-48. He requested a recess of trial for the afternoon to complete his interview. CP 48. The trial court agreed to the recess. RP 30-31, 35.

Later that same afternoon, Glass agreed to plead guilty to the amended charges with the State's agreement to recommend a prison-based drug offender sentencing alternative (DOSAs)<sup>2</sup> and to dismiss the aggravating circumstance. RP 36; CP 31, 36, 46. Glass pled guilty to the five counts of the amended information. RP 36-62; CP 14-27, 37-45.

At sentencing on November 1, 2013, Glass presented two letters to the court stating that his attorney had a conflict with him and that he wished to have new counsel and to withdraw his plea. RP 67-68; CP 51-52, 58-60. The court continued the hearing to review the letters and determine if Glass had presented a prima facie case sufficient to merit an evidentiary hearing. RP 72. On November 4, 2013, the court denied Glass' *pro se* motions. CP 53. Glass sent a letter asking the court to reconsider its ruling and

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<sup>2</sup> Under the prison-based drug offender sentencing alternative, the court may waive the standard range and impose a sentence consisting of a period of confinement of one half the midpoint of the standard range and the remaining one half the midpoint of the standard range as community custody. RCW 9.94A.660(3); RCW 9.94A.662(1)(a)-(b).

presented a number of other complaints about his attorney and the prosecutor. CP 61-66.

At the sentencing hearing, the court denied Glass' *pro se* motion to reconsider its ruling. RP 77. Glass presented another *pro se* motion and letter again asking the court to allow him to withdraw his guilty plea. RP 77-78; CP 84-86. The court reiterated that it had already denied Glass' motion. RP 78.

The court proceeded to sentencing and followed the parties' agreed recommendation. RP 82. The court imposed a prison-based drug offender sentencing alternative on counts 1, 2, and 5 for a total of 39 months of confinement and 39 months of community custody. RP 82-85; CP 70-76. On counts 3 and 4, the misdemeanor charges, the court imposed concurrent 364-day sentences. RP 82-83; CP 80-82.

## **2. SUBSTANTIVE FACTS**

### **a. Facts Of The Case.<sup>3</sup>**

Glass had been in a romantic relationship with Makeba Winstead on and off for approximately eight years. RP 54-55;

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<sup>3</sup> These facts are taken from the Certification for Determination of Probable Cause because Glass pled guilty prior to trial.

CP 5. He had previously been convicted of assaulting Winstead and of violating no contact orders. CP 4, 34. In 2008, Glass was convicted of second degree assault, domestic violence, and two misdemeanor violations of a court order. CP 34. Winstead was the victim in each of these offenses. CP 4. In 2010, Glass was convicted of felony violation of a court order for contacting Winstead. CP 4, 34. In 2012, Glass was again convicted of misdemeanor violation of a court order for contacting Winstead. CP 4, 34.

The 2013 case arose out of Winstead's attempt to recover some of her belongings from Glass' home. CP 6. On April 6, 2013, Winstead had been at Glass' home, which he shared with his mother. CP 6-7. Glass had an altercation with Winstead and bit her hand. CP 6. Winstead had to receive stitches on the palm and fingers of her hand due to Glass' bite. CP 6. She did not return to Glass' home, but instead stayed at a domestic violence shelter. CP 6.

On April 11, 2013, Winstead, accompanied by her sister, returned to Glass' home to retrieve some of her belongings. CP 6. Glass was not at home, but Glass' mother let Winstead inside. CP 6. Glass returned home while Winstead was still in the house.

CP 6. He initially was polite, but his mood rapidly deteriorated.  
CP 6. Winstead recognized the shift in Glass' mood and attempted to leave. CP 6. She placed her hand on the knob of the front door.  
CP 6. Glass grabbed her hand and pulled it off the door knob, ripping open the stitches on Winstead's hand. CP 6. Winstead's sister heard the commotion and ran to see what had occurred.  
CP 6. She saw Glass squeezing Winstead's hand and that Winstead's hand was bleeding. CP 6. Glass drove Winstead and her sister to Virginia Mason Hospital. CP 6.

