

64238-3

64238-3

NO. 64238-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EMORY BERUBE,

Appellant.

2010 MAY -3 PM 4:41
COURT OF APPEALS
DIVISION I
CLERK OF COURT

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED.

A defendant who pleads guilty cannot prevail on a claim of ineffective assistance of counsel based upon deficient investigation without establishing specific prejudice. Specific prejudice is established by showing that a more thorough investigation would have resulted in discovery of evidence that would have changed counsel's advice and the defendant's decision to plead guilty. Did the trial court properly deny defendant's motion to withdraw the guilty plea where there was no showing that further investigation would have resulted in discovery of evidence that would have been favorable to the defense and would have altered counsel's advice or the defendant's decision to plead guilty to a greatly reduced charge?

B. STATEMENT OF THE CASE.

Emory Berube was charged by information with the crimes of assault in the first degree while armed with a firearm, possession of heroin and possession of cocaine. CP 1-2, 10-12. His brother, Ivory Berube, was also charged with the assault. CP 1-2, 10-12.

The certification for determination of probable cause reflects that the victim, Tanisha Barquet, was shot in the neck and the leg

on July 12, 2008. CP 3, 4. When interviewed at the hospital, the victim recounted that she was at an establishment named Thompson's Point of View on the evening of the shooting when a man known to her as "Inch," later identified as Emory Berube, asked her if she was Tanisha Barquet. CP 3. She responded that she was, and he began to question her about an earlier incident in which one of his friends was shot. CP 3. He accused her of being involved in the shooting and said he should "kick her ass." CP 3. He then stated that he would call his brother and they were going to do "some serious harm" to her. CP 3. The man called someone on his cell phone, and several minutes later another man, wearing glasses and a white t-shirt, later identified as Ivory Berube, arrived and began yelling at her and threatening her. CP 3. She saw this second male walk to a nearby vehicle, remove an object and place it in the front of his pants. CP 3. As he walked toward her, she could see the outline of a gun in his pants. CP 4. The victim then left the area. Later that evening, she learned that the two men who had threatened her were brothers named Emory and Ivory. CP 4.

Later in the evening, the victim returned to the area and stopped at an Ethiopian lounge in the 1200 block of East Jefferson Street. CP 4. She was waiting outside for her friend to finish her

drink when Ivory suddenly appeared in front of her and fired a gun at her. CP 4. She ran as the first shot struck her ear and grazed her neck. CP 4. The second shot struck her leg damaging her femoral artery. CP 3-4. She hid under some bushes in a nearby yard because three or four men came into the yard looking for her. CP 4. Police officers found her unconscious underneath the bushes. CP 4. After receiving medical treatment, she positively identified Emory and Ivory Berube from photomontages as the two men who had accosted her. CP 4. She identified Ivory Berube as the shooter. CP 4.

The police obtained security video footage from an establishment named Waid's located in the same block where the shooting occurred. CP 4. The video shows the victim being yelled at by two men. CP 4. One of the men, who will be referred to as "person A," wearing glasses and a white t-shirt, makes a hand gesture that appears to mimic racking the slide of a semi-automatic pistol and pointing it at the victim. CP 4. The video depicts the two men talking and then "person A" separates as "person B" appears to be distracting the victim by continuing to yell at her while clutching at something in the front of his pants. CP 4. "Person A" appears to be "attempting to out flank" the victim by slowly walking

along the fence line. CP 4. "Person B" glances in the direction of "person A" several times as if checking his location. CP 4-5. A few moments later the video depicts the victim running across the street with "person A" following the victim with his right hand extended, with an object in it, pointed at the victim's back. CP 5. Moments later multiple police arrive. CP 5.

Emory Berube was arrested on July 17, 2008. The police found heroin and cocaine on his person. CP 5-6. In a video- and audio-taped statement to the police, Emory Berube admitted to being at Thompson's Point of View and Waid's on the night of the shooting and to being present at the shooting. Pretrial Ex. 1, at 4, 8-9. He also admitted that his street name is "Inch." Pretrial Ex. 1, at 31. He denied involvement in the shooting. Pretrial Ex. 1, at 10.

