

67745-4

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NO. 67745-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER S. CAHILL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES E. ROGERS

BRIEF OF RESPONDENT

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COURT OF APPEALS DIV I
SEATTLE WASHINGTON

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A. ISSUE

1. A defendant may withdraw his guilty plea only if it is necessary to correct a manifest injustice. While a plea entered without the benefit of effective counsel constitutes a manifest injustice, the defendant bears the heavy burden of showing (a) that trial counsel's representation was deficient; and (b) that counsel's deficient representation prejudiced the defendant. 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, he would not have pled guilty and would have insisted on going to trial. Here, after reviewing the State's evidence, which included the defendant's possession of a driver's license and credit card in the names of other persons and found on him after he was seen trespassing in a vacant home, when taken together with the State's declared intention to amend the Information from Identity Theft in the Second Degree to Possession of Stolen Property in the Second Degree, Cahill's counsel chose not to contact individuals who had limited information material to the issue of Cahill's guilt. Did the trial court properly exercise its discretion in denying Cahill's motion to withdraw his plea?

B. STATEMENT OF FACTS

The Appellant, Alexander Cahill, was arrested by Seattle Police on August 7, 2010 for trespassing in a vacant home, and later found to be in possession of a New York state identification card stolen in a robbery and a debit card; both were in the name of persons other than the Appellant. CP 3. The State charged the Appellant with a single count of Identity Theft in the Second Degree under RCW 9.35.020. CP 1-4.

Defense counsel and the King County Prosecuting Attorney's Office negotiated possible resolutions for the matter in advance of trial. 3RP 8. Among the matters discussed with the prosecutor, according to the Appellant's assigned counsel, were evidentiary issues relating to the State's burden to prove that the Appellant intended to commit a crime by way of his possession or use of the credit card. 3RP 8. The Appellant declared that he wished to set the matter for trial, and the court so ordered. CP 5.

At the Omnibus hearing on January 7, 2011 when the parties confirmed trial-readiness the State declared its intention to amend the Information to reflect a count of Possession of Stolen Property in the Second Degree "in lieu of ID Theft." CP 56. The court confirmed the trial date of January 18, 2011. CP 55-57.

During the pendency of the matter, the Appellant was ordered into "Work and Education Release" and "CCAP Enhanced" (Community Center for Alternative Programs) rather than be confined at the King County Jail. CP 48-54. Defense counsel stated that she met with the Appellant several times to discuss his case. 3RP 4-10. Counsel met with the Appellant in person, both at the jail and at counsel's office, as well as over the telephone. 3RP 20. Counsel discussed with the Appellant the differences in the legal standards between Possession of Stolen Property and Identity Theft. 3RP 8-9. Counsel also went over the standard jury instructions ("WPIC") detailing the "reasonable person" standard applicable to proving knowledge, relevant to the Possession of Stolen Property charge. 3RP 8-9.

During these conversations the Appellant told his attorney that he did not "steal" the cards he was charged with possessing, but rather that he found them and was "intending to turn [them] in." 3RP 17. The Appellant maintained that he found the cards near a bus stop, and insisted that witnesses who frequented the area could corroborate that he was a regular visitor to the area. 3RP 5-6.

Counsel opined that the potential of witnesses who might testify that the Appellant frequented a particular area could not provide the degree of proof necessary to contradict the State's expected evidence based on the standards applicable to the charge of possessing stolen property. 3RP 8-9. Counsel testified that such corroboration by potential witnesses might make his version of events "more believable," but would not necessarily have impacted the ultimate issue of guilt or innocence. 3RP 15.

In an attempt to further inquire into the source of the cards, at the Appellant's encouragement, defense counsel submitted a request for her agency's "investigator" to visit the YMCA from which the credit card at issue was reported stolen. 3RP 9-10. Defense counsel testified that oftentimes this request is not made until the matter is confirmed for trial due to scheduling and resource constraints for the investigators. 3RP 18-19. Further complicating matters for counsel and her investigators was the fact that she "didn't have specific information about a particular witness to talk to." 3RP 9. Counsel also testified that she always personally visits and investigates scenes where crimes were alleged to have been committed in advance of trial. 3RP 19.

At some point after the Omnibus hearing, the Appellant had been remanded into secure confinement and called to tell his attorney that he wished to plead guilty. 3RP 11-12. According to defense counsel, she received a telephone voicemail from the Appellant following his remand, stating that he wished to accept the State's offer by pleading guilty because it would result in his being released from jail¹, and he stated that he wanted to set the plea "as soon as possible." 3RP 11. The offer of credit for time served from the State called for the Appellant's release from jail after entry of the plea, thus allowing him to remain out of custody pending a later sentencing date. 3RP 12.

Counsel described the Appellant "disagreed" with the charges, but only until the "point at which he was in jail and wanted to get out, and then he was eager to plead." 3RP 15. The Appellant insisted on language in his plea form that informed the court and others that he only had the card in his possession for "less than 24 hours." 3RP 16. Counsel went over the plea form with the Appellant, including the applicable constitutional rights,

¹ The Appellant's "Offender Score" was calculated at 2, making the standard sentencing range 2-5 months for the conviction to Possession of Stolen Property Second Degree. CP 37-38. Due to the amount of time that the Appellant had served during the pendency of his case, he had served the equivalent of 5 months in-custody prior to his entry of the plea. 2RP 3.

consequences of the plea, and the State's recommendation. 3RP 12-13. At this stage, "his goal appeared to be plea," and that the ultimate decision to enter the plea was made by the Appellant. 3RP 13-14. The Appellant entered his plea on January 11, 2011, and was released from custody. 1RP 1-8.

