

No. 74043-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TYLER ANDREW WAGNER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Millie M. Judge

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Tyler Wagner entered guilty pleas to lesser offenses as part of a plea agreement. Unbeknownst to Mr. Wagner, his attorney had not engaged in a reasonable investigation and had failed to attempt to contact his co-defendant, who possessed potentially exonerating evidence. As a result, Mr. Wagner submits his convictions must be reversed because his attorney rendered constitutionally deficient representation during the plea bargain process which prejudiced him.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Wagner's motion to withdraw his guilty plea.

2. Mr. Wagner was denied his constitutionally protected right to the effective assistance of counsel.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A defendant has a Sixth Amendment right to counsel and to the effective representation of counsel. A defendant is entitled to withdrawal of his guilty plea where he can establish his attorney performed deficiently and that he was prejudiced by the attorney's ineffective representation. Mr. Wagner established that his attorney failed to interview a number of witnesses or engage in any pre-plea

investigation, and further established the potential testimony of at least one of these witnesses was exculpatory. Mr. Wagner also established this failure by his attorney constituted constitutionally deficient representation that prejudiced him. Did the trial court err in refusing Mr. Wagner's motion to withdraw his guilty plea?

D. STATEMENT OF THE CASE

Tyler Wagner was charged with a single count of residential burglary. CP 78. As part of a plea agreement, Mr. Wagner subsequently pleaded guilty to an amended information charging one count of first degree criminal trespass and one count of third degree malicious mischief. CP 64-72.

Prior to sentencing, Mr. Wagner moved to withdraw his guilty pleas. CP 57-62. Mr. Wagner noted that his attorney failed to interview, or even attempt to interview, the co-defendant, Yee Xiong, who Mr. Wagner submitted had invited him to the residence and had led Mr. Wagner to believe he was the owner of the residence. CP 58. In addition, Mr. Wagner's attorney failed to contact Mr. Xiong's attorney, who possessed a deposition transcript of the true owner of the residence, Lourde Godiava, from a civil matter involving her insurance

company, wherein she claimed Mr. Xiong was authorized to stay at the residence. CP 58.

The trial court denied Mr. Wagner's motion, noting that it was reasonable for Mr. Wagner's attorney not to attempt to interview Mr. Xiong. CP 19; RP 18-19.

E. ARGUMENT

The trial court erred in denying the motion to withdraw the guilty pleas as Mr. Wagner was prejudiced by his trial attorney's deficient performance.

1. *Mr. Wagner had a constitutionally protected right to the effective assistance of counsel during the plea bargain process.*

A criminal defendant has a Sixth Amendment right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 343-45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 63-65, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The right to counsel necessarily includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *Richardson*, 397 U.S. at 771. When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

Generally a trial judge's decision regarding a defendant's motion to withdraw a guilty plea is reviewed for an abuse of discretion, but "[b]ecause claims of ineffective assistance of counsel present mixed questions of law and fact, [the Court] review[s] them de novo." *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010), quoting *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

2. *Mr. Wagner's counsel rendered constitutionally deficient representation.*

Mr. Wagner's attorney failed to conduct an adequate investigation which amounted to ineffective assistance and constituting a manifest injustice allowing Mr. Wagner to withdraw his guilty pleas.

A court shall allow withdrawal of a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f); *see also State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996); *State v. Taylor*, 83 Wn.2d 594, 598, 521 P.2d 699 (1974). Four nonexclusive indicia of per se manifest injustice are (1) ineffective assistance of counsel, (2) defendant's failure to ratify the guilty plea, (3) an involuntary plea, or (4) the State's breach of the plea agreement. *Taylor*, 83 Wn.2d at 597. Ineffective assistance of counsel can constitute a manifest injustice that will support a motion to withdraw a guilty plea because "[d]uring plea bargaining, counsel has a duty to assist the defendant 'actually and substantially' in determining whether to plead guilty." *State v. Stowe*, 71 Wn.App. 182, 186, 858 P.2d 267 (1993), quoting *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). *See also Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012) ("During plea negotiations defendants

are ‘entitled to the effective assistance of competent counsel.’”),
quoting Richardson, 397 U.S. at 771.

