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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDREW BRANCH, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH M. ANDRUS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whereas there are no issues that could potentially be raised on review, should appellate counsel be permitted to withdraw from the case?

2. The record of a plea hearing must affirmatively indicate that a guilty plea was made knowingly, intelligently, and voluntarily, with a full understanding of the consequences of such plea. The trial court engaged in an extensive colloquy with Branch, Jr. addressing the rights he was giving up by entering into a plea, and he adamantly indicated that he was choosing to plead guilty and waive his rights in order to take advantage of the State's offer. Was Branch, Jr.'s plea made knowingly and voluntarily with a complete understanding of all of the consequences of his plea?

3. For sentencing purposes, crimes that require the same intent, are committed at the same time and place, and involve the same victim, constitute "same criminal conduct" and are scored as one offense; if any of these three elements is missing, each crime is scored individually. Branch, Jr. was convicted in 2009 of 16 counts of second degree identity theft involving 16 different victims. Because defense counsel did not have a legal basis to

argue that Branch, Jr.'s prior convictions constituted "same criminal conduct" was his performance adequate?

4. CrR 7.5 and CrR 7.8 govern the trial court's authority to grant a new trial and relieve a defendant from judgment, respectively. In the face of nothing more than an artfully drafted motion, the court is not required to hold a hearing, nor is the court required to make a ruling if the defendant does not comply with the rules' requirements. Here, Branch, Jr. pled guilty, and after he was sentenced, he submitted a pro se motion to the trial court requesting a new trial pursuant to CrR 7.5, and for the court to arrest judgment, pursuant to CrR 7.8, without a sworn affidavit. Did the court act within its discretion by not ruling on Branch, Jr.'s motion because it was not properly before the court?

5. A defendant must have a record of sufficient completeness for appellate review of potential errors, but a complete verbatim transcript is not required. Branch, Jr. requested a three-day continuance before the presiding judge, and although the hearing was not recorded, the court record contains a complete account of what transpired at the hearing. Is the record sufficiently complete to allow a review of any potential errors?

B. STATEMENT OF FACTS

The State charged Andrew Branch, Jr. in Count I, with Violation of the Uniform Controlled Substances Act (VUCSA), possession with intent to deliver methamphetamine, for an incident alleged to have occurred on April 27, 2012; and in Counts II, III, and IV, with identity theft in the second degree, with a violation date of May 24, 2012. CP 1-23. Pursuant to RCW 9.94A.535(3)(t), the State further alleged that each crime was committed shortly after Branch, Jr., had been released from incarceration. CP 1-3.

On October 25, 2012, the State amended the information by adding 19 counts of identity theft in the second degree; one count of VUCSA, possession of methamphetamine; and one count of VUCSA, possession of cocaine, for a total of 26 counts, all with a violation date of May 24, 2012.¹ CP 25-46. The State further charged Branch, Jr., with two aggravators for each count: rapid recidivism pursuant to RCW 9.94A.535(3)(t), and free crimes pursuant to RCW 9.94A.535(2)(c). CP 25-46.

On January 8, 2013, defense counsel asked for a brief continuance of the trial date in order to conduct an interview of

¹ Appellant's counsel indicates that Branch, Jr. was charged with 30 counts. App. Br. 4. The amended information reflected a total of 26. CP 25-46.

Branch, Jr.'s Community Corrections Officer (CCO) that could potentially lead to the filing of a motion to suppress evidence pursuant to CrR 3.6.² 9RP 2.³ The State did not object to the continuance, agreeing that the interview could lead to a dispositive motion, and the trial was continued to February 4, 2012. 9RP 4.

On the day of trial, the parties reported to the presiding judge, the Honorable Ronald Kessler, where Branch, Jr. requested a three-day continuance in order to resolve a conflict he had with defense counsel. CP 164; 10RP 3. Judge Kessler denied Branch, Jr.'s request and assigned the case to the Honorable Beth Andrus for trial. CP 164; 10RP 3. The hearing at presiding was not recorded.

The parties proceeded to trial before Judge Andrus. 10RP 2. At the commencement of motions in limine, the State moved to dismiss count I, VUCSA, possession with intent to deliver

² Motions to suppress physical, oral or identification evidence, other than a motion pursuant to CrR 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. The court shall determine whether an evidentiary hearing is required. CrR 3.6.

