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COURT OF APPEALS  
STATE OF WASHINGTON

2009 AUG 28 PM 4:35

NO. 62412-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

REGINALD WILTON,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE

---

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. CrR 7.8 requires a hearing on a motion to withdraw a guilty plea only if the defendant makes a substantial showing that he or she is entitled to relief or if a factual hearing is required. Wilton asserted grounds for a motion to withdraw his plea that were without merit based on the facts he asserted. Did the trial court properly deny a hearing on that motion?

2. CrR 7.8 requires transfer of a post-trial motion to withdraw a guilty plea to the Court of Appeals for consideration as a personal restraint petition if the motion is not timely, or if the motion does not include a substantial showing of a right to relief and does not require a factual hearing. This rule-based right may be waived by a defendant. Wilton presented an affidavit stating that he did not want his motion to be transferred to the Court of Appeals. Did he waive any right to have the motion transferred?

3. There is a presumption that counsel is effective. Wilton claims the attorney who handled his motion to withdraw his guilty plea failed to investigate his claims and failed to present meritorious claims. Wilton has not identified any relevant investigation that was not conducted. The claims asserted on appeal would not justify

withdrawal of the plea. Has Wilton failed to overcome the presumption of effective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On December 13, 2005, Reginald Wilton was charged in this case, King County Cause No. 05-1-13646-1 SEA, with one count of assault in the first degree with a deadly weapon enhancement, one count of robbery in the first degree with a deadly weapon enhancement, two additional counts of robbery in the first degree, one count of burglary in the first degree, and one count of robbery in the second degree. CP 1-4. At the time, Wilton already had a pending charge of robbery in the second degree in King County (Cause No. 05-1-13585-5 SEA). CP 9. On May 18, 2006, the State, by amended information, added a seventh count to the charges in this case—another robbery in the second degree. CP 10-13.

Wilton's competency was evaluated by a defense expert and by a mental health professional at Western State Hospital (WSH).

RP 3-4.<sup>1</sup> Both experts concluded that he was competent<sup>2</sup> and, on September 29, 2006, the court found that Wilton was competent to stand trial. CP 34-35; RP 3-5, 13.

On November 2, 2006, the trial court heard a motion by Wilton to discharge his attorney. RP 12. The court denied the motion. RP 13.

On November 30, 2006, Wilton pled guilty to the seven charges in the amended information, with the exception of the deadly weapon enhancements, which the State indicated its intention to dismiss. CP 37-65. The plea agreement and the statement of the defendant on plea of guilty provided that the State would dismiss King County Cause No. 05-1-13585-5 SEA at sentencing in this case. CP 40, 57.

The plea agreement, signed by Wilton, his attorney, the deputy prosecutor, and the judge, included a stipulation that the facts set forth in the certification for determination of probable cause and the prosecutor's summary were real and material facts for purposes of sentencing in this case. CP 57; RP 25. The

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<sup>1</sup> The verbatim report of proceedings is in four consecutively paginated volumes. It is cited simply by page number.

<sup>2</sup> The WSH evaluator, psychologist Susan Rahman, concluded that Wilton was malingering. CP 28-29.

certification included a description of the robbery of Maria Lopez-Valenzuela. CP 53.

After the guilty pleas and before the sentencing hearing, the deputy prosecutor who was handling the case at the time sent an e-mail to Wilton's attorney. CP 110. That e-mail is dated December 18, 2006. Id. The full text of the e-mail is as follows:

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 caselaw. I am providing this e-mail in response to you[r] recent communication on this matter.  
Thank you, Jim.

Id. A copy of that e-mail was provided to Wilton with a note from his attorney that it could be appended to the Judgment and Sentence. Id. There was no reference to this communication or to the Valenzuela robbery at the sentencing hearing. RP 32-49.

On January 19, 2007, Wilton was sentenced. RP 46-49. The presumptive sentence range on the assault in the first degree was 240 to 318 months, based on an offender score of 16, which

included points for Wilton's other current offenses and for his prior convictions for murder in the first degree and robbery in the first degree. CP 58-59, 69.

Wilton requested an exceptional sentence below the standard range. RP 32, 35. The basis for that request was not stated at the sentencing hearing and, although there was a defense presentence report, it was not filed, so the basis for that request and the term of confinement requested is unknown. RP 39, 44-46. Wilton claimed that the crimes occurred when his judgment was impaired due to drugs, alcohol, and stress. RP 45. At the sentencing hearing, Wilton and his supporters noted that Wilton had been in prison for over 17 years as a result of his murder conviction and they believed that he did not receive adequate support when he was released in October 2005. RP 40-46.

