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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,

v.

MARTHA C. TORRES,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE JAMES CAYCE

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JENNIFER S. ATCHISON  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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A. ISSUE

1. A defendant may withdraw her guilty plea only if it is necessary to correct a manifest injustice. While an involuntary plea constitutes a manifest injustice, the defendant bears the heavy burden of rebutting the strong presumption that her plea was voluntarily entered. A defendant's self-serving allegation of involuntariness is insufficient to meet this burden. Here, Torres signed the plea form and stated on the record that she had not been threatened or coerced into pleading guilty. The only evidence of coercion presented was Torres's allegations in her affidavit. Did the trial court properly exercise its discretion in denying Torres's motion to withdraw her plea?

2. A plea entered without the benefit of effective counsel constitutes a manifest injustice. To withdraw a plea based on ineffective assistance of counsel, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance, she would not have pled guilty and would have insisted on going to trial. Here, after reviewing the State's evidence, including surveillance video that showed Torres committing the alleged crime, as well as the plea offer, Torres's counsel chose not to contact two individuals who had no

information material to the issue of Torres's guilt. Did the trial court properly exercise its discretion in denying Torres's motion to withdraw her plea?

B. STATEMENT OF FACTS

Jacqueline Corona Alvarez owns a music store where customers can also arrange for money orders and wire transfers to be sent to Mexico. CP 2. The cash from the wire transfers and money orders was kept in an unsecured drawer until the clerk deposited the money into the safe. CP 2. In October 2007, Alvarez noticed that the store was missing money from the wire transfer purchases. CP 2. Alvarez's boyfriend, Miguel Oliva Alarcon, installed a surveillance system to determine who was taking the money. CP 2.

Martha Torres was a friend of Alvarez's who frequently came to the store to use the Internet. CP 2. On June 16, 2008, a store clerk thought she saw Torres going through the money drawer and told her employers. CP 2. Alarcon reviewed the surveillance tape and saw that Torres had opened the money drawer, removed something and put it in her pocket. CP 2. Based on receipts

provided by Alarcon, a total of \$11,688.99 was in the drawer at the time Torres was seen removing the item.<sup>1</sup> CP 2.

Alvarez and Alarcon later confronted Torres at her home with still photos from the video. CP 2. After seeing the photos, Torres admitted to stealing money, but claimed that she had taken no more than \$500 during five separate thefts. CP 2. Torres then wrote a personal check in the amount of \$11,370 to reimburse the store. CP 2. When Alarcon attempted to cash the check, it was denied because there were insufficient funds in Torres's bank account. CP 2.

After the crime was reported to the police, Torres was interviewed by King County Sheriff Detective Ben Miller. CP 2. Torres admitted to Miller that she had stolen money from the store, telling him the same story that she had earlier told Alvarez and Alarcon. CP 2.

In July 2008, the State charged Torres with one count of Theft in the Second Degree. CP 1-4. Torres pled guilty as charged

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<sup>1</sup> The store clerk would collect the money from several sales and deposit it into the safe once she had time. CP 2.

on January 6, 2009. CP 5-23; 1RP 2-8.<sup>2</sup> At the plea hearing, the prosecutor conducted a colloquy with Torres in which Torres confirmed that she had gone over the plea form with her attorney, that no one had made any threats or promises to induce her to plead guilty, and that she had no questions about the plea form. 1RP 2, 6. Torres also confirmed that it was her signature on the form, which she had signed three weeks before, and that she still intended to plead guilty that day. 1RP 6.

Torres's counsel, Felicia Wartnik, told the court:

I have had a number of opportunities to meet with Ms. Torres. We have reviewed her options as well as the discovery in the case, and we reviewed the plea form together, and I think I have had an opportunity to answer her questions.

1RP 7. Ms. Wartnik also told the court that she believed that Torres was making a knowing, intelligent, and voluntary decision to plead guilty. 1RP 7.

The court then asked Torres if she agreed with what Ms. Wartnik had just said, to which Torres replied, "Yes." 1RP 7. Torres also stated that she did not have any questions for the court

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<sup>2</sup> The Verbatim Report of Proceedings consists of two volumes. The State has adopted the following reference system: 1RP (01/06/09) and 2RP (05/22/09).

and that it was her personal decision to plead guilty. 1RP 7. After finding that Torres was making a knowing, intelligent, and voluntary decision, the court accepted Torres's guilty plea. 1RP 7-8.

At her sentencing hearing, two weeks later, Torres moved to continue the hearing and hired new counsel, Nicholas Marchi. CP 64-67. On March 20<sup>th</sup>, Torres filed a motion to withdraw her plea based on ineffective assistance of counsel. CP 24, 52-57.