³ The verbatim report of proceedings is referred to as follows: 1RP (August 20, 2012); 2RP (September 13, 2012); 3RP (October 10, 2012); 4RP (October 12, 2012); 5RP (October 19, 2012); 6RP (October 25, 2012); 7RP (November 19, 2012); 8RP (December 5, 2012); 9RP (January 8, 2013 – motion to continue trial date); 10RP (February 4, 2013 – commencement of trial); 11RP (February 5, 2013 – plea); 12RP (April 16, 2013 – sentencing hearing).

methamphetamine, alleged to have occurred on April 27, 2012. 10RP 13. In addressing the need for a hearing pursuant to CrR 3.6, defense counsel indicated that because the State was dismissing count I, his motion to challenge the search that took place on April 27, 2012, was moot. 10RP 12-13. Counsel also stated that he did not have a legal basis to challenge the search conducted on May 24, 2012, hence, there would not be a need to hold a CrR 3.6 hearing. 10RP 13.

Branch, Jr. disagreed with his attorney's decision to not challenge the May 24th search and recounted what he had told the presiding judge earlier: that although he did not wish to discharge counsel, he felt he was forced to proceed to trial with an attorney with whom he had a conflict, in violation of his Sixth Amendment right to counsel. 10RP 28-29. Defense counsel indicated that after the interview with CCO Jeffrey Sargent, he made the decision not to file a CrR 3.6 motion to suppress because he had no legal basis nor a well-founded argument to challenge the suppression of evidence from the May 24th search. 10RP 30-31; 11RP 17.

In addressing the need for a CrR 3.5⁴ hearing, the State indicated that it did not see the need to conduct one because the only statements the prosecutor was seeking to admit at trial were the statements that Branch, Jr. made to his CCO, Kathleen Casey, which were statements made in the course of routine questions between a supervisee and his CCO. 10RP 4. The prosecutor further argued that these statements were made in a non-custodial setting and thus not subject to Miranda.⁵ 10RP 4. Defense counsel agreed with the State that a hearing would not be necessary as he did not have an argument to suppress the statements, given that the statements were not made in a custody setting nor were they coerced. 10RP 4-5.

Later in the day, after concluding with the motions in limine, defense counsel advised the court that the State had made an offer to Branch, Jr., and that "He [Branch, Jr.] is seriously considering it. He is going to talk with his family and friends tonight..." 10RP 111. Based on these representations, the court recessed early in order

⁴ When a statement of the accused is to be offered in evidence, the judge shall hold a hearing for the purpose of determining whether the statement is admissible. CrR 3.5(a).

⁵ Miranda v Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

to provide Branch, Jr. and his attorney ample opportunity to discuss the State's offer. 10RP 111.

The next day, the State informed the court that the parties had reached an agreement where Branch, Jr. would plead guilty to two counts of identity theft in the second degree. 11RP 2.

Pursuant to the plea agreement, the State moved to amend the information and Branch, Jr. pled guilty to two counts of identity theft in the second degree, without any aggravators. 11RP 3; CP 59-60.

During the course of the colloquy, Branch, Jr. indicated that although he had had enough time to consider his options and had decided to enter a plea of guilty instead of going to trial, he still had a problem with his attorney's decision to not file a CrR 3.6 motion. 11RP 6-7. Defense counsel interjected and said he had advised Branch, Jr. that he could potentially appeal his guilty plea pursuant to Missouri v. Frye⁶ by claiming ineffective assistance of counsel. 11RP 7. The court advised Branch, Jr. that by entering into a guilty plea he was taking the risk of waiving his CrR 3.6 objection. 11RP 10. The court also opined that there were other alternatives that would allow Branch, Jr. to preserve that issue, such as a stipulated facts trial. 11RP 11. After an extensive colloquy,

⁶ Missouri v. Frye ___ U.S. ___, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

Branch, Jr. said, "I understand I have a choice to go to trial, yes."
And, "Yes, I understand I don't have to plead guilty." 11RP 15.
Branch, Jr. affirmed his desire to plead guilty by stating, "I am
taking this plea because there is no way for me to win at trial, so I'm
going to take advantage of the plea offer." 11RP 19.