Judge Theresa Doyle sentenced Wilton to 318 months of confinement for assault in the first degree, the high end of the presumptive sentence range. RP 46-48. She imposed standard range sentences on all of the other charges as well, to run concurrently. CP 68-80. The judge also imposed 24 to 48 months of community custody. CP 72. The judge imposed a no contact order for the maximum term of life, prohibiting contact with the

named victims of all of the charged counts. CP 71. The judgment and sentence was filed on January 22, 2007. CP 68.

On November 1, 2007, Wilton filed an affidavit to be incorporated by reference to "my motion to withdraw my plea," though that document had not yet been filed. CP 148-49. On November 7, 2007, Judge Doyle appointed a new attorney for Wilton, apparently for purposes of the motion to withdraw Wilton's guilty pleas. CP 118, 150.

The motion to withdraw Wilton's guilty pleas was filed on January 17, 2008. CP 81. That document was a pro se pleading. CP 81-117. The signature on the motion was dated October 15, 2007. CP 108. Wilton attached to the motion a notice of appeal dated October 10, 2007. CP 111.

On May 30, 2008, Wilton's attorney, Jenny Devine, filed a letter because the court had requested "a response describing the legal grounds supporting Mr. Wilton's withdrawal of his plea." CP 118. She described possible legal grounds for the motion and argued that Wilton "is entitled to due process." CP 118-19. Devine also explained that her relationship with Wilton was difficult. CP 119. She said that contacts by telephone and letter had been insufficient for her "to fully understand Mr. Wilton's legal and factual

positions." Id. Devine noted that Wilton was having difficulty assisting counsel. Id. Devine said that to continue to represent Wilton, she needed to meet with him in person. Id. She concluded, "I would be more than happy to schedule a meeting in chambers if that would be of any assistance." Id.

In an order dated June 4, 2008,<sup>3</sup> Judge Doyle characterized Devine's letter as a motion to schedule a hearing on the motion to withdraw. CP 135. She denied that motion, because the letter "does not establish a prima facie case for withdrawal of plea." CP 135. Devine withdrew as counsel on June 19, 2008. CP 154.

A letter from Wilton to Judge Doyle, dated June 20, 2008, is attached to the Notice of Appeal filed on October 1, 2008. CP 136-46. A declaration by Wilton concludes the letter and states that the letter was mailed on June 27, 2008. CP 144. A declaration of Wilton filed on October 1, 2008, includes a separate page that is a declaration of service of documents on Judge Doyle. Supp. CP \_\_\_ (Sub no. 105, Declaration/Def, 10/1/2008). The document list includes "Notice of Intent to Appeal, Order on Criminal Motion, Letter addressing reasons and/or grounds for withdrawal of plea

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<sup>3</sup> The date next to the signature on the order appears to be 2005, but this obviously is a scrivener's error.

and other relief, Motion for Order of Indigence, Affidavit in support of Motion for Indigence, and Order of Indigence." Id. That declaration of service document includes a stamp indicating that it was received in Judge Doyle's court on July 2, 2008. Id.

On that day, July 2, 2008, Judge Doyle signed an order of indigency. Supp. CP \_\_\_ (Sub no. 108, Order of Indigency, 10/1/2008). By comparing the appearance of the caption (particularly the unusual font) to a motion filed by Wilton, dated June 27, 2008,<sup>4</sup> it is apparent that the order was provided by Wilton himself. The judge apparently signed the order that had been included in the packet that she received from Wilton on July 2, 2008.

Wilton sent a motion for appointment of counsel directly to Judge Doyle, dated August 12, 2008. Motion to Extend at p.2; Motion to Extend Ex. B. Judge Doyle denied that motion on August 21, 2008. CP 155.

On October 1, 2008, Wilton filed a notice of appeal, seeking review of the Order Denying Motion to Withdraw Guilty Plea

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<sup>4</sup> See Motion for Order of Indigence, page 14 of Appendix A to Motion Requesting to Extend The Time To File A Notice of Appeal, filed in Court of Appeals Oct. 27, 2008 (hereafter Motion to Extend).

entered on June 4, 2008. CP 136. This Court granted Wilton's motion to extend time to file his notice of appeal to October 1, 2008.

