70927-5

70927-5

NO. 70927-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERVIN A. COX,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
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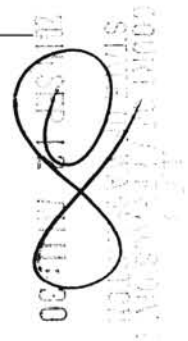
Attorney for Respondent



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I. ISSUES

(1) In a sexual abuse case, the prosecutor made a favorable plea offer. Under the prosecutor's policy, this offer would be withdrawn if the defense interviewed the complaining witnesses. Defense counsel accordingly discussed the plea offer with the defendant without having interviewed the witnesses. The defendant decided to accept the offer. Did counsel's actions fall outside the range of professionally competent assistance?

(2) If counsel's actions are considered deficient, has the defendant established resulting prejudice, where there is no showing of what evidence could have been obtained through an interview?

(3) Under the facts outlined above, was the defendant entitled to an evidentiary hearing on his claim of ineffective assistance of counsel?

II. STATEMENT OF THE CASE

A. THE CRIMES.

In the defendant's plea statement, he agreed that the court could consider the affidavit of probable cause to establish a factual basis for the plea. CP 112. That affidavit set out the following facts:

On July 2, 2009, the defendant reported to Everett police that A.L. (born 4/94) had run away from home. Police were able to contact A.L. and meet with her. She explained that she was afraid of the defendant because he had touched her sexually when she was 12 years old. She said that the defendant slept next to her one night. She awoke with his hand in her pants. She asked the defendant what he was doing, He responded that he thought she was his wife. A.L told her mother, who did not believe her. CP 127.

The officer who contacted A.L. reported this information to her mother. The mother yelled at the officer, "She's lying." CP 127.

Five days later, the defendant reported that A.L. had run away again. Police met with her and returned her home. She became violent and disrespectful. She asked, "What else am I supposed to do? It's either this, or what? I start cutting myself? I'm so depressed and I can't do anything about it!" CP 128.

Police questioned the defendant about this allegation. He said it was fabricated. They attempted to set up another interview with A.L., but she did not show up to be interviewed. The prosecutor's office declined to file charges at that time. CP 128.

More than three years later, on October 23, 2012, police learned that S.D. had told his high school counselor that the

defendant had repeatedly molested him. He reported that the defendant sat next down him on a couch, pulled down his pants, and masturbated him until he ejaculated. The sexual abuse was repeated on multiple occasions. It included performing oral sex on S.D., attempted anal penetration, masturbating him, and having S.D. masturbate the defendant. CP 128.

Police then re-interviewed A.L., who provided further details of the abuse. She said that she and her cousin had been sleeping in the same bed as the defendant. She awoke to find the defendant's hand rubbing her vagina under her underpants. CP 129.

When questioned again, the defendant denied the allegations of both A.L. and S.D. He confirmed, however, that he slept next to A.L. in the same bed with the cousin. CP 130.

B. CHARGES AND GUILTY PLEA.

On November 30, 2012, an information was filed charging the defendant with two counts of second degree child molestation. Count 1 was committed against A.L. between April 28, 2006 and April 27, 2007. Count 2 was committed against S.D. between June 15, 2005, and June 14, 2007. CP 131-32. Jason Schwarz of the

Snohomish County Public Defender Association was appointed to represent the defendant.

The prosecutor delivered a written plea offer to Mr. Schwarz. If the defendant pleaded guilty as charged, the prosecutor would recommend 36 months' confinement, based on a sentencing range of 31-41 months. If this offer was not accepted, the prosecutor would add a count of second degree rape of a child, plus at least two additional counts of second degree child molestation. CP 52. The prosecutor provided Mr. Schwarz with an amended information setting out these charges. CP 56-57. If convicted on all of these charges, the defendant would face an indeterminate life term, with a minimum sentence range of 210-280 months.[1] CP 54.

Mr. Schwarz discussed this plea offer with the defendant. CP 92. On April 30, the defendant entered a plea of guilty as charged. He denied his guilt but agreed that there was "substantial evidence upon which a trier of fact could make a finding of guilt." CP 113.