Emory and Ivory Berube were joined for trial, and trial began on April 9, 2009. RP 4/9/09 4. On the second day of trial, Emory Berube and the State reached a plea agreement. RP 4/13/09 2-18. Pursuant to the plea agreement, the State amended the information to charge assault in the second degree, possession of heroin and possession of cocaine. CP 17-30. The parties agreed to recommend a sentence of 84 months of total confinement. CP 22, 50. If convicted as originally charged, Emory Berube would have

faced a standard range sentence of 300 to 378 months. CP 59. Ivory Berube was convicted by the jury of assault in the first degree while armed with a firearm, and was sentenced to 378 months of confinement. RP 9/18/09 84; Supp CP __ (sub 88).

Prior to sentencing, Emory Berube filed a motion to withdraw his plea, alleging ineffective assistance of counsel based on counsel's failure to adequately investigate and prepare for trial. CP 56-158. Emory Berube presented evidence that counsel had failed to hire an investigator and failed to interview the victim or any other witnesses, although counsel's timesheets indicate that he spent approximately 36 hours reviewing the file, meeting with his client and preparing for trial. CP 148-49, 157-58. Emory Berube testified that before pleading guilty he had been given a copy of the Certification for Determination of Probable Cause, had "scanned" the police reports with counsel and had viewed the videotape. RP 9/18/09 31, 41, 59, 61-62. He also testified that counsel answered all of his questions about the plea. RP 9/18/09 50.

In ruling on the motion to withdraw the plea, the court noted that some of the complaints regarding counsel's trial preparation appeared valid and that he was assuming "for the sake of argument" that counsel's preparation was deficient. CP 81.

However, the court noted that there was no evidence that, but for counsel's allegedly deficient performance, Emory Berube would not have pled guilty. CP 81. The court observed that the defense had presented no evidence or testimony that, if discovered prior to the plea, would have changed counsel's advice to plead guilty to assault in the second degree. CP 85, 92. The court, who had presided over Ivory Berube's trial, noted that the victim had testified at trial, that the jury had found her testimony credible, and that Emory Berube's decision to plead to a lesser charge was, in hindsight, "prudent." RP 9/18/09 84-85. The court denied the motion to withdraw the plea. RP 9/18/09 93.

The court sentenced Emory Berube to 84 months of total confinement in King County Cause No. 08-C-05714-0 SEA, to run concurrently with a 120-month sentence imposed on the same day in King County Cause No. 05-1-08503-3 SEA. CP 162; RP 9/18/09 102.¹

¹ In King County Cause No. 05-1-08503-3 SEA, Emory Berube was found guilty by a jury of possession of cocaine with intent to deliver and bail jumping. RP 9/18/09 95. His standard range in that case was 60 to 120 months. RP 9/18/09 95.

C. ARGUMENT.

THE TRIAL COURT CORRECTLY DENIED THE MOTION TO WITHDRAW THE GUILTY PLEA WHERE THE DEFENDANT FAILED TO ESTABLISH ANY PREJUDICE FROM COUNSEL'S ALLEGEDLY DEFICIENT INVESTIGATION.

Emory Berube contends that the trial court erred in denying his motion to withdraw the guilty plea because he established ineffective assistance of counsel. However, the record reflects that Berube failed to establish that counsel's performance was prejudicial. The State's offer of a plea to the reduced charge of assault in the second degree was very favorable, particularly in light of the fact that his brother was subsequently convicted of assault in the first degree with a firearm and sentenced to 378 months in prison. Berube failed to present any evidence that counsel would have discovered through further investigation that would have been favorable to the defense. Prejudice cannot be established without a showing that some undiscovered evidence, such as an alibi witness, would have changed counsel's advice and the defendant's decision to plead guilty. Because there was no such evidence in this case, the trial court properly concluded that Berube failed to establish prejudice and thus failed to establish ineffective

assistance of counsel. The court properly denied the motion to withdraw the guilty plea.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defendant has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail on a claim of ineffective assistance of counsel the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990). While a lower court's decision on a motion to withdraw a guilty plea is reviewed for abuse of discretion, claims of ineffective assistance of counsel are reviewed de novo. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001); State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

Prejudice is not established by showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Strickland, 466 U.S. at 693. If the standard were so low, virtually any act or omission would meet the test. Id. at 693. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694. When an ineffective assistance claim is based on counsel's failure to call a witness, prejudice generally cannot be established without an affidavit from the witness indicating what the witness would say if called to testify. See State v. Neidigh, 78 Wn. App. 71, 81, 895 P.2d 423 (1995); State v. Sherwood, 71 Wn. App. 481, 484, 860 P.2d 407 (1993).

