

FILED  
May 24, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 74043-1-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

TYLER ANDREW WAGNER,

Appellant.

---

BRIEF OF RESPONDENT

---

MARK K. ROE  
Prosecuting Attorney

JANICE C. ALBERT  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

**TABLE OF CONTENTS**

I. ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 8

    A. THE TRIAL COURT PROPERLY DENIED THE MOTION TO  
    WITHDRAW THE PLEA BECAUSE THE DEFENDANT DID NOT  
    DEMONSTRATE EITHER DEFICIENT PERFORMANCE OR  
    PREJUDICE..... 8

        1. TRIAL COUNSEL PROPERLY AND REASONABLY  
        INVESTIGATED THE CASE..... 10

        2. The Defendant Has Not Shown That He Was Prejudiced By  
        Counsel’s Performance..... 13

IV. CONCLUSION..... 17

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>In re Clements</u> , 125 Wn. App. 634, 106 P.3d 244, <u>review denied</u> , 154 Wn.2d 1020, <u>cert. denied</u> , 546 U.S. 1039 (2005) .....	10
<u>In re Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004) .....	9
<u>State v. A.N.J.</u> , 168 Wn.2d 91, 225 P.3d 956 (2010) .....	8, 13
<u>State v. Garcia</u> , 57 Wn. App. 927, 791 P.2d 244, <u>review denied</u> , 116 Wn.2d 1010 (1990).....	9, 13
<u>State v. Grimes</u> , 92 Wn. App. 973, 966 P.2d 394 (1998) .....	15
<u>State v. Jones</u> , 183 Wn.2d 327, 352 P.3d 776 (2015).....	11
<u>State v. Kyllo</u> , 116 Wn.2d 856, 215 P.3d 177 (2009) .....	9
<u>State v. McFarland</u> , 128 Wn.2d 322, 899 P.2d 1251 (1995) .....	9
<u>State v. Sandoval</u> , 171 Wn.2d 163, 249 P.3d 1015 (2011) .....	8

### FEDERAL CASES

<u>Hill v. Lockhart</u> , 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) .....	9, 15
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 564 (1984).....	9

### COURT RULES

CrR 4.2(d) .....	8
CrR 4.2(f) .....	8

## **I. ISSUES**

1. The defendant was charged with residential burglary. His counsel, his co-defendant's counsel, and the State conducted extensive negotiations based on evidence and statements gathered at the scene, follow-up investigation by the State, and an investigation by the co-defendant's lawyer that uncovered credibility problems with the victim. The State told defense counsel that further evidence regarding witness credibility would not change its position or lead to a better offer than a plea to two misdemeanors, an offer both defendants took. Was counsel's decision not to investigate further deficient or unreasonable when he was aware of what each witness would say, aware of credibility issues surrounding each, and aware that further investigation would only duplicate that already conducted?

2. Was the defendant prejudiced by counsel's decision not to further investigate when an investigation would not have produced any evidence that would have changed the outcome and would not have been helpful at trial?

## **II. STATEMENT OF THE CASE**

At 5:40 a.m. on September 23, 2014, a neighbor in a residential section of Everett called police. He had heard the sound

of broken glass coming from the house next door, a house that had been broken into before, and voices coming from inside. When he asked who was there, a voice called, "Toby", the homeowner's name but not his voice. The neighbor called 911. CP 23-25, 29.

Officers confirmed with the owner, Lourde "Toby" Godiava, that no one was supposed to be in the house. Arriving at the house, they found in the back an open sliding glass door and a previously-boarded broken window. In the front they found Yee Xiong and the defendant coming outside. Both told officers that they were alone at the house. Police found 17-year old A.J. hiding inside. CP 23-26, 33.

Xiong said the house belonged to Toby. He said he had never lived in the Everett house but had lived in a shed on Toby's Mill Creek property. At first he told police to call Toby who would confirm he had permission to be in the house. After Toby arrived at the scene, he admitted that Toby was not his brother (as the defendant claimed he had said), and that he had no permission to go into the house. He admitted he had broken in through the boarded window. CP 23-25, 27, 34.

Xiong said he was at the house to check on a TV and bicycle he had stored there. Police asked Xiong about a large box by the

front door. The box held an entertainment center. Xiong said he had moved it to the front door so that it was not in his way when he looked for his TV. Asked why he had lied about A.J. being in the house, he said he did not want to be a snitch. Id.

A.J. was wearing latex gloves and carrying a flashlight. She said she was at the house to get her bicycle that she had stored there four months earlier when she had visited the house with Xiong and Toby. She confirmed that Xiong did not have a key and had broken in through the window. Four months earlier, when she left her bike there, Xiong had keys and Toby had been there. She was skeptical of Xiong's claim of permission when he broke in. CP 23-25.