## 2. SUBSTANTIVE FACTS

Defendant, Reginald Wilton, was released from a 320-month prison term for murder and robbery on October 5, 2005. CP 9.<sup>5</sup> Between November 16, 2005, and November 30, 2005, he committed the crimes charged in this case. CP 5-8.

On November 16, 2005, Wilton robbed Tod Merley. CP 5. When Wilton displayed a knife and threatened to "stick" Merley, Merley tried to run away, but Wilton caught him. Id. Wilton threw Merley into a fence, punched him and then stabbed him five times. Id. Then Wilton stole Merley's wallet and fled. Id. This incident was reflected in Counts 1 and 2, assault in the first degree and robbery in the first degree. CP 10-11.

Two days later, November 18, 2005, one block away from where Wilton attacked Merley, Wilton robbed Lois Hayes. CP 5. Wilton approached Hayes at a bus stop and grabbed her purse. Id. They struggled over the purse until Hayes fell to the ground and

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<sup>5</sup> The facts included are those in the Certification for Determination of Probable Cause and Prosecutor's Summary, which the parties stipulated to be fact for purposes of sentencing. CP 5-9, 57.

Wilton got the purse away from her. Id. Hayes saw Wilton run into the Vintage Park Apartments. Id. This incident was reflected in Count 3, robbery in the second degree. CP 11.

On November 20, 2005, Wilton robbed Sandra Thiebeault in the Vintage Park Apartments. CP 5. Thiebeault was walking home when Wilton attacked her from behind and grabbed her purse. Id. Thiebeault and Wilton struggled over the purse, and Thiebeault was slammed against a wall where she hit her head. Id. Thiebeault was then knocked to the ground. CP 6. Finally the purse strap broke and Wilton fled. Id. Thiebeault was injured and was very traumatized by the robbery. RP 38-39. This incident was reflected in Count 7, robbery in the second degree. CP 13.

On November 28, 2005, Wilton forced his way into the home of Rolf Paul and robbed him. CP 6. Paul's home was in the same block as Thiebeault's home. CP 5-6. Paul responded to a knock at his door and Wilton forced his way inside and hit and kicked Paul, knocking him to the floor. CP 6. As Paul lay on the floor with fractured ribs, Wilton rifled through Paul's desk and stole his wallet. Id. This incident was reflected in Counts 4 and 5, burglary in the first degree and robbery in the first degree. CP 11-12.

On November 30, 2005, at about 2:40 p.m., Maria Lopez-Valenzuela was robbed at the Vintage Park Apartments. CP 6. A man came up behind her and grabbed her purse. Id. They struggled over the purse until the man punched her in the face. Id. At that point, he got the purse away from her and fled with the purse along with the groceries that she had been carrying. Id. He fled into the Vintage Park Apartments. Id. This incident was not charged.

On November 30, 2005, at about 9:50 p.m., Wilton robbed Lakiva Herndon at the Vintage Park Apartments. CP 6. Wilton came from behind Herndon and grabbed her purse. Id. As they struggled over her purse, they fell to the ground and Herndon cut her elbow. Id. Finally, Wilton struck Herndon in the face and got the purse, then fled through the apartment complex. Id. This incident was reflected in Count 6, robbery in the first degree. CP 12-13.

On December 1, 2005, Wilton was arrested by Seattle Police after a purse snatch (robbery) and confessed to that crime. CP 7. That incident was reflected in a charge of robbery in the second degree in King County Cause No. 05-1-13585-5 SEA. CP 7, 9.

Also on December 1, 2005, the manager of the Vintage Park Apartments told a King County Sheriff's Deputy that she believed that Wilton, who was a tenant there, was the person who had robbed Herndon. CP 7. Herndon identified Wilton as the robber.

Id.

After waiving his constitutional rights, Wilton confessed to all of the described robberies in a taped statement. CP 7-8. He said that he had been living at the Vintage Park Apartments since early to mid-November. CP 8.

C. ARGUMENT

1. THERE IS NO BASIS FOR WITHDRAWAL OF THE GUILTY PLEAS.

Wilton contends that there are two grounds that required the trial court to grant his motion to withdraw his plea: a technical violation of CrR 4.2(e) and the length of the no contact order imposed as to two of the victims. Neither ground has merit. A technical violation of CrR 4.2(e) is not a manifest injustice warranting withdrawal of a guilty plea. The no contact order imposed was a proper crime-related prohibition and even if it was not, that condition is not a basis for withdrawal of a guilty plea.

a. A Technical Violation Of CrR 4.2(e) Is Not A Manifest Injustice Warranting Withdrawal Of The Guilty Pleas.

