NO. 45569-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ERIN RIEMAN,

Appellant.

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

The Honorable Michael J. Sullivan, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The appellant's *Alford*[1] plea to the charge of first degree manslaughter was involuntary and constitutes a manifest injustice because it was entered under duress and coercion.

2. The trial court erred in ruling that the appellant's evidence did meet the threshold requirements for withdrawal of his *Alford* plea under CrR 7.8(b).

3. The trial court erred in denying the appellant's motion for a hearing on the merits of his motion to withdraw the *Alford* plea or alternatively transferring the motion to the Court of Appeals under CrR 7.8(c)(2).

4. The trial court erred in ruling the appellant's motion to withdraw his *Alford* plea was not timely.

5. The trial court erred in denying the appellant's *pro se* motion for reconsideration.

6. The appellant received ineffective assistance of counsel in his attempt to withdraw his plea and vacate the conviction.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does a trial court err if it denies an appellant an evidentiary

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[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

hearing on a motion to withdraw guilty plea and vacate a conviction when the motion sets out a factual and legal basis for the relief requested? Assignments of Error 1, 2, 3, 4, and 5.

2. Where the appellant established a *prima facie* case of duress and coercion, did the trial court abuse its discretion in failing to hold a full hearing on the merits of appellant's motion to withdraw his guilty plea or in the alternative, by transferring the motion to the Court of Appeals as a Personal Restraint Petition? Assignments of Error 2 and 3.

3. The trial court abuse its discretion in denying the appellant's motion to vacate his conviction, denying his motion for reconsideration, and in failing to conduct an evidentiary hearing on the motion or transfer the case to the Court of Appeals where the appellant presented newly discovered evidence that reasonable diligence could not have discovered within the statutory one year period? Assignments of Error 1, 2, 3, 4, and 5.

4. Did the appellant receive ineffective assistance of counsel while attempting to withdraw his *Alford* plea because counsel failed to diligently pursue the motion and present evidence pertaining to Walter Bremmer's subsequent arrest and conviction in a separate matter in Hawaii? Assignment of Error 6.

C. STATEMENT OF THE CASE

1. Procedural Facts

The Pacific County Prosecutor charged appellant Erin Rieman by amended information in Cause Number 09-1-00157-8, with one count of first degree manslaughter with aggravating circumstances. RCW 9A.32.060(1)(a). Clerk's Papers (CP) 5-6. Mr. Rieman was accused of the death of John Adkins. CP 5. On May 11, 2010, the defendant entered a written plea to the amended information pursuant to *Alford*. CP 7-15. As part of the plea, Mr. Rieman agreed to an exceptional sentence. Report of Proceedings (RP) (5/11/10) at 47.

On May 21, 2010 the court imposed an exceptional sentence of 132 months. CP 23.

2. October 11, 2013 Motion Hearing to withdraw *Alford* plea

On September 30, 2013, counsel for Mr. Rieman filed a motion for an order to withdraw his *Alford* plea pursuant to CrR 7.8. CP 48-52. Mr. Rieman's counsel offered as a reason for withdrawing the plea that it was involuntary because it was entered under duress and coercive threat against Mr. Rieman by Walter Bremmer, who was present at the time of the offense. CP 51-52. At the hearing on the motion, counsel argued that the threat by Mr. Bremmer against Mr. Rieman ended when Mr. Bremmer was arrested in

Hawaii for a subsequent offense and could no longer present a threat to Mr. Rieman. RP (10/11/13) at 3-4.

After hearing argument, the court refused to grant an evidentiary hearing, ruling that on the face of his claims, Mr. Rieman had not met the threshold to receive a hearing on the merits and therefore was not entitled to relief. RP (10/11/13) at 4-5. The court entered the following written order on October 11, 2013:

> That the motion of the defendant to withdraw his guilty plea is denied. More than one year has elapsed since the defendant was sentenced. The defendant has not made a threshold showing that he meets the requirements for withdrawal of plea as listed in CrR 7.8(b) and RCW 10.73.100.
>
> CP 56.

3. Motion for Reconsideration

On October 30, 2013, the appellant, now *pro se*, filed a motion for reconsideration of the trial court's ruling denying an evidentiary hearing. CP 59-64. In the motion for reconsideration, Mr. Rieman argued that the one year limitation in RCW 10.73.100 was inapplicable due to newly discovered evidence that Mr. Bremmer had been arrested in Hawaii, which was not known to Mr. Rieman until October, 2012. CP 60-62.