The defendant said Xiong was an acquaintance who told him the house belonged to his brother. The defendant said he went to the house to check on Xiong's things. At first, he claimed they had all entered through the sliding door. Later he admitted that Xiong had broken in. The defendant said Xiang told him to put the entertainment center by the front door so they could take it with them when they left. Xiong told him that the entertainment center did not belong to him. The defendant said that going into the house "spooked" him. CP 23-25, 31, 32, 34.

Godiava spoke to police at the scene and again a few days later. He said Xiong was not his brother, was a compulsive liar, had no permission to be in the Everett house, and had broken into his homes on previous occasions while Godiava was in jail. He confirmed that Xiong had previously stayed in a shed on Godiava's Mill Creek property for few days. He also identified his entertainment center by the front door and said it had not been there the night before. He claimed he had not seen Xiong in a year. CP 32-35.

The State charged both Xiong and the defendant with residential burglary. CP 78-9, CP 38.

Xiong's attorney investigated Godiava, his family, Xiong and Godiava's relationship, and previous police call-outs to Godiava's various homes. She shared that information with the State and the defendant. The State referred her to an insurance company that had handled some of Godiava's homeowner claims. CP 38-47.

Xiong's attorney obtained a transcript of Godiava's testimony at an insurance hearing and summarized it. Godiava had significant credibility issues. He often changed his name, received disability but hid his income, and "melted down" during questioning. He had reported other burglaries at his homes that occurred while

he was in jail. Reports on the other burglaries showed that although Godiava was in jail, Xiong was twice at the house, apparently with permission. Id.

All of that information was shared with the State, Xiong's attorney, and the defendant's counsel. Id.

Both attorneys used the results of the investigation to negotiate their cases. The defendant's attorney believed his client was entitled to a better deal based on "evidentiary, witness, or other legal reasons why the case should be reduced." He argued that his client was a follower and deserved less time than Xiong was more culpable. He acknowledged that each side's case had weaknesses and credibility issues.

Xiong told Wagner about this house. Xiong pried the plywood off of the broken window... Xiong and Godiava[ ]... [had] a prior relationship and it has been filled with deceit.

Id.

Xiong, who had prior convictions for crimes of dishonesty, pleaded guilty to criminal trespass and malicious mischief on March 11, 2015. CP 49. The defendant pleaded guilty to criminal trespass and malicious mischief on June 2, 2015. CP 64-71.

Shortly thereafter, the defendant moved to withdraw his plea claiming ineffective assistance of counsel. CP 57-62. The claim was based on counsel's failure to uncover on his own the information he had already received from Xiong's counsel. Id. In an offer of proof accepted by the State, newly-appointed counsel said that Xiong would have testified that he had lived at the home in the past and was permitted to return. RP 3-4. Defense also claimed that the defendant believed the house was Xiong's and that Xiong simply did not have his keys. CP 58.

The State pointed out that Xiong's statements were nothing new. All parties were aware of all of Xiong's claims and the witnesses' credibility issues during negotiations. It noted the circumstances of the break in, the police reports that contained the defendant's own statements. Under the circumstances, interviewing a co-defendant with credibility problems might not be productive. CP 48-55.

The State also noted that in addition to the negotiations reflected in its affidavit, all three parties had engaged in other, ongoing negotiations. RP 10. All parties were aware that Xiong claimed he had a right to be in Godiava's house and that Godiava had credibility issues.

...[A]t the end of the day the inconsistencies in the statements, what occurred based on the police reports... contradicted everything that was being said and was being told during the negotiations about Mr. Wagner's position and Mr. Xiong's position...

... At the end of the day it was going to be an interesting trial... problematic trial, certainly... because every party weighed what the circumstances were, given the evidence we knew about and we all weighed them. We all understood the risk and this was the decision that everybody made.

RP 11-13.

