

NO. 377²7-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
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DEPUTY

STATE OF WASHINGTON, Respondent,

v.

MIGUEL DIAZ ELROD, Appellant.

APPELLANT'S BRIEF

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REGULATIONS AND RULES

CtR 4.2 5, 6, 7

I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Elrod's motion to withdraw guilty plea without permitting Elrod to be heard on the merits of the motion.
2. The trial court erred by declining to hear Elrod's motion to withdraw guilty plea.
3. The trial court erred by denying Elrod's motion for new counsel without permitting Elrod to be heard on the merits of the motion.
4. The trial court erred by declining to hear Elrod's motion for new counsel.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court erred by denying Elrod's motions to withdraw his guilty plea and for new counsel without hearing the merits of the motions or permitting Elrod to explain his reasons for making the motions.

III. STATEMENT OF THE CASE

Miguel Diaz Elrod was charged as an accomplice in a drive-by shooting that had resulted in the death of a passenger in the targeted car. CP 1-2. Initially, the information charged Elrod with one count of murder in the first degree. CP 1-2.

On March 4, 2008, Elrod told the court that he had agreed to an Alford plea of guilty to the amended information, charging him with murder in the second degree. CP 38, RP1 4, 16. Elrod stated that:

I did not commit this crime. However, after reviewing the evidence with my attorney I believe there is a substantial likelihood I would be convicted by a jury. I am pleading guilty to accept the State's reduction in the charge and sentencing recommendation.

CP 64. In lieu of a statement of the crime, Elrod agreed that "the court may review [sic] statement of probable cause supplied by the prosecution to establish a factual basis for the plea. For plea purposes only and not for sentencing." CP 64.

The court questioned Elrod and found that the plea was given freely and voluntarily. RP1 16. The court further found that there was a factual basis for the plea. RP1 16. The court then set the case over for sentencing.

On May 2, 2008, the parties appeared again before the court for sentencing. RP2. Elrod's attorney told the court that Elrod was making a motion to withdraw his plea and for new counsel. RP2 4.

[Defense Attorney]: Your Honor, we are not prepared to proceed forward with the sentencing this afternoon. Mr. Diaz-Elrod has asked me to withdraw as his counsel and have the Department of Assigned Counsel appoint him new counsel, to explore withdrawing his guilty plea in this matter. Mr. Diaz-Elrod requested that almost immediately after he entered the plea.

...

Based upon his assertions to me as to why he wants to withdraw the plea, I believe it would be prudent for me to withdraw, based upon his statements to me about the basis for the withdrawal, and that DAC appoint Mr. Diaz-Elrod other counsel.

RP2 3-4. Without ever giving Elrod the opportunity to explain the reasons for his motion to withdraw his guilty plea and to have new counsel, the court denied the motion, stating:

THE COURT: Okay. The Court's going to proceed with sentencing.

This Court, I believe, when a motion of this type is made at this juncture of the case, and having already continued the sentencing once, I believe I have the discretion in order to proceed with the sentencing.

This, in no way, limits Mr. Elrod from retaining counsel or being—having new counsel assigned to this case after the sentencing, and bringing forth the motion to set aside the plea of guilty, but I do not believe it

would be in the interest of justice, nor do I believe there would be any prejudice to the defendant, to having counsel proceed and be attorney of record through this sentencing, based on his history of this case. And I believe he can more than adequately represent the interest of this defendant.

And again, I'm not ruling or making any— attempting to make any rulings on the issue of him having an opportunity to bring a motion for setting aside the verdict; I think that's his absolute right. And if new counsel's required because of a conflict of interest that's developed, then that could be a matter for another hearing. But for now, because of the lateness of this motion, and the fact that we have continued this once, already, and that all parties are present, I believe, in the interest of justice, that we should proceed with sentencing.

RP2 7-8.

The court then sentenced Elrod to 265 months, the maximum of the standard range. RP22. Judgment and Sentence was subsequently signed and entered. CP 68-79. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY DENYING ELROD'S MOTIONS TO WITHDRAW HIS GUILTY PLEA AND FOR NEW COUNSEL WITHOUT HEARING THE MERITS OF THE MOTIONS OR PERMITTING ELROD TO EXPLAIN HIS REASONS FOR MAKING THE MOTIONS.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238,

242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). This standard is reflected in CrR 4.2(d), which mandates that the trial 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.” Under this rule, once a guilty plea is accepted, the court must allow withdrawal of the plea when doing so would “correct a manifest injustice.” CrR 4.2(f). Courts have recognized the following circumstances as amounting to manifest injustice: the denial of effective counsel, the defendant’s failure to ratify the plea, an involuntary plea, and the prosecution’s breach of the plea agreement. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

A guilty plea constitutes a waiver of significant constitutional rights by a defendant including the right to a jury trial, to confront one’s accusers, to remain silent, and to be convicted by proof beyond a reasonable doubt. *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001) (citing cases). Therefore, “a defendant has a constitutional right to withdraw from a negotiated guilty plea if it was unconstitutionally obtained.” *State v. Korum*, 157 Wn.2d 614, 668, 141 P.3d 13 (2006).