Winstead was treated at the emergency department of Virginia Mason Hospital. CP 6. A social worker contacted police so that Winstead could report Glass' assault of her. CP 6. Officers responded and discovered that there were two no contact orders prohibiting Glass from contacting Winstead. CP 6.

Glass' neighbor, Christy Olson, had observed part of the altercation that Glass had had with Winstead and also reported it to police. CP 6-7. Olson lived next door to Glass and knew Glass and Winstead. CP 7. She had seen Glass assault Winstead in the past. CP 7. On April 11, 2013, Olson had heard a loud commotion and then had seen Winstead and Glass outside of his home. CP 7. She heard Winstead begging Glass, "Stop it," and, "Leave me

alone—you're hurting me." CP 7. She then heard Glass screaming and swearing at Winstead. CP 7. Glass then seemed to be talking to his mother or another woman, but referring to Winstead, when he said, "I'll kill her." CP 7. Olson then saw that Winstead got into Glass' Mercedes and begged him to drive her to the hospital. CP 7. Glass pushed Winstead out of the car, and then grabbed her hand. CP 7. Olson heard Winstead scream in pain. CP 7. Eventually, Glass drove off with Winstead and another woman, whom Olson believed was Sarah Chaffee-Leingang. CP 7. Olson had recently seen Chaffee-Leingang with Glass at Glass' house. CP 7.

Olson then saw that Glass returned home at approximately 12:30 PM with Chaffee-Leingang. CP 7. She could not see if Winstead was also in the car. CP 7. She then saw Glass remove a large rifle from the trunk of his car. CP 7. Olson called 911 because she feared that Glass would kill Winstead. CP 7.

Officers responded to Olson's 911 call and contacted Glass. CP 6. Glass was interviewed and released at the scene. CP 6. Glass' rifle was recovered and taken by the police. CP 6. The following day, officers contacted Glass and arrested him for assaulting Winstead. CP 7. An officer also interviewed

Chaffee-Leingang. CP 7. Chaffee-Leingang said that she was Glass' new girlfriend. CP 7. She claimed Winstead had made multiple threatening phone calls to her, had broken into Glass' home, assaulted her, and stolen items from the house. CP 7. Chaffee-Leingang claimed that Glass had been with her and that Glass had not and could not have assaulted Winstead. CP 7.

**b. Facts Surrounding Glass' Guilty Plea And Motion To Withdraw His Plea.**

On September 26, 2013, Glass pled guilty to the amended charges with the agreement that the State would dismiss the aggravating circumstance on counts 1 and 2 and recommend a DOSA. RP 36-62; CP 14-27, 31, 37-46. The prosecutor engaged in a thorough colloquy with Glass regarding his decision to plead guilty, the plea forms, and the consequences resulting from the plea. RP 36-59.

As the prosecutor discussed each relevant section of the plea forms, Glass confirmed that he understood the section. RP 36-59. At one point during the colloquy, Glass conferred with his attorney, Mark Flora, about the elements of each of the charges and what the State would have had to prove at trial. RP 39-40.

The prosecutor then confirmed with Glass that his attorney had adequately answered his questions and that Glass understood the elements of the charges. RP 40. Glass specifically agreed that he understood the constitutional rights that he had at a trial, that he had reviewed each of those rights with his attorney, and that he was waiving those rights by pleading guilty. RP 40-41. Even so, Glass stated that he still wished to plead guilty. RP 42. Glass indicated that he had reviewed with his attorney and personally read the plea forms, was pleading of his own accord, that he did not wish to have any more time to consider the plea or to consult with his attorney, and that he had no further questions about the pleas. RP 38, 57, 59-62.

The trial court accepted Glass' guilty pleas. RP 62. The trial court found that Glass had made a knowing, intelligent, and voluntary waiver of his rights and that there was a sufficient factual basis to support the pleas. RP 62. A sentencing date was set. RP 62.

At sentencing on November 1, 2013, Glass filed two letters and orally made a *pro se* motion to the court. RP 66-69; CP 50-52, 57-60. Glass claimed that he had entered into the plea agreement under duress and that his counsel had been ineffective. RP 66.