The nature of the plea agreement in this case was part of the record at the time the plea was entered. If there was any violation of the court rule in the parties' failure to clearly articulate a detail of that agreement, it was a technical defect that does not warrant withdrawal of the guilty pleas. There was no manifest injustice warranting withdrawal of the guilty pleas when there is no allegation that the pleas were not knowingly, voluntarily, and intelligently entered.

CrR 4.2 contains procedural safeguards that are designed to ensure that defendants' constitutional rights are protected in the process of entering a guilty plea. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). These procedural requirements are not constitutionally mandated. Id.

CrR 4.2 requires that if there is a plea agreement, the nature of that agreement be made a part of the record when a guilty plea is entered. It provides:

(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.

CrR 4.2(e).

Because the robbery of Valenzuela was described in the certification for determination of probable cause in this case, which was stipulated as fact for purposes of sentencing and was presented to the judge who accepted the guilty plea, it was at least a fair inference that nonprosecution of that incident was part of the plea agreement as to this case. The State's agreement to dismiss the deadly weapon enhancements on Counts 1 and 2, and to dismiss the robbery charge in cause number 05-1-13585-5 SEA, was explicitly stated in the plea agreement and the guilty plea itself. CP 40, 57. The nature of the plea agreement was on the record.

If this Court concludes that the inference that the Valenzuela robbery would not be separately prosecuted was not clear enough to satisfy CrR 4.2(e), nevertheless that defect did not create a manifest injustice that would warrant relief pursuant to CrR 7.8. The Supreme Court has held that failure to follow the technical requirements of CrR 4.2(g) (providing for the written statement on

plea of guilty) does not amount to a manifest injustice that would justify withdrawal of a guilty plea. Branch, 129 Wn.2d at 642. The Court held that even the absence of the defendant's signature on the guilty plea form was a technical defect that did not warrant withdrawal of a guilty plea, where the record established that the plea was entered voluntarily and intelligently. Id. at 642-43.

Wilton does not claim that his pleas of guilty were not entered knowingly, voluntarily and intelligently. His claim is simply that any technical violation of CrR 4.2(e) requires the court allow him to withdraw his guilty pleas. That argument should be rejected.

Review of Wilton's claim is limited because Wilton did not file an appeal from his conviction, and this post-sentencing motion was a collateral attack on the judgment. A post-judgment motion to withdraw a guilty plea is a collateral attack on the conviction. RCW 10.73.090(2); State v. Davis, 125 Wn. App. 59, 63, 104 P.3d 11 (2004). To obtain collateral relief from a conviction based on nonconstitutional grounds, a defendant "must establish that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." In re Moore, 116 Wn.2d 30, 32-33, 803 P.2d 300 (1991) (quoting In re Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990)).

The Supreme Court has specifically held that a claim that CrR 4.2 has been violated is subject to "the rule that a conviction may not be collaterally attacked upon a nonconstitutional ground which could have been raised on appeal, but was not." In re Keene, 95 Wn.2d 203, 205, 622 P.2d 360 (1980). Because an appeal may be taken as to the circumstances under which a plea was made, if no appeal is taken, the claim of a violation of CrR 4.2 is precluded. Id.

Wilton relies on State v. Perez, 33 Wn. App. 258, 654 P.2d 708 (1982), arguing that it establishes an absolute rule requiring withdrawal of a guilty plea for a technical violation of CrR 4.2(e). While the opinion in Perez states that absolute rule, it also notes<sup>6</sup> that Division I of the court took a contrary position in State v. Ridgley, 28 Wn. App. 351, 623 P.2d 717, rev. denied, 95 Wn.2d 1020 (1981). In Ridgley, this Court held that a technical violation of CrR 4.2 does not warrant relief unless there is an allegation of prejudice and proof of prejudice. Id. at 358-59. The court in Perez did not address the limitation on collateral attacks identified by the Supreme Court in Keene, precluding nonconstitutional claims in a post-sentencing motion to withdraw guilty plea. After the Perez

opinion, the court in State v. Osborne, 35 Wn. App. 751, 759, 669 P.2d 905 (1983), affirmed on other grounds, 102 Wn.2d 87 (1984), followed Ridgley, supra, holding that a technical error in taking a guilty plea is not a manifest injustice warranting withdrawal of that plea.

b. The No Contact Order Imposed Was A Proper Crime-Related Prohibition.