Once the law has created such an expectation or right, due process requires a hearing before it can be taken away. *See Vitek v. Jones*, 445 U.S. 480, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980); *In re Sinka*, 92 Wn.2d 555, 599 P.2d 1275 (1979); see also *State v. Davis*, 125 Wn. App. 59, 63-64, 104 P.3d 11 (2004) (holding that a CrR 4.2(f) pre-sentence motion to withdraw a guilty plea is a critical stage of a criminal proceeding, for which a defendant has a constitutional right to be assisted by counsel). “A hearing ensures that the right or the expectation is not arbitrarily denied.” *In re James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982) (holding a court must hold a hearing before the prosecutor is permitted to renege on plea agreement).

A defendant may move, orally or in writing, to withdraw a guilty plea prior to judgment. CrR 4.2(f); *State v. Davis*, 125 Wn. App. 59, 63-64, 68, 104 P.3d 11 (2004). *Cf.* CrR 4.2 (CrR 4.2 does not set specific procedures for making the motion to withdraw a plea). The court will review conclusions of law, such as the voluntariness of a plea, de novo. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004) (citing *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004)), *cert. denied*, 544 U.S. 922 (2005). The court reviews a trial court’s decision on a motion to withdraw a guilty plea for abuse

of discretion. *State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141, review denied, 132 Wn.2d 1002 (1997). And the court will review the findings of fact that support this decision for substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006).

In *State v. Davis*, 125 Wn. App. 59, 104 P.3d 11 (2004), the court found that the trial court erred in not considering Davis's CrR 4.2(f) motion to withdraw. Critical to the analysis was the meaning of "after judgment" in CrR 4.2(f) because the court had pronounced Davis's sentence but it had not yet finalized it with Davis's fingerprints nor filed it with the court clerk. The reviewing court found that Davis made his motion before judgment because the judgment and sentence had not yet been filed with the clerk. *Davis*, 125 Wn. App. at 68. The court then noted:

Because the determination of whether Davis's plea of guilty was voluntary and intelligent is a question of fact 'peculiarly within the province of the trial court,' we must remand the issue. Davis is entitled to representation by counsel on this motion because it is an essential stage of his prosecution.

Davis, 125 Wn. App. at 68 (footnotes omitted) (quoting *State v. McLaughlin*, 59 Wn.2d 865, 870, 371 P.2d 55 (1962)). The court also noted that this distinction is important because if a manifest injustice occurred, the defendant should have immediate relief rather than

having to invoke post judgment proceedings without counsel's assistance. *Davis*, 125 Wn. App. at 64.

Although CrR 4.2 limits the grounds upon which a guilty plea may be withdrawn, the trial court never even considered Elrod's reasons and whether these justified allowing him to withdraw his plea under CrR 4.2. The court never even asked Elrod why he was bringing the motion. As was the case in *Davis*, the court refused to consider Elrod's motion on its merits and instead condemned him to raising a post-judgment motion, which is much more limited and must be pursued without the benefit of counsel, rather than a CrR 4.2 pre-judgment motion. Thus, under *Davis*, Elrod is entitled to remand for a hearing to consider the merits of his motion under CrR 4.2(f).

Furthermore, the court abused its discretion by failing to inquire into the reason for the motion to determine if new counsel should be appointed. Although whether or not an indigent defendant's dissatisfaction with court-appointed counsel is justified and warrants the appointment of a new lawyer lies within the sound discretion of the trial court,¹ that discretion cannot be exercised without the trial court's consideration of the defendant's stated

¹ *State v. Dougherty*, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982); *State v. Brittain*, 38 Wn. App. 740, 689 P.2d 1095 (1984).

reasons for bringing the motion. The defendant bears the burden of providing the court with legitimate reasons why he is entitled to reassignment of counsel. *McKee v. Harris*, 649 F.2d 927 (2d Cir. 1981), *cert. denied*, 456 U.S. 917 (1982); *Wilks v. Israel*, 627 F.2d 32, 36 (7th Cir. 1980), *cert. denied*, 449 U.S. 1086 (1981); *Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976). A defendant can never satisfy that burden if the court refuses to hear from the him what his reasons are. Thus, it was an abuse of discretion for the court to deny Elrod's motion for new counsel without permitting Elrod to tell the court why he felt new counsel was required.

V. CONCLUSION

The trial court deprived Elrod of his due process rights when it failed to consider the merits of Elrod's motions to withdraw guilty. Further, the trial court abused its discretion in declining to hear the reason Elrod had brought a motion for new counsel. For these reasons, this court must remand for a new hearing with the opportunity to be heard.

DATED: October ¹⁰ ~~8~~ 2008

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¹⁰ CERTIFICATE OF SERVICE
I certify that on October ¹⁰ ~~8~~, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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