NO. 35701-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

HARRY EUGENE YBARRA, APPELLANT

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STATE OF WASHINGTON
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Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee and The Honorable Katherine M. Stolz

No. 06-1-01779-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to establish that his defense counsel was ineffective by failing to argue either deficient performance or prejudice?

2. Was the court authorized by the Washington and United States Constitutions to order defendant to provide a DNA sample for identification purposes?

B. STATEMENT OF THE CASE.

1. Procedure

On April 21, 2006, the Pierce County Prosecutor's Office filed an information charging HARRY EUGENE YBARRA, hereinafter "defendant," with one count of first degree unlawful possession of a firearm, one count of unlawful possession of a controlled substance, and one count of making a false or misleading statement to a public servant. CP 1-2. Defendant pleaded guilty to these charges knowingly, intelligently, and voluntarily on June 27, 2006. CP 47-51. As part of this agreement, defendant entered into a contract with the State to stay in contact with the Lakewood Police Department and cooperate with certain requests. RP(2) 8-9; CP 52-53. If defendant adhered to this agreement, the state agreed to recommend a shorter sentence. RP(2) 8-9.

The court held a sentencing hearing on November 29, 2006. RP(2) 1-21. Before the court declared sentence, defendant requested a Drug Offender Sentencing Alternative ("DOSA"). RP(2) 8-17. The State explained that defendant had not maintained contact with the Lakewood Police Department, so it was requesting the high end of defendant's sentencing range. RP(2) 8-9. If the court granted a DOSA, defendant would receive 50.75 months confinement, only five months more than the State would have recommended if defendant had maintained contact with the Lakewood Police Department. RP(2) 9-11. The Court denied defendant's DOSA request. RP(2) 17.

The court sentenced defendant to 116 months confinement for Count I, 24 months confinement and 9-12 months community custody for Count II, and 365 days confinement for Count III. RP(2) 18; CP 12-24. These sentences will be served concurrently to each other and to a sentence for a King County conviction. RP(2) 18; CP 12-24. The court ordered defendant to pay monetary penalties and gave defendant credit for 158 days served. RP(2) 18; CP 12-24. The court also ordered defendant to provide a DNA sample for identification purposes. CP 54-55.

After defendant learned that he would not receive DOSA and heard his sentence, defendant said that he wanted to withdraw his plea. RP(2) 19. His attorney explained to him that they had discussed that issue before and that they would discuss it again after sentencing. RP(2) 19. The defense attorney then explained that they had to finish sentencing

paperwork before they could speak about a motion to withdraw. RP(2) 19-20. Defendant began conferring with counsel, and the court warned defendant that the proceedings were recorded, so he was at risk of putting information on the record. RP(2) 20. In the interests of protecting defendant from incriminating himself, the court said, "I would be quiet if I were you." RP(2) 20. From entry of his judgment and sentence, defendant has filed a timely notice of appeal. CP 30.

2. Facts

Previous to April 20, 2006, defendant was convicted of first degree robbery. CP 47-51. On April 20, 2006, defendant was in Pierce County when he knowingly possessed a firearm. CP 47-51. He also knowingly possessed cocaine on that day. CP 47-51. When questioned by police officers on April 20, 2006, defendant gave those officers a false name. CP 47-51.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO ESTABLISH THAT DEFENSE COUNSEL WAS INEFFECTIVE BECAUSE DEFENDANT HAS NOT ESTABLISHED THAT HIS COUNSEL'S PERFORMANCE WAS DEFICIENT OR THAT DEFENDANT WAS PREJUDICED BY THE LACK OF MOTION TO WITHDRAW DEFENDANT'S PLEA.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial

testing." United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceedings has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge

the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir.1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir.1990). The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. Id. An appellate court is

unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Under CrR 4.2(f), a 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."

RAP 10.3(a)(5) requires parties to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). An appellate court need not consider claims that are insufficiently argued. State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990). Courts of appeal will not review issues for which inadequate argument has been briefed or only passing treatment has been made. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).

Defendant's ineffectiveness claim rests on the assumption that defense counsel refused to litigate a motion to withdraw defendant's plea, but defendant fails to support his argument. He fails to cite legal authority, refer to the record, or make any argument to establish either deficient performance or prejudice.

First, defendant has failed to establish that his counsel was deficient. The record does not indicate that defense counsel refused to litigate a motion to withdraw defendant's plea. After defendant pleaded guilty and heard his sentence, he decided that he then wanted to withdraw

his plea. RP(2) 19. His attorney explained to him that they had discussed that issue before and that they would discuss it again after sentencing. RP(2) 19. The defense attorney then explained that they had to finish sentencing paperwork before they could speak about the motion. RP(2) 19-20. The Court then warned defendant to be quiet to avoid putting information on the record. RP(2) 20. At no other time did defendant mention withdrawing his plea. Furthermore, at no point did defense counsel refuse to litigate defendant's motion. The record merely establishes that defendant may have spoken to his attorney after the sentencing hearing and that no motion to withdraw the guilty plea was filed with the court. RP(2) 20. Without more facts, it is impossible to determine why no motion was filed. Defendant cannot assume facts that are unsupported by the record, so he cannot assume that defense counsel refused to file the motion.

Defendant also fails to establish that the motion to withdraw would have been granted. Defendant has not articulated why the court would have relieved defendant from his knowing, intelligent, and voluntary guilty plea. He does not argue that his plea was involuntary or any other reason that the circumstances surrounding the plea constitute a " manifest injustice." CrR 4.2(f). Because defendant has not argued why such a motion would have been granted, this Court cannot assume that it would have been. See, CrR 10.3(a)(5); Dennison, 115 Wn.2d at 629. There is nothing in the record that would suggest a manifest injustice in this case.