In her attached affidavit, Torres stated that she informed her attorneys<sup>3</sup> that she and her family had been threatened by Alarcon, and that she was fearful that Alarcon would harm her or her family. CP 59. Torres further declared that she had provided to her attorneys copies of the audio recordings of the threatening messages, as well as contact information for her sister, Karla Torres, who had received some of the threatening phone calls. CP 59. Torres also stated that another individual, Teresa Hernandez<sup>3</sup>, had had a similar experience where Alarcon and Alvarez threatened her regarding an alleged debt. CP 59.

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<sup>3</sup> Torres was represented by two attorneys with Society of Counsel Representing Accused Persons. Supp. CP 61-62. The second attorney, Felicia Wartnik, became attorney of record in October, 2008, three months after filing. CP 63. Ms. Wartnik conducted negotiations and signed the plea paperwork. CP 14, 20, 23.

Torres declared that she did not believe that her attorneys investigated the information that she had provided or contacted any witnesses, and that had she known that that was the case, she would not have pled guilty and agreed to \$11,370 in restitution. CP 58-60.

At the hearing on the motion to withdraw Torres's plea, the court first inquired of Mr. Marchi whether he had a transcript of the plea hearing. 2RP 2-3. Mr. Marchi responded that he did not believe that the transcript was necessary, as "[t]he basis of the claim [was] ineffective assistance of counsel based on her attorney's performance and lack of investigation in her case." 2RP 3.

The court next asked Mr. Marchi whether Torres had answered truthfully when she stated at the plea hearing that no threats or promises had been made to her to induce her to plead guilty. 2RP 3. Mr. Marchi responded that although Torres's attorneys had not threatened her to get her to plead guilty, the victim had, and therefore Torres's plea was obtained under duress. 2RP 4.

The State rested on its brief, in which it argued that the motion should be denied for three reasons: 1) without the transcript

of the plea hearing, the record before the trial court was insufficient to address the motion; 2) Torres's affidavit was insufficient to establish that her plea was involuntary, where she had been informed of the direct consequences of her plea, was aware of all of the information contained in her affidavit at the time of her plea, and signed the plea paperwork indicating that she had not been coerced into pleading guilty; and 3) given that Torres's affidavit was self-serving and uncorroborated, the affidavit alone was insufficient to rebut the presumption that counsel's decisions were tactical, or to show that, had counsel spoken with the two potential witnesses, counsel's advice about whether Torres should plead guilty would have changed. CP 25-32. No testimony was presented at the hearing. 2RP.

Relying on the judge's memory of the plea hearing, the court denied Torres's motion, concluding that she had not provided sufficient evidence for the court to find that her counsel was ineffective, particularly in light of the colloquy conducted at the plea hearing. 2RP 4.

The court set sentencing over one week, at which time the court imposed a standard range sentence of 30 days of confinement, converted to 240 hours of community service. CP 37.

The court also imposed the agreed restitution amount of \$11,370.

CP 35, 39.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED TORRES'S MOTION TO WITHDRAW HER KNOWING, INTELLIGENT, AND VOLUNTARY GUILTY PLEA.

Torres asserts that the trial court abused its discretion when it denied her motion to withdraw her guilty plea because she established that it was involuntary. Torres's claim is without merit because, during the plea hearing, Torres affirmatively stated that she had not been coerced into pleading guilty and had had ample time to decide whether to enter a guilty plea or go to trial, and she did not provide any evidence of coercion beyond her self-serving allegations.

Due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). In other words, a plea must be entered without coercion and with a correct understanding of the charge and the direct consequences of pleading guilty. State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001); State v. Ross,

129 Wn.2d 279, 284, 916 P.2d 405 (1996). Whether a plea is knowingly, intelligently, and voluntarily made is determined from the totality of the circumstances. Branch, 129 Wn.2d at 642.

A trial court may allow a defendant to withdraw her guilty plea before sentencing under CrR 4.2(f), if the “withdrawal is necessary to correct a manifest injustice.” The Washington State Supreme Court recognizes four indicia of manifest injustice: 1) the defendant was denied effective assistance of counsel; 2) the plea was not ratified by the defendant; 3) the plea was involuntary; 4) the plea agreement was not kept by the prosecution. State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974); State v. Dixon, 38 Wn. App. 74, 76, 683 P.2d 1144 (1984). The defendant has the burden of establishing a manifest injustice “in light of all the surrounding facts of his case.” Dixon, 38 Wn. App. at 76. This is a demanding standard, made so because of the many safeguards taken when a defendant enters a guilty plea. State v. Conley, 121 Wn. App. 280, 284, 87 P.3d 1221 (2004); State v. Hystad, 36 Wn. App. 42, 45, 671 P.2d 793 (1983). A manifest injustice is one that is “obvious, directly observable and not obscure.” Ross, 129 Wn.2d at 283-84. A trial court’s denial of a motion to withdraw a guilty plea is reviewed for an abuse of discretion. State v.