The court asked him if he was asking the court to appoint him a new attorney and withdraw his plea. RP 67, 70. Glass stated yes. RP 67, 70. The court inquired into Glass' basis for these *pro se* motions. RP 70. Glass stated that his grounds were ineffective assistance of counsel and counsel's failure to investigate mitigating factors. RP 70. He presented two letters to the court. RP 71; CP 50-52, 57-60.

The first letter was dated September 12, 2013.<sup>4</sup> RP 71; CP 50. The other was undated. RP 71. From the content of the second letter, it appeared to have been written after Glass had pled guilty. CP 58-60. The court inquired whether Glass understood that if his motion to withdraw his plea was granted then there was no guarantee that the State would still recommend a DOSA sentence. RP 71. Glass stated that he wished to have another attorney to present more mitigating evidence in hopes that there would then be a better plea offer. RP 71-72. The court reiterated that if his motion to withdraw his plea were granted, then there was no guarantee that he would receive the same plea offer. RP 72. Glass said he understood. RP 72. The court then continued the

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<sup>4</sup> Although this letter is dated September 12, 2013, it appears from the record to have not been presented to the court until sentencing on November 1, 2013.

hearing so that it could review Glass' letters and determine whether Glass had presented sufficient evidence to merit an evidentiary hearing. RP 72. The hearing was continued to November 22, 2013. RP 75.

Glass' first letter alleged that he had not received effective assistance of counsel. He cited to Strickland v. Washington, 466 U.S. 668, 108 S. Ct. 2052 (1984), and United States v Nguyen, 262 F.3d 998 (9th Cir. 2001). He offered no facts to illustrate how these cases applied to him. He mentioned a serious breakdown in communication by stating, "Wherever if current counsel is capable a serious breakdown in communication has the contingency for faulty [sic] defense [,] I can't help but notice my tangible discontent at the fact that this may come to pass because of our conflict." CP 52. He did not provide any facts as to the specific communication issue or conflict with his attorney. He then stated that he "viciously oppose[d]" proceeding with his case until his requests were heard. CP 52.

Glass' second letter began by thanking the court and all involved in the DOSA program. CP 58. He expressed his appreciation at the opportunity to participate in the program and that he felt that without help for his drug and alcohol issues, he may

suffer great harm. CP 58. He then stated that his attorney had not visited him as often as he had requested during the pendency of his case nor had his attorney returned his messages. CP 58. He said he had, therefore, not been able to give his attorney details regarding his family's attempts to prohibit Winstead from visiting Glass' home or that Winstead had forged checks from his mother's account and had been convicted of check fraud.<sup>5</sup> CP 58. Glass explained that "these mitigating factors play a huge role in the mitigation process." CP 58. Glass then alleged that his attorney had failed to interview Winstead and that his attorney had not provided him with discovery when he requested it. CP 58. Next, Glass explained that he felt there had been "friction" with his attorney and that during the beginning of the trial his attorney had told him that "we cannot win" and then given him the plea offer. CP 59.

Glass' letter continued with a list of Glass' specific complaints about his attorney. CP 59. Glass alleged that his attorney had not interviewed Winstead or Glass' family members

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<sup>5</sup> Glass' attorney, the prosecutor, and the trial court were all aware of Winstead's convictions for crimes of dishonesty. RP 14, 26-28. The parties stipulated that Winstead's and Olson's convictions for crimes of dishonesty in the last ten years were admissible at trial under ER 609. RP 27.

about Winstead's alleged statement that "if she could not have me, no one could," and that Winstead had shown up at his house uninvited and "stalk[ed]" the house. CP 59. Glass explained that these were only a few of the mitigating factors that he felt his attorney had not brought to the forefront. CP 59.

