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Court of Appeals  
Division I  
State of Washington

NO. 72620-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

LAVELLE XAVIER MITCHELL,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

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**BRIEF OF RESPONDENT**

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**A. ISSUE**

1. An appeal of a ruling declining to vacate an earlier ruling does not bring up the earlier ruling for review. Mitchell did not timely appeal the trial court's original order denying his motion to withdraw his guilty plea. In denying Mitchell's subsequent motion to vacate the original order, the trial court did not exercise discretion anew but referred back to the earlier hearing and to the court's ruling following that hearing, and noted that the issues raised in the second motion had already been considered. Mitchell timely appealed the second ruling. Should Mitchell's attempt to resurrect issues decided in the original ruling via this appeal of the second ruling be rejected?

**B. STATEMENT OF THE CASE**

Defendant Lavelle Xavier Mitchell was charged by information with Robbery in the First Degree. The State alleged that on June 3, 2012, Mitchell and his twin brother, Darnell Brown, displayed a handgun in the course of robbing the victim of jewelry, cash and other personal items. CP 56-61.

According to the Certification for Determination of Probable Cause, Mitchell and Brown fled from the scene in Brown's car.

They were apprehended on foot after they abandoned the car. The victim positively identified both Mitchell and Brown. The car was subsequently searched pursuant to a search warrant, and police recovered 3.2 grams of rock cocaine, packaged in individual plastic bindles. A wallet containing Lavelle Mitchell's identification was found in a pair of jeans in the trunk. CP 58-60.

On January 23, 2013, the parties reached a plea agreement: Mitchell would plead guilty to an amended information charging Possession of Cocaine; on a standard range of 0-6 months, the State would recommend 6 months, while Mitchell was free to recommend the low end (i.e., no jail time). CP 51-55. In accordance with the agreement, the State amended the information to charge Possession of Cocaine, and Mitchell pled guilty to that charge. CP 62, 68-80. In his Statement of Defendant on Plea of Guilty, Mitchell admitted that: "On 6/3/12, in King County, WA, I unlawfully and feloniously possessed cocaine, a controlled substance and narcotic drug." CP 79.

The trial court sentenced Mitchell on March 8, 2013 to credit for time served – 5 days in jail. CP 84. Mitchell did not appeal.

The trial court held a hearing over a year later, on August 29, 2014, on Mitchell's motion to withdraw his guilty plea. CP 8-36.

Following argument, the court denied the motion. CP 35. The court entered a written order on the same day, denying the motion and adding that: "The court affirmatively finds that Mr. Mitchell's plea was made knowingly, intelligently, and voluntarily." CP 89. Mitchell did not file a notice of appeal of this order within 30 days.

On September 19, 2014, Mitchell filed in the superior court a motion to vacate the order denying his motion to withdraw his guilty plea. CP 1-37. On September 26, 2014, he filed a memorandum in support of this motion. CP 38-43. The trial court denied the motion in an order entitled "Order Denying Defendant's 2<sup>nd</sup> Motion to Withdraw Guilty Plea and Vacate Judgment," filed on October 2, 2014. CP 44-45. The court made it clear that it had already denied Mitchell's motion to withdraw his plea:

THIS MATTER came before the court on the defendant's *pro se* motion to vacate his judgment on his plea of guilty, which was entered on January 22, 2013. The defendant has already brought this motion before the court. A hearing with oral argument was held to consider the motion on August 29, 2014, at which time the motion was denied. The arguments that the defendant is raising in his current motion were considered at the August 29, 2014 hearing. The defendant is not entitled to a second hearing on this same matter.

CP 44.

On October 14, 2014, Mitchell filed a pro se notice of appeal of the October 2, 2014 order (“Order Denying Defendant’s 2<sup>nd</sup> Motion to Withdraw Guilty Plea and Vacate Judgment”). CP 90. On October 20, 2014, Mitchell, through his attorney, filed two more notices of appeal: one appealing “this Court’s denial of his Motion to Withdraw Guilty Plea,” and one appealing “all pretrial matters, his conviction, and his sentence.” CP 91-104, 105-25.

At this Court’s direction, Mitchell moved to enlarge time to file the latter two notices of appeal (the two notices filed on October 20, 2014). This Court denied the motion by order dated June 2, 2015:

Appellant, Lavelle Mitchell, has moved to enlarge the time to file notices of appeal from the trial court decisions entered March 8, 2013 [judgment and sentence], and August 29, 2014 [order denying motion to withdraw guilty plea]. The respondent, State of Washington, has filed an answer. We have considered [the] motion under RAP 18.8(b) and have determined that it should be denied. Now, therefore, it is hereby

ORDERED that the motion to enlarge the time to file notices of appeal is denied.

Appendix A.<sup>1</sup>

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<sup>1</sup> This Court may take judicial notice of its own records in this case. Swak v. Dep’t of Labor & Indus., 40 Wn.2d 51, 53, 240 P.2d 560 (1952).

**C. ARGUMENT**

**1. MITCHELL'S APPEAL OF THE OCTOBER 2, 2014 ORDER DOES NOT BRING UP FOR REVIEW THE AUGUST 29, 2014 ORDER DENYING HIS MOTION TO WITHDRAW HIS GUILTY PLEA.**

Mitchell attempts, through this appeal of the denial of his motion to vacate the order denying his motion to withdraw his guilty plea, to attack the trial court's original ruling denying his motion to withdraw his guilty plea. But Mitchell did not timely appeal this earlier, substantive ruling. His appeal of the denial of his second motion does not bring the earlier ruling up for appellate review. And because the trial court did not exercise discretion in the later ruling, there is nothing to appeal. This appeal should be dismissed.