Williams, 117 Wn. App. 390, 398, 71 P.3d 686 (2003), rev. denied, 151 Wn.2d 1011 (2004).

When a defendant completes a written statement on plea of guilty in compliance with CrR 4.2(g), and acknowledges that he or she has read and understands the form and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. In re Pers. Restraint of Scott, 150 Wn. App. 414, 427, 208 P.3d 1211 (2009); Branch, 129 Wn.2d at 642 n.2. When a judge inquires orally of the defendant and "satisfies himself on the record of the existence of various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable." State v. Perez, 33 Wn. App. 258, 262, 654 P.2d 708 (1982). A defendant's self-serving affidavit alleging coercion is insufficient to satisfy the high evidentiary burden required under CrR 4.2(f). State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

Torres states in her affidavit that she and her sister received threatening phone calls from Alvarez and Alarcon about pleading guilty, and that she was fearful that Alarcon would harm her or her family. CP 59. But Torres did not produce any audio recordings of the alleged threats that she claimed to have provided to her attorneys, nor did Torres produce any evidence to corroborate the

existence of these threats. More importantly, Torres told the court that she had not been coerced into pleading guilty, and, in fact, she had signed the plea form three weeks before the hearing, indicating her intent to plead guilty. 1RP 6-7; CP 13-14.

A total of seven weeks passed between the time the plea offer was made in November and the plea hearing in January. 1RP; CP 23. This was ample time for Torres to consult with her attorney, evaluate her options, and decide how to proceed. Because Torres signed the plea form and told the court at the hearing that she had not been threatened or coerced into pleading guilty, the self-serving and uncorroborated allegations of coercion Torres sets forth in her affidavit are insufficient to rebut the strong presumption that her plea was made voluntarily. See Osborne, 102 Wn.2d at 97. Her conviction should be affirmed.

2. THE TRIAL COURT PROPERLY DENIED TORRES'S MOTION TO WITHDRAW HER GUILTY PLEA BECAUSE SHE HAD COMPETENT COUNSEL.

Torres argues that the trial court abused its discretion when it denied her motion to withdraw her guilty plea because the State failed to produce evidence rebutting Torres's claim that her counsel

was ineffective. This argument is without merit for two reasons. First, contrary to Torres's assertion, the State had no burden to produce any evidence regarding the competency of Torres's counsel. Rather, it was Torres's burden to show that a manifest injustice occurred because she was denied effective counsel. Second, Torres cannot establish that her counsel's tactical decision not to contact two non-material witnesses prejudiced her.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: 1) that trial counsel's representation was deficient; and 2) that counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong of the test defeats the claim. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990). In assessing performance, "the court must make every effort to eliminate the distorting effects of hindsight." State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (quoting In re Pers. Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)).

Conduct that can be characterized as legitimate trial strategy or tactics cannot constitute ineffective assistance. Osborne, 102 Wn.2d at 99.

a. Torres Has Not Established That Her Counsel's Performance Fell Below An Objective Standard Of Reasonableness.

Competency of counsel is evaluated from the trial counsel's perspective at the time of the alleged error and in light of the entire record below. McFarland, 127 Wn.2d at 335. Counsel's performance is deficient only when it falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88. A reviewing court engages in a strong presumption that counsel's performance was effective and within the wide range of reasonable professional assistance. McFarland, 127 Wn.2d at 335.

Counsel's duty in the plea bargaining process includes communicating the prosecutor's offers, discussing tentative plea negotiations, as well as discussing the strengths and weaknesses of the defendant's case so that the defendant knows what to expect

and makes an informed decision on whether to plead guilty. State v. James, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). During the negotiations, counsel must “actually and substantially [assist] his client in deciding whether to plead guilty.” Osborne, 102 Wn.2d at 99. The duty to “actually and substantially assist” includes informing the defendant about all of the direct consequences of a guilty plea. State v. Barton, 93 Wn.2d 301, 305, 309 P.2d 1353 (1980). Direct consequences are those that have a “definite, immediate and largely automatic” effect on the defendant’s range of punishment.<sup>4</sup> Id.