The trial court found prior counsel's representation effective assistance and tactical. Attorneys for both defendants had done a substantial amount of investigation, Xiong's attorney the lion's share, and the information had been shared. The facts that the defendant claimed should have been discovered during further investigation were already known. Defense counsel reasonably assumed that Xiong's credibility issues, including his guilty plea and his prior convictions, made him an unhelpful witness. At best, Xiong would have claimed he had permission to be in the house, not a particularly helpful statement because of his credibility issues. At worst, Xiong would have said he did not have permission, an unhelpful statement. Nothing that Xiong could have said in another

interview would have helped the defendant or led to a positive outcome at trial. RP 17-19.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT PROPERLY DENIED THE MOTION TO WITHDRAW THE PLEA BECAUSE THE DEFENDANT DID NOT DEMONSTRATE EITHER DEFICIENT PERFORMANCE OR PREJUDICE.**

A court must not accept a guilty plea without first determining that it is made voluntarily with an understanding of the charge and the consequences of the plea. CrR 4.2(d). A trial court may set aside a guilty plea when necessary to correct a manifest injustice. CrR 4.2(f). Generally a trial court's decision on whether to allow a defendant to withdraw a guilty plea is reviewed for abuse of discretion. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010). However, ineffective assistance may render a guilty plea involuntary or unintelligent. State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). Review of the denial of a motion to set aside a plea based on ineffective assistance is reviewed de novo. Id.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 564

(1984). For that reason, reviewing courts strongly presume that counsel's representation was effective. State v. McFarland, 128 Wn.2d 322, 335, 899 P.2d 1251 (1995). A convicted defendant bears the burden of showing both (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's poor work prejudiced him. In re Davis, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004). Counsel's mistake must have been so serious that, in effect, counsel was not functioning as counsel. State v. Kylo, 116 Wn.2d 856, 862, 215 P.3d 177 (2009).

In the context of a guilty plea, the question is whether counsel's performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The defendant must show that but for counsel's deficient performance, there is a reasonable probability he would have insisted on going to trial. Hill at 59; State v. Garcia, 57 Wn. App. 927, 933, 791 P.2d 244, review denied, 116 Wn.2d 1010 (1990).

The defendant in the present case has not met his burden on either prong. He has not shown deficient performance because it was reasonable for counsel not to duplicate the investigation already conducted. He has not shown prejudice because there is no reasonable probability further investigation would have led him

to insist on a trial since he had all of the information when he pleaded guilty.

#### **1. TRIAL COUNSEL PROPERLY AND REASONABLY INVESTIGATED THE CASE.**

The defendant argues that his attorney should have conducted further investigation before advising him on whether to plead guilty. Specifically he claims the attorney should have interviewed Xiong and reviewed Godiava's deposition transcript. However, the record shows that the attorney made a reasonable and tactical decision not to gather again information he already had and that was not particularly helpful to his case.

A similar failure-to-investigate argument was rejected in In re Clements, 125 Wn. App. 634, 106 P.3d 244, review denied, 154 Wn.2d 1020, cert. denied, 546 U.S. 1039 (2005). There, the defendant was convicted of residential burglary and assault after entering his girlfriend's apartment and assaulting her. He argued that his attorney should have interviewed two witnesses whose statements would provide a "more optimistic assessment" of his trial chances. The court disagreed. One witness had not seen the unlawful entry and the other had threatened the victim. "Given these circumstances and the witnesses' close relationship to

Clements, defense counsel could reasonably have concluded that their testimony was unlikely to be helpful at trial.” Id. at 646-47. The decision not to investigate was a tactical decision, not deficient performance.

The same reasoning applies in the present case. First, the defendant already had the information before he pleaded guilty and, second, the information would not have been helpful at trial.

Defense counsel already knew that Xiong had made contradictory statements to police at the scene and to the court at his guilty plea. Counsel already knew the information about Godiava's deposition. Not only did counsel know what the witnesses would have said; he also knew that the information showed that both witnesses were plagued with credibility problems and would not be helpful at trial.

The defendant mistakenly relies on State v. Jones, 183 Wn.2d 327, 352 P.3d 776 (2015). There, defense counsel was ineffective because he never asked for discovery and never interviewed witnesses who might have testified about other suspects and provided an alternative explanation for the 4-year old victim's statements. Id. 340-41. The Supreme Court said that an attorney could not make a strategic decision not to interview or call

a witness when it had no idea what the witness would say. Id. at 341.

That reasoning applied in the present case shows that counsel was not ineffective. He knew just what the witnesses could say. He already had Xiong's contradictory statements and Godiava's contradictory statements, provided by police investigating this incident, prior police calls, and Xiong's attorney. Defense counsel did not need to interview either since he already knew what they would say, as reflected in negotiations.

In fact, further investigation presented defense counsel with a dilemma. If, during an interview, Xiong said he had no right to be in Godiava's house, as he had admitted to the police, the State's case would become stronger. If, on the other hand, Xiong said he had a right to be in Godiava's house, the defendant's case would not improve because of Xiong's lack of credibility, his contradictory statements, the circumstances of the break in, and the defendant's own statements at the scene.