Next, Glass alleged that the prosecution had "maliciously held a charge over [his] head" by requiring that he plead guilty or face amended charges. CP 59. He explained that he felt "preyed upon" by the prosecution because he had been honest with the police that he did possess the rifle and he turned it over to the police. CP 59. He explained that he had not been arrested or charged for doing so. CP 59. Finally, Glass expressed that he felt the prosecution was unfairly adding "multipliers" when Winstead was the person who had continually shown up at Glass' house.<sup>6</sup> CP 59. Glass stated he disagreed with the calculation of his

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<sup>6</sup> For counts 1 and 2, felony violation of a court order, Glass had an offender score of 11. RP 87; CP 71. Because these crimes were domestic violence offenses, each counted as 2 points as a current offense for calculation of the offender score on the other count. CP 32. This appears to be what Glass was referring to when he stated there were "multipliers." Glass' score on the first degree unlawful possession of a firearm charge did not have these domestic violence offense "multipliers" and counted as 1 point. CP 33.

offender score.<sup>7</sup> CP 60. Glass then said he was “highly uncomfortable” with the plea he had entered and that it was entered under duress. CP 60.

On November 4, 2013, the court issued a written order denying Glass’ motion to withdraw his plea and for a new attorney. CP 53. Glass sent a third letter, dated November 7, 2013 and filed on November 19, 2013, asking the court to reconsider its ruling. CP 61-66. In this third letter, Glass expressed his anger at Winstead, his attorney, and the assigned prosecutor. CP 63-65. Glass explained that his family had attempted to obtain an order preventing Winstead from contacting Glass’ mother or the home Glass had shared with his mother. CP 63. Glass explained that his family had mistakenly included Glass in that order. CP 63. Glass again claimed that Winstead had shown up uninvited and had “stalk[ed]” his residence. CP 63. He also claimed that Winstead had harassed and assaulted Chaffee-Leingang and then had

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<sup>7</sup> Glass’ attorney and the prosecutor understood that Glass thought that 5 of his previous felony convictions would count as only 1 point because these 5 charges were under the same cause number. RP 88-89. Prior to the plea, Glass’ attorney brought this to the prosecutor’s attention and it was investigated and discussed extensively between the two. RP 89. However, the prosecutor found no prior agreement in that case nor was there a legal basis that these 5 convictions would only count as 1 point. RP 89. Therefore, Glass’ correct offender score was 11 on counts 1 and 2 and 7 on count 5. RP 87; CP 71.

accused Glass of violating the no contact order. CP 63. He claimed to have presented his attorney with a copy of a letter from Winstead in which she had admitted to having falsely accused Glass in the past of violating the no contact order and assaulting her.<sup>8</sup> CP 64.

Glass' third letter then went on to recount his previous convictions and that he had previously been allowed to participate in a pretrial release program, C.C.A.P. CP 64. Glass objected to his counsel's failure to file a motion to reconsider the pretrial release program, C.C.A.P., after it had been denied to him on the current case. CP 64. Finally, Glass requested "exoneration and dismissal of charges" or, in the alternative, to be allowed to serve his time in the pretrial release program. CP 65.

At the sentencing hearing on November 22, 2013, Glass again made a *pro se* motion for the court to reconsider its ruling on his motion to withdraw his plea and for a new attorney. RP 77; CP 4-86. Glass presented a fourth letter to the court. RP 77. The

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<sup>8</sup> Defense counsel, the prosecutor, and the trial court were well aware that Winstead had minimized or recanted allegations of Glass' domestic violence in the past. Some of these incidents were included in the original certification for determination of probable cause. CP 6-8. The prosecutor offered some of these prior incidents as ER 404(b) evidence and they were discussed during the pretrial motions. RP 14-23; Supp. CP \_\_ (sub 42).

court explained it had denied Glass' motion made in his third letter to reconsider its ruling. RP 77. However, the court allowed Glass to make his record of this last motion. RP 77.

In Glass' fourth letter, which he read to the court, Glass made a motion to withdraw his guilty plea due to his ineffective counsel. RP 77-78; CP 84. Glass alleged that his attorney had been ineffective for failing to file Glass' pretrial motions prior to Glass' plea, not conducting a "Brady interview" with the victim prior to omnibus, that Glass had not had an omnibus,<sup>9</sup> and that his attorney had not discussed any trial strategies with him. CP 86. Glass claimed that his attorney only encouraged plea offers and did not present "mitigating" evidence. CP 86. He stated that this was a conflict and that he wished to have new counsel to file his pretrial motions and withdraw his plea. CP 86.

