

62412-1

62412-1

REC'D

JUN 16 2009

King County Prosecutor
Appellate Unit

NO. 62412-1-I

2009 JUN 16 PM 4:05

FILED
COURT OF APPEALS
STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

v.

REGINALD WILTON,

Appellant.

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

The Honorable Ronald Kessler, Kenneth Comstock and Theresa B. Doyle,
Judges.

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
HARLAND R. DORFMAN
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. <u>Procedural History</u>	3
2. <u>Substantive Facts</u>	6
3. <u>Motion to Withdraw Plea</u>	10
C. <u>ARGUMENT</u>	14
<i>Summary of Arguments</i>	14
1. THE COURT ACTED WITHOUT AUTHORITY AND ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD A HEARING ON WILTON’S MOTION TO WITHDRAW HIS PLEA	16
2. WILTON RECEIVED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO PERFECT HIS MOTION AND FAILED TO SUBSTANTIVELY BRIEF A VIABLE BASIS FOR HIS MOTION TO WITHDRAW HIS PLEA.	24
D. <u>CONCLUSION</u>	29

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Adams</u> 138 Wn. App. 36, 155 P.3d 989, rev. <u>denied</u> , 161 Wash.2d 1006 (2007).....	11
<u>State v. Adel</u> 136 Wn.2d 629, 965 P.2d 1072 (1998).....	24
<u>State v. Armendariz</u> 160 Wn.2d 106, 156 P.3d 201 (2007).....	18, 22
<u>State v. Cienfuegos</u> 144 Wn.2d 222, 25 P.3d 1011 (2001).....	25
<u>State v. Julian</u> 102 Wn. App. 296, 9P.3d 851 (2000).....	21
<u>State v. Jury</u> 19 Wn. App. 256, 576 P.2d 1302, rev. <u>denied</u> , 90 Wn.2d 1006 (1978).....	25, 28
<u>State v. Kennar</u> 135 Wn. App. 68, 143 P.3d 326 (2006), rev. <u>denied</u> , 161 Wn.2d 1013 (2007).....	11
<u>State v. Lopez</u> 79 Wn. App. 755, 904 P.2d 1179 (1995).....	passim
<u>State v. Perez</u> 33 Wn. App. 258, 654 P.2d 708 (1982).....	21
<u>State v. Rohrich</u> 149 Wn.2d 647, 71 P.3d 638 (2003).....	23
<u>State v. Smith</u> 144 Wn. App. 860, 184 P.3d 666 (2008).....	17, 19, 23, 24

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987)..... 25

State v. Zavala-Reynoso
127 Wn. App. 119, 110 P.3d 827 (2005)..... 17

FEDERAL CASES

Blakely v. Washington
542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 11, 12, 26

Lee v. Davis
328 F.3d 896 (7th Cir. 2003) 26

Miranda v. Arizona
384 U.S. 436, 86 S. Ct. 1136, 79 L. Ed. 2d 694 (1966)..... 9

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 25

RULES, STATUTES AND OTHER AUTHORITIES

CrR 4.2..... 16, 20

CrR 7.8..... passim

RCW 9.94A.030 20

RCW 9.94A.411 20

RCW 9.94A.421 20

RCW 9.94A.431 20

RCW 9.94A.510, .602 3

RCW 9A.20.021 22

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 9A.36.011	3, 22
RCW 9A.52.020	4, 22
RCW 9A.56.190, .200	3
RCW 9A.56.190, .210	3
RCW 9A.56.200	22
RCW 9A.56.210	22
RCW 10.73.090	18

A. ASSIGNMENTS OF ERROR

1. The court erred when it denied counsel's motion for a hearing on Appellant's motion to withdraw his plea.
2. The court erred when it ruled counsel failed to present a prima facie case in support of Appellant's motion to withdraw his plea.
3. The court erred by refusing to reconsider its denial of the motion for a hearing and its determination that Appellant failed to make a prima facie case in support of his motion to withdraw.
4. Failure to incorporate all terms of the plea agreement into the official record justifies withdrawal of Appellant's plea.
5. The term of the no contact order regarding two victims exceeds the statutory maximums for the charged crimes.
6. Appellant received ineffective assistance of counsel when counsel failed to adequately brief the issues presented in Appellant's motion to withdraw his plea.
7. Appellant received ineffective assistance of counsel when counsel failed to perfect Appellant's pro se motion to withdraw his plea.