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[1] In computing the offender score, each conviction for a sex offense would count as 3 points. Former RCW 9.94A.525(16), as amended by Laws of 2002, ch. 290, § 3 (now codified as RCW 9.94A.525(17)). Conviction on four counts would thus lead to an offender score of 9. Second degree rape of a child is seriousness level XI, so the standard sentence range would be 210-280 months. Under RCW 9.94A.507, that crime is subject to "determinate plus" sentencing.

The court questioned the defendant concerning his understanding of the plea. It twice asked the defendant if he had any questions for the court. None of the defendant's responses indicated any reluctance to plead guilty. 4/30 RP 3-7.

Shortly after the plea was entered, the defendant sent a letter to the court asking to "reconsider my plea of guilty." He claimed that he was "under threats plus blackmail from the D.A." CP 125. He continued to submit pro se motions complaining about various aspects of the guilty plea. CP 99-100, 98, 95-96. On the date scheduled for sentencing, the court permitted Mr. Schwarz to withdraw. 6/6 RP 7. Gurjit Pandher was then appointed to represent the defendant.

Mr. Pandher, acting on the defendant's behalf, filed a motion to withdraw the defendant's guilty plea. CP 86-90. The sole factual support for this motion was a declaration from the defendant. CP 91-93. A copy of that declaration is attached to this brief. The defendant claimed that he met with Mr. Schwarz only once in "a Professional Visit." He did "not believe the alleged victims and witnesses have been interview [*sic*] by Mr. Schwarz or any investigator." He also claimed that Mr. Schwarz had failed to obtain computers that purportedly contained exculpatory evidence. CP 92.

The defendant did not provide any further information about the scope of any investigation. There is no indication that any attempt was made to obtain a declaration from Mr. Schwarz.

At the hearing on the motion to withdraw, the parties agreed that Mr. Schwarz had not interviewed A.L. or S.D. The prosecutor described his office's policy with respect to witness interviews as follows:

> [T]he defendant is in a pretty unique position among the parties in the case to know what happened and what didn't happen, because he is one of the two people who is alleged to have been there when the sexual abuse occurred. If the defendant chooses, with the knowledge from that unique perspective, to further test the State's evidence and further subject minor victims of sexual assault to the inherent trauma of even being subject to a defense interview, our office usually takes that as a signal that this case is done with the negotiating phase, and it is headed for trial.

8/13 RP 6-7. Defense counsel agreed that "the State's policy on interviewing witnesses, especially in [Special Assault Unit] cases, is very well known." 8/13 RP 7.

With regard to the computers, they contained videos that the defendant had secretly obtained, which purportedly showed the complaining witnesses engaging in sexual activities. The prosecutor argued that these were not exculpatory. They would,

however, implicate the defendant in additional crimes. 8/13 RP 10-11.

The court determined that, in light of the prosecutor's policy, defense counsel made a reasonable decision not to interview the complaining witnesses. The evidence on the computers would not have been exculpatory. Consequently, there was no showing of ineffective assistance. The motion to withdraw the plea was therefore denied. 8/13 RP 18-19; CP 30-31.

III. RESPONSE TO APPELLANT'S STATEMENT OF THE CASE

The appellant's brief contains two factual statements that are unsupported by the record:

1. "Defense Counsel Did Not Conduct Any Other Investigation. CP 92."

Brief of Appellant at 4.

The cited portion of the defendant's declaration states:

> I do not believe the alleged victims and witnesses have been interview [*sic*] by Mr. Schwarz or any investigator. I have neither met nor know the name of the investigator on my case.

This statement is based on the defendant's "belief," not on any facts. The declaration does not even mention any type of investigation other than witness interviews. The defendant's lack of

knowledge of the investigator's name does not mean that there was no investigator.

2. "[Defense Counsel] Met One Time Privately And In-Person With Mr. Cox. CP 92."

Brief of Appellant at 4-5.

The cited portion of the defendant's declaration states:

> Although I was provided a copy of my discovery to review and made copious notes for Mr. Schwarz, I rarely met him in a Professional Visit. My recollection is that I only met with him once in a Professional Visit. The only other times I spoke to Mr. Schwarz was briefly before a court hearing in C 304. In fact, the conversation where Mr. Schwarz coerced me into accepting this plea offer was done over the video chat and not in person.