The court again denied Glass' motion to reconsider its previous ruling. RP 78. The court then imposed the agreed recommendation of a prison-based DOSA of 39 months in prison and 39 months on community custody. RP 70-76. Glass was

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<sup>9</sup> An omnibus hearing was held on Glass' case on September 20, 2013. Supp. CP \_\_ (sub 30). At the omnibus hearing, the prosecutor amended the information and the parties filed an omnibus order regarding the pretrial motions and potential ER 404(b) evidence. Supp. CP \_\_ (sub 30); Supp. CP \_\_ (sub 31).

sentenced to 364 days of concurrent time on the misdemeanors.

CP 80-82.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY DENIED GLASS' MOTION TO WITHDRAW HIS PLEA AND FOR NEW COUNSEL BECAUSE GLASS DID NOT PRESENT A SUFFICIENT BASIS TO MERIT A HEARING.**

Glass argues that the trial court improperly denied his request to withdraw his plea because he was entitled to new counsel when he alleged that his counsel had been ineffective. This argument should be rejected. Glass presented the trial court with no basis to support his claim of ineffective assistance of counsel, and, thus, the trial court was not required to appoint him new counsel. This Court should affirm the trial court's denial of Glass' motion to withdraw his guilty plea and for new counsel.

A trial court's decision to deny a motion to withdraw a guilty plea or to deny new court-appointed counsel is reviewed for abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001), abrogated on other grounds by State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012); State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A trial court abuses its discretion when it

bases its decision on untenable grounds or reasons. Sisouvanh, 175 Wn.2d at 623.

Criminal Rule 4.2 protects criminal defendants by ensuring that guilty pleas are entered into voluntarily and intelligently.

State v. Davis, 125 Wn. App. 59, 63, 104 P.3d 11 (2004). The rule provides that a trial 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.” CrR 4.2(f). The defendant bears the burden of proving a manifest injustice.

In re Personal Restraint of Clements, 125 Wn. App. 634, 640, 106 P.3d 244, review denied, 154 Wn.2d 1020 (2005). This is a demanding standard. Id. The defendant must show “that he has suffered ‘an injustice that is obvious, directly observable, overt, not obscure.’” Id. (quoting State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996)). A manifest injustice exists when effective counsel was denied. State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel’s performance was deficient, and (2) that counsel’s deficient performance prejudiced him. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011)

(citing Strickland, 466 U.S. at 687). The first prong of the test “requires a showing that counsel’s representation fell below an objective standard of reasonableness based on consideration of all of the circumstances.” State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 689). The second prong of the test requires a showing that counsel’s deficient performance prejudiced the defendant, in that there is a reasonable probability that, but for counsel’s errors, the outcome of the proceeding would have been different. Id. If one prong has not been met, a reviewing court need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990).

In the context of a plea bargain, effective assistance of counsel means that counsel actually and substantially assisted the defendant in deciding whether to plead guilty. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pled

guilty and would have insisted on a trial. In re Personal Restraint of Riley, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993).

Although counsel must reasonably evaluate the evidence and likelihood of conviction prior to the defendant deciding whether to plead guilty, counsel is not required to interview all potential witnesses. State v. A.N.J., 168 Wn.2d 91, 112, 225 P.3d 956 (2010). A lawyer does not have to conduct an exhaustive investigation prior to entry of a plea. Clements, 125 Wn. App. at 646-47; In re Personal Restraint of Pirtle, 136 Wn.2d 467, 488, 965 P.2d 593 (1998). For example, in Clements, counsel's decision not to interview two pretrial witnesses who had not witnessed the alleged crime was reasonable, given that counsel reasonably concluded that their testimony was unlikely to be helpful at trial. 125 Wn. App. at 646-47. Clements was aware of these two witnesses' potential testimony, given that one was his current girlfriend and the other was his friend. Id. Therefore, Clements' conclusory assertion was not sufficient to establish a reasonable probability that he would have proceeded to trial had his attorney interviewed these witnesses. Id.

