NO. 47488-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TERRENCE SMITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin, Judge

No. 14-1-03102-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should defendant's challenge to the validity of his knowing, intelligent and voluntary guilty plea to one count of first degree robbery be rejected when it depends on a baseless claim refuted by the available record?

2. Has defendant failed prove the plea was the result of ineffective counsel since the record reveals he received sound strategic advice that spared him a decade of imprisonment for the two firearm enhanced first degree robberies he clearly committed by taking money from two bank tellers at gunpoint?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with two counts of firearm enhanced first degree robbery (Cts. I-II), unlawful possession of a firearm (Ct.III), and obstruction (Ct. IV). CP 87-89.[1] The probable-cause declaration alerted him to surveillance video of the bank robbery he committed with his twin brother as well as the incriminating evidence recovered from their getaway car. CP 85-86. Discovery was completed by November 14, 2014, with most provided by August 26, 2014. CP 90-94; RP(3/27/15) 26. All the evidence was explained to defendant in a series of meetings with his counsel and the investigator she retained to help them evaluate the case. CP 35. It established defendant and his twin robbed the bank together, with defendant

[1] Clerk's papers above No. 84 reflect the State's estimate of how its supplemental designation will be numbered.

acting as the principal inside the bank, and the twin acting as the accomplice-getaway driver. CP 85-86; RP(11/18/14) 8-10, 13; (3/27/15) 27-30. There is no evidence anyone else committed the crimes.

Defendant pleaded guilty to first degree robbery November 18, 2014. CP 17-26; RP(11/18/14) 1-13. He assured the trial court of his factual guilt while affirming his knowing, intelligent and voluntary plea. RP (11/18/14) 12-13; CP 26. About one month later, he nevertheless moved to withdraw it, claiming counsel's failure to *show* him incriminating-photographic evidence referenced in the declaration of probable cause. CP 85-86; RP (12/11/14) 2-4. RP(3/25/15) 24-25. The motion was denied due to defendant's failure to prove the plea was manifestly unjust. RP (3/27/15) 31-32. Defendant proceeded to sentencing. RP (3/27/15) 34-36. His prior convictions for second degree robbery, unlawful possession of a firearm, felony assault, failure to register, third degree rape and first degree child molestation gave him an offender score of 8. CP 64. A 120 month sentence was imposed. CP 67. Defendant's notice of appeal was timely filed. CP 95.

2. Facts

Compelling evidence of defendant's guilt was summarized in the probable-cause declaration. CP 85-86. He entered a Puyallup Bank wearing a bandana, plaid shirt, grey sweat pants and distinctive athletic shoes as his twin brother waited for him in a blue Lincoln outside. *Id.* Defendant approached bank teller Pricilla Wilson, placed his stolen handgun on the counter aimed in her direction and said: "Give me your money from under

the drawer." CP 85. Wilson complied. *Id.* Teller Aimee Brumley similarly complied when he directed the same command at her. *Id.* He rejoined his twin in the getaway car. CP 85-86. They fled eastbound on 104th Street East. *Id.* Their Lincoln was photographed accelerating away. *Id.*

Police gave them an opportunity to pull over on an extension of 104th Street East within four minutes of the robbery. *Id.* They feigned compliance by pulling toward the right, only to accelerate along the shoulder in excess of 80 mph in a 60 mph zone. *Id.* Police forced them off the road. *Id.* Defendant emerged from the passenger door. *Id.* He raised his hands as if to surrender, but quickly fled on foot. *Id.* He was apprehended at a nearby gas station. *Id.* His twin was apprehended as he fled from the driver's side. *Id.* There was $572 in his pocket. *Id.*

Both tellers were transported to the scene. *Id.* Bramley identified defendant as the gunman by his physique and grey sweat pants, which were visible in the bank's security video with his distinctive athletic shoes. *Id.* Several other items of evidence connected him to the robbery. A photograph taken at the bank appeared to capture the Lincoln's license plate. *Id.* One of the bank's tracking devices was discarded near the pursuit route. *Id.* There was a silver handgun in open view on the driver's floorboard. *Id.* A plaid shirt like the one defendant wore in the bank was located with some cash on the passenger side where he sat. *Id.* The plaid shirt, defendant's ID, remnants of the bank's bait pack, a bandana, $3,094 and the stolen handgun were seized from the Lincoln during a subsequently executed search warrant. *Id.*

C. ARGUMENT.

1. DEFENDANT'S CHALLENGE TO THE VALIDITY OF HIS KNOWING, INTELLIGENT, AND VOLUNTARY PLEA SHOULD BE REJECTED BECAUSE IT DEPENDS ON A BASELESS CLAIM REFUTED BY THE RECORD.