Issues Pertaining to Assignments of Error

1. Appellant entered a negotiated plea agreement with the State, but one of the State's obligations under the agreement was not incorporated into the formal plea agreement, or made part of the record at

the plea or sentencing hearings. Appellant subsequently moved to withdraw his plea, citing failure to formalize the State's obligation as one of the reasons. Appellant also cited no-contact provisions in excess of the statutory maximum in his motion. The court rule requires the court to either transfer the motion to the court of appeals or hold a show cause hearing. The court below, however, dismissed the motion without a hearing. Did the court act without authority when it dismissed Appellant's motion?

2. Prior to dismissing Appellant's motion, the court inquired of appointed counsel regarding the status of the motion. Counsel advised she had not yet been able to meet with Appellant and did not have an adequate understanding of his issues. Counsel never addressed the failure to include all terms of the plea agreement in the formal record. Neither did counsel address the no-contact provisions, which exceeded the statutory maximum. Despite counsel's advisement and the failure of counsel to address issues raised in Appellant's motion, the court found Appellant had not presented a prima facie case for a hearing on his motion. Did the court abuse its discretion by denying counsel's motion for a hearing, and Appellant's motion to withdraw his plea, when it ruled without adequately appraising itself of the bases for that motion?

3. Did the court abuse its discretion when it denied Appellant's request for reconsideration?

4. Counsel was appointed to assist Appellant in his motion to withdraw his plea. Answering the court's request, counsel wrote a letter to the court stating she had not yet met face-to-face with Appellant, outlining her problems understanding Appellant's issues, and presenting a brief discussion of two of his three issues. Counsel, however, did not present the third and most viable issue to the court. Counsel also failed to ensure Appellant's motion to withdraw his plea was supported by a properly executed affidavit. Did Appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On December 13, 2005, the King County Prosecutor charged Appellant Reginald Wayne Wilton with: Count I – first-degree assault with a deadly weapon allegation (RCW 9A.36.011(1)(a); RCW 9.94A.510, .602), committed on November 16, 2005 against Tod Merley; Count II – first-degree robbery with a deadly weapon allegation (RCW 9A.56.190, .200(1)(a)(i); RCW 9.94A.510, .602), committed on November 16, 2005 against Tod Merley; Count III – second-degree robbery (RCW 9A.56.190, .210), committed on November 18, 2005

against Lois Hayes; Count IV – first-degree burglary (RCW 9A.52.020), committed on November 28, 2005 with an allegation of assault against Rolf Paul; Count V – first-degree robbery (RCW 9A.56.190, .200(1)(a)(iii)), committed on November 28, 2005 against Rolf Paul; and Count VI – first-degree robbery (RCW 9A.56.190, .200(1)(a)(iii)), committed on November 30, 2005 against Lakira Herndon. CP 1-4. An amended information was filed on May 18, 2006 adding Count VII – second-degree robbery (RCW 9A.56.190, .210), committed on November 20, 2005 against Sandra Thibeault. CP 10-13.

Wilton was evaluated for competency to stand trial three times, including an evaluation at Western State Hospital. CP 14-17, 21; 1RP 3-4.¹ The Western State Hospital evaluation found Wilton suffered from polysubstance dependence, malingering, and antisocial personality disorder. CP 28-29. Following a hearing on the evaluation, the court determined Wilton was competent to stand trial. CP 34-35; 1RP 5.

Wilton then moved to discharge his court appointed attorney. 2RP 12. Wilton told the court, “The reason being that I don’t know who I am.” Wilton’s other reasons were: he did not know the nature of his charges; he

¹ There are four volumes of Verbatim Report of Proceedings referenced as follows: 1RP – September 29, 2006; 2RP – November 2, 2006; 3RP – November 30, 2006; 4RP – January 19, 2007.

was still hearing voices; he was still receiving medication; and he did not understand the legal system. 2RP 12. The court acknowledged Wilton might have “other issues” but determined those had nothing to do with counsel. 2RP 13. The court denied Wilton’s motion. CP 36; 2RP 13.

Pursuant to a plea agreement, Wilton pled guilty to all seven counts in the amended information. CP 37-47, 57. In return for his guilty plea, the State agreed to dismiss the deadly weapon enhancements in Counts I and II. CP 57. The State also agreed to dismiss a second-degree robbery charge arising from a Seattle purse-snatching incident – King County cause number 05-1-13585-5. CP 57. An additional, uncharged second-degree robbery in Burien was discussed during the plea negotiations but was not addressed in the formal documents. CP 110.

Wilton’s plea was heard by The Honorable Kenneth Comstock serving as a judge pro tem. 3RP 15-16. Following a colloquy with Wilton in which the plea form, the statutory maximums, standard ranges and the State’s recommendations were addressed, the court found Wilton entered his plea “freely and voluntarily, with full knowledge of the consequences[,]” and without threat or promise. 3RP 19-26. Wilton then pled guilty to all seven counts of the amended information. 3RP 26.