The amount of investigation necessary to provide effective assistance in the context of a guilty plea depends on the issues and facts of each case. Defense counsel must at least reasonably evaluate the evidence and the likelihood of a conviction so that the

decision whether to plead is meaningful. State v. A.N.J., 168 Wn.2d 9, 111-12, 225 P.3d 965 (2010).

That is precisely what defense counsel did in the present case as reflected in the plea negotiations. All three parties – Xiong, the defendant, and the State - recognized the strengths and weaknesses of their cases which included Xiong's ever-changing statements, history, and plea, and Godiava's ongoing credibility issues. As the court noted, the investigation was reasonable, thorough, and known to the defendant's counsel.

Under the circumstances of this case, defense counsel conducted all necessary and reasonable investigation. The defendant has not shown deficient performance. Because he failed to meet his burden on this, the court need not address the prejudice prong, but can simply affirm the conviction.

**2. The Defendant Has Not Shown That He Was Prejudiced By Counsel's Performance.**

To meet his burden on the prejudice prong, the defendant must show that but for his counsel's error, there is a reasonable probability he would have insisted on going to trial. Garcia, 57 Wn. App. at 933. The assessment is based largely on whether the

evidence he could have gathered would have changed the outcome of a trial.

Generally, this is shown by demonstrating to the court some legal or factual matter which was not discovered by counsel or conveyed to the defendant himself before entry of the plea of guilty.

Id.

The defendant has not demonstrated any legal or factual matter that was not discovered by counsel before entry of the plea. Therefore, he has not shown a reasonable probability that more investigation would have led him to insist on a trial. .

Defense counsel could not have discovered anything helpful from an interview with Xiong. Xiong already had given contradictory statements. The defendant was aware of Xiong's statements, plea, and credibility problems before he pleaded. Those all factored in to plea negotiations.

The defendant has not demonstrated that his counsel would have discovered anything helpful from Godiava's statements to his insurance company. He already knew what they were and that the relationship between Xiong and Godiava was "filled with deceit" before he pleaded. As the State noted, all of that information went into the parties' negotiations.

When a defendant claims a failure to investigate a possible defense, the inquiry is whether the defense was likely to succeed at trial. Hill, 474 U.S. at 59. The defendant in the present case has not shown that his defense was likely to succeed at trial because there was nothing “discovered” after his plea that would have helped his case.

The witnesses’ credibility was an important issue, especially looked at in light of the circumstances of the break in. The defendant now argues, in effect, that Xiong had permission to invite him into Godiava’s home. A similar argument was made in State v. Grimes, 92 Wn. App. 973, 966 P.2d 394 (1998). There, a homeowner discovered the defendant and another man in her home. The defendant claimed someone other than the homeowner had given him permission to enter the house and he relied on that person. The court found the argument unpersuasive. Grimes’s claim of a good faith belief that he had permission was rebutted by evidence that he went into the house with intent to commit a crime. A stranger’s statement, “Come help me move my stuff,” is insufficient to support a good-faith belief that an entry is lawful. Id. at 979-80.

The same reasoning applies here. No amount of investigation could have changed the fact that Xiong was not the owner, had no key, broke in, and intended to steal the true owner's entertainment center. Defense counsel was aware of the evidence, the witnesses' potential statements, and their credibility problems. No investigation would have added to that base of knowledge or changed the probability of the defendant's decision to plead rather than risk a trial. The defendant was completely aware of all of the evidence before he made his plea.

The defendant had not met his burden of showing that but-for the failure to personally interview Xiong or Godiava he would have insisted on going to or prevailed at trial. This is a case of buyer's remorse, not ineffective assistance. The conviction should be affirmed.

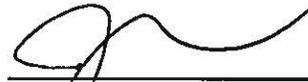
**IV. CONCLUSION**

For the foregoing reasons, the conviction should be affirmed.

Respectfully submitted on May 17, 2016.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:



---

JANICE C. ALBERT, #19865  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

TYLER ANDREW WAGNER,

Appellant.

No. 74043-1-1

DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

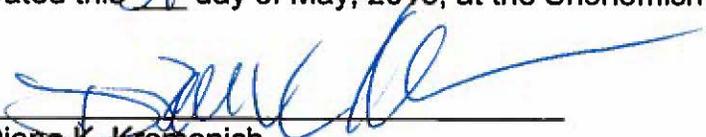
The undersigned certifies that on the 27<sup>th</sup> day of May, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Thomas M. Kummerow, Washington Appellate Project, [tom@washapp.org](mailto:tom@washapp.org); and [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org).

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

Dated this 27<sup>th</sup> day of May, 2016, at the Snohomish County Office.

  
\_\_\_\_\_  
Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office