The enforcement of valid plea agreements is of profound public importance. ***State v. Codiga***, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). A guilty plea is valid when the totality of the circumstances show it was knowing, intelligent and voluntary. ***State v. Branch***, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996); ***Wood v. Morris***, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976). Courts will only permit a plea to be withdrawn to correct manifest injustice. ***Codiga***, 162 Wn.2d at 922 (citing CrR 4.2(f)). To be "manifest" injustice must be obvious, directly observable, overt not obscure. ***State v. Pugh***, 153 Wn. App. 569, 577, 222 P.3d 821 (2009).

a. The plea was knowingly made.

A plea is knowingly made when entered by a defendant aware of its direct consequences. ***Codiga***, 162 Wn.2d at 923-24. Direct consequences have a definite, immediate and largely automatic effect on punishment. Among them are the maximum sentence or a term of community custody. ***State v. Knotek***, 136 Wn. App. 412, 423, 149 P.3d 676, 681 (2006). They do not include collateral consequences consisting of ancillary results peculiar to the defendant. ***State v. Cameron***, 30 Wn. App. 229, 233, 633 P.2d 901, 904 (1981). Use of the word "knowingly" makes explicit advisement of the direct consequences a requirement of a valid plea. *Id.*; *see*

also ***State v. Cashaw***, 4 Wn. App. 243, 248-49, 480 P.2d 528 (1971). The requirement can be satisfied by plea documents. *Id.*

Defendant alleges the plea was not knowingly made, but fails to identify a misunderstanding of its direct consequences. The claim-defeating omission is understandable, for those consequences were explicit in the agreement he signed after counsel advised him of its terms. *E.g.* CP 3-4, 18; RCW 9A.20.021(a). They were reiterated during the plea colloquy. RP (11/18/14) 7-8. Defendant was a twenty nine year old man with fourteen years of education at the time, so he cannot attribute the plea to confusion. *Id.* at 12; CP17. By nonetheless claiming the plea was unknowingly made, he either betrays a misunderstanding of the standard governing the claim or a lack of regard for it, either way, the claim should fail.

b. The plea was intelligently made.

An intelligent plea reflects rational choice among available options, making defendant's claim of an unintelligently made plea indefensible. ***State v. Stowe***, 71 Wn. App. 182, 187, 858 P.2d 267, 269 (1993); *see* ***State v. Cashaw***, 4 Wn. App. 243, 248-49, 480 P.2d 528 (1971). He was charged with two counts of firearm enhanced first degree robbery, one count of first degree unlawful possession of a firearm and obstruction. CP 87-89. Conviction would have increased his offender score to 9+. *See* CP 64; RCW 9.94A.589(1)(a). The enhancements would have added 120 months consecutive-flat time to the base sentence, resulting in a prison term of approximately twenty to twenty four years. RCW 9.94A.535(3).

Review of the available record reveals the likelihood of conviction was high. There is no evidence defendant was anything less than an equally culpable accomplice to the robberies; meanwhile, he was clearly identified as the principal by an eyewitness, physical evidence, his position in the getaway car and the circumstances of his arrest. *See* CP 85-86; RCW 9A.08.020; 9.94A.533(3). He was similarly prone to conviction on the UPOF count regardless of which part he played, for the firearm used by the principal in the bank, or another one, was recovered from the getaway car where it was constructively possessed by both brothers. *See* CP 85-86; ***State v. Turner***, 103 Wn. App. 515, 524, 13 P.3d 234, 239 (2000).