The sentencing hearing was held on January 19, 2007 before The Honorable Theresa B. Doyle. 4RP 32-49. Following the State’s

recommendation, the court sentenced Wilton to the top of the standard range on all counts, to be served concurrently. 4RP 47-48. The court also sentenced Wilton to a 24-48 month period of community custody, ordered payment of restitution and entered a no contact order with the victims for a term of life. CP 70-72, 77-78; 4RP 48-49. An additional order setting restitution was entered on May 7, 2007. Supp. CP ____ (sub no. 94, Additional Order Setting Restitution, filed 05/07/2007).

2. Substantive Facts²

In 1988, Wilton was sentenced to serve 320 months on a first-degree murder conviction. CP 9. He was released on October 5, 2005. CP 9. Wilton's sentence had not included a community custody provision. CP 58; 4RP 44. Within two months, Wilton had been charged with a number of offenses arising from a series of robberies in Burien and Seattle. CP 5-9.

On November 16, 2005, at approximately 11:20 p.m., Tod Merley was accosted by a black male who told Merley to give him his money. CP 5. The male pulled out a knife and threatened to "stick" Merley. Id.

² Because Wilton entered a plea, the substantive facts are taken from the allegations in the Certification for Determination of Probable Cause and the Prosecuting Attorney's Case Summary. CP 5-9. Under the plea agreement, the court could look to these documents to establish the real facts for sentencing. CP 57.

Merley ran, but was caught, thrown into a fence, punched in the face and stabbed multiple times. Id. The suspect then took Merley's wallet and fled. Id. Merley was treated at the hospital for a fractured left orbital. Id. Exploratory surgery on the stab wounds showed no vital organs had been hit. Id. This incident led to the filing of Counts I and II. CP 1-2, 10-11.

On November 18, 2005, at approximately 6:10 a.m., Lois Hayes was accosted by a black male who asked her for the time and grabbed her purse. CP 5. They struggled, but the man got the purse when Hayes fell to the ground. Id. Hayes said the man ran into the Vintage Park apartments. Id. This incident led to the filing of Count III. CP 2, 11.

On November 20, 2005, at approximately 6:40 p.m., Sandra Thibeault was accosted by a black male who tapped her on her shoulder, and said "Excuse me," as she entered her building at the Vintage Park apartments in Burien. CP 5-6. He grabbed her purse, but Thibeault held on. Id. In the struggle, Thibeault hit her head as she was slammed against a wall and fell to the ground. Id. The man pulled so hard on the purse that the strap broke, and he fled with the purse. Id. This incident led to the filing of Count VII in the Amended Information. CP 13.

On November 28, 2005, at approximately 3:43 p.m., Rolf Paul was at his home in Burien and answered a knock at his door. CP 6. A black male kicked the door, entered, and kicked Paul in the back, knocking him

to the ground. Id. The man hit Paul in the face and kicked him in the back, causing pain. Id. The man found Paul's wallet, and fled. Id. Paul called 911, was taken to the hospital, and was diagnosed with fractured ribs. Id. This incident led to the filing of Counts IV and V. CP 2-3, 11-12.

On November 30, 2005, at approximately 9:50 p.m., Lakira Herndon was walking home in the Vintage Park apartments, when she was startled by a black male, who came out of some bushes. CP 6. As Herndon turned to get away, the man said, "Shh, it's only Reggie." Id. Herndon did not recognize the man and started walking away, when he came up behind her and grabbed her purse. Id. Herndon held onto her purse, and –in the ensuing struggle – they both fell, and Herndon cut her elbow. Id. The man struck her in the face, retained her purse, and fled through the complex. Id. Herndon attempted to follow him, but he got away. Id. Herndon called 911, and told responding deputies she thought she had previously met the man at a friend's apartment. Id. That friend told police deputies Reggie's last name was "Wilton." Id. This incident led to the filing of Count VI. CP 3-4, 12-13.

Also on November 30, 2005, at approximately 2:40 p.m., Maria Lopez-Valenzuela was accosted by a black male as she was returning with groceries to her home in the Vintage Park apartments. CP 6. The man

approached her from behind, told her he was going to take her purse, and grabbed it. Id. Lopez-Valenzuela resisted. Id. The man punched her in the face and managed to get the purse. Id. He fled though the complex, taking Lopez-Valenzuela's groceries along with the purse. Id. No charges were filed as a result of this incident. CP 102-03, 110.