The court entered an order denying the motion for reconsideration on November 20, 2013. CP 94. Following entry of this written order, the

defendant filed timely notice of appeal. CP 104.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT AN EVIDENTIARY HEARING ON HIS MOTION TO WITHDRAW HIS PLEA BECAUSE THE MOTION SETS OUT A FACTUAL AND LEGAL BASIS FOR GRANTING THE RELIEF REQUESTED

CrR 4.2(f) governs motions to withdraw guilty pleas. It provides that a court shall allow a defendant to withdraw a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f).

Washington courts have set forth four nonexclusive instances of "manifest injustice" necessitating withdrawal: (1) ineffective assistance of counsel, (2) a plea not ratified or authorized by the defendant, (3) an involuntary plea, and (4) the prosecutor's failure to keep the plea agreement. *State v. Saas,* 118 Wn.2d 37, 43, 820 P.2d 505 (1991) (quoting *State v. Taylor,* 83 Wn.2d 594, 597, 521 P.2d 699 (1974)).

In the case at bar, the motion was made after imposition of judgment and sentence, which was entered May 21, 2010. CP 16-20, 48-52. Thus, under CrR 4.2(f), CrR 7.8 governs. *State v. Forest*, 125 Wn. App. 702, 706, 105 P.3d 1045 (2005). CrR 7.8 sets forth the substantive basis for relief from judgment, along with a procedural framework which governs such

motions. However, the "manifest injustice" standard delineated in CrR 4.2 and the case law interpreting it nevertheless applies to motions conducted under CrR 7.8.

The denial of a motion to withdraw guilty is reviewed for abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001); *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

The application of CrR 7.8(b) to post-judgment motion to withdraw a guilty plea places the motion within specified time limitations and procedural requirements. For example, as noted by the trial court in the case at bar, under CrR 7.8(c)(2), the court has the right to deny an evidentiary hearing if the defendant's motion is insufficient on its face. RP (10/11/13) at 5.

Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily with full knowledge of his legal and constitutional rights and of the consequences of the plea. *Wood v. Morris*, 87 Wn.2d 501, 506, 554 P.2d 1032 (1976); *In re Woods v. Rhay*, 68 Wn.2d 601, 605, 414 P.2d 601, *cert. denied*, 385 U.S. 905 (1966); *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); *State v. Barton*, 93

Wn.2d 301, 304, 609 P.2d 1353 (1980).

CrR 4.2(d) provides:

> (d) **Voluntariness.** The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Therefore, in order to be valid, a guilty plea must be voluntary. An involuntary plea constitutes a manifest injustice. *In re Pers. Restraint of Matthews*, 128 Wn. App. 267, 270, 115 P.3d 1043 (2005). Indeed, coercion of the accused to plead guilty is a basis for invalidating the plea regardless of whether there was any involvement or knowledge of the State in the coercion. *State v. Frederick*, 100 Wn.2d 550, 556, 674 P.2d 136 (1983), *overruled on other grounds in part, Thompson v. Dept. of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999).

The defendant bears the burden of showing a manifest injustice. *Branch*, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996). On the other hand, the State bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). In the case at bar, Mr. Rieman's plea was involuntary because it was entered under duress and coercion. As argued in a memorandum provided by his attorney, Mr. Bremmer threatened

Mr. Rieman and his family, and that the threats only ended when Mr. Bremmer was "arrested and convicted of murder in Hawaii." CP 49. A letter by Mr. Rieman describing the threats by Mr. Bremmer and the allegation that Mr. Bremmer strangled Mr. Adkins and forced Mr. Rieman to watch. CP 50, 51. Mr. Rieman wrote that Mr. Bremmer threatened his life "if I did not support his story and help him dispose of John's body .... " CP 51.

The trial court erred in failing to provide an opportunity for a full hearing on the merits of Mr. Rieman's motion to withdraw his plea. If coerced, a plea of guilty is involuntary and constitutes a manifest injustice. *Boykin v. Alabama,* 395 U.S. at 243. Coercion renders a guilty plea involuntary whether or not the state was involved in or knew about the coercion. *State v. Frederick,* 100 Wn.2d 550, 556, 558-59, 674 P.2d 136 (1983) (reversed and remanded for a new trial on habitual criminal charge in which the defendant may present evidence of coercion in entering plea).

