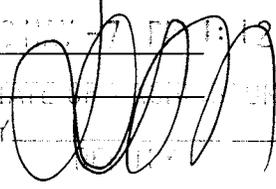


NO. 38149-4

COURT OF APPEALS  
DIVISION II

COURT OF APPEALS  
STATE OF WASHINGTON  
BY: 

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BOB PUGH, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Sergio Armijo

No. 06-1-00431-2

---

**BRIEF OF RESPONDENT**

---

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

1. Did the court properly exercise its discretion in denying defendant's motion to withdraw his guilty plea when defendant failed to support his motion with any evidence and when defendant's claims were refuted by the information in the record?
2. Has defendant failed to present a cognizable claim for ineffective assistance of counsel when he failed to show that his standby counsel violated any duty he owed defendant under his limited role as standby counsel?

B. STATEMENT OF THE CASE.

On January 27, 2006 the Pierce County Prosecutor's office charged appellant, BOB PUGH (defendant), with assault in the third degree and resisting arrest. CP 1-3. Defendant was committed to the Special Commitment Center (SCC) on McNeil Island at the time of the alleged crimes. *Id.* On March 20, 2006 Linda King of the Pierce County Department of Assigned Counsel substituted in as the defendant's attorney. CP 4. She obtained an order so that defendant would be examined by staff at Western State Hospital, including a developmental disabilities professional, for an evaluation as to his competency to stand trial, his sanity at the time of the offense and whether he had the capacity to form the relevant mental state at the time of his offense. CP 14-17

The defendant was evaluated by Dr. George Nelson, who submitted a report to the court. CP 89-102. Dr. Nelson found that defendant did not suffer a major mental disorder that would affect: 1) his competency to stand trial; 2) his sanity at the time of the offense; or 3) his capacity to form the relevant mental state at the time of the offense. *Id.* (Report at pp. 11-13). Additionally, after interviewing defendant and reviewing results of recent testing, Dr. Nelson did “not believe a diagnosis of Borderline Intellectual Functioning [was] warranted any longer[,]” as defendant tested in the low-average range of functioning. *Id.* at p. 8. On August 8, 2006 the Honorable Vicki Hogan entered an order finding the defendant competent to proceed to trial. CP 103-104.

On February 26, 2007 the State filed a second amended information charging the defendant with only assault in the third degree in exchange for his guilty plea. CP 31; 2/26 RP 3. On that same date the defendant entered a plea of guilty before the Honorable Sergio Armijo. CP 33-36; 2/26 RP 3-6. During the plea colloquy, defendant stated that he understood English and that he had gone over the plea form with his attorney and understood the elements of the crime and its penalties. 2/26 RP 4-5. Defendant acknowledged that he was adopting the statement in paragraph 11 as his own and that he was entering his guilty plea freely and voluntarily. CP 33-36; 2/26 RP 6. At the conclusion of the colloquy, the court stated:

Court is satisfied that this plea is made freely and voluntarily with a complete understanding of the rights being waived and of the potential sentence that maybe imposed.

2/26 RP 6. The court agreed to set sentencing over for one year as recommended by the parties and that the defendant would be returned to the SCC during this delay. 12/26 RP 6-7. Sentencing was initially set for February 4, 2008, but was set over until February 21, 2008. CP 107, 108. On February 21, 2008, the court entered an order allowing defendant's current counsel to withdraw and directing the substitution of new counsel. CP 37. The order further indicates that defendant had filed a motion to withdraw his plea and a motion to proceed pro se. *Id.* The court directed that these motions would be heard at a future date. *Id.* On May 16, 2008, the court allowed defendant to proceed pro se but also directed that his substitute counsel would remain as standby counsel. CP 40.

Defendant filed a written motion to withdraw his plea and the State filed a written response. CP 41-49, 50-58. The Court was also provided a copy of the transcript from the plea hearing. 8/1 RP 4-11.