Branch, Jr. acknowledged understanding that the maximum
sentence for each count was five years in prison and a \$10,000
fine, and that his standard range was 43 to 57 months based on his
offender score of 26. 11RP 20. He also acknowledged that the
State would be asking the court to impose an exceptional sentence
of 60 months for each count. 11RP 22-24. Branch, Jr. agreed that
the following factual statement set forth in the Statement of
Defendant on Plea of Guilty was true:

On May 24, 2012, I knowingly possessed the
financial information of James Linse and Kathleen
Ball. I intended to use this financial information in
order to secure funds to finance my illegal drug habit
as I currently suffer from drug addiction. These acts
occurred in King County, Washington.

11RP 30-31.

At the conclusion of the colloquy, the court inquired whether
anybody had made any threats or promises to Branch, Jr., to which
he responded in the negative; and if his plea was freely and

voluntarily made, to which he responded, "Yes. Yes, I am. I do, I know I have a choice, and this is the choice that I have to make right now, yeah." 11RP 32-33. The court accepted Branch, Jr.'s plea of guilty on two counts of identity theft in the second degree. 11RP 34; CP 61-90.

At the sentencing hearing, defense stipulated that Branch, Jr.'s score was a 26. 12RP 5-6. Branch, Jr. exercised his right to allocution and stated, "I have 26 points. I got 18 of them on my last conviction."⁷ 12RP 17. Pursuant to the plea agreement, the State asked the court to impose 60 months in custody on each count, to run concurrently. 11RP 6. Branch, Jr. asked the court to impose a Drug Offender Sentencing Alternative (DOSA). 11RP 10-11. The court imposed the high end of the range of 57 months in custody and three months of community custody. 12RP 20-21; CP 138-63.

On April 22, 2013, Branch, Jr. filed a pro se motion asking the trial court to give him a new trial, and to arrest judgment and sentence pursuant to CrR 7.5 and CrR 7.8. CP 147-53. The trial court did not rule on this.

⁷ The details of his last conviction are discussed more fully in section C.3 of the Respondent's brief, infra.

C. ARGUMENT

1. THIS COURT SHOULD PERMIT COUNSEL TO WITHDRAW BECAUSE THERE ARE NO NON-FRIVOLOUS ISSUES TO BE RAISED.

RAP 15.2(i) provides, "If counsel can find no basis for a good faith argument on review, counsel should file a motion in the appellate court to withdraw as counsel for the indigent as provided in rule 18.3(a)." RAP 18.3(a)(2) provides, in relevant part, "The motion shall identify the issues that could be argued if they had merit and, without argument, include references to the record and citations of authority relevant to the issues." That procedure has been invoked in this case.

Counsel for the State has reviewed the prosecutor's file, the appellant's brief, the court file, and the transcripts in this case. The record demonstrates that the issues set forth in appellant's brief lack merit under the facts of this case. Accordingly, the State concurs in appellate counsel's motion to withdraw and requests dismissal of the appeal.

2. THE TRIAL COURT PROPERLY ESTABLISHED THAT BRANCH, JR. ENTERED INTO HIS GUILTY PLEA KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY, AND WITH A SUFFICIENT UNDERSTANDING OF THE CONSEQUENCES.

Branch, Jr. could argue that his guilty plea was involuntary because he was not properly advised that by pleading guilty he was waiving his right to challenge evidence admitted pursuant to CrR 3.5 and CrR 3.6. This argument would fail because the record clearly establishes that the trial court engaged in an extensive colloquy with Branch, Jr. regarding the constitutional rights he was giving up, including his opportunity to preserve any CrR 3.6 issues. Because Branch, Jr.'s answers to the court indicated that he knowingly, voluntarily, and intelligently pled guilty to the amended information in order to take advantage of the State's offer, his argument would be rejected.

The Fourteenth Amendment to the United States Constitution provides in part: "No state shall... deprive any person of life, liberty, or property, without due process of law." It is a violation of due process to accept a guilty plea without an affirmative showing that the plea was made intelligently and

voluntarily. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980).