Similarly, counsel is not ineffective simply because he failed to find a viable defense. In Osborne, the two defendants claimed that their counsel were ineffective for failing to find a viable defense and failing to conduct an adequate pretrial investigation. 102 Wn.2d at 99. However, counsel interviewed witnesses, obtained an independent review of the autopsy report, and reviewed the evidence with the defendants. Id. Counsel were not ineffective by advising their clients to take advantage of the State's plea offer and were "merely trying to make the best out of a bad situation." Id. at 100.

Here, Glass did not and cannot allege facts sufficient to meet either prong of the ineffective assistance test based on his attorney's representation. At sentencing, Glass raised for the first time the allegation that he felt his attorney had been ineffective. RP 66-71. Glass raised his concerns by presenting two letters to the trial court. RP 70-71; CP 51-52, 58-60. Glass' first letter contained the barest of allegations that he had a conflict with his attorney and that he and his attorney had had a serious breakdown in communication. CP 51-52. Notably, this first letter was dated sixteen days prior to Glass' entry of his plea. CP 51. Glass' main concern in the first letter was that his case was moving forward

while he was represented by his current counsel. CP 52.<sup>10</sup> He provided no factual basis as to why he felt he had a breakdown in communication with his attorney or that his attorney had a conflict.

Glass did not raise any of these concerns to the trial court once trial began on September 26, 2013. Nor did Glass raise any concerns with his attorney's representation of him during the thorough plea colloquy by the prosecutor or the trial court prior to the court's acceptance of his guilty pleas. Instead, during the lengthy colloquy, Glass expressed his satisfaction with his attorney, affirming that his attorney had answered all of his questions about the consequences of his plea, and that his attorney had explained everything to him. RP 38, 41, 44, 49, 56, 57, 59-62.

Glass' second letter, which was undated, expressed his dissatisfaction with his attorney for allegedly failing to meet with him as often as he requested, not sufficiently investigating mitigating information, and not providing him with complete discovery.

CP 58-60. Specifically, Glass alleged that his attorney failed to

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<sup>10</sup> Glass' first letter, dated September 12, 2013, stated in relevant part: "Wherever if current counsel is capable a serious breakdown in communication has the contingency for faulty [sic] defense I can't help but notice my tangible discontent at the fact that this may come to pass because of our conflict. Your Honor[,] I'm very troubled by this [and] I'm supporting new counsel. I viciously oppose forward motion with the case until my meekly earnest request are [sic] heard." CP 52. Glass' letter was presented to the trial court at sentencing on November 1, 2014 and was filed on the same date. CP 51-52.

interview Winstead or Glass' family members about her statement, "if she could not have me, no one could." CP 59. He also claimed that Winstead had showed up at his house uninvited and "stalk[ed]" the house. CP 59. The remainder of Glass' second letter expressed Glass' dissatisfaction with the prosecutor's charging decision and Glass' offender score. CP 59-60.

As to the first prong of the ineffective assistance test, Glass did not allege sufficient facts that counsel's representation of him was deficient. First, Glass' attorney did interview Winstead. RP 30-31. The trial court was well aware that defense counsel had done so because the court recessed for the afternoon in order for defense counsel to complete his interview of Winstead. RP 30-31, 35; CP 48. Glass' main complaint centered on his allegation that his attorney did not interview Winstead about a particular statement he alleged she had made, and that his attorney had not investigated that Winstead had shown up at his house and "stalk[ed]" him. CP 59.

Even if the allegation were true that counsel did not ask Winstead about a particular statement, counsel was not deficient in his representation for not doing so. Because the decision whether to interview a particular witness is a strategic decision for defense

counsel, the decision as to which questions to ask during a witness interview must also be a strategic decision. See Pirtle, 136 Wn.2d at 488 (finding counsel was not ineffective for not interviewing several police witnesses because the law affords an attorney wide latitude in his choice of tactics, including whether to interview some witnesses prior to trial).

Counsel may have strategically determined that he should not ask Winstead about this particular statement. He may have wished to save it for cross-examination, or reasoned that whether or not Winstead made the statement would not have had any bearing on his defense of Glass, especially as Glass' neighbor was to testify that she observed Glass assault Winstead. CP 7. Regardless, counsel conducted an interview of Winstead and ensured that he had enough time to conduct a thorough interview, since he received a recess from the trial court in order to complete the interview. Therefore, counsel was not ineffective even if he did not ask Winstead specifically about this alleged statement.