The hearing on the motion to withdraw plea occurred on August 1, 2008. 8/1 RP 2. On that day, defendant claimed that he was not ready because his prior counsel, Ms. King, was not present; additionally, he claimed to be suffering from seizures and was unprepared to proceed without medication as he was unable to concentrate; the State was ready to proceed on the motion and with sentencing if the court denied the motion.

8/1 RP 2-3. Defendant asserted that there needed to be affidavits filed or live testimony taken regarding his motion but had not obtained any affidavits and, apparently, had not subpoenaed any witnesses. 8/1 RP 4-5. Based upon the information before the court, it denied the motion noting that it found nothing in the transcript of the plea colloquy or the forensic report regarding defendant's mental health that would cause the court to doubt the knowing and voluntary nature of defendant's plea. 8/1 RP 11. The court signed an order denying the motion. CP 64; 8/1 RP 11. The court then proceeded to sentencing imposing 9 months confinement with credit for 9 months served, one year community custody, and certain legal financial obligations. CP 65-73; 8/1 RP 15.

Defendant filed a timely notice of appeal from entry of this judgment. CP 60.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO WITHDRAW GUILTY PLEA.

CrR 4.2 permits a defendant to withdraw a guilty plea to correct a manifest injustice. A trial court should grant a motion to withdraw a guilty plea *only* when withdrawal is necessary to correct a manifest injustice. CrR 4.2(f); *State v. Taylor*, 83 Wn.2d 594, 595, 521 P.2d 699 (1974); *State v. Dixon*, 38 Wn. App. 74, 76, 683 P.2d 1144 (1984) (manifest injustice standard also applies to motions to withdraw *Newton*

or *Alford* pleas). A manifest injustice occurs when “(1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) effective counsel was denied; or (4) the plea agreement was not kept.” *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001). An appellate court reviews the denial of a motion to withdraw a guilty plea for abuse of discretion. *Marshall*, 144 Wn.2d at 280. In order for an appellate court to reverse the trial court’s decision, “the record must show that the discretion exercised by the court [in denying the motion] was predicated upon grounds clearly untenable or manifestly unreasonable.” *State v. Olmsted*, 70 Wn.2d 116, 119, 422 P.2d 312 (1966).

When a defendant completes a written plea statement, and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998), citing *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). Furthermore, when a defendant, who has received the information, pleads guilty pursuant to a plea bargain, there is a presumption that the plea is knowing, intelligent, and voluntary. *In re Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), *review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994). “A defendant’s signature on the plea form is strong evidence of a plea’s voluntariness.” *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). If the trial court orally inquires into a matter that is on this plea statement, the presumption that the defendant understands this matter becomes “well nigh irrefutable.”

*Branch*, 129 Wn.2d at 642 n.2; *State v. Stephan*, 35 Wn. App. 889, 894, 671 P.2d 780 (1983). After a defendant has orally confirmed statements in this written plea form, that defendant “will not now be heard to deny these facts.” *In re Keene*, 95 Wn.2d 203, 207, 622 P.2d 13 (1981).

In the case currently before the court, defendant assigns error to the trial court’s denial of his motion to withdraw his plea. The record does not reveal that the trial court abused its discretion. Here the trial court was faced with a defendant who entered a plea pursuant to a plea agreement and while represented by counsel. Defense counsel represented that she had gone over the plea form with her client and that it was her belief that he understood its contents; she further indicated that she believed that he was pleading guilty of his own free will. 2/26 RP 3-4. During the plea colloquy, the defendant specifically assured the court that he understood the elements of the crime he was pleading guilty to and the consequences of entering a plea. 2/27 RP 4-6. He represented that was entering his plea freely and voluntarily and denied any coercive influences. 2/26 RP 6. The trial court did not err in finding from this record that defendant had entered a voluntary guilty plea.