In addition to the minimum requirements imposed by the Fourteenth Amendment, criminal pleas are governed by rules of court. CrR 4.2 establishes requirements beyond the constitutional minimum:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d). The record of a plea hearing, or clear and convincing extrinsic evidence, must affirmatively disclose that a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea. Wood v. Morris, 87 Wn.2d 501, 503-07, 554 P.2d 1032 (1976). The State carries a heavy burden of demonstrating a voluntary, knowing, and intelligent waiver of any constitutional right. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

In order for the waiver implicit in a guilty plea to meet the requirements of the due process clause, the plea must constitute

“an intentional relinquishment or abandonment of a known right or privilege,” possible only after advisement of the right to trial by jury, the right to confront accusers, and the privilege against self-incrimination. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Woods v. Rhay, 68 Wn.2d 601, 605, 414 P.2d 601 (1966).

Failure to disclose the nature of the offense or consequences of a plea may result in a procedural defect of constitutional magnitude if the defendant's plea as a consequence of that failure is involuntary. In re Hews, 99 Wn.2d 80, 91, 660 P.2d 263 (1983). In determining whether a defendant's plea of guilty was knowing, intelligent, and voluntary, an appellate court must consider all the facts and circumstances revealed by the record as well as the defendant's statement on plea of guilty; among other factors, the court should consider the description of the crime and the defendant's culpable conduct as set forth in the information, the defendant's discussion of the information with his counsel, and the defendant's general acknowledgement of his criminal acts. Id.

Here, all the facts and circumstances in the record demonstrate that Branch, Jr. evaluated his options and had time to

think about the consequences of pleading guilty before making an intelligent decision. At the conclusion of the first day of trial, after the State presented an offer to Branch, Jr., the trial court recessed early in order to provide counsel and Branch, Jr. an opportunity to discuss the offer. 10RP 111. Defense counsel stated that Branch, Jr. was “seriously considering it [the offer]. He is going to talk with his family and friends tonight...” 10RP 111. Not a few minutes later, but the next day, the parties indicated they had reached an agreement where Branch, Jr. would plead guilty to only two counts of identity theft in the second degree.⁸ 11RP 2.

The record also indicates that after Branch, Jr. took the time to consider his options, he made a knowing decision to plead guilty. Prior to entering into the plea, Branch, Jr. reviewed the Statement of Defendant on Plea of Guilty with his attorney. 11RP 5. The trial court specifically asked Branch, Jr. if he had had enough time to consider his options and “digest” what was in the document, to which Branch, Jr. answered, “Yes, yeah, I feel like that is the case.” 11RP 6.

The court asked Branch, Jr. if he understood he was giving up certain rights, including his right to appeal, which he responded

⁸ The State dismissed the other 23 counts and the aggravators. CP 59-60.

that he intended to appeal his attorney's decision to not pursue a CrR 3.6 motion. 11RP 6-7. Defense counsel followed up by stating that he had informed his client of his right to withdraw his guilty plea under Missouri v. Frye, by claiming ineffective assistance of counsel. 11RP 7. The trial court repeatedly advised Branch, Jr. that with a plea of guilty he could very well be waiving his CrR 3.6 objection because he "can't have it both ways." 11RP 10-15. The trial court even suggested that instead of pleading guilty, he could go forward with a stipulated facts trial and preserve any CrR 3.6 issues. 11RP 11. After a lengthy exchange between the trial court and Branch, Jr., he firmly stated: "I understand I have a choice to go to trial, yes. Yes, I understand I don't have to plead guilty." 11RP 15. He further stated: "I am taking this plea because there is no way for me to win at trial, so I'm going to take advantage of the plea offer." 11RP 19.

Branch, Jr.'s comments and answers demonstrate that his plea was made knowingly and intelligently after weighing the risks and benefits of pleading guilty versus going to trial, mainly, that he would lose at trial and wanted to take advantage of the State's offer.

Branch, Jr. acknowledged on the record that with an offender score of 26, his standard range was 43-57 months in custody, with a statutory maximum sentence of five years in prison and \$10,000 fine. 11RP 20-21. He also understood the State's recommendation for an exceptional sentence of 60 months. 11RP 24. Branch, Jr. indicated that nobody had made any promises or threats in order to get him to plead guilty, and when asked if his plea was freely and voluntarily made he answered: "Yes. Yes, I am, I do, I know I have a choice, and this is the choice that I have to make right now, yeah." 11RP 33. The record establishes that Branch, Jr.'s decision to plead guilty was voluntarily made.

