

FILED
COURT OF APPEALS
DIVISION II

NO. 39368-9-II

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STATE OF WASHINGTON

BY  DEPUTY

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

STATE OF WASHINGTON, RESPONDENT

v.

MARTIN GOMEZ-VILLA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan Serko

No. 07-1-05633-7

Brief of Respondent

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

1. Whether the trial court abused its discretion in denying the defendant's motion to withdraw his guilty plea?
2. Whether the defendant has demonstrated that performance of counsel at the time of the plea was deficient; specifically that he failed to contact an alibi witness?
3. Whether the defendant has demonstrated prejudice; that, if counsel had contacted the witness, counsel would have not have recommended that the defendant plead guilty?
4. Whether the trial court abused its discretion in declining to hear oral testimony regarding the defendant's motion to withdraw his plea?
5. Whether the court denied the defendant due process when it declined to hear oral testimony and based its decision on the pleadings and arguments submitted by the parties?

B. STATEMENT OF THE CASE.

1. Procedure

On November 11, 2007, the Pierce County Prosecuting Attorney charged Martin Gomez-Villa, hereinafter referred to as the defendant, with four counts of assault in the first degree, all with firearm enhancements;

and four counts of drive-by shooting. CP 1-5. On October 23, 2008, in exchange for a valid guilty plea, the State amended the Information to charge one count of assault in the first degree, with a firearm enhancement; and one count of drive-by shooting. CP 52-53. The defendant entered a plea of guilty. CP 6-14, RP 10/23/2008.

Some time after the plea, and before the sentencing hearing, the defendant hired a new lawyer, Robert Quillian. Through Mr. Quillian, the defendant filed a motion to withdraw the plea. CP 15-19. The defendant moved for an evidentiary hearing (CP 20-23) and filed declarations of Carmen Benson (CP 30-31) and Seong Kim (CP 28-29).

On May 21, 2009, the court heard the defendant's motions. RP 5/21/2009. After considering the pleadings and hearing argument, the court denied the defendant's motions. RP 5/21/2009 15, CP 46-47. On the same day, the court sentenced the defendant. CP 32-45. The defendant filed a timely appeal on 6/3/2009.

2. Facts

The underlying facts of this case are not at issue. This summary is based on information from the State's declaration for determination of probable cause, CP 50-51.

On October 21, 2007, the defendant and three co-defendants: Jonathan Aguilar Mera, Jorge Lamas Olivera, and Oscar Ramos Olivera, drove by the home of the Mederos family in the 3500 block of East Howe Street in Tacoma. CP 50. The defendants opened fire at the Mederos

house. *Id.* While firing from the car or cars, the defendants' gunshots also struck the homes of three of Mederos' neighbors. *Id.*

Police found .22 caliber ammunition at the scene. *Id.* In the course of the investigation, police served a search warrant at Gomez-Villa's home. *Id.* There, police recovered a handgun and several .22 live rounds and casings. CP 51.

Ramos Olivera told police that the group, including Gomez-Villa, had been present in vehicles to conduct the shooting. CP 50. Gomez-Villa admitted that he was present, as a driver for the shooting, and aware of the purpose of the shooting. CP 51. The other three co-defendants all admitted being present for the shooting and their participation either as a driver or a shooter. CP 50, 51. All four men claimed affiliation with the Varro Surenos Lokotes (VLS) street gang set and were acting out of loyalty to the gang. CP 51.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

CrR 4.2(f) states that "the 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." This rule imposes a demanding standard on the defendant to demonstrate a manifest

injustice, i.e., “an injustice that is obvious, directly observable, overt, not obscure.” *State v. Taylor*, 83 Wn. 2d 594, 596, 521 P.2d 699 (1974).

Because all of the safeguards surrounding an acceptance of a guilty plea, trial courts should exercise great caution before setting aside a guilty plea. *Id.*, at 597. An appellate court will overturn a trial court's denial of a motion to withdraw a plea only for abuse of discretion. *State v. Zhao*, 157 Wn. 2d 188, 197, 137 P.3d 835 (2006), *see also*, *State v. Olmsted*, 70 Wn.2d 116, 422 P.2d 312 (1966).

One of the following four criteria must be met for a showing of manifest injustice regarding withdrawal of a guilty plea: (1) the denial of effective assistance of counsel, (2) the plea was not ratified by defendant, (3) the plea was not voluntary, (4) the plea agreement was not honored by the prosecution. *State v. Saas*, 118 Wn. 2d 37, 42, 820 P.2d 505 (1991); *State v. Taylor*, 83 Wn.2d at 597.