By the time of the plea defense counsel had not personally visited the scene, nor had her agency's investigator visited the scene. 3RP 19. Although counsel had not been to the scene her intention was to do so before the trial; this was because she had been spending "a lot of time trying to work out an alternate resolution," including the potential of "Mental Health Court," until it was clear that the matter would likely proceed to trial. 3RP 19-20.

The Appellant ultimately presented a motion to withdraw his plea of guilty before sentencing. 2RP 3; CP 28-32. The Appellant testified at the evidentiary hearing that he, "from the very beginning," implored his attorney to go talk to people near the "131 bus stop." 3RP 23. The Appellant was under the impression that people nearby that scene could corroborate that he spent time in this area. 3RP 22-23. The Appellant conceded that he entered his plea, in part, due to his being removed from work release and remanded back into the jail. 3RP 26, 29-30. The Appellant testified

that he had previously entered pleas of guilty to criminal matters before, and understands what it means to plead guilty. 3RP 28-29.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED CAHILL'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE HE HAD COMPETENT COUNSEL.

Cahill asserts that assigned trial counsel was ineffective during the plea process because counsel had not completed investigation into potential witnesses who could potentially corroborate the defendant's potential testimony that he frequented a particular area. This argument is without merit because the nature of the offense charged and pled to required only that a "reasonable person" in the defendant's position would know, or should know, that the items possessed were stolen. See RCW 9A.56.140; see also WPIC 10.02. The argument also fails because the outcome of this potential evidence, given the facts of the case and the nature of the charge is speculative, at best.

A trial court may allow a defendant to withdraw a 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." State v. Ross, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996). 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).

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. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

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

Competence 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. State v. Riofta, 134 Wn. App. 669, 693, 142 P.3d 193 (2006); McFarland, 127 Wn.2d at 335. The court engages in a strong presumption that counsel's performance was effective and within the wide range of reasonable professional assistance. Riofta, 134 Wn. App. at 693.

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 the] 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. Id.

Here, before entering her guilty plea, Cahill and defense counsel had spoken multiple times about the facts of the case, the legal distinctions between Identity Theft and Possession of Stolen Property (PSP), and the corresponding differences in the State's burden of proof at trial with respect to those charges. As such, Cahill knew that the State intended to amend the charge to PSP, and that the potential witnesses that he was requesting that

counsel seek out would not necessarily be able to rebut an inference that a reasonable person would know that abandoned cards, found on the ground near a bus stop, were stolen. Cahill knew this because counsel took the time to meet with him on multiple occasions, explained the governing law as contained in the standard WPIC jury instructions, and discussed the differences between Identity Theft and PSP. At no point does the record reflect that Cahill directed counsel to any specific person who could establish that Cahill "did not know" the cards were stolen. Counsel made a reasoned legal conclusion that these potential witnesses would not be able to establish Cahill's innocence.

The record reflects that counsel spent the majority of her time discussing alternative resolutions to Cahill's case, including a discussion with the deputy prosecutor about the State's challenges in proving "intent" with respect to the Identity Theft charge, the possibility of Mental Health Court, and ultimately negotiating an amendment to the PSP charge to which the Appellant ultimately pled guilty.

The record also, and more importantly, reflects that Cahill's decision to plead guilty had more to do with his recent remand into the King County Jail, and his desire to be released immediately.

This is further evidenced by his question at the end of his plea hearing, "so I'm released today?" 1RP 8. Based on all of the circumstances at the time of the plea, it is clear that counsel provided Cahill the necessary information from which to make a reasoned choice as to how to proceed, thus Cahill fails to meet his burdens to show that counsel was deficient in her representation at the time of the plea and that the court abused its discretion in denying his motion to withdraw his guilty plea.

b. Cahill 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)). Claims of prejudice cannot be speculative, as "a defendant must *affirmatively prove prejudice*, not simply show that 'the errors had some conceivable effect on the outcome.'" State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 693) (emphasis in original).

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

The potential witnesses suggested by the Appellant in case were not disclosed to counsel by-name, and their probative value to the issues to be presented at trial were speculative, at best. There is nothing in the record to suggest that any of these potential witnesses could establish that Cahill “did not know” that the cards were stolen, but only that Cahill often spent time in the particular area in which *Cahill* claims he found the cards. Cahill fails to meet his burden under this prong because he cannot establish that the failure to seek out and interview these witnesses somehow deprived him of the opportunity to present evidence that would change the outcome at trial.

But it is even more clear that, notwithstanding the availability or value of these witnesses or their testimony, that Cahill entered his plea because he was desperate to get out of jail, and had already served incarceration equivalent to the 5 month top-end of the standard sentencing range to the charge of PSP. Counsel and Cahill both testified that the Appellant's primary motivation, despite not being happy about pleading guilty, was to be released from custody. To this, Cahill also fails to meet his burden to establish prejudice such that his decision to plead guilty would have been different had counsel located and interviewed potential witnesses.

Cahill has failed to establish that counsel's performance was so deficient that it prejudiced him. Therefore, the trial court properly denied her motion to withdraw his guilty plea and his conviction should be affirmed.

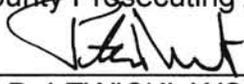
D. CONCLUSION

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

DATED this 13th day of July, 2012.

Respectfully submitted,

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