Branch, Jr. stipulated to real facts as outlined in the certification for determination of probable cause, 11RP 25-26, and agreed to the factual statement set forth in the Statement of Defendant on Plea of Guilty. 11RP 30-31. After the trial court concluded the plea colloquy with Branch, Jr., the judge accepted his guilty plea. 11RP 33-34. At the conclusion of the colloquy, the judge reiterated,

You have voluntarily and intelligently made a decision to plead guilty to these two charges in exchange for the deal that has been offered to you by the State,

and you have made this decision knowingly and freely.

11RP 34.

In sum, the potential issue that Branch, Jr.'s guilty plea was not knowing, intelligent, or voluntary would fail. Branch, Jr.'s statement on plea of guilty and the court record show that Branch, Jr. intentionally relinquished his rights in order to take advantage of the plea offer. Branch, Jr.'s questions and answers to the judge demonstrate that he understood the law, the rights he was giving up, and the consequences of his guilty plea. His statement in the plea document, which he claimed was true and adopted as his own, met all of the elements of the crime. 11RP 30-31. Branch, Jr., would not be able to make a showing that his plea was not voluntary or that it was made without sufficient understanding of the consequences.

3. DEFENSE COUNSEL HAD NO LEGAL BASIS TO ARGUE THAT BRANCH, JR.'S PRIOR IDENTITY THEFT CONVICTIONS CONSTITUTED "SAME CRIMINAL CONDUCT" BECAUSE THEY INVOLVED DIFFERENT VICTIMS.

Branch, Jr. could argue that his attorney was ineffective for failing to argue that his 2009 convictions for 16 counts of identity

theft in the second degree were part of the “same criminal conduct” for sentencing purposes. His argument would fail because crimes constitute “same criminal conduct” when they require the same intent, are committed at the same time and place, and involve the same victim. Here, the 2009 convictions were against 16 different victims.⁹ Therefore, his 16 prior convictions for identity theft did not constitute “same criminal conduct.”

Ineffective assistance of counsel claims present a mixed question of law and fact. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). As a result, they are reviewed *de novo*. Id. In order to establish ineffective assistance of counsel, the defendant must show (1) that his attorney's performance fell below a minimum objective standard of reasonable conduct, and (2) that but for his counsel's errors, there is a reasonable probability that the results at trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674

⁹ Detective Hansen's Certification for Determination of Probable Cause from Branch, Jr.'s 2009 convictions for identity theft in the second degree states that Branch, Jr. was in possession of documents that contained personal identifying information and/or financial information belonging to approximately 248 individual victims. Detective Hansen contacted a number of these victims who did not know Branch, Jr. and who denied giving him permission to possess their personal information. CP 135-37.

(1984)). In other words, a defendant must show both deficient performance and resulting prejudice. State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). If the defendant fails to establish either prong, the court should reject the claim. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Two or more crimes constitute “same criminal conduct” when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). Courts construe this narrowly and will not find same criminal conduct if any of the three elements is missing. State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004). Thus, if different crimes involved different victims, a court must treat the crimes as separate in calculating the offender score. State v. Vermillion, 66 Wn. App. 332, 343, 832 P.2d 95 (1992).

A court’s determination of “same criminal conduct” will not be disturbed unless the sentencing court abuses its discretion or misapplies the law. State v. Graciano, 176 Wn.2d 531, 535, 295 P.3d 219 (2013). The offender bears the burden of proving offenses encompass the same criminal conduct. Id. at 539.

Application of the “same criminal conduct” statute involves a factual determination and the exercise of discretion.

State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000).

A defendant who agrees in his own presentence memorandum that his offender score has been properly calculated, and who fails to identify a factual dispute for the court's resolution, waives any challenge of his offender score on appeal. Id. at 521-23;

State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553, rev. denied, 167 Wn.2d 1007 (2009).

Here, defense counsel was not deficient in failing to argue that Branch, Jr.'s 2009 convictions for second degree identity theft constituted "same criminal conduct" because it was evident they did not. Even if the actions that resulted in his 16 second degree identity theft convictions happened at the same time and in the same place, they involved 16 different victims. CP 135-37. Therefore, because one of the three elements required to constitute "same criminal conduct" was missing, each crime was correctly scored separately.

Branch, Jr. would be unable to argue that his counsel's performance was deficient, and more importantly, he would not prevail in making a showing that if his attorney had argued "same criminal conduct" the results would have been different.

