70107-0

70107-0

NO. 70107-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID SIONA SOLOMONA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUZANNE R. PARISIEN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

GRACE ARIEL WIENER
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Rules and Regulations

Washington State:

A. ISSUES PRESENTED

A trial court shall 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 Solomona pled guilty, he moved *pro se* to withdraw his guilty plea because his counsel had not interviewed the State's witnesses. Defense counsel was not required to interview these witnesses, nor would doing so have provided him any additional information to assist in Solomona's defense. Since the trial court was presented with no basis that would support an ineffective assistance claim, did the trial court properly exercise its discretion by denying Solomona's motion to withdraw his guilty plea?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged David Siona Solomona with three counts of felony violation of a court order-domestic violence on February 25, 2011. CP 1-4. On May 19, 2011, the State added five additional counts of that same charge and one count of tampering with a witness-domestic violence. CP 14-19. A jury found Solomona guilty of all nine counts on May 26, 2011. CP 20.

The Honorable Jay White imposed concurrent sentences totaling 60 months. CP 20-30.

Solomona appealed, raising the single issue of whether it was improper to deny his *pro se* request to reopen and testify after both parties had rested. CP 31-33. The State conceded the issue. Id. This Court reversed and remanded the case for a new trial. Id.

Solomona's new trial on the same nine charges began on February 4, 2013, before the Honorable Suzanne Parisien. 2/4/13 RP 4.[1] After a number of pretrial hearings, Solomona and the State negotiated a plea to reduced charges. 2/4/13 RP 56. Solomona pled guilty to three counts of felony violation of a court order-domestic violence and one count of tampering with a witness-domestic violence. CP 51-80; 2/4/13 RP 56-70.

At sentencing on February 15, 2013, Solomona filed two *pro se* motions, to withdraw his guilty plea and to dismiss his case, because his defense counsel had not interviewed all of the State's witnesses. CP 89-94; 2/15/13 RP 3-4. The trial court denied Solomona's motions, finding no indicia of a manifest injustice. 2/15/13 RP 5-6. Solomona was sentenced to a total of 60 months,

[1] The Report of Proceedings consists of two volumes which will be referenced as follows: 2/4/13 RP (Beginning of New Trial; Plea) and 2/15/13 RP (Motion to Withdraw; Sentencing).

to run concurrently with his sentence on a separate cause number. CP 81-88; 2/15/13 RP 11. Solomona timely appealed. CP 95.

2. SUBSTANTIVE FACTS.

a. Facts Of The Case.

Solomona was married to Carey Solomona[2] and they had two children in common. CP 5. Solomona was twice convicted of violating a court order prohibiting him from having any contact with Carey. Id. On January 10, 2011, at Solomona's arraignment on a harassment charge, Seattle Municipal Court issued another no contact order prohibiting Solomona from having any contact with Carey. Id. Solomona was booked into custody on that pending harassment charge. Id.

A Seattle Police Detective investigating Solomona on an unrelated robbery reviewed his jail calls. Id. Solomona had called and spoken to Carey eleven times between January 10 and January 20, 2011, in violation of the no contact order. CP 5-6. In one phone call, Solomona told Carey that he planned on taking the harassment case to trial and added, "...the fact is, if you don't, if a person doesn't show up, then really there's nothing," reminding her

[2] Because David and Carey Solomona share the same last name, Carey Solomona will be referred to by her first name. No disrespect is intended.

that the case would be dropped if she did not appear for the harassment trial.[3] CP 6.

After the detective referred the violations for filing, the prosecutor continued to monitor Solomona's jail calls and found that Solomona had made 143 calls to Carey Solomona between January 17 and March 8, 2011. Supp. CP __ (Sub. 135). The State charged Solomona with eight of those violations and with witness tampering. CP 14-19.

b. Solomona Pleads Guilty And Moves To Withdraw His Plea.