Defendant's plea to one count of first degree robbery reduced his exposure to 144 months with the benefit of a 120 month recommendation. Removal of the firearm enhancements made the entire sentence eligible for "good-time" reduction. The net result was less prison time than defendant would have served on the originally charged firearm enhancements before he served one day of the remaining ten to fourteen years. From a defense perspective, the plea was exceedingly rational. *See* Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. Cal. L. Rev. 209, 216 (2009). There is no credibility to defendant's claim to the contrary.

c. The plea was voluntarily made.

Guilty pleas are voluntary when entered by uncoerced defendants that understand the constitutional protection waived, the charged offense's

elements and how their conduct satisfied those elements. ***Hews v. Evans***, 99 Wn.2d 80, 87, 660 P.2d 263, 267 (1983); ***State v. Williams***, 117 Wn. App. 390, 398, 71 P.3d 686, 690 (2003). A defendant's signed or otherwise acknowledged plea statement is *prima facie* verification of voluntariness. ***State v. Perez***, 33 Wn. App 258, 261-2, 654 P.2d 708 (1982); ***In re Keene***, 95 Wn.2d 203, 206-7, 622 P.2d 360 (1980); *Cf.* ***Branch*** at 129 Wn.2d at 642. The presumption is nearly "irrefutable" if a defendant affirms a plea's voluntariness during a colloquy with the court. ***Perez***, 33 Wn. App at 262.

Defendant rightly abandoned an earlier claim of coercion. The signed-guilty plea avers the absence of threats or extraneous promises. CP 25; RP (11/18/14) 1-13. Each right waived was explained to him verbally and in writing. CP 17-18, 25; RP (11/18/14) 5-6. So too were the elements of the charged offense. CP 17; RP (11/18/14) 5. Defendant's appreciation for how they were met by his theft of the bank's money through force or fear was manifest in his stipulation to the probable-cause declaration, which he expanded upon in his handwritten affirmation of guilt. CP 25; RP (11/18/14) 13. Both of which were informed by the State's summary of the case in his presence. RP (11/18/14) 8-11. The plea was plainly voluntary.

d. The trial court did not abuse its discretion by denying defendant's motion to withdraw the plea.

"Because of the many safeguards preced[ing] a ... plea, the manifest injustice standard for ... withdrawal is demanding." ***Pugh***, 153 Wn. App. at

577 (citing ***State v. Taylor***, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). Defendants must prove manifest injustice occurred. ***State v. Oseguera Acevedo***, 137 Wn.2d 179, 194, 970 P.2d 299, 306 (1999). This requires them to identify a constitutional error and show how it actually prejudiced their rights. *Id.* Denial of a motion for withdrawal will only be reversed for an abuse of discretion; conversely, it will be affirmed if based on tenable grounds or reasons. ***State v. Marshall***, 144 Wn.2d 266, 280, 27 P.3d 192 (2001); ***State v. Brown***, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

Defendant curiously alleges the plea is invalid because his counsel "never advised him ... the [S]tate could not prove its case." As a preliminary matter, there is no support for his unrealistic assessment of the evidence. The available record portends a trial would have almost certainly concluded in conviction. This is partly because conviction would follow each of three possible interpretations of the available evidence, *i.e.*: (1) defendant was the principal inside the bank; (2) defendant was the accomplice in the getaway car; or (3) defendant was either the principal or the accomplice. No election would have been needed as the elements are identical for principals and accomplices alike. ***State v. Teal***, 117 Wn. App. 831, 838, 73 P.3d 402, 407 (2003) aff'd, 152 Wn.2d 333, 96 P.3d 974 (2004).

Defendant's allegation of ineffective assistance likewise embellishes the record of counsel's purported failure. The thrust of defendant's criticism is he would not have admitted the truth about his crime if he had reviewed several items of discovery prior to the plea—so much for remorse, but so it

goes. *See* RP (3/27/15) 25-26. At the evidentiary hearing, he *said* the bank-security video and photographs of the getaway car called proof of his identity as the robber into doubt. RP (3/27/15) 25-26. But he neglected to explain how they accomplished so much let alone proved as much, making it impossible to review his claim in this direct appeal. There is consequently no manifest injustice. It is no wonder the trial court could not find a basis to permit the requested withdrawal. RP (3/27/15) 33. That decision should be affirmed since it cannot be fairly reversed as an abuse of discretion.