Extrinsic evidence is admissible in post-plea proceedings to determine a plea's voluntariness. *Frederick,* 100 Wn.2d at 553-54. A bare allegation of coercion, without other evidence in the record, is, however, insufficient to overcome a defendant's statements in the plea proceeding indicating that the

plea was voluntary. *State v. Osborne,* 102 Wn.2d 87, 97, 684 P.2d 683 (1984). In Mr. Rieman's case there is more than a bare allegation of coercion and duress. *C.F., Osborne,* 102 Wn.2d at 97. Here, it is not challenged that Mr. Bremmer was subsequently arrested after Mr. Rieman entered his *Alford* plea. Mr. Rieman asserts that the fact of Mr. Bremmer's conviction in Hawaii supports his argument that his plea was coerced and therefore involuntary, because Mr. Bremmer was revealed to be violent and capable of committing a violent offense. Mr. Rieman contends that not only was his plea involuntarily, but evidence of Mr. Bremmer's disposition should be presented to a jury in order to evaluate Mr. Bremmer's credibility as a witness for the State against Mr. Rieman.

Although permission to withdraw a guilty plea rests within the sound discretion of the trial court, such discretion should be "exercised liberally in favor of life and liberty." *State v. Saylors*, 70 Wn.2d 7, 9, 422 P.2d 477 (1966). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here, the court did not offer a tenable reason for denying Mr. Rieman's motion. Instead, the court merely stated that it agreed with the State

that the defendant had not made a threshold showing for an evidentiary hearing. RP (10/11/13) at 5.

Mr. Rieman contends that the facts presented in his letter attached to his counsel's motion establish a *prima facie* showing of a manifest injustice for which the court below should have granted a hearing on the merits. *See In re Hews,* 99 Wn.2d 80, 83-85, 88, 660 P.2d 263 (1983). Alternatively, Mr. Rieman submits that he raised sufficient facts such that the court, if it chose not to grant a hearing, to transfer the matter to this Court as a PRP under CrR 7.8(c)(2).

Mr. Rieman's plea was coerced and thus involuntary. This Court should reverse the trial court, and remand for a hearing on the merits of Mr. Rieman's motion to vacate the conviction and withdraw his guilty plea, or accepts the matter as a PRP.

2. MR. RIEMAN TIMELY FILED THE MOTION FOR NEW TRIAL UNDER CrR 7.8(B) WHERE HE PRESENTED NEWLY DISCOVERED EVIDENCE TO THE COURT

As noted *supra*, options brought under CrR 7.8(b)(1) and (2) must be brought within one year of a final judgment. CrR. 7.8 provides that a motion for a new trial can be made when, among other reasons, there is newly discovered evidence that by due diligence could not have been discovered in

time to move for a new trial under CrR 7.5 (which requires such motions to be made within ten days after the verdict or decision.) CrR 7.8(b)(2). The rule states that any such motion must be made "within a reasonable time and for reasons (1) and (2) not more than one year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. CrR 7.8. In other words, a motion brought pursuant to CrR 7.8(b)(2) must be made within one year, but may be brought after the expiration of the one year period if allowed by the provisions of RCW 10.73.090, .100, .130, or .140. Under the terms of CrR 7.8(b), any motion brought under its provisions is specifically "subject to RCW 10.73.090, .100, .130, and .140."

Under RCW 10.73.100(1), a motion constituting a collateral attack on a judgment may be made more than one year after final judgment if there is newly discovered evidence, and if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion. In his motion for reconsideration, filed October 30, 2013, Mr. Rieman argues that Mr. Bremmer's arrest and subsequent conviction constitutes newly discovered evidence. CP 59-62. Mr. Bremmer was arrested on October 14, 2012, approximately two years after Mr. Rieman entered his plea. The

evidence of his arrest and conviction could not have been discovered by the time of trial by due diligence since the arrest occurred after Mr. Rieman entered his plea. Moreover, Mr. Riemen states that no one except Mr. Bremmer and Mr. Rieman knew about the threats as a result of Mr. Rieman witnessing Mr. Adkin's death. CP 61-62.

This constitutes reasonable diligence in filing the motion after discovery of this new evidence, as required by RCW 10.73.100(1). Mr. Rieman's motion to vacate his conviction based on newly discovered evidence is not time-barred.