This declaration does not indicate whether the "brief" meetings were or were not private. Moreover, it is clear that he had at least one lengthy private conversation that was not "in person."

IV. ARGUMENT

A. THE DEFENDANT HAS NOT ESTABLISHED THAT HIS GUILTY PLEA RESULTED FROM INEFFECTIVE ASSISTANCE OF COUNSEL.

The defendant challenges the denial of his motion to withdraw his guilty plea. "The court shall allow a defendant to withdraw his plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). A "manifest injustice" is one that is "obvious, directly observable, overt, not

obscure." This imposes a "demanding standard" on the defendant. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). Here, the defendant claims that he received ineffective assistance of counsel. This claim, if established, would give rise to a "manifest injustice" warranting withdrawal of his plea. Id.

In the context of plea bargaining, effective assistance requires that counsel actually and substantially assist his client in deciding whether to plead guilty. Id. at 99.

> [The defendant] bears the burden of showing that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him. While generally the trial judge's decision on whether to allow a defendant to withdraw a guilty plea is reviewed for abuse of discretion, because claims of ineffective assistance of counsel present mixed questions of law and fact, we review them de novo.

State v. A.N.J., 168 Wn 2d 91, 109 ¶ 24, 225 P.3d 956 (2010). The defendant here cannot satisfy either element of ineffective assistance.

1. When A Plea Offer Is Conditioned On Foregoing Interviews With Complaining Witnesses, Defense Counsel Can Properly Decide To Postpone Such Interviews Until After His Client Decides Whether To Accept The Offer.

On appeal, the defendant asserts only one area of deficient performance: failing to interview the complaining witnesses. Before advising a client on whether to plead guilty, an attorney must

"reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial." Id. at 111 ¶ 27. There are, however, no rigid rules governing the scope of such an investigation.

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions

Strickland v. Washington, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel is entitled to make reasonable professional judgments about the scope of investigation. Id. at 691. "The degree and extent of investigation required will vary depending upon the issues and facts of each case..." A.N.J., 168 Wn.2d at 111 ¶ 27. Counsel's actions can be considered deficient only if they fall "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690.

In the present case, counsel's decision about the scope of investigation had to take into account a critical factor. As the parties agreed, the Prosecutor's Office has a general policy of not engaging in plea negotiations with defendants who choose to

interview the complaining witnesses in cases involving sexual assaults against minors. At the hearing on the motion to withdraw the plea, defense counsel acknowledged that this policy was well known. 8/13 RP 7. In light of this policy, a decision to interview those witnesses was effectively a rejection of the plea offer.

Under these circumstances, defense counsel may well have had a *duty* to discuss the plea offer with the defendant *before* interviewing the complaining witnesses. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1408, 182 L.Ed.2d 379 (2012). Such a duty is explicitly recognized in the Washington ethical rules. RPC 1.4, comment [2].

Here, counsel had received a formal offer to resolve the case with a plea to two counts of second degree child molestation. The State offered to recommend 36 months' confinement, based on a standard range of 31-41 months. The State reserved, however, the right to withdraw this offer at any time prior to a guilty plea. CP 52. If the offer was not accepted, the State intended to file an amended information adding a charge of second degree rape of a child, plus two additional counts of second degree child

molestation. CP 56-57. Conviction on these charges would have resulted in an indeterminate life term, with a minimum range of 210-280 months. CP 54.

It was counsel's duty to communicate this offer to his client and advise him on whether to accept it. To do so, he needed to forgo attempts to interview the complaining witnesses. Under the prosecutor's policy, such interviews would have led to withdrawal of the offer – thereby making it impossible to accept.

Far from being ineffective, counsel's actions may have been *mandatory* under these circumstances. If he had proceeded to interview the witnesses, this would in effect have been a rejection of the plea offer. The defendant could then legitimately complain that counsel never gave him the opportunity to accept a favorable plea offer. As in Frye, such conduct could amount to ineffective assistance: "When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." Frye, 132 S.Ct. at 1408.

The defendant argues that the prosecutor's policy prevented him from rendering effective assistance. "[T]he hallmark of a Sixth Amendment ineffective assistance of counsel claim is based on the

substandard performance of the criminal defendant's attorney, not on the actions of third parties." Accordingly, a prosecutor's failure to provide discovery does not render counsel constitutionally ineffective. State v. Greiff, 141 Wn.2d 910, 925, 10 P.3d 390 (2000).