Here, before entering her guilty plea, Torres and her attorney reviewed the discovery from the State and discussed Torres’s options in light of the State’s evidence against her. 1RP 7. As such, Torres knew that the State possessed a copy of the surveillance tape that showed her final theft from the store, as well

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<sup>4</sup> Torres does not dispute that she was informed of all of the direct consequences of her plea. Direct consequences include (1) the statutory maximum sentence, (2) the standard sentencing range, (3) eligibility for SSOSA, (4) mandatory community placement, (5) restitution, and (6) any mandatory minimum sentence. State v. McDermond, 112 Wn. App. 239, 243-45, 47 P.3d 600 (2002) (internal citations omitted), overruled on other grounds by In re Pers. Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004).

as the wire transfer receipts, which established that the amount of cash missing was in excess of \$11,000. 1RP 7; CP 2. Torres also undoubtedly knew that Alvarez and Alarcon would testify at trial that when they confronted her about the thefts, Torres wrote a check, which subsequently bounced, in the amount of \$11,370 to reimburse the store for the stolen money. 1RP 7; CP 2.

Even if Torres told Ms. Wartnik about her two potential witnesses, given the strength of the State's evidence, Ms. Wartnik likely decided that it was unnecessary to contact two witnesses who had no exculpatory information to offer. Moreover, Ms. Wartnik would have known that if Torres opted to go to trial, the State would likely amend the information to a first degree theft based on the value of the cash stolen.<sup>5</sup> The strength of the State's evidence and the potential for greater punishment post trial are legitimate considerations during negotiations and when deciding whether to accept the plea offer of the State. Because Torres cannot show that Ms. Wartnik's decision not to contact her sister and another potential witness was objectively unreasonable in light of the

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<sup>5</sup> A person commits theft in the first degree if the property or services stolen exceed \$1,500. RCW 9A.56.030(1)(a) (2008).

State's evidence against her, she has failed to establish that Ms. Wartnik's performance was deficient.<sup>6</sup>

b. Torres Has Failed To Establish Prejudice.

When a challenge to a guilty plea is based on a claim of ineffective assistance of counsel, the prejudice prong is analyzed in terms of whether counsel's performance affected the outcome of the plea process. Garcia, 57 Wn. App. at 932-33 (citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). Where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination of whether the error prejudiced the defendant by causing her to plead guilty rather than go to trial depends on the likelihood that the

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<sup>6</sup> After the filing of Appellant's Opening Brief, the Washington State Supreme Court issued its decision in State v. A.N.J., 168 Wn.2d 91, 25 P.3d 956 (2010), in which the defendant moved to withdraw his guilty plea based on a claim of ineffective assistance for, among other things, failure to investigate his case. The court held that counsel was ineffective, in part because he could not properly evaluate the State's plea offer without properly evaluating the State's evidence. Id. at 110. "The degree and extent of the investigation required will vary depending on the issues and facts of each case, but...counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." Id. at 111-12. A.N.J. is distinguishable from the instant case because Ms. Wartnik, in addition to reviewing the plea paperwork, reviewed the State's evidence with Torres—especially the video of Torres committing the crime. 1RP 7.

“newly discovered evidence” would have led counsel to change her recommendation as to the plea. Garcia, 57 Wn. App. at 933. To prevail, Torres must satisfy this Court that there is a reasonable probability that, but for counsel’s deficient performance, she would not have pled guilty and would have insisted on going to trial. Id.

None of the facts alleged in Torres’s affidavit constitute “newly discovered evidence” that was unknown to Torres at the time that she entered her guilty plea. CP 58-60. Nor do any of these statements support the conclusion that, had Ms. Wartnik contacted additional witnesses or further investigated in some unspecified way, exculpatory evidence would have been discovered. Furthermore, as discussed above, the State had a strong case against Torres and the potential to amend the information to a higher charge. There is nothing in the record to suggest that Ms. Wartnik’s recommendation regarding the State’s plea offer would have changed if the additional investigation had been conducted. See Garcia, 57 Wn. App. at 933.

Torres has failed to establish that Ms. Wartnik’s performance was so deficient that it prejudiced her. Therefore, the trial court properly denied her motion to withdraw her guilty plea and her conviction should be affirmed.

D. CONCLUSION

For the foregoing reasons, Torres's conviction should be affirmed.

DATED this 21<sup>st</sup> day of April, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: Jennifer S. Atchison  
JENNIFER S. ATCHISON, WSBA #33263  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

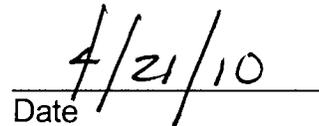
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nicholas Marchi, the attorney for the appellant, at Carney & Marchi, containing a copy of the Brief of Respondent, in STATE V. MARTHA C. TORRES, Cause No. 63672-3-1, 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.



Name Wynne Brame  
Done in Seattle, Washington

  
Date