Defendant’s written motion to withdraw his plea claimed that he should be allowed to withdraw his plea because: 1) his former attorney was ineffective for not investigating a mental health defense; 2) his plea was involuntary because he was not on his medication that day; 3) that his low IQ prevented him from making an intelligent plea; and, 4) state agents

had coerced his plea. CP 41-49. The only evidence supporting the motion to withdraw was an affidavit of the defendant. CP 47-49. This affidavit contained information about what defendant alleges to have occurred one month prior to the entry of his guilty plea. CP 47-49. The affidavit contains no information about his attorney's alleged deficient performance, the failure to take medication, his low IQ, or an explanation of what state agents did to make his plea coerced. *Id.* Thus, the written motion was wholly unsupported by any competent or relevant evidence.

Moreover, the record before the trial court provided evidence that defendant's claims were unfounded. The record showed that his attorney had sought an evaluation of defendant mental state with regard to his competency to stand trial, sanity at the time of the offense, and capacity to form the requisite mental state at the time of the offense. CP 14-17. The results of this evaluation showed that defendant *did not suffer a major mental disorder* that would affect: 1) his competency to stand trial; 2) his sanity at the time of the offense; or 3) his capacity to form the relevant mental state at the time of the offense. CP 89-102. This record does not indicate a lack of exploration of defendant's mental health issues; rather it indicates an exploration that proved unfruitful as to a possible defense at trial. The trial court did not err in denying the motion to withdraw the guilty plea on defendant's claim of ineffective assistance of counsel.

Defendant presented no evidence to the trial court that he failed to take medications on the day of his plea, much less that the failure to take

such medication would have any impact on his mental faculties or call into question the voluntariness of his plea. Defendant could have included some evidence supporting this claim in his affidavit, but he failed to do so. As this claim was wholly unsupported by any evidence, the trial court did not abuse its discretion in rejecting it.

Defendant asserts that his low IQ prevented him from entering a voluntary plea. However, the court referenced that the Western State Hospital evaluation found otherwise. 8/1 RP 11. That report stated:

Concerns have been raised about [defendant's] cognitive limitations. However, the results of recent intelligence testing suggest that he is functioning in the low-average range of cognitive functioning, and that was consistent with his presentation during interview. In any case, he clearly has sufficient cognitive capacity to understand the legal proceedings

CP 89-102 (*see* p. 11 of report). The information before the court disputed defendant's claims and defendant presented no evidence to support his position. 8/1 RP 11. The court did not abuse its discretion in rejecting this claim.

Finally as for defendant's claim that state agents coerced him into pleading guilty, defendant never explained this claim as to how he was coerced and never presented any evidence to support it. 8/1 RP 7-8. At the time of the plea he indicated that he was pleading freely and voluntarily and denied that anyone was forcing him to plead guilty or that anyone had made him any special promises. 2/26 RP 6. As defendant

orally confirmed the statements in his written plea form, the trial court was correct in finding that defendant “will not now be heard to deny these facts.” See *In re Keene*, 95 Wn.2d at 207. Again this record does not reveal any abuse of discretion in the denial of the motion to withdraw guilty plea. The trial court’s ruling should be affirmed.

2. DEFENDANT HAS FAILED TO RAISE A CLAIM THAT MAY BE CONSIDERED ON APPEAL AS HE SEEKS TO CHALLENGE THE EFFECTIVENESS OF HIS STAND-BY COUNSEL BUT HAS FAILED TO SHOW THAT HIS STANDBY COUNSEL VIOLATED ANY DUTY HE OWED DEFENDANT IN HIS LIMITED CAPACITY.

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. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution 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).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

While Sixth Amendment to the United States Constitution gives a criminal defendant the right to effective assistance of counsel, it also gives a criminal defendant the right to represent himself or herself at trial. *Faretta v. California*, 422 U.S. 806, 816, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). “Generally, defendants who are afforded the right to self-representation cannot claim ineffective assistance of counsel for the obvious reason they become their own counsel and assume complete responsibility for their own representation.” *State v. McDonald*, 143 Wn.2d 506, 512, 22 P.3d 791 (2001). Standby counsel has limited obligations or duties to the defendant when counsel has been appointed by the court. *Id.* at 512.