Wilton asserts as an assignment of error that the term of the no contact order imposed at sentencing exceeds the maximum term of sentence as to Lois Hayes and Sandra Thiebeault, who were victims of robbery in the second degree. Wilton claims the trial court erred because it did not correct the judgment and sentence, but no such relief was sought by Wilton below. In any event, the trial court did not abuse its discretion in imposing the no contact order.

The challenge to a condition of sentence is beyond the scope of this appeal from the denial of a motion to withdraw the guilty pleas. The scope of appeal from a hearing under CrR 7.8 is limited to the issues raised in that hearing. State v. Gaut, 111 Wn.

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<sup>6</sup> 33 Wn. App. at 263 n.1.

App. 875, 880-81, 46 P.3d 832 (2002). The only motion before the trial court in this case was a motion to withdraw the guilty pleas.

The reference that Wilton made below to the length of the no contact order entered was a claim of error as to the no contact order as a whole; it was not directed only to the victims specified in this appeal. CP 107. Wilton's claim below included no citation to authority. Id. It appears most likely that it related to Wilton's argument that under Blakely v. Washington,<sup>7</sup> the maximum term for each crime was the high end of the presumptive sentencing range. CP 92.

Even if the argument asserted on appeal had been presented to the trial court, it was irrelevant to the relief sought—withdrawal of the plea. Because Wilton did not seek correction of the sentence below, the issue is not properly raised in this appeal.

Moreover, the no contact order as to Hayes and Thiebeault was proper because these two victims of robbery in the second degree were witnesses as to the other charges and because all of the charges were related. The court had the authority to impose a no contact order as a crime-related prohibition for a term of life as

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<sup>7</sup> 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

to Counts 1, 2, 4, 5, and 6. RCW 9.94A.505(8); State v. Armendariz, 160 Wn.2d 106, 118-19, 156 P.3d 201 (2007). The court had the authority to include Lois Hayes and Sandra Thiebeault in its no-contact order as a crime-related prohibition on any of those counts.

A "crime-related prohibition" must relate to "conduct that directly relates to the circumstances of the crime." RCW 9.94A.030(10). No contact orders are not limited to direct victims of the crime. State v. Warren, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009). The trial court's imposition of a crime-related prohibition is reviewed for abuse of discretion. Id. at 32.

The primary concern in reviewing crime-related prohibitions is that they do not involve coerced rehabilitation. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). Otherwise, crime-related prohibitions are within the sentencing judge's discretion and will be reversed only if manifestly unreasonable, such that no reasonable person would take the view of the trial court. Id. at 37.

All of the convictions in this case involved crimes that were of a similar nature—all related to robberies and crimes linked to

those robberies. CP 5-8. All of the crimes occurred within two weeks and within an area of a few blocks. Id. Given the close connection between the crimes, the imposition of the no contact order for Hayes and Thiebeault as a crime-related prohibition on the other convictions, effective for life, was not an abuse of discretion.

2. WILTON HAS NOT ESTABLISHED A VIOLATION OF CrR 7.8(c).

Wilton argues that the trial court applied an old version of CrR 7.8 and acted without authority in denying his motion without a hearing. That argument should be rejected. The trial court properly applied CrR 7.8 when it concluded that no prima facie case for relief had been presented and denied a hearing. The court properly did not transfer the motion to the court of appeals because Wilton objected to such a transfer.

CrR 7.8(c) provides in relevant part:

(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.

CrR 7.8(c)(2), (3).

a. Wilton Waived The Right To Transfer Of His Motion To The Court Of Appeals.

A defendant may prevent a transfer of a post-sentence motion under CrR 7.8(c)(2) for strategic reasons. State v. Smith, 144 Wn. App. 860, 864-65, 184 P.3d 666 (2008). Wilton included an election in his motion in the trial court specifying that he objected to the transfer of his motion to the court of appeals pursuant to CrR 7.8. CP 110. A party cannot create an error and then complain of that error on appeal. In re Thompson, 141 Wn.2d 712, 723-24, 10 P.3d 380 (2000). Because Wilton asked the trial court not to transfer the motion, he is precluded from complaining now of this alleged violation of CrR 7.8(c)(2).

b. The Trial Court Properly Denied A Hearing On The Motion To Withdraw The Guilty Pleas.