On December 1, 2005, Wilton was arrested in Seattle after a purse-snatching incident. CP 7. Wilton confessed, and was charged with second-degree robbery.³ CP 7, 9. A King County Sheriff's detective investigating the Burien incidents showed a photomontage containing Wilton's photograph to Herndon who positively identified him as her assailant. CP 7. The photomontage was also shown to Thibeault who said she was pretty sure Wilton was the person who robbed her. CP 7.

Subsequently, detectives contacted Wilton while he was in custody at the King County Jail on the Seattle incident. CP 7. Wilton agreed to talk with the officers. CP 7. He was advised of and waived his Miranda⁴ rights. CP 7. Wilton confessed to all of the Burien incidents and provided specific details. CP 7. Wilton explained he was unemployed, hungry, and

³ This case was filed under King County cause number 05-1-13585-5. It was ultimately dismissed under the plea agreement in this case. CP 9, 57.

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1136, 79 L. Ed. 2d 694 (1966).

addicted to crack when he committed the robberies. CP 7. Wilton also expressed remorse for his acts. CP 7-8.

3. Motion to Withdraw Plea

On November 1, 2007, documents indicate an affidavit in support of a motion to withdraw Wilton's plea was filed, but that affidavit does not appear to have been placed in the file at that time. Supp. CP ___ (sub no. 96, Affidavit of Mailing, filed 11/01/2007). On November 8, 2007, the court on its own motion, appointed counsel to represent Wilton on his motion to withdraw his plea, and counsel appeared the next day. Supp. CP ___ (sub no. 97, Order Appointing OPD Counsel, filed 11/08/2007), Supp. CP ___ (sub no. 98, Notice of Appearance and Request for Discover, filed 11/09/2007). Wilton's pro se motion to withdraw his plea was filed on January 17, 2008, less than one year after the Judgment and Sentence was filed. CP 81-117.

Wilton presented three grounds in support of his motion to withdraw his plea. First, he asserted he had been misinformed as to the direct consequences of his plea because he had been misinformed about the maximum sentence. CP 84-90. Wilton complained he was told the maximum sentence on his first-degree assault, first-degree robbery, and

first-degree burglary counts was life, while under Blakely⁵, the judge sentencing on a plea could only sentence him to the top of the standard range. CP 84-90. Wilton's second basis was the imposition of a term of community custody in addition to a term of incarceration at the top of the standard range amounted to an exceptional sentence above the "statutory maximum."⁶ CP 91-97.

Wilton's third basis was failure of the plea agreement, and the record, to include all of the agreed consideration. CP 98-107. In particular, Wilton complained there was no official record of the State's promise not to proceed with charges in regard to the Lopez-Valenzuela incident. CP 102-05. That promise was memorialized in an e-mail message from the trial deputy to counsel. CP 110.

On May 30, 2008, Wilton's appointed counsel wrote a letter to the court – apparently in response to a letter from the court dated May 21,

⁵ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

⁶ In regard to these two claims, counsel is aware of this Court's decisions in State v. Kennar, 135 Wn. App. 68, 74-76, 143 P.3d 326 (2006), rev. denied, 161 Wn.2d 1013 (2007) (final sentencing range is not established at plea colloquy, but rather at sentencing hearing, where Blakely applies) and of Division Three's decision in State v. Adams, 138 Wn. App. 36, 51, 155 P.3d 989, rev. denied, 161 Wash.2d 1006 (2007) (where statutory maximum is life imprisonment, addition of term of community custody to a sentence at the top of the standard range sentence does not constitute an exceptional sentence).

2008⁷ – outlining counsel’s understanding of the legal grounds supporting Wilton’s motion to withdraw his plea. CP 118-134. Counsel, however limited her brief discussion of Wilton’s issues to the first and second bases he presented for withdraw, those discussing the implications of Blakely. CP 118-19. Counsel never addressed Wilton’s third issue, the failure to include the State’s promise not to file charges related to the Lopez-Valenzuela incident in the official record.

Also in her letter, counsel indicated she had not been able to clarify Wilton’s legal and factual position by telephone or written correspondence and discussed difficulties she had arranging a face-to-face meeting, given her schedule and Wilton’s incarceration at Walla Walla. CP 119. Counsel said, “At this point, if I am to continue to represent Mr. Wilton, a face-to-face meeting must occur. I can request OPD funding to travel to Walla Walla for that purpose.” CP 119. Counsel ended the letter with an offer to schedule a meeting with the court in chambers “if that would be of any assistance.” CP 119.