The Supreme Court has held “the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). It is well-established that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. The duty to investigate derives from counsel’s basic function, which is “to make the adversarial testing process work in the particular case.” *Kimmelman v. Morrison*, 477 U.S. 365, 384, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986), *quoting Strickland*, 466 U.S. at 690. This duty includes the obligation to investigate all witnesses who may have information concerning his client’s guilt or innocence. *Bryant v. Scott*, 28 F.3d 1411, 1419 (5th Cir. 1994), *citing Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir. 1991) *cert. denied*, 502 U.S. 1050 (1992). *See also Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (“Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client.”). The scope of an attorney’s

pretrial investigation necessarily follows from the decision as to what the theory of defense will be. *Soffar v. Dretke*, 368 F.3d 441, 473 (5th Cir. 2004). “[I]n assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” *Wiggins v. Smith*, 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

“[A] defendant’s counsel cannot properly evaluate the merits of a plea offer without evaluating the State’s evidence.” *A.N.J.*, 168 Wn.2d at 109.

Counsel has a duty to assist a defendant in evaluating a plea offer. RPC 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires . . . thoroughness and preparation reasonably necessary for the representation”); RPC 1.2(a) (“In a criminal case, the lawyer shall abide by the client's decision, *after consultation with the lawyer*, as to a plea.” (emphasis added)); *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (citing *State v. Cameron*, 30 Wn.App. 229, 232, 633 P.2d 901 (1981)). Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial. *S.M.*, 100 Wn.App. at 413, 996 P.2d 1111. The degree and extent of investigation required will vary depending upon the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case

proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.

A.N.J., 168 Wn.2d at 111-12 (emphasis in original). Further, counsel's failure to interview the witnesses identified in the police reports constitutes deficient performance. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).

In *Jones*, defense counsel failed to interview three witnesses identified in police reports, one of whom could have corroborated another witness who did testify who stated Mr. Jones had acted in self-defense in a second degree assault case. This was determined to be ineffective assistance by the Supreme Court. *Jones*, 183 Wn.2d at 340-41, 344.

Here, Mr. Wagner's trial attorney failed to investigate and as a result, was unable to accurately advise Mr. Wagner prior to Mr. Wagner's guilty plea. Had counsel contacted Mr. Xiong he would have discovered exonerating testimony: the homeowner's deposition showed Mr. Xiong had authority to invite Mr. Wagner inside. Without this critical information, counsel could not properly advise Mr. Wagner regarding the plea offer and press for dismissal of the unlawful entry charge. Counsel was ineffective in failing to fully investigate the matter.

3. *The failure to investigate was not a strategic decision.*

The trial court was convinced that Mr. Wagner's attorney's actions were strategic choices. RP 18-19. But

strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-91. *See also Jones*, 183 Wn.2d at 340-41 (failure to interview witness is not informed and reasonable strategic decision). In assessing defense counsel's decision not to conduct further investigation, the focus is on whether the investigation leading up to that decision "was itself reasonable." *Wiggins*, 539 U.S. at 526.

The attorney's actions were not reasonable and thus not properly strategic in light of the important information that could have been gleaned. As noted, the information counsel could have easily discovered was exculpatory. If Ms. Godiava authorized Mr. Xiong to enter, then Mer. Wagner was not trespassing. Counsel's failure to attempt to contact Mr. Xiong was not a strategic decision but deficient representation.

4. *Mr. Wagner suffered prejudice from counsel's deficient performance.*

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. *Hill*, 474 U.S. at 59. In the context of guilty pleas, a defendant must show the outcome of the plea process would have been different with competent advice. *Cooper*, 132 S. Ct. at 1384; *Hill*, 474 U.S. at 59. Generally, this is shown by demonstrating to the court some legal or factual matter that was not discovered by counsel or conveyed to the defendant himself before pleading guilty. The Supreme Court has explained that:

where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Hill, 474 U.S. at 59.

Here, Mr. Wagner showed that had his attorney conducted any sort of investigation, he would have discovered evidence which was

exculpatory. Further, Mr. Wagner opined at sentencing that if he had known that Mr. Xiong was a resident and possessed the authority to invite Mr. Wagner inside, he would not have pleaded guilty and would have set the matter for trial. RP 25. As a consequence, Mr. Wagner has shown the requisite prejudice from his attorney's deficient performance. Mr. Wagner was entitled to withdraw his guilty pleas and the trial court erred in refusing to allow the withdrawal. This Court should reverse Mr. Wagner's convictions.

F. CONCLUSION

For the reasons stated, Mr. Wagner asks this Court to reverse his convictions and remand for him to withdraw his guilty pleas.

DATED this 20th day of April 2016.

Respectfully submitted,

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DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74043-1-I
)	
TYLER WAGNER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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