The Strickland standard applies to claims that counsel was ineffective in advising the defendant to plead guilty. Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). As with a trial, the prejudice prong focuses on whether counsel's performance affected the outcome of the proceeding. Id. at 59. In order to satisfy the prejudice requirement, the defendant must show a reasonable probability that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. Where the claim is deficient investigation, the prejudice

determination depends on whether the discovery of additional evidence would have led counsel to change his recommendation to plead guilty. Id. In other words, the defendant must show that but for the deficient investigation, counsel would have discovered evidence that would have changed his recommendation to plead guilty.

For example, in State v. Garcia, 57 Wn. App. at 929, after pleading guilty the defendant alleged that defense counsel was ineffective in failing to investigate the possible defenses of diminished capacity and cocaine psychosis. This Court rejected the claim, concluding that to prevail on his claim of ineffective assistance of counsel the defendant was required to show that those defenses were viable, not simply that counsel failed to investigate them. Id. at 934. See also Smith v. Mahoney, 596 F.3d 1133, 1147 (9th Cir. 2010) (defendant who pled guilty failed to establish ineffective assistance in spite of deficient performance where uninvestigated affirmative defenses were unlikely to succeed at trial); Lambert v. Blodgett, 393 F.3d 943 (9th Cir. 2004) (defendant who pled guilty failed to establish ineffective assistance of counsel in spite of failure to investigate fetal alcohol defense where little chance that defense would have succeeded).

Applying Strickland and Hill v. Lockhart to the present case, it was not enough for Berube to show that counsel failed to interview the victim or any other witnesses. Berube was required to show that if counsel had interviewed the victim or other witnesses he would have discovered evidence that would have changed his recommendation to plead guilty. Berube completely failed to make this showing. The victim in fact testified at Ivory Berube's trial. Emory Berube could point to nothing in her testimony that would have been helpful to his defense. Likewise, Berube contended that there were four "possible witnesses," three of which were available because they were incarcerated. Appellant's Opening Brief, at 11. However, these witnesses were never identified and there was absolutely no showing that any of the four would have provided information that would have been helpful to Emory Berube's defense.²

The trial court properly focused on the prejudice prong in denying the motion to withdraw the plea. The court asked counsel,

² In the "Supplemental Declaration of Benito Cervantes" submitted to the trial court, Mr. Cervantes states only that "I met with Emory Berube at the king county jail Friday September 11, 2009. He gave me the names of 4 possible witnesses. The same day I was able to locate 3 of those witnesses. 2 are in the king county jail and 1 is in the Federal Detention Facility." CP 156.

"Is there anything you can point to in her [the victim's] testimony, in any of the other witness' testimony, or in any of the witnesses that didn't get interviewed by Mr. Todd that would lead me to say, you know, if Mr. Berube had that information going into the plea, he probably wouldn't have pled guilty." RP 9/18/09 85. Berube was not able to point to any evidence that was not discovered that would have been helpful to his defense. RP 9/18/09 85-91. Because Berube failed to establish the prejudice prong of the Strickland standard, the trial court properly concluded that he had failed to establish ineffective assistance of counsel.

Berube attempts to relieve himself of the burden of showing specific prejudice by arguing that prejudice should be presumed. This argument should be rejected. There is no authority for presuming prejudice under these circumstances. Berube's attempt to rely on United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), is misplaced. In Cronic, the defendant was charged with \$9,400,000 worth of mail fraud that was alleged to have occurred over a four-month period. Id. at 649. Shortly before trial Cronic's retained counsel withdrew. With only 25 days left to prepare, the court appointed a young real estate lawyer to represent him. Id.

