

67903-1

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NO. 67903-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FAIVAFALE TIMALI,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS HILL

**BRIEF OF RESPONDENT**

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A. ISSUES

Is a defendant entitled to a new attorney to attempt to withdraw his guilty plea whenever he claims that he had "ineffective assistance of counsel" even if the plea court considered the defendant's concerns and found that there was no basis for a claim of ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Defendant Faivafale Timali came to the house of his ex-girlfriend, Tashara Hutton, with a loaded gun. CP 4. Hutton told Timali that there was an existing no contact order for her protection and for him to leave. Id. Timali became angry, pointed the gun at Hutton, and threatened to kill Hutton. Id. Hutton called 911 and Timali fled. Id. Police arrived to the scene shortly thereafter and began a K-9 track, which ultimately led to Timali. Id. Timali was arrested near Hutton's apartment. Id. Along the K-9 track, police found Timali's pistol. Id.

At trial, Timali was charged by amended information with a count of Felony Violation of a No Contact Order, a count of Felony Harassment with a Firearm Enhancement, a count of Second

Degree Assault with a Firearm Enhancement, and a count of First Degree Unlawful Possession of a Firearm. RP 24-25; CP 24-26.

Before opening statements, the parties and the case detective learned for the first time that one of the police car cameras recorded statements made by Hutton after the assault. RP 82-84. After opening statements, counsel for both parties reviewed the video, and the State indicated its intention to use the video as impeachment evidence against Hutton, if necessary. RP 84. Hutton had been consistent in her reports to law enforcement, but she did not want to testify. RP 79-80, 91. Defense brought forward a motion for dismissal, for exclusion of the evidence, and for a mistrial. RP 122. The court found no government misconduct and denied the defense motions, but reserved on whether a mistrial would be appropriate. RP 144, 146, 154-55.

Hutton had come to court but refused to testify. RP 79. She "plead[ed] the Fifth," was appointed counsel, and the court directed her to return to court. RP 79-80, 157-58. The court recessed the trial for a few days so that defense could further review the video tape evidence and do any additional investigation. RP 193-96.

When trial resumed, Hutton failed to return to court and the court issued a material witness warrant. RP 157-58.

Timali and the State then negotiated a plea to reduced charges. RP 198-99. Timali pleaded guilty by second amended information to a count of Unlawful Possession of a Firearm in the Second Degree and a count of Misdemeanor Violation of a No Contact Order. RP 198-209; CP 36-37. Timali and the Court engaged in a full colloquy related to the plea form, his decision to plead guilty, and consequences resulting from the pleas. RP 198-209. Timali told the court that he reviewed and personally read the plea forms, was pleading on his own accord, and had no further questions about the pleas. RP 201, 206-07; CP 48, 57. The court accepted Timali's plea as being made competently, knowingly, intelligently, and voluntarily. RP 208; CP 48, 57. A sentencing date was set. RP 209.

Before sentencing, Timali sent a letter to the court saying that he wanted to withdraw his plea with a declaration "supporting ineffectiveness in regards to [his counsel]." RP 211; CP 98-99. In the letter, Timali claimed that his attorney never explained the penalties of the plea and that the State had threatened him into taking the plea. CP 99. The court set a hearing to investigate

whether there was a basis for a withdrawal or if there was a potential claim of ineffective assistance of counsel. RP 211.

In court, Timali expressed frustration related to the "ineffectiveness of my attorney" in the case. RP 212. Timali first explained that he was upset that his case was not dismissed due to the discovery of the new video evidence. RP 212-13. The court explained that it had previously ruled on that matter before his plea and that it was not a basis to withdraw his plea. RP 213. Timali then expressed his frustration that the court issued a material witness warrant for Hutton. RP 213. The court explained that this claim, too, was not a basis to withdraw his plea. RP 214-15.

The court focused Timali on whether he had any claim of ineffective assistance of counsel. RP 213. Timali stated that his counsel "told me nothing about what's going to happen" and that Timali did not understand the plea colloquy. RP 214. The court reminded Timali that she was the same judge who had taken Timali's plea, that Timali and the court had reviewed the consequences of the plea, that he had signed the plea form, and that Timali confirmed at the time of the plea that he had no further questions about the plea. RP 213-14.

The court denied Timali's motion to withdraw his plea on the issues raised and found that "none of the defendant's claims raised amount to a claim of ineffective assistance of counsel." RP 215; CP 58. Timali now brings this appeal to reverse the trial court's denial of his motion to withdraw his plea. CP 80-91.

C. ARGUMENT

1. SINCE THE TRIAL COURT FOUND NO BASIS FOR A CLAIM OF INEFFECTIVE ASSISTANCE, IT PROPERLY DENIED TIMALI'S ATTEMPT TO WITHDRAW HIS GUILTY PLEA.