If a defendant has received the information and pleads guilty pursuant to a plea agreement, there is a presumption that the plea is made knowingly, intelligently, and voluntarily. *State v. Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993). When a defendant signs a written plea form that includes a statement of guilt and acknowledges that he has read and understands the agreement, "the written statement provides prima facie verification of the plea's voluntariness." *State v. Stephan*, 35 Wn. App. 889, 893, 671 P.2d 780 (1983) (quoting *State v. Perez*, 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982) (citing *In re Keene*, 95 Wn.2d 203, 206-

207, 622 P.2d 13 (1981)). If a trial court orally inquires into a matter that is on a plea statement, there is a presumption that the defendant understands this matter, and it becomes "well nigh irrefutable." *State v. Stephan*, *supra* at 893-894. After a defendant has orally confirmed statements in this written plea form, that defendant should "not now be heard to deny th[is] fact." *In re Keene*, *supra* at 207. Additionally, if the record reflects that if a defendant understood the nature and consequences of the plea, and had determined that the plea was in his or her best interest, then the plea was voluntary. *In Re Barr*, 102 Wn.2d 265, 269, 684 P.2d 712 (1984) citing *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L.Ed.2d 162 (1970).

Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *See, State v. McFarland*, 127 Wn. 2d 322, 335, 899 P.2d 1251 (1995).

In the present case, the record reflects that the defendant was aware of the rights he was giving up and the consequences of his plea. The court inquired carefully of the defendant before accepting his plea. RP 10/23/2008 6 ff. Regarding the facts, the court read the *Alford*¹ language to the defendant, including "after *reviewing the discovery with defense counsel*". RP 10/23/2008 9 (emphasis added). The court went on to review the declaration of probable cause. CP 50-51; RP 10/23/2008 10. The court

¹ *See, also State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

found a factual basis for the plea from the declaration, and incorporated it into the defendant's plea. *Id.*

In considering the defendant's motion to withdraw his plea, the trial court referred to the extensive record made at the time of the plea. RP 5/21/2009 6. The court heard argument regarding the circumstances of the plea and that the original charge carried a prison term of 866 months. *Id.*, at 8, 9. Further, the court heard argument that the declaration of probable cause reflected that a co-defendant stated that the defendant participated in the crime, the defendant himself confessed to being present and participating in the crime, and a gun and ammunition consistent with that used in the crime was found at the defendant's home. RP 5/23/2009 13; CP 50-51.

The record reflects that the defendant had reviewed the evidence with his attorney. The court had before it, and considered, the summary of evidence in the declaration for probable cause; the factual basis of the charges. The plea was knowingly and voluntarily made. The court did not abuse its discretion when it declined to consider additional evidence, not when it denied the defendant's motion to withdraw the plea.

2. THE DEFENDANT DID NOT AND DOES NOT
DEMONSTRATE A MANIFEST INJUSTICE BASED
UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

As stated above, one of the factors to demonstrate a manifest injustice necessary to withdraw a guilty plea is ineffective assistance of counsel. *Saas*, 118 Wn. 2d at 42.

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. *Id.* The reviewing court makes a determination of ineffective assistance of counsel from the record considered as a whole. *State v. Ciskie*, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988).

In the context of a motion to withdraw a guilty plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *In re Personal Restraint of Riley*, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993). Where the defendant alleges that counsel failed to investigate exculpatory evidence, the assessment of whether the error

prejudiced the defendant involves the likelihood that 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.” *In re Personal Restraint of Clements*, 125 Wn. App. 634, 646, 106 P.3d 244 (2005)(internal quotes omitted).

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.

Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial. *State v. S.M.*, 100 Wn. App. 401, 413, 996 P.2d 1111 (2000). A defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence. *See, State v. A.N.J.*, ___ Wn. 2d ___, ___ P.3d ___ (2010 WL 314512)(2010).

Counsel's decisions regarding the use of witnesses is a matter of trial strategy. *In re Personal Restraint of Stenson*, 142 Wn. 2d 710, 735-736, 16 P.3d 1 (2001). Failure to call or use an alibi witness is a matter of trial tactics. *State v. Floyd*, 11 Wn. App. 1, 521 P.2d 1187 (1974). In the present case, counsel's decision not to call Ms. Kim as a witness was

tactical. It is unlikely that her testimony would have benefited the defendant. Her statement was contradicted by the defendant's own confession.

Here, the facts in the record reflect that the defendant confessed to participating in the crimes originally charged. A co-defendant also stated that the defendant was present and participated in the crime. Inculpatory evidence was found at the defendant's home. The record reflects that the plea agreement reduced the charges from 8 counts to 2; from four 60-month firearm enhancements to one. The record reflects that the plea agreement reduced the penalty on the assault in the first degree charges from 240-318 months plus three consecutive 93-123 month sentences,² to one at 111-147 months. The plea agreement reduced the firearm enhancements from 20 years of flat time, consecutive to the underlying four assault sentences, to 5 years.