3. MR. RIEMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO DILIGENTLY PURSUE THE MOTION TO WITHDRAW THE PLEA BY INTRODUCING EVIDENCE OF MR. BREMMER'S ARREST IN HAWAII.

If this Court finds the motion to withdraw the guilty plea untimely, this Court should nevertheless consider the appeal because Mr. Rieman received ineffective representation. Counsel's failure to properly investigate and brief the issue of coercion and apprise the court of the coercion by Mr. Bremmer, forcing Mr. Rieman to enter the plea, amounted to a denial of effective assistance of counsel, justifying withdrawal of Mr. Rieman's plea.

The test for ineffective assistance of counsel is (1) whether counsel's

performance fell below an objective standard of reasonableness and (2) whether there is a reasonable probability the result would have been different, absent the errors. *Strickland v. Washington,* 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2952 (1984); *State v. Thomas,* 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). When Mr. Rieman first moved to withdraw his guilty plea, counsel presented no evidence of Mr. Bremmer's conviction for manslaughter in Hawaii other than Mr. Rieman's own letter. Instead, counsel merely filed a motion seeking to withdraw the plea and requesting an order of transport. CP 48. The motion contained a four paragraph "memorandum," which stated in relevant part:

> Defendant was convicted of manslaughter in the first degree with an aggravating factor for the death of his friend and business partner John C. Adkins. Defendant asserts that his plea of guilty was an involuntary result of duress and coercive threats by Walter Bremmer against the defendant, his girlfriend at the time, his daughter and grandchildren who live in Hawaii. Those threats only ended when Bremmer was arrested and convicted of murder in Hawaii.
>
> CP 49.

Counsel attached a letter by Mr. Rieman in which he described that Mr. Bremmer killed Mr. Adkins while on a fishing boat on July 5, 2009, and that he threatened his life and lives of his family members if he did not support his story. CP 50-52. Other than the letter, counsel presented no

substantive facts regarding Mr. Rieman's argument that he was threatened by Mr. Bremmer into entering the plea agreement.

Defense counsel was ineffective for failing to present evidence of Mr. Bremmer's conviction. *Strickland*, 466 U.S. at 694. Mr. Rieman was prejudiced by his trial counsel's failure to produce evidence of Mr. Bremmer's conviction, which tended to support the argument that Mr. Bremmer is violent, that he caused the death of Mr. Adkins, and that he threatened Mr. Rieman in order to cover up the crime.

Mr. Rieman has demonstrated the merits of his motion to withdraw his guilty plea, based on a manifest injustice, or that he is at a minimum entitled to a hearing on the merits of his motion.

E. CONCLUSION

Based on the foregoing, this Court should remand this case with an order allowing Mr. Rieman to withdraw his guilty plea. In the alternative, this Court should remand for a full hearing on the merits of the motion to withdraw the plea, or direct the trial court to forward the motion to this Court pursuant to CrR 7.8(c)(2).

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/ / /

DATED: September 12, 2014.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Of Attorneys for Erin Rieman

CERTIFICATE OF SERVICE

The undersigned certifies that on September 12, 2014, that this Opening Brief was mailed by U.S. mail, postage prepaid, to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 12, 2014.

PETER B. TILLER

ATTACHMENT

CrR RULE 4.2

PLEAS

(a) Types. A defendant may plead not guilty, not guilty by reason of insanity, or guilty.

(b) Multiple Offenses. Where the indictment or information charges two or more offenses in separate counts, the defendant shall plead separately to each.

(c) Pleading Insanity. Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their
understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same
hearing at which the plea is accepted.

(f) Withdrawal of Plea. The 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. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall
inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

(g) Written Statement. A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty:

(NOTE - See the Statement of Defendant on Plea of Guilty and the Interpreter's Declaration at: http://www.courts.wa.gov/rules/Word/supCrR4.02_GP.doc)

(h) Verification by Interpreter. If a defendant is not fluent in the English language, a person the court has determined has fluency in the defendant's language shall certify that the written statement provided for in section (g) has been translated orally or in writing and that the defendant has acknowledged that he or she understands the translation.

RULE CrR 7.8
RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence;
Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in

obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been
discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and
(2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

(c) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion stating the grounds upon
which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) Transfer to Court of Appeals. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3) Order to Show Cause. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

TILLER LAW OFFICE

September 12, 2014 - 4:34 PM

Transmittal Letter

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Affidavit

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