The 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). If the motion for withdrawal of a guilty plea is made after judgment, it is governed by CrR 7.8. Id. Motions pursuant to CrR 7.8 must be made "within a reasonable time," and there is a one-year limit if the motion is based on CrR 7.8(b)(1) (mistake, inadvertence, surprise, excusable

neglect or irregularity) or (b)(2) (newly discovered evidence).

CrR 7.8(b).<sup>2</sup>

An appellate court will not reverse a trial court's order on a defendant's motion to withdraw his guilty plea absent an abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). An appellate court will not find an abuse of discretion unless the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

In denying Mitchell's motion to withdraw his guilty plea (the August 29, 2014 order), the trial court explicitly found that the plea was made knowingly, voluntarily and intelligently. CP 89. Mitchell cannot challenge this exercise of discretion, as he did not timely appeal this order. See Appendix A.

In its order denying Mitchell's subsequent motion (the October 2, 2014 order), the trial court observed that "[t]he defendant has already brought this motion before the court." CP 44. The court further observed that "[t]he arguments that the defendant is raising in his current motion were considered at the

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<sup>2</sup> It is arguable that Mitchell's first motion to withdraw his guilty plea, brought more than a year after the judgment was entered, was untimely. Nevertheless, the trial court entertained that motion. The court was under no obligation, however, to entertain a second untimely motion attacking the plea.

August 29, 2014 hearing,” and concluded that Mitchell was “not entitled to a second hearing on this same matter.” CP 44.

While Mitchell timely appealed the October 2<sup>nd</sup> order, this avails him nothing. The court exercised no discretion in reaching its decision in this order – all of the discretion was exercised at the August 29<sup>th</sup> hearing, at which the previous order was entered. There is nothing of substance in the October 2<sup>nd</sup> order to appeal.

Nor can Mitchell’s second motion somehow resurrect the issues adjudicated pursuant to the first motion. See In re Marriage of Osborn, 24 Wn. App. 862, 864-65, 604 P.2d 954 (1979) (where party did not timely appeal decree of dissolution, timely appeal from order denying a later motion to modify custody provisions does not bring up for review the original judgment).

In any event, Mitchell’s appeal is wholly without merit. He repeatedly alleges that the State never filed a “formal charging instrument” before allowing him to plead guilty to possession of cocaine. Appellant’s Opening Brief (“AOB”) at 3-4. This is patently untrue. The State filed an amended information charging Mitchell with possession of cocaine on the same day that Mitchell pled guilty to that charge. CP 62, 68.

Mitchell further alleges that his trial counsel was ineffective in advising him to plead guilty to the amended charge because the State "lacked evidence of Robbery and Assault charges." AOB at 3. But the Certification for Determination of Probable Cause contains ample evidence, including statements from eyewitnesses, that could have led to conviction on the far more serious charge of Robbery in the First Degree. CP 58-60. Absent a conclusive showing that the State could never have proved the facts set out in the certification (a showing that Mitchell has not made), Mitchell can show neither deficient performance nor prejudice from advice leading him to plead guilty to a low-level drug possession crime for which he served a total of five days of confinement. A failure on either prong means that he cannot prevail on his ineffective assistance claim. See State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, *review denied*, 115 Wn.2d 1010 (1990) (if defendant makes an insufficient showing as to either deficient performance or prejudice, his claim of ineffective assistance fails).

Mitchell also seems to believe that there was no evidence to support the drug possession charge. AOB at 8. But a search of Mitchell's brother's car, in which the two fled, revealed 3.2 grams of rock cocaine, as well as Mitchell's wallet with his identification.

CP 58-60. There was thus a factual basis for the charge in the amended information.

Regardless of the merits of these claims, Mitchell cannot predicate them on his appeal of the October 2, 2014 order. This appeal should be dismissed.

**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to dismiss Mitchell's appeal.

DATED this 10th day of September, 2015.

Respectfully submitted,

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# **APPENDIX A**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,  
Respondent,  
v.  
LAVELLE XAVIER MITCHELL,  
Appellant.

No. 72620-0-1

ORDER DENYING MOTION  
TO ENLARGE TIME TO  
FILE NOTICES OF APPEAL

Appellant, Lavelle Mitchell, has moved to enlarge the time to file notices of appeal from the trial court decisions entered March 8, 2013, and August 29, 2014. The respondent, State of Washington, has filed an answer. We have considered motion under RAP 18.8(b) and have determined that it should be denied. Now, therefore, it is hereby

ORDERED that the motion to enlarge the time to file notices of appeal is denied.

Done this 2nd day of June, 2015.

COX, J.

Leach, J.

Belinda, J.

2015 JUN -2 AM 10:27  
COURT OF APPEALS  
STATE OF WASHINGTON

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 **Lavelle Xavier Mitchell**, the appellant, at **DOC #375920, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584**, containing a copy of the **Brief of Respondent**, in **STATE V. LAVELLE XAVIER MITCHELL**, Cause No. **72620-0-I**, in the Court of Appeals for the State of Washington, Division I.

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

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

09-10-15  
\_\_\_\_\_  
Date