On February 4, 2013, Solomona pled guilty to four of the nine domestic violence charges pending against him, with the agreement that the parties would recommend that his sentence run concurrently with his sentence on another cause. CP 51-80; 2/4/13 RP 56-70. The prosecutor engaged in a thorough colloquy with Solomona related to the plea form, his decision to plead guilty, and the consequences resulting from the plea. Id. As the prosecutor discussed each relevant plea form section, Solomona confirmed both that he understood the section and that his attorney had gone over it with him. 2/4/13 RP 57-67. Solomona indicated that he had

[3] Solomona's efforts were successful: Carey Solomona did not appear for the harassment trial and the case was dismissed with prejudice. Supp. CP __ (Sub. 135).

reviewed and personally read the plea forms, was pleading of his own accord, and had no further questions about the pleas. 2/4/13 RP 59, 65, 67.

The trial court accepted Solomona's guilty pleas as being made knowingly, voluntarily, and competently. 2/4/13 RP 68. The trial court found that Solomona had an understanding of the nature of the charge and the consequences of the plea, and that there was a factual basis for the plea. Id. A sentencing date was set. 2/4/13 RP 70.

At Solomona's sentencing hearing on February 15, 2013, Solomona filed two *pro se* motions. CP 89-94; 2/15/13 RP 3-4. In his motion to withdraw his guilty plea, Solomona claimed that he should be able to withdraw his plea because his attorney "fail[ed] to conduct a Brady interview with all state's witnesses befor (*sic*) the defendant's plea of guilty under U.S. v. Couto, 311 F.3d 179 (2nd Cir. 2002)." CP 90.

The trial court conducted a preliminary inquiry to determine whether there was a sufficient basis to hold an evidentiary hearing on Solomona's motion. 2/15/13 RP 3-6. Defense counsel stated:

> I can certainly let the court know, and the court's well aware, that these [counts] are based largely on phone calls from the jail. The two civilian witnesses would

> have been Mr. Solomona's ex-wife's parents[4], who were coming from Montana. There was a prior trial. There were trial transcripts, that kind of thing. And so I didn't feel as though it was necessary to interview those witnesses.

2/15/13 RP 4. The trial court then heard from the prosecutor, who also explained why the motion lacked a sufficient basis:

> [I]f you look at the motions on the face, they have no merit whatsoever. Defense counsel is not required to conduct interviews. In this case, there would have been no point to it. He had transcripts of everything the witnesses were expected to testify to in the trial. He knew everything there was. He had transcripts to impeach, if necessary. There was no—there's no additional information to be discovered. So, I don't see any merit in either of Mr. Solomona's motions and I request that we proceed with sentencing.

2/15/13 RP 5. Solomona never requested that he receive new counsel to assist him with his motion to withdraw. CP 89-94; 2/15/13 RP 3-6.

The trial court then noted that guilty pleas are governed by CrR 4.2(f) and that they are looked upon in a very stringent manner. 2/15/13 RP 5. The judge reminded Solomona that she was the same judge who had accepted his plea eleven days earlier and that everything was done in accordance with court rules. Id. The judge stated, "I do not see that there is any indicia of a

---

[4] Solomona's ex-wife's parents authenticated the voices of Solomona and their daughter on the jail phone calls. Supp. CP __ (Sub. 135).

manifest injustice, which is the only grounds by which we would accept your withdrawal of a guilty plea, so that motion has been denied and I'm ready to move forward with sentencing." Id. at 5-6.

The trial court sentenced Solomona to 60 months on each of the four counts, to run concurrently with each other and with a sentence on a different cause number. CP 81-88; 2/15/13 RP 11. Solomona now appeals, claiming that he was denied his right to counsel when he moved *pro se,* while represented, to withdraw his guilty plea. CP 95.

C. ARGUMENT

1. SINCE THE TRIAL COURT WAS PRESENTED WITH NO BASIS THAT WOULD SUPPORT A CLAIM OF INEFFECTIVE ASSISTANCE, IT PROPERLY DENIED SOLOMONA'S ATTEMPT TO WITHDRAW HIS GUILTY PLEA.