On June 4, 2008, the court entered an order on counsel’s motion to schedule a hearing on Wilton’s motion to withdraw his plea. CP 135. The court denied the motion “because the letter/brief dated 5/30/08 from

⁷ This letter does not appear in our record.

defense counsel does not establish a prima facie case for withdrawal of plea.” CP 135. The court also authorized counsel to withdraw, which counsel did on June 19, 2008. CP 135; Supp. CP ___ (sub 103, Notice of Withdrawal of Attorney, filed 06/19/2008). In a letter dated June 20, 2008, Wilton wrote Judge Doyle directly in response to the court’s order denying a hearing on his motion to withdraw his plea. CP 138-146.⁸ Wilton asked the court to reconsider its decision and to review the matter presented in his pro se pleadings. CP 138.

On August 22, 2008, the court filed an order on criminal motion denying “Defendant Motion for Appointment of Counsel.” Supp. CP ___ (sub no. 104, Order Denying MT TP Appoint Counsel, filed 08/22/2008). The record, however, does not reflect a motion by Wilton to appoint counsel at this time. Wilton’s pro se notice of appeal of the court’s denial of his motion to withdraw his plea, dated June 25, 2008, was filed October 1, 2008.

⁸ This letter does not appear to have been separately filed in the record, but it is attached to the Notice of Appeal along with the order denying the motion for a hearing on the motion to withdraw. CP 136-146.

C. ARGUMENT

Summary of Arguments

In the course of negotiations leading to Wilton's plea agreement, the State promised not to charge Wilton with robbing Maria Lopez-Valenzuela on November 30, 2005. This promise was memorialized in an e-mail dated December 18, 2006 from the trial deputy to counsel:

Counsel.

Pursuant to our prior understanding and the felony plea agreement in this case, we will not file any additional charges of robbery in these matters, specifically including Ms. Valenzuela. Please consider this e-mail binding on this matter. I do not believe it is necessary to file an addendum to the felony plea agreement, as this was originally contemplated in the agreement.

As a practical matter, I believe we would be prohibited from doing so even if we wanted to due to mandatory joinder rules and case law. I am providing this e-mail in response to you [sic] recent communication on this matter.

Thank you, Jim [Ferrell].

CP 110.

From the record, it appears counsel provided a copy of this e-mail to Wilton:

Mr. Wilton – we can ask that this be attached to the Judgment & Sentence so that it will be part of the court record.

CP 110.

In the motion to withdraw, Wilton cited, as an independent basis to withdraw his plea, the failure to include the State's agreement not to charge the Lopez-Valenzuela robbery. CP 98-107. Appointed counsel, however, failed to address this basis in her letter to the court. CP 118-19. The court denied the requested hearing based on counsel's failure to present a prima facie case in support of the motion, and in the process denied Wilton's motion to withdraw his plea. CP 135. The record also suggests the court denied Wilton's request for reconsideration.⁹ CP 138-46; Supp. CP ___ (sub no. 104, supra).

Three issues arise. First, the court acted without authority when it dismissed Wilton's motion to withdraw his plea, and abused its discretion when it effectively denied his motion for reconsideration. Second, the court failed to correct no-contact provisions in the judgment and sentence, which, regarding some victims, exceed the statutory maximums for the

⁹ The court order denying a hearing on Wilton's motion was filed on June 4, 2008. CP 135. Wilton's letter to the court requesting reconsideration prior to appeal, which is attached to the Notice of Appeal, is dated June 20, 2008. CP 138. The only action, not related to perfecting this appeal, taken by the court after Wilton's letter was the court's order on criminal motion denying defendant's motion to appoint counsel dated August 22, 2008. Supp. CP ___ (sub no. 104, Order Denying MT TP Appoint Counsel (filed 08/22/2008)). Since no motion by Wilton for appointment of counsel appears in his letter requesting reconsideration, it appears the court effectively denied Wilton's motion for reconsideration by implication when it denied appointment of the un-requested counsel.

crimes. Third, Wilton received ineffective assistance of counsel when counsel failed to assert Wilton's most viable basis for withdrawing his plea (failure to document State's agreement not to charge Lopez-Valenzuela robbery) in her letter to the court, and when counsel failed to adequately perfect Wilton's motion.

1. THE COURT ACTED WITHOUT AUTHORITY AND ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD A HEARING ON WILTON'S MOTION TO WITHDRAW HIS PLEA.

CrR 4.2(f)¹⁰ requires a court to permit a defendant to withdraw a guilty plea whenever it appears withdrawal is necessary to correct a manifest injustice. CrR 7.8(b),¹¹ which governs post-judgment motions

¹⁰ CrR 4.2 – Withdrawal of Plea – provides, “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 motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.”