Glass' counsel was also reasonable in not investigating Glass' claim that Winstead had "stalk[ed]" Glass' house and initiated contact with him. CP 59. Such facts would not have been a defense to the charges of felony violation of a court order.

State v. Dejarlais, 136 Wn.2d 939, 946, 969 P.2d 90 (1998) (the protected party's consent is not a defense to the crime of violation of a court order); see also RCW 26.50.035 (a no contact order must include the following statement: "You can be arrested even if the person. . .who obtained the order invite[s] or allow[s] you to violate the order's provisions."). Counsel was not required to interview Glass' family members about these claims either, since it would not have been a defense to the charges.

Defense counsel's conduct also cannot be considered ineffective considering that he was able to facilitate Glass taking advantage of the State's offer to dismiss the aggravating circumstance and for the State to agree to recommend the DOSA sentence. Glass had five convictions for domestic violence offenses against Winstead in four years, and the State was aware of a number of uncharged incidents of domestic violence.<sup>11</sup> The State also had strong evidence of Glass' guilt. Glass had been observed by a third-party witness, Christy Olson, assaulting Winstead and violating the no contact order. CP 7. Glass had also admitted to police that he had been in possession of a firearm, and

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<sup>11</sup> The State offered the uncharged incidents of domestic violence as ER 404(b) evidence. RP 14-23; Supp. CP \_\_\_ sub no. 42 at 5, 8, and Appendix B.

had given the firearm to police. CP 6. Considering Glass' history and the State's evidence, counsel negotiated a reasonable and beneficial resolution for Glass. Glass was able to receive a dismissal of the aggravating circumstance and the State's agreement to recommend the DOSA sentence. In these circumstances, counsel's performance was not deficient.

Glass also failed to demonstrate prejudice. To establish prejudice in the context of a plea bargain, Glass must have shown that but for counsel's deficient representation he would have proceeded to trial. Osborne, 102 Wn.2d at 99. Instead, the record shows that Glass wished to plead guilty and maintained that position throughout his statements to the court.<sup>12</sup> He was also clear that he wished to take advantage of the DOSA sentence.<sup>13</sup> CP 58.

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<sup>12</sup> For example: Glass told the court on November 1, 2013, that he took responsibility for his actions and then stated he wished to have new counsel so that he could obtain a better plea offer (RP 69, 71-72); in his second letter he expressed his gratitude for being allowed to participate in the DOSA program and get drug treatment (CP 58); and, at sentencing on November 22, 2013, he stated he looked forward to being a part of the DOSA program and that he thought it would assist him greatly (RP 82).

<sup>13</sup> Glass' second letter stated in pertinent part: "Your Honor, Thank you for your time and efforts. I would also like to acknowledge and thank the parties involved in the forefront [sic] and behind the scenes who put the DOSA program together. I truly believe that my philandering relationship with drugs and alcohol would have cut my life span drastically, if not ended it! My thanks and gratitude go out to the individuals behind the program who are unequivocally seeking out the most positively effective solutions for people who struggle with addiction. Though I'm expressing genuine appreciation for the State's concern for the above issue, I ultimately bear the responsibility for my actions." CP 58.

His main complaint with his attorney was not the alleged failure of his attorney to interview or investigate, but that Glass felt his attorney did not bring “mitigating factors” to the prosecutor and obtain a better plea offer for Glass. RP 71-72.

While Glass may have felt that the maximum amount of confinement time was too great, Glass did not have a right to any plea offer from the State. State v. Moen, 150 Wn.2d 221, 227-30, 76 P.3d 721 (2003). The prosecution does not have to engage in plea bargaining with a defendant. Id. Glass’ counsel had no control over whether the State would ever make an offer better than the one Glass received for a DOSA sentence. Because Glass failed to show sufficient facts to meet either prong of the ineffective assistance test, Glass’ claim was baseless.