The trial court properly denied a show cause hearing. Wilton does not contend that the legal arguments presented to the trial

court by his counsel had merit. Neither does he identify a factual issue that required resolution in order to rule on the motion to withdraw his pleas. Because there was not a substantial showing that Wilton was entitled to relief or that a factual hearing was required to resolve the motion, no trial court hearing was required pursuant to CrR 7.8(c).

The trial court requested a statement of the legal basis for the motion to withdraw from defense counsel. CP 118. Counsel on the motion, Jenny Devine, filed a letter in response to that request indicating that the core of the motion was a contention that under Blakely v. Washington,<sup>8</sup> the maximum term for each crime was the high end of the presumptive sentencing range. CP 118. She indicated that if a sentence extending beyond the maximum term were considered an exceptional sentence after Blakely, it may be that Wilton was not advised properly about this. CP 118-19. She also indicated that if the premise (that the maximum term was limited by the presumptive range) was correct, Wilton may have been misinformed about the maximum term. Id. Wilton does not contend on appeal that either of his arguments premised on Blakely

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<sup>8</sup> 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

has any legal merit. As the grounds presented for relief did not have merit, the court properly denied the motion.

Devine's assertion in her letter that it was difficult to advise Wilton does not change this analysis. She asserted that despite telephone conversations and letters, she did not "fully understand Mr. Wilton's legal and factual positions." CP 119. Wilton's position is reflected in his lengthy motion filed in the trial court.<sup>9</sup> CP 81-117. Devine's argument reflects the first two arguments in Wilton's own motion. CP 84-96.

Although Wilton claims that the trial court erred in refusing to reconsider its denial of the motion to withdraw the pleas and the motion for a hearing, there was no motion for reconsideration filed. Even if Wilton's letter dated June 20, 2008,<sup>10</sup> was received by the court, and might be considered a motion for reconsideration, it was not properly filed.

Civil Rule 59 requires that a motion for reconsideration be filed and served within ten days of the order at issue. CR 59(b). Because the criminal rules do not address the procedure for

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<sup>9</sup> The trial court apparently concluded that the motion filed on January 17, 2007, was effective in noting a motion to withdraw the guilty pleas pursuant to CrR 7.8.

<sup>10</sup> A letter from Wilton to Judge Doyle, dated June 20, 2008, is attached to the Notice of Appeal filed on October 1, 2008. CP 136-46.

motions for reconsideration, this civil rule applies. See Mark v. King Broadcasting Co., 27 Wn. App. 344, 349-50, 618 P.2d 512 (1980), aff'd sub nom, Mark v. Seattle Times, 96 Wn.2d 473, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124 (1982) (civil procedural rules apply if criminal rules do not address the procedure). The June 20, 2008, letter was not filed and there is no indication that it was served on the State. Further, the judge's order was entered on June 4, 2008, and Wilton's declaration on the letter is that it was mailed on June 27, 2008,<sup>11</sup> so the letter was mailed well beyond the time limit for a motion for reconsideration. The time limit for a motion for reconsideration may not be extended. CR 6(b).

Wilton claims that the court's denial of a motion for appointment of counsel, entered on August 21, 2008, may have been a denial of Wilton's motion for reconsideration, because no motion for appointment of counsel was filed. App. Brief at 13, 23. However, Wilton sent a motion for appointment of counsel directly to Judge Doyle, dated August 12, 2008. Motion to Extend at p.2; Motion to Extend Ex. B. The trial court denied that motion in its order of August 21, 2008. CP 155. The claim that this ruling was based on an incorrect legal standard and was based on untenable

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<sup>11</sup> CP 144.

reasons fails as the premise that there was not motion for counsel is faulty.

Wilton does not argue that Devine's possible legal theories had substantive merit and, as discussed in section C.1, supra, the defects claimed in this appeal also have no merit. Because there was no legal foundation for Wilton's motion, it did not require a show cause hearing.

3. THE DEFENSE ATTORNEY HANDLING THE MOTION TO WITHDRAW DID NOT PROVIDE INEFFECTIVE ASSISTANCE.

Wilton argues that his counsel for the post-sentencing motion to withdraw his guilty plea was ineffective for failing to investigate his claims and for failing to present the two claims raised in this appeal. That argument should be rejected. Wilton has shown no plausible basis for withdrawal of his guilty plea and has not identified any theory that required factual investigation. He cannot show that the failure to investigate an unidentified theory was deficient representation or that he was actually prejudiced by that failure or the failure to raise meritless grounds for relief.

