

70107-0

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No. 70107-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID S. SOLOMONA,

Appellant.

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

The Honorable Suzanne R. Parisien

BRIEF OF APPELLANT

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STATE OF WASHINGTON
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DIVISION ONE
KING COUNTY
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A. ASSIGNMENT OF ERROR

Mr. Solomona's constitutionally protected right to counsel was denied at the sentencing hearing.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Under the Sixth and Fourteenth Amendments as well as article I, section 22, a defendant has a right to counsel at all critical stages of the proceedings. A presentencing hearing on a motion to withdraw a guilty plea is a critical stage. Here, Mr. Solomona's attorney refused to advocate for his motion to withdraw his guilty pleas, and took an adversarial position to him at the hearing, effectively leaving him without counsel. Did the trial court violate Mr. Solomona's right to counsel when it refused to appoint new counsel in light of former counsel's abandonment of his client?

C. STATEMENT OF THE CASE

David Solomona was charged with eight counts of felony violation of a court order (FVNCO), and one count of tampering with a witness. CP 8-12. Pursuant to a plea agreement, Mr. Solomona pleaded guilty to three counts of FVNCO and the tampering count. CP 51-80.

Prior to the sentencing hearing, Mr. Solomona, acting *pro se*, filed a motion to withdraw the guilty plea alleging the ineffective assistance of his attorney. CP 89-91.¹ At the sentencing hearing, Mr. Solomona's attorney noted that Mr. Solomona had filed the motions. RP 3-4² ("Your Honor, um, these are Mr. Solomona's motions I guess. Um, we can classify them as being filed *pro se*, necessarily."). Without prompting and without allowing Mr. Solomona to speak to the court, and instead of advocating for either the appointment of new counsel to investigate the ineffective assistance claim or advocating for the motion to withdraw the guilty plea, defense counsel immediately defended his actions in opposition to Mr. Solomona's position. RP 4. Without holding a hearing on Mr. Solomona's motion, or appointing new counsel to investigate defense counsel's ineffectiveness, the trial court summarily denied Mr. Solomona's motion. RP 5-6.

¹ Mr. Solomona also filed a motion to dismiss for a violation of due process. CP 92-94.

² Only the transcript of the February 15, 2013, hearing will be cited, and will be cited as "RP."

D. ARGUMENT

MR. SOLOMONA'S RIGHT TO COUNSEL WAS DENIED WHEN THE TRIAL COURT REFUSED TO APPOINT NEW COUNSEL TO INVESTIGATE HIS ATTORNEY'S INEFFECTIVENESS

A criminal defendant has a right to counsel protected by both the United States and Washington Constitutions. U.S. Const. amend. VI; Const. art. I, § 22; *Gideon v. Wainwright*, 372 U.S. 335, 343-44, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 68, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *State v. Templeton*, 148 Wn.2d 193, 207-10, 59 P.3d 632 (2002). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

A criminal defendant is guaranteed the right to counsel at all critical stages of the criminal proceeding. CrR 3.1(b)(2); *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). A presentencing hearing on a motion to withdraw a guilty plea is a critical stage of the

criminal proceeding and the defendant has the constitutional right to be assisted by counsel at that hearing. *Robinson*, 153 Wn.2d at 698 n. 7; *State v. Harell*, 80 Wn.App. 802, 804, 911 P.2d 1034 (1996).

Courts must presume that a defendant was denied his constitutional right to counsel when counsel “[is] either totally absent or prevented from assisting the accused during a critical stage of the [criminal] proceeding.” *United States v. Cronin*, 466 U.S. 648, 659 n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Courts will also presume this error is prejudicial and will not conduct a harmless error analysis when the trial court outright denies the defendant his right to counsel. *Harell*, 80 Wn.App. at 805.

The decision on a motion to withdraw a guilty plea rests within the trial court’s discretion. *State v. Padilla*, 84 Wn.App. 523, 525, 928 P.2d 1141 (1997). However, it must allow a defendant to withdraw his plea if necessary to correct a manifest injustice. The denial of effective assistance of counsel can constitute a manifest injustice. CrR 4.2(f); *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

Here, Mr. Solomona’s attorney refused to assist him in presenting the motion to withdraw the guilty plea and effectively testified for the State in arguing his own effectiveness in the face of Mr.

Solomona's contention that counsel was ineffective. Mr. Solomona was left to act *pro se* and left without the assistance of counsel.³

This Court's decision in *Harell* provides guidance on this issue. In *Harell*, the defendant pleaded guilty and, before the court sentenced him, he brought a motion to withdraw his pleas, alleging ineffective assistance of counsel at the plea stage of the criminal proceeding, and the trial court granted a hearing on his motion. 80 Wn.App. at 803. Mr. Harell's defense counsel refused to assist him at the hearing; the trial court ordered that the attorney-client privilege was waived and Mr. Harrell's defense counsel testified as a witness for the State. *Harell*, 80 Wn.App. at 803. Thus, Mr. Harell acted *pro se* at the hearing on his motion. *Harell*, 80 Wn.App. at 805. This Court held that "Harell was clearly without counsel while appointed counsel testified as a witness against him. An outright denial of the right to counsel is presumed prejudicial and warrants reversal without a harmless error analysis." *Harell*, 80 Wn.App. at 805. This Court remanded for a new hearing on

³ To the extent the Court looks to the merits of Mr. Solomona's motion, it is based on the failure of counsel to interview witnesses. CP 89-94. The failure to engage in any pretrial investigation and interview witnesses is a basis for a finding of ineffective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 109-14, 225 P.3d 956 (2010).

Mr. Harell's motion to withdraw his guilty plea and required the trial court to appoint new counsel for him. *Harell*, 80 Wn.App. at 805.

Here, Mr. Solomona was effectively in the same position as Mr. Harell. His attorney abandoned him at the sentencing hearing and he was left to act *pro se* and denied the assistance of counsel. In abandoning Mr. Solomona, defense counsel also took an antagonistic position to Mr. Solomona when he argued his own effectiveness. At that point the court should have appointed new counsel to investigate counsel's ineffectiveness. *See United States v. Wadsworth*, 830 F.2d 1500, 1510-11 (9th Cir.1987) (where defendant's attorney takes an antagonistic and adversarial position to his client, the remedy is for the court to suspend proceedings and appoint new counsel).


Defense counsel's actions at the presentencing hearing on Mr. Solomona's motion to withdraw his guilty plea left him without counsel. The trial court's failure to appoint new counsel to investigate former counsel's ineffectiveness violated Mr. Solomona's right to counsel. This Court must reverse and remand for the appointment of new counsel.

E. CONCLUSION

For the reasons stated, Mr. Solomona asks this Court to reverse and remand for the appointment of new counsel to investigate his attorney's ineffective assistance of counsel.

DATED this 5th day of September 2013.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 70107-0-I
v.)	
)	
DAVID SOLOMONA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> DAVID SOLOMONA 807395 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF SEPTEMBER, 2013.

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