¹¹ CrR 7.8(b) provides:

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;

for withdrawal, permits a court to relieve a party from a final judgment for a variety of reasons including: irregularity in obtaining the judgment; the judgment is void; and for any other reason justifying relief from the operation of the judgment.

Generally, appellate courts review a court's CrR 7.8(b) decisions for abuse of discretion. State v. Zavala-Reynoso, 127 Wn. App. 119, 122, 110 P.3d 827 (2005). The court here, however, acted without authority when it denied Wilton's motion without holding a show cause hearing. See State v. Smith, 144 Wn. App. 860, 863, 184 P.3d 666 (2008) (under current rule, court lacks authority to dismiss CrR 7.8 motion). Thus, review is de novo. See State v. Armendariz, 160 Wn.2d 106, 110, 156

(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.

P.3d 201 (2007) (where court acts without statutory authority, review is de novo).

CrR 7.8(c) prescribes the procedures to be applied when a person moves for relief from judgment:

(1) Motion. Applications 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.

This version of CrR 7.8 became effective on September 1, 2007.

Thus, it applies to Wilton's motion, dated October 15, 2007 and filed January 17, 2008. CP 81, 108.

In contrast to the current rule, the prior rule permitted the court to deny the motion without a hearing if the facts alleged in the affidavits do not establish grounds for relief. See former CrR 7.8(c)(2).¹² Apparently,

¹² Former CrR 7.8(2) provided:

the court applied the former rule when it refused to schedule a hearing, and dismissed Wilton's motion on the basis of failure to establish "a prima facie case for withdrawal of plea." CP 135.

Under the current rule, however, the court did not have authority to dismiss Wilton's motion without a hearing. Smith, 144 Wn. App. at 863. Under the new rule, the court must transfer the motion to the Court of Appeals for consideration as a personal restraint petition unless it finds the motion is timely and either presents a substantial showing for granting relief or demonstrates the necessity for a factual hearing. Id. In cases where transfer is not required, the court must hold a show cause hearing. CrR 7.8(c)(3).

Here, Wilton's motion was timely. It also presented a substantial showing requiring relief, and demonstrated the need for a factual hearing, on the failure of the plea agreement, and the official record, to address the

(2) Initial Consideration. The court may deny the motion without a hearing if the facts alleged in the affidavits do not establish grounds for relief. The court may transfer a motion to the Court of Appeals for consideration as a personal restraint petition if such transfer would serve the ends of justice, Otherwise, the court 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.

State's promise not to charge Wilton with robbing Lopez-Valenzuela. CP 98-107, 110.

When a defendant enters a guilty plea as a result of an agreement, CrR 4.2(e) requires “[t]he nature of the agreement and the reasons for the agreement . . . be made a part of the record at the time the plea is entered.”¹³ In like manner, RCW 9.94A.431 requires the court to be informed as to the nature of the plea agreement.¹⁴ While neither the rule,

¹³ CrR 4.2(e) – Agreements – provides:

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.

¹⁴ RCW 9.94A.431(1) provides:

If a plea agreement has been reached by the prosecutor and the defendant pursuant to RCW 9.94A.421, they shall at the time of the defendant's plea state to the court, on the record, the nature of the agreement and the reasons for the agreement. The prosecutor shall inform the court on the record whether the victim or victims of all crimes against persons, as defined in RCW 9.94A.411, covered by the plea agreement have expressed any objections to or comments on the nature of and reasons for the plea agreement. The court, at the time of the plea, shall determine if the agreement is consistent with the interests of justice and

nor the statute, requires the plea agreement to be in writing, both require the agreement to be stated on the record to the court. State v. Julian, 102 Wn. App. 296, 303, 9P.3d 851 (2000). Failure to comply with this rule is grounds for withdrawal of a plea. State v. Perez, 33 Wn. App. 258, 263, 654 P.2d 708 (1982). Because Wilton's motion was timely and included a substantial showing of entitlement to relief, the court acted without authority when it refused to hold a show cause hearing on Wilton's motion to withdraw his plea.

Wilton also raised an issue that required the court to correct his judgment and sentence. Wilton challenged what he called a "per se error" where the no-contact order in his judgment and sentence was extended for a term of life. CP 107. The no-contact provision in the judgment and sentence is for the maximum term of life and applies to Tod Merley, Lois Hayes, Rolf Paul, Lakira Herndon, and Sandra Thibeault. CP 71. While this is the correct term for the victims of Wilton's class A felonies – Merley, Paul, and Herndon – the provision exceeds the statutory

with the prosecuting standards. If the court determines it is not consistent with the interests of justice and with the prosecuting standards, the court shall, on the record, inform the defendant and the prosecutor that they are not bound by the agreement and that the defendant may withdraw the defendant's plea of guilty, if one has been made, and enter a plea of not guilty.

maximum for the victims of Wilton's class B felonies – Hayes and Thibeault.