Because a defense attorney is not required to litigate a meritless motion, the defense attorney was not deficient if he indeed chose not to litigate the motion to withdraw defendant's plea. See, Cuffle, 906 F.2d at 388.

Second, defendant has failed to establish that he was prejudiced by the lack of motion to withdraw defendant's plea. Defendant cannot show that a failure to litigate this motion prejudiced him if he cannot point to a single reason why the motion would have been granted. See, Cuffle, 906 F.2d at 388. Defendant cannot claim that failure to litigate the motion prejudiced him because he fails to establish how the motion would have benefited him.

The record below indicates that defendant actually had ample time to confer with his attorney. Five months lapsed between the time defendant pleaded guilty and the time he was sentenced. RP(1) 1, RP(2) 1. During that time, defendant had had a chance to discuss his plea agreement and the possibility of a DOSA with his attorney. RP(2) 8-17, 19. If the record indicates anything about the defense attorney's performance, it is that the defense attorney diligently consulted with defendant before sentencing and that he continued to do so after the sentencing hearing was finished. RP(2) 19-20. Defendant's actions alone prejudiced his case; the State only requested a higher sentence because defendant failed to maintain contact with the Lakewood Police Department. RP(2) 8-9; CP 52-53.

Because defendant has not established that defense counsel was deficient or how a motion to withdraw his plea would have benefited him, he has failed to establish his ineffective assistance of counsel claim.

2. THE COURT DID NOT VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS IN ORDERING A DNA TEST.

Defendant claims that the court's order that he provide a DNA sample for identification purposes in accordance with RCW 43.43.754 violates his rights under article I, section 7 of the Washington State Constitution and under the Fourth Amendment of the United States Constitution. See Br. of Appellant at 5-17.

Article I, section 7 of the Washington State Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause," U.S. Const. amen. IV. According to RCW 43.43.754(1), "[e]very adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis." The Washington Supreme Court has determined

that RCW 43.43.754 is constitutional under both the state and federal constitutions. State v. Surge, ___ Wn.2d __, 156 P.3d 208 (2007).

The Surge court found that RCW 43.43.754 does not violate article I, section 7 of the Washington State Constitution for four reasons. Surge, __ Wn.2d __. First, the term "private affairs" in the Washington Constitution is limited to those privacy interests "which citizens of this state have held, and should be entitled to hold, safe from government trespass absent a warrant." Surge, __ Wn.2d __ (quoting State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994)). Convicted persons' identifying information like photographs and finger prints are not private affairs that are protected by article I, section 7. Surge, __ Wn.2d __. When, as here, DNA is collected for identification purposes only, such collection does not infringe on the convicted felon's privacy interest. Id. Second, the court reasoned that the government does not have to have individualized suspicion to collect DNA samples under RCW 43.43.754 because it has long been accepted that convicted persons must give identifying information to the government in the form of finger prints or photographs. Id. Third, while the court acknowledged that the DNA records of people already released from prison will remain in the government database, other identifying information (such as photograph and finger print information) is also retained in this way. Id. Finally, defendants' private affairs are not violated by the fact that DNA

information can be used for more than just identification purposes because RCW 43.43.754 limits DNA use to identification purposes only. Id.

The Surge court found that, under State v. Olivas, 122 Wn.2d 73, 856 P.2d 1076 (1993), RCW 43.43.754 does not violate the Fourth Amendment. The Olivas court concluded that collecting DNA data under RCW 43.43.7541 met the special needs exception to the Fourth Amendment because it was collected to deter recidivism, which was not a normal law enforcement purpose. Surge, __ Wn.2d __. The Surge court also concluded that the RCW 43.43.754 met the balancing approach outlined in Justice Utter's concurrence in Olivas. Surge, __ Wn.2d __. No federal court has refuted the Olivas opinion. Surge, __ Wn.2d __. In fact, the Ninth Circuit Court of Appeals has found that DNA sampling statutes like RCW 43.43.754 are in accord with the Fourth Amendment. Id. (Citing United States v. Kincade, 379 F.3d 813 (9th Cir. 2004), cert. denied sub nom. Kincade v. United States, 544 U.S. 924 (2005); Padgett v. Donald, 401 F.3d 1273, 1278 (11th Cir. 2005), cert. denied sub nom. Boulineau v. Donald, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005)). There is no case supporting either the special needs approach or the totality of the circumstances approach that supports defendant's argument that DNA sampling violates the Fourth Amendment. Surge, __ Wn.2d __.

The Washington Supreme Court's decision in State v. Surge addresses every issue that defendant raises in his Issue 2. RCW 43.43.754 does not violate either the Washington State Constitution or the United

States Constitution. Because RCW 43.43.754 is constitutional, this court should affirm the sentencing court's order and require defendant to provide a DNA sample for identification purposes.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm defendant's conviction and the court's order to provide a DNA sample for identification purposes.

DATED: JUNE 5, 2007

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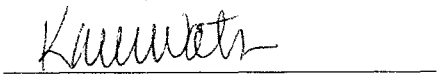

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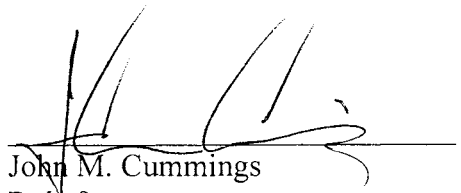
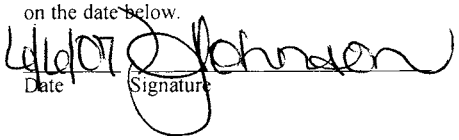


John M. Cummings
Rule 9

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



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