2. DEFENDANT FAILED TO PROVE HIS PLEA IS THE RESULT OF INEFFECTIVE COUNSEL AS EVEN THE INCOMPLETE RECORD ON REVIEW REVEALS HE RECEIVED SOUND STRATEGIC ADVICE THAT HELPED HIM AVOID A DECADE OF IMPRISONMENT FOR TWO WELL-ESTABLISHED ROBBERIES.

To prevail on his ineffective assistance of counsel claim, defendant must prove counsel failed to substantially assist him in deciding whether to plead guilty and the failure prejudicially induced the plea. ***In re Pers. Restraint of Cross***, 180 Wn.2d 664, 706, 327 P.3d 660 (2014); ***State v. Osborne***, 102 Wn.2d 87, 99, 684 P.2d 684 P.2d 683 (1984); ***In re Peters***, 50 Wn. App. 702, 703, 750 P.2d 643 (1988)); ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052 (1984); U.S. Const. Amend. 6; Wash. Const. Art. I § 22. Courts make every effort to eliminate the distorting effects of hindsight when evaluating counsel's performance. ***State v. Brown***, 159 Wn. App. 336, 371, 245 P.3d 776 (2011).

a. Defendant improperly seeks direct review of an ineffective assistance of counsel claim that depends on evidence outside the available record.

Where, as here, an ineffective assistance of counsel claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251, 1257 (1995). The burden is on a defendant to show deficient representation in the existing record. Claims dependent on extraneous evidence must be raised through a collateral attack. *Id.*

Proper review of defendant's ineffective assistance claim cannot be completed due to the inability to assess three critical components of the case: (1) all the evidence establishing defendant as one of the bank robbers; (2) a comprehensive accounting of counsel's conduct leading to the plea; and (3) any evidence of defendant's confidentially expressed reason for pleading guilty. Whereas this Court only has a two-page summary of the case drafted to establish probable cause to impose conditions of release, the prosecutor's extemporized overview of it and defendant's vague assertion some currently unreviewable evidence called proof of his guilt into doubt in some unexplained way.

There is cause to believe a thorough accounting of counsel's conduct would contradict his claim of deficient performance, for she disclosed as much in his motion to withdraw the plea, which represented:

> [She] has ... information pertaining to [the] motion ... that is in actual conflict with arguments supporting [it].

Id. One can safely assume at least some of the conflicting information was touched upon in her motion to withdraw, which further represented:

> [She] retained an investigator who reviewed the discovery. Both [she] and the investigator met several times with [defendant] to discuss the case. Two of the three bank employees involved in the robbery were interviewed by defense counsel and the investigator. Both reviewed the physical evidence stored. All of this information was shared with [defendant].

Id. Although unfortunate, defendant's willingness to besmirch counsel's reputation to pursue a perceived benefit despite the effort it appears she expended on his behalf is not uncommon. Appellate courts have long "note[d], with increasing concern, ... it seems to be standard ... for the accused ... to develop an undertone of studied antagonism ... to argue on appeal ... [he or she] ... was represented by incompetent counsel." ***In re Stenson***, 142 Wn.2d 710, 734, 16 P.3d 1(2001). The aspersions in this case appear to be born of defendant's frustration with the more favorable deal his twin received on account of his less violent albeit equally criminal act of driving the getaway car. RP (3/27/15) 28-29; CP 35.

b. Defendant's assertion counsel neglected to show him evidence she discussed with him prior to the plea is not proof of deficient performance.

Counsel competently handles pretrial resolutions by relaying offers, discussing negotiations and explaining the case to a defendant, so he or she can make an informed decision on how to proceed. ***State v. Edwards***, 171 Wn. App. 379, 394, 294 P.3d 708, 715 (2012); ***State v. Malik***, 37 Wn. App. 414, 416, 680 P.2d 770 (1984); ***In re McCready***, 100 Wn. App. 259, 263, 996 P.2d 658 (2000). To overcome the presumption these affairs were adequately addressed, a defendant must prove the absence of any legitimate explanation for counsel's conduct. ***State v. Grier***, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). The presumption will accordingly survive a defendant's self-serving allegations of counsel's deficiency. *See* ***In re Connick***, 144 Wn.2d 442, 451, 28 P.3d 729 (2001); ***Osborne***, 102 Wn.2d at 97.