The only part of the record that supports the defendant's argument is his self-serving allegations in his motion to withdraw his plea (CP 15-19). The defendant has not shown, from the record as a whole, that counsel at the time of the plea failed to investigate the case. The defendant's allegations, compared with the record as a whole, do not overcome the strong presumption that counsel was effective and that

² See, former RCW 9.94A.589.

counsel fulfilled his obligations. The defendant has not shown, from the record, that counsel at the time of the plea was deficient.

Even assuming, for the purpose of argument, that defense counsel in the present case failed to contact Ms. Kim, and that failure to contact her was deficient performance, the defendant must still show prejudice. He must show that this evidence likely would have changed counsel's recommendation regarding the plea. Here, the factual record before the court showed that the defendant himself confessed to being present and participating in the crime. A co-defendant corroborated this. Additional corroborating evidence; a handgun and .22 ammunition consistent with that found at the shooting scene, was found in the defendant's home.

The defendant must now show that Ms. Kim's purported testimony would likely have changed the outcome of a potential trial. In other words, he must show that Ms. Kim's purported evidence would have convinced counsel that, despite the great weight of evidence, including the defendant's own confession, to the contrary, it would be best to reject the plea offer and go to trial.

The defendant's current argument is contrary to the evidence and reason. The defendant cannot demonstrate either deficiency of counsel or prejudice. Counsel was not ineffective. There was no manifest injustice under *Saas*.

3. THE COURT DID NOT DENY THE DEFENDANT DUE PROCESS WHEN IT DECLINED TO HEAR TESTIMONY REGARDING HIS MOTION TO WITHDRAW PLEA.

Due process does not require the court to take oral testimony in a plea hearing. Procedural due process requires that the State may not deprive a liberty or property interest without giving reasonable notice and opportunity to be heard to the person who is to suffer the deprivation. *See, Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973). Due process does not guarantee a particular form of procedure. It is a flexible concept which calls for procedural protections appropriate for a given situation. *State v. Creegan*, 123 Wn. App. 718, 724, 99 P.3d 897 (2004)(due process rights not violated where fish and wildlife officers seized defendant's suction dredge without notice or hearing); *see also, Lungu v. Dept. of Licensing*, 146 Wn. App. 485, 186 P.3d 1067 (2007)(due process rights not violated where court denied defendant's request to present live testimony of state toxicologist at license revocation hearing).

The defendant cites several cases where trial courts have heard evidence in support of a motion to withdraw a guilty plea. App. Br. at 14-15. While it is certainly true that courts may do so, none of these cases

state that a court must do so. None of these cases states that failure to hear evidence on the motion violates due process.

A trial court has the discretion to determine if it needs to hear evidence in order to rule on a motion. For example, in determining the admissibility of evidence under ER 404(b), the court need only hear testimony when it cannot fairly decide, based on an offer of proof. *State v. Kilgore*, 147 Wn. 2d 288, 294-295, 53 P.3d 974 (2002). Kilgore had been charged with four counts of child molestation. Before trial, he moved to exclude any evidence of uncharged sexual misconduct. *Id.*, at 290. At the pretrial hearing, he wished to confront any witnesses regarding such alleged acts, and to call witnesses in rebuttal. *Id.* The State made an offer of proof regarding the proposed testimony. *Id.*, at 290-291. The trial court declined to hear testimony regarding the allegations. The Supreme Court found no error.

In *State v. McLaughlin*, 74 Wn. 2d 301, 444 P.2d 699 (1968), the defendant, charged with forgery, moved to suppress a handwriting exemplar and other evidence police had taken. Defense counsel filed an affidavit and offer of proof to support the motion. *Id.*, at 303. The trial court refused to hear oral evidence regarding the defendant's motion to suppress. *Id.*, at 302. The Supreme Court found that it was within trial court's discretion whether to hear the oral testimony at the hearing. *Id.*

In the present case, the defendant made a motion for an evidentiary hearing. The court read the motion and the statements from the defendant's sister and Ms. Kim. RP 5/21/2009 4. The record reflects that the court considered the pleadings submitted by both sides. The court stated that it had read the pleadings of the parties more than once. *Id.* It was within the court's discretion to decide if testimony was necessary.

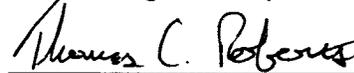
There was no due process violation. The defendant had notice, was present, filed a brief, presented the affidavits of his sister and Ms. Kim, and argued his case. The court did not err in declining to hear Ms. Kim's testimony.

D. CONCLUSION.

The defendant made a knowing and voluntary plea of guilty, with the advice of counsel. For the reasons argued above, the State respectfully requests that the judgment be affirmed.

DATED: March 17, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

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STATE OF WASHINGTON

BY _____
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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.

4.16.16 Theresa Ka
Date Signature