The appropriate time limit for no-contact orders imposed at sentencing is the statutory maximum for the crime. Armendariz, 160 Wn.2d at 118-20. Wilton's first-degree assault, first-degree robberies, and first-degree burglary convictions are class A felonies, subject to a statutory maximum term of life imprisonment. RCW 9A.20.021(1)(a) (statutory maximum term for class A felonies is life); RCW 9A.36.011(2) (first-degree assault is a class A felony); RCW 9A.52.020(2) (first-degree burglary is a class A felony); RCW 9A.56.200(2) (first-degree robbery is a class A felony). Thus, the appropriate term for the no-contact order regarding the victims of those crimes – Merley, Paul, and Herndon – is life.

The two second-degree robberies Wilton was sentenced for, however, are class B felonies, subject to a statutory maximum of ten years. RCW 9A.20.021(1)(b) (statutory maximum for class B felonies is ten years); RCW 9A.56.210(2) (second-degree robbery is a class B felony). Thus the appropriate term for the no-contact order regarding the victims of those crimes – Hayes and Thibeault – is ten years. The judgment and sentence requires correction. Armendariz, 160 Wn.2d at 118-20. The

court acted without authority when it refused to conduct a show cause hearing to correct Wilton's judgment and sentence.

Wilton's motion was timely. Because Wilton made a substantial showing regarding the incomplete record of the plea agreement and the no-contact orders in excess of the statutory maximum, he was entitled to relief. At that point, the court's only authorized response was to schedule a show cause hearing. The court acted without authority when it failed to order that hearing and dismissed Wilton's motion.

Further, if the court's ruling denying appointment of counsel was addressed to Wilton's request for the court to reconsider its ruling, the court abused its discretion by applying the wrong legal standard and by ruling without reasonable grounds. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) ("A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.").

As discussed above, the court did not have authority to deny Wilton a hearing on his motion to withdraw his plea. Smith, 144 Wn. App. at 863. Thus, the court applied the wrong legal standard and abused its discretion when it denied his request for reconsideration. In addition, given appointed counsel's representation that she had not had adequate communications with Wilton and did not adequately understand his legal

and factual issues, the record shows no reasonable factual grounds for the court's denial of Wilton's request for reconsideration. CP 118-19; see State v. Lopez, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995) (addressing defendants' motions to change court appointed counsel, the court abuses its discretion by failing to inform itself of facts on which to exercise discretion), disapproved of on other grounds by State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998).

Wilton objected to his motion being converted into a personal restraint petition. CP 100. Under CrR 7.8, Wilton was entitled to a show cause hearing. Because it would be inappropriate to convert Wilton's motion into a personal restraint petition without first giving him notice, remand is required for a show cause hearing on Wilton's motion to withdraw his plea. See Smith, 144 Wn. App. at 863-64 (discussing future collateral consequences of converting a CrR 7.8 motion into a personal restraint petition).

2. WILTON RECEIVED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO PERFECT HIS MOTION AND FAILED TO SUBSTANTIVELY BRIEF A VIABLE BASIS FOR HIS MOTION TO WITHDRAW HIS PLEA.

When trial counsel makes errors so serious that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and the defendant is prejudiced by that deficient performance, the defendant's

right to a fair trial has been violated. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Trial counsel's performance is deficient when "counsel's representation [falls] below an objective standard of reasonableness." Thomas, 109 Wn.2d at 226; Strickland, 466 U.S. at 687-88. A defendant suffers prejudice as a result of counsel's deficient performance when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d 226 (quoting Strickland, 466 U.S. at 694). A showing that "counsel's deficient conduct more likely than not altered the outcome in the case" is not required. Thomas, 109 Wn.2d 226 (quoting Strickland, 466 U.S. at 693). The question of whether counsel's performance was ineffective requires a case-by-case analysis. State v. Cienfuegos, 144 Wn.2d 222, 229 25 P.3d 1011 (2001); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, rev. denied, 90 Wn.2d 1006 (1978).

Where the record shows counsel failed to conduct adequate investigation into the legal or factual issues presented, the presumption of competent counsel is overcome, and counsel's performance is deemed deficient. Jury, 19 Wn. App. at 263. Counsel will be considered

ineffective if his or her “lack of preparation is so substantial that no reasonably competent attorney would have performed in such manner.” Jury, 19 Wn. App. at 264.