Furthermore, because Branch, Jr. agreed with his offender score,

and did not identify a factual dispute as to the issue, he waived any claims on appeal.

4. BRANCH, JR.'S MOTION FOR A NEW TRIAL AND TO ARREST JUDGMENT WERE NOT PROPERLY BEFORE THE TRIAL COURT.

Branch, Jr could argue that the trial court abused its discretion by not ruling on his pro se motion for a new trial and to arrest judgment pursuant to CrR 7.5 and CrR 7.8. Branch, Jr.'s argument would fail because he pled guilty, rendering CrR 7.5 inapplicable, and his CrR 7.8 written motion was not supported by sworn affidavits as required by the rule.

CrR 7.5 governs the trial court's authority to grant a new trial upon a motion of a defendant if any of the specific enumerated circumstances is present,¹⁰ and if it affirmatively appears that a

¹⁰ (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
(2) Misconduct of the prosecution or jury;
(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
(4) Accident or surprise;
(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
(6) Error of law occurring at the trial and objected to at the time by the defendant;
(7) That the verdict or decision is contrary to law and the evidence;
(8) That substantial justice has not been done.

substantial right of the defendant was materially affected. When the motion is based on matters outside the record, the facts shall be shown by affidavit. CrR 7.5. Similarly, under CrR 7.8(b), a trial court may relieve a defendant from judgment as a result of mistakes, inadvertence, excusable neglect, newly discovered evidence, or fraud.¹¹ Rulings under both rules are reviewed for abuse of discretion. State v. Thach, 126 Wn. App. 297, 318, 106 P.3d 782 (2005) (pertaining to CrR 7.5); State v. Swan, 114 Wn.2d 613, 642, 790 P.2d 610 (1990) (pertaining to CrR 7.8).

The court abuses its discretion when it bases its decisions on untenable or unreasonable grounds. State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007); State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The range of discretionary choices is a question of law and the judge abuses his or her discretion if the decision is contrary to law. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

¹¹ The court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

CrR 7.5 is inapplicable in this situation because Branch, Jr., pled guilty to the amended information. An accused who elects to plead guilty may not have a new trial. Young v. Konz, 88 Wn.2d 276, 283, 558 P.2d 791 (1977), on reh'g, 91 Wn.2d 532, 588 P.2d 1360 (1979). And Branch, Jr.'s post-judgment motion under CrR 7.8 to withdraw his guilty plea was not properly before the court where his grounds for withdrawing the plea were not supported by affidavit as required by the court rule. State v. Forest, 125 Wn. App. 702, 704, 105 P.3d 1045 (2005). CrR 7.8(c)(1) provides that a motion to withdraw a guilty plea "shall be made by motion stating the grounds upon which relief is asked, and *supported by affidavits* setting forth a concise statement of the facts or errors upon which the motion is based." (Italics added).

In the face of nothing more than an artfully drafted motion, the trial court is not required to schedule or hold an evidentiary hearing on defendant's post-trial motion for arrest of judgment or new trial, by which defendant sought to establish ineffective assistance of counsel. State v. Bandura, 85 Wn. App. 87, 93-94, 931 P.2d 174 (1997). Procedural due process does not mandate oral argument on a written motion. Oral argument is a matter of

discretion so long as the movant is given the opportunity to argue in writing his or her version of the facts and law. Id. at 92-93.

Here, although Branch, Jr. presented facts in support of his motion, they were not in the form of a sworn affidavit. Thus, Branch, Jr.'s motion was not properly before the trial court, and his challenge would fail on appeal.

5. THE RECORD IS SUFFICIENTLY COMPLETE TO ALLOW APPELLATE REVIEW OF ANY POTENTIAL ISSUES.

Branch, Jr. could argue that the lack of a trial court record of his motion to continue the trial date for three days prevented his appellate counsel from exploring all potential appellate issues. However, this argument would be rejected because the record contains sufficient information to examine all potential appealable issues.

A criminal defendant must have a "record of sufficient completeness" for appellate review of potential errors. State v. Larson, 62 Wn.2d 64, 66, 381 P.2d 120 (1963) (citing Draper v. Washington, 372 U.S. 487, 495-96, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963)). But a "complete verbatim transcript" is not required. State v. Tilton, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). Only when the

reconstructed record fails to recount events material to issues on appeal satisfactorily, must the appellate court order a new trial. Id. at 783.