The American Bar Association has defined the role of standby counsel as follows:

- (a) Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.
- (b) Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.

American Bar Association Standard 4-3.9 *Obligations of Hybrid and Standby Counsel*; see also *State v. Silva*, 107 Wn. App. 605, 628, 27 P.3d 663 (2001). Standby counsel must be (1) conflict free and able to fully

represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary,(2) candid and forthcoming in providing technical information/advice, and (3) able to maintain attorney-client privilege. *McDonald*, 143 Wn.2d at 512-13. The role contemplated for standby counsel "is one in which counsel acts as an advisor to the accused when requested, but does not in any respect act as an errand runner." *Silva*, 107 Wn. App. at 628. In *State v. Bebb*, 108 Wn.2d 515, 525, 740 P.2d 829 (1987), the Washington Supreme Court indicated that under *Faretta*, standby counsel should provide technical information and be available to represent the accused if he so desires. It suggested that technical information should take the form of giving advice about procedure, appropriate law books, and research material, rather than actually performing research services for the defendant. *Id.*

While defendant challenges the effectiveness of his stand by counsel, he does not raise a challenge pertaining to the limited duties of a standby counsel. Defendant does not allege a conflict of interest or a violation of the attorney client privilege. Defendant does not point to any part of the record where defendant sought technical information or advice and his standby counsel was not forthcoming with assistance. Rather defendant asserts that stand by counsel is responsible for the failure to subpoena witnesses and obtaining of affidavits. As noted in *Silva*, stand by counsel is not an errand runner or a legal assistant. Defendant presents no authority that these tasks fall with the scope of stand by counsel's

duties and the case law cited above indicate that they are not. Defendant, acting pro se, was responsible for subpoenaing witnesses and acquiring affidavits. Any failure to do so does not present a cognizable claim for ineffective assistance of stand by counsel.

Defendant asserts that stand by counsel was responsible for these tasks because the trial court directed him to assist defendant with these matters. The record below does not support this claim. The motion to withdraw was set to be heard on May 16, 2008. Almost immediately, the court pointed out that no written motion had been filed with the court. 5/16 RP 2-3, 5. During the colloquy regarding defendant's desire to proceed pro se, the court repeatedly questioned defendant about his ability to file the necessary paperwork to bring a motion to withdraw his plea; defendant repeatedly assured the court that he knew what needed to be done. 5/16 RP 6-7, 9-10. The record also indicates that his standby counsel had been advising him on the need for an affidavit to support his claim for being off of his medications. 5/16 RP 10-11. Defendant indicated that if he got a continuance that he could get witnesses and obtain the needed declaration as long as he had an order declaring that he was proceeding pro se. 5/16 RP 10-11. The court then granted defendant's request to proceed pro se and for a continuance; he directed the defendant to file the appropriate paperwork and directed standby counsel to "assist" him. 5/16 RP 12. The court directed defendant to file his written motion by May 30, 2008; the written motion was not filed until June 2, 2008.

5/16 RP 15; CP 41-49. The record indicates that the direction was to assist defendant with filing the written motion to withdraw his plea, not to assist in obtaining affidavits or to subpoena witnesses.

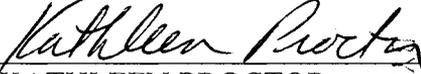
As defendant has failed to show that his standby counsel violated any duty he owed defendant under his limited role as standby counsel, defendant's claim of ineffective assistance of counsel must fail.

D. CONCLUSION.

For the forgoing reasons, this court should find that the court properly exercised its discretion in denying the motion to withdraw guilty plea and that defendant has failed to show ineffective assistance of his standby counsel. The court should affirm the judgment below.

DATED: May 7, 2009.

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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.

5/7/09   
Date Signature