Timali argues that the trial court improperly denied his request to withdraw his plea because he was due new counsel when he challenged the "ineffectiveness of my attorney." RP 212. But the court inquired into Timali's reasons for why he was withdrawing his plea and found no basis for a claim of ineffective assistance of counsel. Thus, the court was not required to appoint new counsel and properly denied Timali's motion to withdraw his plea.

CrR 4.2 protects criminal defendants by requiring that guilty pleas be entered into voluntarily and intelligently. State v. Davis, 125 Wn. App. 59, 63, 104 P.3d 11 (2004). Thus, a trial court "shall

allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). The defendant bears the burden of proving manifest injustice, defined as "obvious, directly observable, overt, not obscure." State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)); State v. Moore, 75 Wn. App. 166, 171-72, 876 P.2d 959 (1994). An involuntary plea produces a manifest injustice to permit withdrawal. Saas, 118 Wn.2d at 42, 820 P.2d 505; Moore, 75 Wn. App. at 172, 876 P.2d 959.

The determination of whether a plea of guilty was voluntary and intelligent is a question of fact "peculiarly within the province of the trial court." Davis, 125 Wn. App. at 68 (quoting State v. McLaughlin, 59 Wash.2d 865, 870, 371 P.2d 55 (1962)). Moreover, a "trial court is not required to waste valuable court time on frivolous or unjustified CrR 4.2 motions." Davis, 125 Wn. App. at 68. A trial court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

When a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). CrR 4.2 creates a standard written form that provides the necessary notification of a defendant's rights and consequences pursuant to a plea of guilty. CrR 4.2(g). "A written statement on plea of guilty in compliance with CrR 4.2(g) provides prima facie verification of its constitutionality, and when the written plea is supported by a court's oral inquiry on the record, 'the presumption of voluntariness is well nigh irrefutable.'" Davis, 125 Wn. App. at 68 (quoting State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982)).

Timali sent a letter to the trial court asking to withdraw his plea, and the court set a hearing to discuss the matters with Timali. RP 211; CP 98-99. Timali raised claims related to the "ineffectiveness of my attorney." RP 212. Timali explained to the court that he was upset that the court had denied his earlier motion to exclude evidence and his motion to dismiss the case. RP 212-13. The court denied this claim as a basis to withdraw his plea. RP 215. The court focused Timali on whether he was raising a matter that could form the basis for a claim of ineffective assistance of

counsel. RP 213. Timali said that he was upset that the court had issued a material witness warrant for the victim in the case. RP 213-14. Again, the court told Timali that such a claim could not form the basis to withdraw a plea. RP 214. Timali then said to the court that his counsel "told me nothing about what's going to happen" and that Timali did not understand the plea colloquy. RP 214.

During his plea, the court engaged in full colloquy with Timali to ensure that he was making the plea with full knowledge of the consequences and understanding of everything involved in the plea. RP 200. The plea documents conformed with CrR 4.2(g). CP 38-57. Timali confirmed that he had reviewed with his attorney the plea documents and also personally read all the documents himself. RP 201. Timali reviewed the plea consequences orally with the court and confirmed that he understood each aspect of the plea. RP 201-08. Timali also confirmed that he was not being threatened into making the plea and that he understood the consequences of the plea. RP 206-09.

The court found a factual basis for Timali's pleas, after reading the statement for determination of probable cause in the case. RP 199-200, 208-09. Following the colloquy, the court found

that Timali was making his pleas voluntarily and competently with an understanding of the nature of the charges and the consequences of the pleas. RP 208. Timali's plea was consistent with someone who was voluntarily entering into a guilty plea to avoid the likelihood of conviction for much more serious offenses and enhancements if Hutton were to testify.

Therefore, when Timali later claimed that his attorney "told me nothing about what's going to happen" and that Timali did not understand the plea colloquy, the court reminded Timali that she was the same judge who took Timali's plea and that this claim was not supported by the record. RP 214. The court challenged the credibility of Timali's version of the plea colloquy and clarified the facts as they had actually occurred. RP 214-15. Timali never raised any claim that his attorney had misrepresented to him any aspect of the plea consequences. RP 211-16. After discussing the matter with Timali, the court did not "at this point see a basis for a claim of ineffective assistance of counsel." RP 215. The court then filed written findings that none of the issues raised by Timali amounted to a claim of ineffective assistance of counsel, and that his other matters raised did not form a basis to withdraw a plea. RP 214-15; CP 58. Timali's counsel told the court that he would

assist Timali in getting a copy of the plea paperwork for Timali's records. RP 215.

Because the court considered the matters raised by Timali and determined that no further fact-finding would be necessary, the court was "not required to waste valuable court time on [the] frivolous or unjustified CrR 4.2 motions." See Davis, 125 Wn. App. at 68. The court essentially found no justification to Timali's claim that his plea was involuntary. The full colloquy, coupled with the proper use of the plea form of CrR 4.2(g), was sufficient for the court to exercise its discretion in denying Timali's request to withdraw his plea. RP 215; Davis, 125 Wn. App. at 68 (quoting State v. Perez, 33 Wn. App. at 261-62).