On appeal, the Court of Appeals reversed the conviction based on no specific errors by counsel, but upon a conclusion that the circumstances hampered his preparation. Id. at 650. The United States Supreme Court reversed the Court of Appeals, finding that the defendant had failed to point to any specific errors made by counsel. Id. at 666. The Court contrasted Cronic with Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 2d 158 (1932), a pre-Strickland capital rape case with strong racial overtones in which the defendant's lawyer was a volunteer from another state who was appointed to represent the defendant on the first day of trial. The Court stated that in such a case the "surrounding circumstances could make it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance." Cronic, 466 U.S. at 661. The Court concluded that Cronic was not such a case. Id. at 666. The present case, like Cronic, is not a case where the "surrounding circumstances could make it so unlikely that any lawyer could provide effective assistance." There is nothing unusual about the surrounding circumstances in the present case. Counsel was appointed to represent Berube well before trial, and had ample opportunity to review the file and

evidence. There is no basis for presuming prejudice. Berube must satisfy the prejudice prong by showing a reasonable probability that if counsel had conducted a more thorough investigation, information helpful to the defense would have been discovered that would have changed counsel's advice and Berube's decision to plead guilty to the reduced charge of assault in the second degree.

Berube's extensive reliance on State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010), is also misplaced. In A.N.J., the 12-year-old juvenile respondent pled guilty to child molestation in the first degree. Id. at 96. He contended on appeal that counsel was ineffective in failing to conduct an adequate investigation. Id. Although the court disapproved of counsel's performance, and disapproved of the funding system for public defense, the court did not hold that A.N.J. had established ineffective assistance of counsel based on the failure to investigate. Id. at 109-12. Instead, the court held that A.N.J.'s plea was involuntary because he was misinformed as to a consequence of the plea: whether the conviction could be removed from his record in the future. Id. at 116-17. The court also held that A.N.J.'s plea was involuntary because he was not adequately informed about the nature of the charge, in particular, the definition of sexual contact. Id. at 118.

The court reversed the conviction after finding ineffective assistance of counsel based on counsel's misinforming A.N.J. of the consequences of his plea and not adequately informing him of the nature of the charge. Id. at 120. A.N.J. does not alter the requirement set forth in Hill v. Lockhart that a claim of ineffective assistance of counsel based upon failure to adequately investigate requires a showing of a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different.

The trial court correctly concluded that Berube failed to establish the prejudice prong of the ineffective assistance of counsel standard. Berube failed to establish that but for counsel's alleged failure to investigate, counsel would not have advised him to plead guilty and he would not have accepted the plea. If convicted as charged, as his brother was, he would have faced up to 378 months in prison. By pleading guilty to assault in the second degree, without a firearm enhancement, he reduced his potential sentence by 294 months, which is more than *24 years*.

Berube failed to show that there were any witnesses who would have been helpful to the defense. Because Ivory Berube proceeded to trial, we know that the jury found the victim's testimony credible. The other evidence against Emory Berube was strong. In his statement to police, Berube admitted to being present at the shooting and admitted that his street name was "Inch." The surveillance tape of the shooting depicted the two men acting in concert. In his brief, Berube alludes to a "possible defense," but no such defense was identified below. The trial court properly concluded that Berube failed to establish a reasonable probability that if defense counsel had investigated further, his advice to plead guilty to a greatly reduced sentence, and Berube's decision to plead guilty to a greatly reduced sentence, would have been different.

Under these facts, the trial court properly concluded that Berube failed to establish ineffective assistance of counsel. The court properly denied the motion to withdraw the plea.

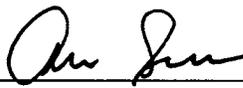
D. CONCLUSION.

The trial court properly denied Berube's motion to withdraw his plea. The trial court's decision should be affirmed.

DATED this 3rd day of May, 2010.

Respectfully submitted,

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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 Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BERUBE, Cause No. 64238-3-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.

W Brame
Name
Done in Seattle, Washington

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