The trial court considered Glass’ oral statements and letters presented to the court on November, 1, 2013. RP 70-74. The trial court did not proceed with sentencing at that time as planned, but instead took the time to consider Glass’ allegations and whether they were sufficient to merit an evidentiary hearing. RP 72. The trial court then properly entered a written order denying Glass’

motions to withdraw his plea and for appointment of new counsel. CP 53. Implicit in the trial court's denial of Glass' motion was the finding that there had not been a manifest injustice warranting withdrawal of Glass' pleas because Glass had not presented a prima facie case that his counsel had been ineffective. RP 76-78; CP 53.

The trial court had significant knowledge of the case and of counsel's representation from the pretrial motions and plea hearings. The written statement on plea of guilty in compliance with CrR 4.2(g) was prima facie verification of the plea's constitutionality and, when coupled with the court's oral colloquy on the record, the presumption of a voluntary plea was nearly irrefutable. Davis, 125 Wn. App. at 68. Therefore, the trial court was well within its discretion in denying Glass' motions without an evidentiary hearing because it was "not required to waste valuable court time on frivolous or unjustified CrR 4.2 motions." Id.

Glass nevertheless argues on appeal that he should have been appointed new counsel and was entitled to an evidentiary

hearing on his claims. Glass relies on State v. McCollum, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997), review denied, 137 Wn.2d 1035 (1999). However, McCollum did not discuss when a defendant is entitled to an evidentiary hearing and appointment of new counsel when the defendant has alleged ineffective assistance of counsel in the plea context. 88 Wn. App. at 982-83. Instead, McCollum examined the defendant's claim of ineffective assistance of counsel when the trial court had held an evidentiary hearing on whether the defendant was entitled to withdraw his plea. Id. McCollum is not helpful to this Court's analysis.

A defendant is not entitled to a new lawyer simply because he raises a claim that his current counsel was ineffective. State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684, review denied, 109 Wn.2d 1003 (1987). To justify appointment of new counsel, a defendant "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997).

The court is not required to appoint new counsel when it has evaluated the defendant's claim and found nothing but a frivolous accusation of ineffective assistance. Stark, 48 Wn. App. at 253. The court is not, nor should it be, required to appoint a new attorney to engage in a baseless hearing. Davis, 125 Wn. App. at 68. A trial court should not delay its judgment and sentence simply because a defendant alleges ineffective assistance when the court factually finds no basis for the claim. The appellate court reviews the trial court's decision whether to appoint substitute counsel for an abuse of discretion. Stark, 48 Wn. App. at 252.

Here, the trial court evaluated Glass' claims raised in his two letters and orally to the court on November 1, 2013. The additional two letters and oral motions by Glass did not provide sufficient new information or allegations for the trial court to reconsider its ruling. The trial court had presided over the pretrial motions and was familiar with counsel's representation of Glass. It also presided over the plea hearing where Glass entered his guilty pleas. The trial court was in the best position to evaluate Glass' claims that his attorney had not been effective. It found Glass' motions without

merit, and denied his request for new counsel and to withdraw his plea without an evidentiary hearing. The trial court was well within its discretion to do so. For these reasons, this Court should deny Glass' request to remand for an evidentiary hearing with new appointed counsel on a motion to withdraw his plea.

**2. GLASS' CASE SHOULD BE REMANDED TO CORRECT A SCRIVENER'S ERROR ON THE JUDGMENT AND SENTENCE.**

Glass also seeks remand to correct the finding in the judgment and sentence that the aggravating circumstance that these offenses were domestic violence offenses that were part of an ongoing pattern of abuse of the same victim applied to counts 1 and 2. The State agrees that Glass' case should be remanded to correct this scrivener's error. The State agreed as part of the plea agreement to dismiss the aggravating circumstance. RP 36. However, the judgment and sentence does not reflect this agreement. CP 91. Glass' case should be remanded so that this finding may be stricken.

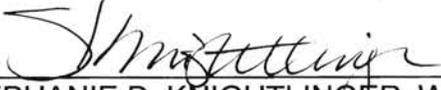
**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Glass' conviction and remand to correct the scrivener's error in the judgment and sentence.

DATED this 27<sup>th</sup> day of August, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MICHAEL GLASS, Cause No. 71493-7-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame  
Name  
Done in Seattle, Washington

8/27/19  
Date