Timali argues on appeal that he was denied counsel during his attempt to withdraw his plea. He maintains that the trial court denied him of his right to counsel by not automatically granting him a new attorney for his claim of ineffective assistance of counsel. But the court specifically inquired into "whether there's any basis for a claim of ineffective assistance of counsel." RP 213. After sufficient questioning of Timali, the court found no basis for any claim of ineffective assistance. RP 214; CP 58. When the court evaluates whether there is any merit to a claim and finds nothing

but a frivolous accusation of “ineffectiveness of my attorney,” the court is not, nor should it be, required to appoint a new attorney to engage in a baseless hearing. RP 212; see Davis, 125 Wn. App. at 68. A trial court should not delay its judgment and sentence, just because a defendant claims “ineffective assistance,” if the court factually finds no basis for the claim.

Timali was represented by counsel throughout the proceeding. Timali maintains the moment that he raised his claim of ineffective assistance, however, his attorney had an automatic conflict and thus Timali was denied representation regardless of the court’s findings. Timali cites State v. Harell, which held that a defendant is entitled to conflict-free counsel at a hearing to withdraw a plea. 80 Wn. App. 802, 805, 911 P.2d 1034 (1996). But in Harell the trial court found sufficient merit in Harell’s claim of ineffective assistance to initiate a fact-finding hearing. Id. at 804-05. Harell’s counsel then withdrew as counsel. Id. at 803. Ethical rules require that “A lawyer shall not use information relating to representation of a client to the disadvantage of the client,” and thus an attorney must withdraw if the attorney will use this information against the client’s interests. RPC 1.8(b). This withdrawal left Harell attorney-less. Id. at 805. Harell’s prior

counsel became a State's witness, who was called to discredit Harell, while pro se Harell had to question his former counsel on the stand regarding his ineffective assistance. Id. This Court held that since the trial court found sufficient facts for a claim of ineffective assistance, Harell should not have been pro se, and Harell was entitled to conflict-free counsel at the hearing. Id. at 804-05.

In our case, the court never found a basis for a claim of ineffective assistance. RP 215. Timali's attorney assisted Timali in helping clarify Timali's concerns to the court and never withdrew as Timali's counsel. RP 213-15. Timali's counsel certainly was never a witness against Timali, unlike in Harell. RP 211-15. Timali's counsel had no duty to withdraw, since there was no basis for a claim of ineffective assistance of counsel and thus no conflict. Accordingly, Timali was never deprived of counsel.

Under Timali's argument, a trial court would deprive a defendant of his right to counsel whenever a defendant claims "ineffective assistance," even if the court determines that the claim is frivolous and without basis. Timali provides no authority to

support this position. It is inconsistent with the discretion provided to the trial courts to evaluate facts and determine whether the plea was made voluntarily and intelligently. See Davis, 125 Wn. App. at 68; McLaughlin, 59 Wash.2d at 870. Timali's argument should be rejected.

Finally, Timali argues on appeal that he was under the influence of medications at the time of his plea. Timali raised no such claim during his motion to withdraw his plea. The plea court was also Timali's trial court. The court had plenty of exposure to Timali and would have observed the manner in which he answered questions in his plea colloquy. Indeed, the court expressly found that Timali competently entered his plea. RP 208. Timali cannot show that the trial court abused its discretion in determining that the plea was made competently, knowingly, intelligently, and voluntarily. The trial court properly found that there was no basis for Timali to withdraw his plea.

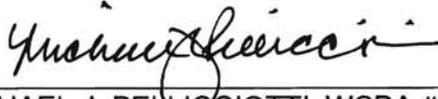
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the trial court's denial of Timali's motion to withdraw his plea.

DATED this 23<sup>rd</sup> day of April, 2012.

Respectfully submitted,

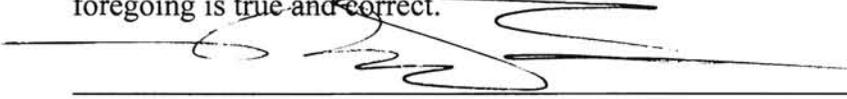
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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to David Bruce Koch, of Nielsen, Broman and Koch, P.L.L.C., at the following address: Central Building, 1908 East Madison Street, Seattle, WA 98122, the attorney of record for the appellant, containing a copy of the Brief of Respondent in STATE V. FAIVAFALÉ TIMALI, Cause No. 67903-1-I in the Court of Appeals of the State of Washington, Division I.

I certify under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



\_\_\_\_\_  
Name  
Done in Seattle, Washington

04-23-12  
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Date