In Larson, our Supreme Court held a reconstructed record insufficient where (1) a reporter's notes for the entire trial were lost and the trial court provided its own narrative instead; and (2) the defendant had new counsel on appeal and, thus, because he had not been trial counsel, he could not appraise the sufficiency of the record. Under these circumstances, the court found a violation of due process and ordered a new trial. 62 Wn.2d at 65-67.

In Tilton, the Court also held a reconstructed record insufficient and reversed where (1) the trial court's tape recorder was accidentally left off during the defendant's testimony; (2) his trial lawyer had no independent memory or notes of the defendant's testimony; and (3) the defendant's unrecorded testimony was essential to his appeal based on ineffective assistance of trial counsel. The Supreme Court generally noted that a new trial will seldom be required when a report of proceedings is not recorded or where it has been lost. 149 Wn.2d at 779-83.

By contrast, in State v. Putman, 65 Wn. App. 606, 829 P.2d 787 (1992), rev. denied, 122 Wn.2d 1015 (1993), the court held that

a reconstructed record of proceedings that took place outside of the presence of the jury was sufficient for appellate review. Id. at 610. Putman was convicted by a jury of second degree burglary, one count of felony murder in the first degree, and one count of premeditated murder in the first degree with aggravating circumstances. Id. at 608. He argued on appeal that he was effectively denied his right of appeal by the absence of a verbatim report of one of two of the suppression hearing proceedings, in which the murder weapon was ruled admissible, and of the closing arguments. Id. at 609. Distinguishing Larson, which dealt with a lack of a record of proceedings before a jury, the court ruled that the record was of sufficient completeness to allow review when it had a State-prepared narrative report of proceedings from its contemporaneous notes, the court's written findings of fact and law, and the verbatim report of the trial court's ruling on the motion to suppress. Id. at 610.

Similarly, in State v. Miller, 40 Wn. App. 483, 698 P.2d 1123, rev. denied, 104 Wn.2d 1010 (1985), the defendant argued that the trial record was insufficient for review because it omitted the court's response to a jury inquiry during deliberations. Id. at 486. This Court held that Miller had waived his right to a complete record by

not attempting to obtain affidavits from the trial court and counsel concerning the missing portion of the record. Id. at 488. The Court noted that where possible, the trial court should try to recreate an adequate narrative using available resources, including third parties. Id. at 487-88. In finding that Miller had failed to show any prejudice resulting from the missing portion of the record, this Court affirmed Miller's convictions for second degree robbery and first degree theft. Id. at 489.

Analogous to Putman and Miller, the missing record here was not made in front of the jury. Rather, it was a short proceeding where Branch, Jr. was requesting of Judge Kessler, the presiding judge, a three-day continuance of his trial date in order to resolve a disagreement that he had with his attorney regarding whether or not counsel had a legal basis to file a CrR 3.6 motion. 10RP 3, 12-13, 29. The substance of the hearing before Judge Kessler was repeated to the trial judge in detail. In addition to defense counsel stating on the record that Branch, Jr. was seeking a brief continuance in the morning, Branch, Jr. also advised the court that he was seeking a continuance because he felt the nature of the conflict with his attorney was infringing upon his Sixth Amendment right to counsel and he simply wanted a short break to resolve it.

10RP 28-30. Thus, all of the material and relevant information is in the record for review of any appellate issues.

Because Branch, Jr., would not be able to show that the lack of a record from his motion to continue somehow impeded a complete appellate review of the case, or that he was prejudiced, his argument would be rejected.

D. CONCLUSION

For the foregoing reasons, the potential issues raised by Branch, Jr.'s counsel are clearly without merit and would not support an arguable claim on appeal. After an independent review of the record in this case, the State could not identify any other potential issues for review. Therefore, the State respectfully asks this Court to grant counsel's motion to withdraw and dismiss this appeal.

DATED this 10th day of February, 2014.

Respectfully submitted,

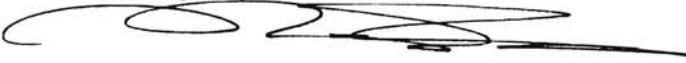
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By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared B. Steed, the attorney 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. ANDREW BRANCH, JR., Cause No. 70436-2-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.



Bora Ly
Done in Seattle, Washington

02-19-14
Date