Both federal and state courts have upheld similar policies by prosecutors. The United States Supreme Court has held that prosecutors can properly require, as a condition of a plea agreement, that defendants waive their right to receive impeachment materials or information concerning affirmative defenses. Such a policy does not render a plea involuntary:

> Of course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be. But the Constitution does not require the prosecutor to share all useful information with the defendant. And the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances-even though the defendant may not know the *specific detailed* consequences of invoking it

United States v. Ruiz, 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (court's emphasis, citations omitted).

Similarly, the Washington Supreme Court has upheld a prosecutor's policy of refusing to plea bargain with defendants who

demanded disclosure of the identity of a confidential informant. The court recognized the State's "legitimate interest in protecting confidential informants." The prosecutor's plea-bargaining policy was a proper effort to protect that interest. State v. Moen, 150 Wn.2d 221, 230-31, 76 P.3d 721 (2003). Relying on Moen, this court held that such a policy did not preclude defense counsel from providing effective assistance. State v. Shelmidine, 166 Wn. App. 107, 115-16 ¶¶ 19-20, 269 P.3d 362, review denied, 174 Wn.2d 1006 (2012).

In short, counsel had a legitimate tactical reason for withholding interviews of the complaining witnesses until after he discussed the plea offer with a defendant. Such action was necessary to ensure that the offer would remain open. Confronted with this situation, the defendant decided that he was better off accepting the plea offer rather than proceeding with further investigation. His hindsight regrets do not give him the right to withdraw his plea. Counsel's performance was not deficient.

2. Even When Counsel's Lack Of Investigation Is Considered Deficient, The Defendant Cannot Establish Prejudice Without Showing What Facts An Investigation Would Have Produced.

Even if counsel's investigation were considered inadequate, that would not be sufficient to establish prejudice. The defendant

must show that "there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted in going to trial." State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011); Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

> [W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial

Hill, 474 U.S. at 59. In the present case, there is no showing of *any* additional evidence that could have been discovered by additional investigation.

The defendant argues that "[t]he strength of the State's case does not appear overwhelming." Brief of Appellant at 17. That fact, of course, was well known to counsel and the defendant at the time of the plea. It is probably the reason why the State was prepared to make a comparatively-lenient plea offer. "[A] defendant seeking relief under a 'failure to investigate' theory must show a reasonable likelihood that the investigation would have produced useful

information not already known to defendant's trial counsel." In re Davis, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). In the present case, no such showing has been made. Consequently, the defendant has not carried his burden of establishing prejudice.

B. ABSENT A PRIMA FACIE SHOWING OF ENTITLEMENT TO RELIEF, A DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING ON HIS MOTION TO WITHDRAW HIS GUILTY PLEA.

The defendant also claims that he was entitled to an evidentiary hearing. Under CrR 4.2(f), the defendant bears the burden of showing that withdrawal of a guilty plea is necessary to correct a manifest injustice. Osborne, 102 Wn.2d at 97. "In general, the burden is on a moving party to come forward with sufficient facts to warrant the exercise of discretion in his or her favor." State v. Graciano, 176 Wn.2d 531, 539 ¶ 17, 295 P.3d 219 (2013). An evidentiary hearing may be required if the defendant makes a prima facie showing of entitlement to relief. State v. Jackson, 75 Wn. App. 537, 543-44, 879 P.2d 307 (1994) (motion for new trial based on juror bias).

The defendant claims that "[d]efense counsel would not provide any further information about his investigation or the reasons he advised Mr. Cox to plead guilty with a court order." Brief

of Appellant at 13, citing CP 36. The cited portion of the record is from the prosecutor's memorandum. It states that the attorney's law firm had a policy against their attorneys discussing their actions without "a signed court order declaring that the attorney-client privilege has been waived." This appears to refer to efforts by the *prosecutor* to obtain such information. The defendant, as the client, could waive the privilege. Dietz v. Doe, 131 Wn.2d 835, 850, 935 P.2d 611 (1997); see RPC 1.6(a). If the attorney had insisted on a court order, the defendant could have sought entry of such an order. Nothing in the record indicates that the defendant made any attempt to obtain information from his former attorney.