That is what happened here. In her letter to the court, counsel appointed for the CrR 7.8 motion acknowledge she did not “fully understand Mr. Wilton’s legal and factual positions.” CP 119. This was more than five months after counsel had been appointed. CP 118. While counsel attached some case law regarding the need for defendant’s to be fully informed of sentencing consequences, none of those cases addressed the Blakely issue Wilton had raised. CP 120-34. More to the point, however, counsel completely neglected Wilton’s third issue, the failure to enter the State’s promise not to prosecute the Lopez-Valenzuela incident into the official record of the plea agreement. Thus, Wilton’s most viable issue was never presented to the court. See Lee v. Davis, 328 F.3d 896 900-01 (7th Cir. 2003) (in appellate context, failure to raise an issue “both obviously and clearly stronger” than issues raised is objectively deficient).

Failure to ensure Wilton could not be prosecuted for this offense prejudiced him. At that time, the statute of limitations had not run,¹⁵ and

¹⁵ At this point, the statute of limitations on what is presumably a second-degree robbery in the Lopez-Valenzuela incident appears to have run. RCW 9A.04.080(1)(h) provides, “No other felony may be prosecuted more than three years after its commission[.]” The Lopez-Valenzuela

the State could have charged the offense. This would have left Wilton to prove a breach of the plea agreement based solely on an e-mail and an attached note from counsel.

In addition to counsel's failure to adequately investigate and brief Wilton's issues to the court, counsel also failed to ensure the adequacy of his pleading in support of that motion. A motion for relief from judgment must be supported by a properly executed affidavit or a certification that the foregoing is true upon penalty of perjury. CrR 7.8(c)(1). While Wilton signed his pleading, he did not have it properly executed as an affidavit, or certify it, as required by statute. Instead, his signature page states:

EXECUTED under my hand this 15th day of October, 2007.

/signature/
REGINALD WAYNE WILTON
Petitioner

FURTHER AFFIANT SAYETH NAUGHT

Wilton's judgment and sentence was filed on January 22, 2007.

CP 92. According to counsel, Wilton filed his pro se motion to withdraw his plea on or about October 24, 2007, and counsel acknowledged she had

incident occurred November 30, 2005. CP 6. That said, however, discretion of what charges to bring, and what degrees of offenses to charge, rests solely with the prosecutor's office.

received Wilton's motion to withdraw his plea on November 8, 2007. CP 118. Thus, she had approximately two-and-a-half months to ensure Wilton's motion was timely supported by a properly executed affidavit. Instead, counsel re-filed Wilton's unperfected motion on January 17, 2007. CP 118.

Counsel failed to undertake even the most basic analysis of Wilton's motion. As a result of this failure, counsel's performance fell below an objective standard of reasonableness. See Jury, 19 Wn. App. at 261, 264 (failure to support motion with appropriate affidavits indicative of deficient performance). At this point, Wilton has not suffered any prejudice arising from counsel's failure to perfect his motion because it is being heard here based on his incompletely executed affidavit. Should Wilton's right to have his motion heard be deemed waived due to the inadequacy of the affidavit, however, he will have suffered prejudice from counsel's deficient performance. In such circumstance, he will have received inadequate assistance of counsel. The proper remedy is remand for appointment of new counsel to perfect Wilton's motion to withdraw his plea and assist him at the show cause hearing.

D. CONCLUSION

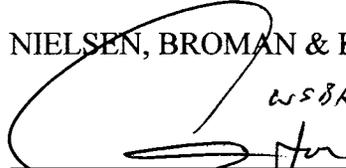
Because the court acted without authority and abused its discretion when it denied counsel's motion for a hearing on Wilton's motion to withdraw his plea, remand is required. Because Wilton received ineffective assistance, remand is required. On remand, Wilton should be appointed new counsel, permitted to perfect his motion to withdraw, and given the choice of withdrawing his plea or having specific performance by formal incorporation of the State's agreement not to charge the Lopez-Valenzuela robbery into the plea agreement. Should he choose specific performance, the no-contact provision of his judgment and sentence must be corrected.

DATED this 16th day of June 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

WSBA 25097


HARLAN R. DORFMAN

WSBA No. 25375


CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Reginald Wilton
No. 62412-1-I

Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

Reginald Wilton 940598
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326-0769

Containing a copy of the brief of appellant, in State v. Reginald Wilton, Cause No. 62412-1-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.



John Sloane
Done in Seattle, Washington

Date

6-16-09

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 JUN 16 PM 4:05