To establish ineffective assistance of counsel, Wilton must show both that defense counsel's representation was deficient, *i.e.*,

that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced Wilton. In re Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The reviewing court must begin with a strong presumption that the representation of counsel was effective. Hutchinson, 147 Wn.2d at 206. "[T]his presumption will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). Beginning with the strong presumption that counsel's representation was effective, the court must base its determination of a claim of deficient representation on the record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Wilton has not shown that his attorney's performance was deficient.

When the allegation of ineffectiveness relates to failure to investigate, "a particular decision not to investigate must be directly assessed for reasonableness, giving great deference to counsel's judgments." In re Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). The attorney's actions or inaction is evaluated based on "what was

known and reasonable at the time the attorney made his choices."

Id. at 253.

The record does not support Wilton's claim that the attorney who handled his post-sentencing motion, Jenny Devine, did not adequately investigate grounds for relief. Devine both talked to Wilton and corresponded with him by letter. CP 119. Without evidence that there was a failure to investigate particular facts that could support a legitimate claim for relief, a claim of deficient investigation must be rejected. In re Gentry, 137 Wn.2d 378, 403-04, 972 P.2d 1250 (1999). The record does not support a claim that counsel neglected investigation of any issue.

While Wilton asserts that a clearer record could have been made that the State had agreed not to prosecute the Valenzuela robbery, that was not the goal of Wilton's motion to withdraw the guilty plea. The State explicitly stated its agreement not to prosecute that robbery in an e-mail to Wilton's trial counsel, which was sent prior to the sentencing hearing. CP 110. The issue was not raised at the sentencing hearing by either counsel, or by Wilton. RP 32-49. There is no indication that the State might bring a charge based on that robbery or that Wilton ever had any concern that the State would bring such a charge. Wilton has not identified

what action could have been taken in the context of this CrR 7.8 motion to guarantee that charge would not be filed. As he has not identified what could have been done, Wilton has not established deficient representation in the failure of counsel to do it.

Devine was acting in a role comparable to appellate counsel when she identified potential legal grounds for withdrawal of Wilton's guilty plea. In order to prevail on a claim of ineffective assistance of appellate counsel, Wilton must show that the legal issue that counsel failed to raise had merit and that Wilton actually was prejudiced by the failure to raise the issue. In re Dalluge, 152 Wn.2d 772, 787, 100 P.3d 279 (2004). The State has explained in a previous section of the brief that the legal grounds for withdrawal of the guilty plea that are raised in this appeal lack merit. Counsel was not deficient in failing to raise these meritless issues.

Finally, Wilton cannot establish the prejudice prong of his ineffective assistance claim. Even if counsel's performance was deficient, there must be a showing that but for counsel's errors, the result of the proceeding would have been different. State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006).

Speculation that a different result might have occurred is not sufficient. Id. at 99-102. The defendant must "*affirmatively prove*

*prejudice*" to establish ineffective assistance of counsel. Id. at 102 (emphasis in original). Without that showing of prejudice, Wilton's ineffectiveness claim must be rejected. The standard applied to appellate counsel is that to establish prejudice the defendant must show a reasonable probability that, but for his counsel's failure to raise the issue, "he would have prevailed." In re Dalluge, 152 Wn.2d at 788.

With no evidence that Wilton's guilty pleas were not knowing, voluntary and intelligent, there has been no showing of any probability that the only outcome at issue here, the denial of Wilton's motion to withdraw his guilty pleas, would have changed after more unspecified investigation or if other issues had been presented in the letter filed by counsel.

If the court concludes that counsel was ineffective for failure to investigate or raise a post-sentencing claim, the remedy is to remand for Wilton to present that claim in a show cause hearing before Judge Doyle. Wilton's request for appointment of new counsel in the trial court should be denied. Although counsel was appointed after the motion was filed below, Wilton does not have a right to appointed counsel for purposes of that motion. RCW 10.73.150; Davis, 125 Wn. App. at 63-64.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the trial court's order denying the motion to withdraw the guilty pleas entered by Wilton in this case.

DATED this 28<sup>th</sup> day of August, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: Donna Wise  
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to CHRISTOPHER GIBSON and HARLAND DORFMAN, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, 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.

U Brame  
Name  
Done in Seattle, Washington

8/28/09  
Date