The evidence offered by the defendant did not make a prima facie showing of entitlement to relief. It was insufficient to establish either deficient performance of counsel or resulting prejudice. The evidence also did not establish that the plea was involuntary. Under such circumstances, the court was not required to hold any further hearing.

V. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on September 11, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

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Deputy Prosecuting Attorney
Attorney for Respondent

FILED AB

August 5, 2013

SONYA KRASKI
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SNOHOMISH COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. ERVIN COX, Defendant.	Case No.: 12-1-02434-5 AB DECLARATION OF ERVIN COX

DECLARATION

I, Ervin Cox, declare and affirm as follows that:

1. I am the named Defendant in the above captioned matter and make this declaration of my own knowledge and information in support of the motion to withdraw my guilty plea.
2. I have been charged with two counts of Child Molestation in the Second Degree and I have maintained my innocence since I was interviewed by law enforcement prior to my arrest. I think it is important to note that these allegations were not reported for six (6) years after they allegedly occurred.
3. On or about April 30, 2013, I was in Court in front of Honorable Judge Joseph Wilson and entered pleas of guilty to both of those charges. Those pleas were entered pursuant to Alford v. North Carolina, where I maintained my innocence but professed that I thought that their was substantial evidence that the charges could be proven and that I wanted to take advantage of the prosecutor's offer. In reality, I do not believe there is substantial likelihood that these charges could be proven because 1) I am innocent, and 2) I was not fully advised of the allegations against me and did not have a proper investigation on my behalf. Further, the physical and the emotional stress of my

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incarceration left me without the ability to properly understand the effects and consequences of my plea. Lastly, I was blackmailed and coerced into taking this plea. I wrote a letter to Court immediately after the plea hearing to express my desire to withdraw the plea.

4. I am innocent of these crimes and would like to have my day in Court to have the State prove beyond a reasonable doubt that these allegations occurred. My current range is 31-41 months and if I take this matter to trial the State has threatened to amend the Information to charge more crimes. If convicted of what was threatened, I believe I would be looking at 86-116 months. I want to take that risk since I did not commit any these crimes.

5. The Snohomish County Public Defender's Association, specifically Mr. Jason Schwarz, were assigned to represent me. From the very beginning, Mr. Schwarz and I did not see eye to eye about how to proceed in defending me in this case. I do not believe that Mr. Schwarz was acting in my best interests and did little to defend me. Although I was provided a copy of my discovery to review and made copious notes for Mr. Schwarz, I rarely met him in a Professional Visit. My recollection is that I only met with him once in a Professional Visit. The only other times I spoke to Mr. Schwarz was briefly before a court hearing in C 304. In fact, the conversation where Mr. Schwarz coerced me into accepting this plea offer was done over the video chat and not in person. I do not believe the alleged victims and witnesses have been interview by Mr. Schwarz or any investigator. I have neither met nor know the name of the investigator on my case. I repeatedly told Mr. Schwarz that I had exculpatory evidence on computers located at my residence. I told him that we needed that evidence to prove my innocence and gave him authority and access to those computers. He did nothing to obtain the computers and I fear that at this point they are no longer accessible to me. I believe the alleged victims have stolen the computers and destroyed the information on those computers.

6. I have been in custody on this matter since approximately November 13, 2012 and that has taken a physical and emotional toll. I am 61 years old and not in the greatest health; what exacerbated the problems with my emotional and physical health is that I was transferred to the "hole" about two (2) months prior to entry of the plea. It was impossible to sleep with the constant screaming and lights. I was unable to properly

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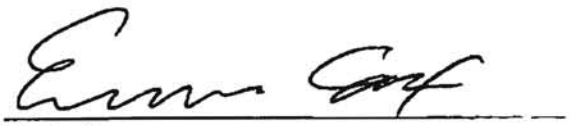
appreciate and process what occurred on April 30, 2013. I did not make this plea in a knowing and intelligent manner.

7. Mr. Schwarz coerced me into entering this plea by telling me that I was going to get convicted and spend an inordinate amount of time in prison. He did not properly review with me the possible defenses that I had and only went over the allegations that were against me. He did not give me any hope in winning this case and overcame my will.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Everett, Washington on this 5th day of August, 2013.



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