Defendant's claim of ineffective assistance is predicated on his self-serving allegation counsel failed to *show* him several items of evidence before he entered the plea. RP (3/27/15) 25-26. This claim fails as a matter of law, for neither the Due Process Clause governing the validity of the plea nor the Sixth Amendment controlling counsel's administration of the pretrial investigation compelled counsel to *show* him every piece of evidence she reviewed to inform their discussions about the case. *See* ***Lafler***

v. Cooper, 132 S. Ct. 1376, 1390 (2012)); ***State v. A.N.J.***, 168 Wn.2d 91, 108-11, 225 P.3d 956, 966 (2010); *e.g.* ***State v. Wright***, 457 So. 3d 465, 477 (2011)(lawful to preclude defendant's access to child pornography counsel reviewed in illicit-depictions case); ***Ford v. Schofield***, 488 F. Supp. 2d 1258, 1366 (N.D. Ga. 2007)(defendant's presence not required during fact-gathering endeavors). ***Rompilla v. Beard***, 545 U.S. 374, 383, 125 S. Ct. 2456 (2005); ***Wiggins v. Smith***, 539 U.S. 510, 525, 123 S. Ct. 2527 (2007). She was required to reasonably examine the evidence. *See* ***Strickland,*** 466 U.S. at 691; ***A.N.J.***, 168 Wn.2d at 109. The examination was adequate if it enabled her to prepare him to make an informed decision about whether plead guilty or proceed to trial. *See* ***Hill v. Lockhart***, 474 U.S. 52, 57-58; 106 S. Ct. 366, 370-71 (1985); ***A.N.J.***, 168 Wn.2d 109, 111-12.

There is no evidence she failed in this regard. Defendant alleged but never proved post-plea review of crime-scene video and photographs exposed a yet to be explained weakness in the case. Even if true, the fact additional scrutiny might have resulted in a useful discovery does not prove constitutional deficiency as defendant was never entitled to perfect counsel. *See* ***State v. Adams***, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978). There is not enough information in the record about defendant's purported discovery to assess its materiality or discernibility to the end of determining whether it could have been reasonably overlooked. Conversely, if the evidence actually proved as incriminating as portrayed, there would have been little more for counsel to do than report the bad news. ***Brown***, 159 Wn. App. at

371; ***McFarland***, 127 Wn.2d at 334. Defendant failed to prove he received constitutionally deficient assistance of counsel.

c. Defendant's claim he would have proceeded to trial had he seen several items of discovery apparently explained to him does not prove actual prejudice.

The prejudice component of ***Strickland*** turns on whether the alleged deficiency affected the outcome of the plea process. ***Hill***, 474 U.S. at 58-59. Such prejudice cannot be established unless there is a reasonable probability a proven deficiency would have prompted defendant to insist on proceeding to trial. *Id.* The analysis largely depends on him being able to demonstrate reasonable counsel would have advised against the plea based on his yet to be explained discovery. This would, in turn, depend on whether the discovery would have changed the outcome of a trial. These predictions must be made objectively, without regard for defendant's idiosyncrasies. *Id.* at 59-60. The bare assertion he would not have pleaded guilty but for the alleged deficiency is insufficient to prove actual prejudice. ***In re Riley***, 122 Wn.2d 772, 782, 863 P.2d 554 (1993). For this Court should not find it based on counsel's alleged failure to make a useful discovery where, as here, the incomplete record compels the Court to speculate about its utility. *See Id.*; ***State v. Jury***, 19 Wn. App. 256, 265, 576 P.2d 1302 (1978). Defendant's unsubstantiated ineffective assistance of counsel claim should fail.

D. CONCLUSION.

The trial court's denial of defendant's motion to withdraw the valid plea he entered to avoid a twenty year sentence for robbing two bank tellers at gunpoint should be affirmed as he failed to prove it was induced by ineffective assistance of counsel.

DATED: February 16, 2016.

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2-16-16
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