Solomona argues that the trial court improperly denied his request to withdraw his plea because he was entitled to new counsel when he challenged his attorney's effectiveness. This argument should be rejected. Solomona presented the trial court with no basis that would support a claim of ineffective assistance of counsel, and thus was not required to appoint new counsel. This Court should affirm the trial court's denial of Solomona's motion to withdraw his guilty plea.

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); 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. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

CrR 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). Thus, 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, defined as "obvious, directly observable, overt, not obscure." State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). The denial of effective assistance of counsel results in a manifest injustice. Taylor, 83 Wn.2d at 597.

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) trial counsel's performance was deficient in that it fell below an objective standard of

reasonableness, and (2) 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. State v. Brett, 126 Wn.2d 136, 199, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). 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 (1990). Courts engage in a strong presumption that counsel's representation was effective. Brett, 126 Wn.2d at 198.

In the plea bargaining context, "effective assistance of counsel" merely requires that counsel "actually and substantially [assist] his client in deciding 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 (1981)). In satisfying the prejudice prong, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he 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).

A lawyer does not have to interview witnesses or conduct an exhaustive investigation before a defendant pleads guilty.

In re Personal Restraint of Clements, 125 Wn. App. 634, 647, 106 P.3d 244, *review denied*, 154 Wn.2d 1020 (2005). Thus, Solomona did not and cannot allege facts sufficient to meet either prong of the ineffective assistance test based on his attorney not interviewing the State's witnesses in this case. Counsel's decision not to interview the witnesses was reasonable, since all the charges were based on recorded jail phone calls and defense counsel had transcripts of the witnesses' testimony from the prior trial. Both attorneys articulated to the trial court these legitimate reasons why defense counsel did not need to interview the State's witnesses. 2/15/13 RP 4-5.

Defense counsel's conduct also cannot be considered ineffective under the circumstances because he was able to facilitate Solomona taking advantage of the State's plea offer to drop five of the nine charges and run Solomona's sentence concurrent to another case. Such tactics are not deficient, particularly in a case where a jury had previously convicted Solomona of all nine charges based on the exact same evidence that would be presented in this new trial.

Solomona also failed to show prejudice. Solomona never claimed that he would have demanded a trial but for his counsel's

failure to interview the State's witnesses. Indeed, he could not have claimed this because both he and his counsel knew the exact content of the witnesses' testimony. Because Solomona could not meet either prong of his ineffective assistance claim, his claim was baseless.

The trial court considered the matter being raised by Solomona and properly concluded that he had not alleged sufficient facts in support of his ineffective assistance claim. Thus, the court determined that no fact-finding would be necessary,[5] as the court was "not required to waste valuable court time on frivolous or unjustified CrR 4.2 motions." Davis, 125 Wn. App. at 68. Solomona's failure to present a prima facie case of ineffective assistance, coupled with the representations made by each counsel, was sufficient for the court to exercise its discretion in denying Solomona's request to withdraw his plea. CP 89-94; 2/15/13 RP 3-6; Davis, 125 Wn. App. at 68. The trial court therefore properly entered an oral finding that a manifest injustice warranting the withdrawal of Solomona's plea had not occurred and dismissed his motion. 2/15/13 RP 5-6.

---

[5] Implicit in a trial court's decision to hold a hearing is a finding that sufficient facts were alleged to warrant a hearing. State v. Harell, 80 Wn. App. 802, 804-05, 911 P.2d 1034 (1996). Thus, the inverse must also logically be true.

Nonetheless, Solomona argues on appeal that he was denied counsel during his attempt to withdraw his plea. He maintains that the trial court denied him his right to counsel by not automatically granting him a new attorney for his claim of ineffective assistance of counsel. However, a defendant is not entitled to a new lawyer just because he makes an allegation that his current lawyer was ineffective. 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).

When the court evaluates whether there is any merit to a claim and finds nothing but a frivolous accusation of ineffective assistance, 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; State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684 (1987). A trial court should not delay its judgment and sentence just because a defendant claims ineffective assistance, if the court factually finds no basis for the claim.

Solomona was represented by counsel throughout the proceeding. However, Solomona suggests that the moment that he raised his claim of ineffective assistance, his attorney had an automatic conflict and thus Solomona was denied representation regardless of the court's findings. Solomona cites State v. Harell, which held that a defendant is entitled to conflict-free counsel at a hearing to withdraw a plea. 80 Wn. App. 802, 805, 911 P.2d 1034 (1996). However, in Harell, the trial court found sufficient merit in Harell's claim of ineffective assistance to initiate a fact-finding hearing. Id. at 804-05. Harell's counsel then withdrew as counsel. Id. at 803. Ethical rules require that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client," and thus an attorney must withdraw if the attorney will use this information against the client's interests. RPC 1.8(b). This withdrawal left Harell without an attorney. Id. at 805. Harell's prior counsel became a State's witness, who was called to discredit Harell, while *pro se* Harell had to question his former counsel on the stand regarding his ineffective assistance. Id. This Court held that since the trial court found sufficient facts for a claim of ineffective assistance, Harell should not have been *pro se*, and

Harell was entitled to conflict-free counsel at the hearing. Id. at 804-05.

In Solomona's case, unlike in Harell, the trial court did not find sufficient merit in Solomona's ineffective assistance claim to initiate a fact-finding hearing. 2/15/13 RP 3-6. Additionally, Solomona's counsel did not testify on behalf of the State, causing Solomona to have to cross-examine his own counsel. Id. Defense counsel did explain why his interviewing the State's witnesses would have done nothing to advance Solomona's defense.[6] Id. at 4. However, Solomona's counsel was not stating anything other than what was apparent from the record. Prior to a resolution being reached, the trial court heard pretrial motions making it aware that the charges were based on jail phone calls and that the procedural posture of the case likely resulted in transcripts of prior testimony. Supp. CP __ (Sub. 135); 2/4/13 RP 4-55. Solomona's counsel had no duty to withdraw, since there was no basis for a claim of ineffective assistance of counsel and thus no conflict. Accordingly, Solomona was never deprived of counsel.

[6] Interviewing Carey Solomona's parents would have proved fruitless where their testimony was secured to authenticate the voices of Solomona and Carey Solomona on jail calls. Supp. CP __ (Sub. 135).

Under Solomona's argument, a trial court would deprive a defendant of his right to counsel whenever a defendant utters the words "ineffective assistance" and the court fails to appoint new counsel, even if the court determines that the claim is frivolous and without basis. Solomona provides no authority to support this position. It is inconsistent with the discretion provided to the trial court to evaluate facts and determine whether the plea was made voluntarily and intelligently. See Davis, 125 Wn. App. at 68; State v. McLaughlin, 59 Wn.2d 865, 870, 371 P.2d 55 (1962). It is also inconsistent with the demanding standard imposed on a defendant who seeks to withdraw a guilty plea under CrR 4.2(f). Taylor, 83 Wn.2d at 596.

Solomona has failed to show a manifest injustice necessitating the withdrawal of his guilty plea under CrR 4.2(f). He has further failed to show that he was entitled to new counsel to investigate an ineffective assistance claim for which he failed to allege sufficient facts to warrant an evidentiary hearing. The trial court properly exercised its discretion by denying Solomona's motion to withdraw his guilty plea and by not appointing him new counsel to investigate his baseless claim. Solomona's argument should be rejected.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the trial court's denial of Solomona's motion to withdraw his plea.

DATED this 3rd day of December, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Grace Ariel Wiener
GRACE ARIEL WIENER, WSBA #40743
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DAVID SOLOMONA, Cause No. 70107-0-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.

Dated this 3Rd day of December, 2013

W Brame

Wynne Brame
Done in Seattle, Washington