

FILED
COURT OF APPEALS
DIVISION II

COURT OF APPEALS NO. 39828-1-H

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STATE OF WASHINGTON

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

VINCENT E. STERLING,

Defendant/Appellant.

Pierce County Superior Court Cause Number No. 08-1-02786-6

**The Honorable Susan K. Serko,
Presiding Judge at the Trial Court**

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

Mr. Sterling was deprived of his state and federal due process rights when the trial court summarily denied his presentencing motion to withdraw his guilty pleas without an evidentiary hearing.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where, prior to sentencing, Mr. Sterling presented colorable claims to allow withdrawal of his guilty pleas, was the trial court required to permit him a hearing to support those claims with evidence?

III. STATEMENT OF THE CASE

1. Procedural History

On June 12, 2008, the appellant/defendant, Vincent Edward Sterling, was charged by Information with one count of first degree robbery with a firearm enhancement,¹ and one count of second degree unlawful possession of a firearm.² CP 1-2.

1 RCW 9A.56.190, 9A.56.200(1)(2)(ii), RCW 9.41.010, 9.94A.310/ 9.94A.510 and 9.94A.370/9.94A.530.

2 RCW 9.41.040(2)(a)(iii).

Between July of 2008 and May of 2009 seven trial continuances were granted. CP 65-71. At no time did Mr. Sterling sign/file a Waiver of Speedy Trial. On April 30, 2009, Mr. Sterling filed, pro se, a “Motion and Affidavit to Support Motion to Dismiss.” CP 6. The motion was never heard.

On June 25, 2009, Mr. Sterling entered guilty pleas to both charges and to the firearm enhancement. CP 7-15; RP 3-10. On June 7, 2009 and again on June 9, 2009, Mr. Sterling filed, pro se, two separate motions to withdraw his guilty pleas. CP 16-17, 18-19.

On September 25, 2009, Mr. Sterling appeared for his motion to withdraw his guilty pleas with newly appointed counsel, who had filed a Motion to Withdraw Plea the previous day, on Mr. Sterling’s behalf. CP 28-35; RP 25. The trial court denied the motion. RP 27-28. On the same date, Mr. Sterling was sentenced to the Department of Corrections for forty-eight (48) months plus sixty (60) months for the strike offense of first degree robbery with a firearm enhancement, and eight (8) months for the crime of second degree possession of a firearm. The

base sentences were ordered to be served concurrently, while the enhancement was to be served consecutively. Mr. Sterling's sentence represented the high end of his standard range. CP 38-51.

A timely Notice of Appeal was filed on September 25, 2009. CP 54.

2. *Relevant Facts*

Mr. Sterling was seventeen (17) years of age and had completed the tenth (10th) grade at the time he entered his guilty pleas. RP 4, CP 38-51. He had no prior criminal history. CP 38-51. On the same date that Mr. Sterling entered his guilty pleas his mother emailed his attorney to advise that Mr. Sterling wished to withdraw the pleas. RP 12. Twelve days later Mr. Sterling filed his motions to withdraw his pleas pro se. The grounds for the withdrawal requests were: 1) that Mr. Sterling had been coerced into pleading guilty by both his own counsel and the prosecutor, and 2) that he had been incorrectly advised concerning his standard range sentence. CP 16-17, 18-19. Shortly thereafter, both Mr. Sterling's mother and father wrote letters to the

court supporting their son's assertions of coercion and erroneous sentencing advise. Additionally, they advised the court that Mr. Sterling's attorney had not kept Mr. Sterling reasonably informed, and had been generally ineffective during his representation. CP 20-22, 23-24.

Mr. Sterling's newly appointed counsel, who represented Mr. Sterling for the purpose of the motion to withdraw his guilty pleas, asserted in his written motion and declaration that Mr. Sterling had not been adequately assisted in his decision to plead guilty. Specifically, his prior attorney had never met with Mr. Sterling in the jail during the fourteen (14) months he was in custody, had never reviewed the evidence/police reports with Mr. Sterling, and had failed "to properly advise him of all the ramifications of his plea." CP 28-39, RP 26.

The trial court reviewed the plea transcript and ruled that, because the plea colloquy and Mr. Sterling's written guilty plead were adequate, the guilty pleas would stand. RP 27. No evidentiary hearing was held, nor were any findings and conclusions entered.

IV. ARGUMENT

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. STERLING'S MOTION TO WITHDRAW HIS GUILTY PLEAS WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

Under the state and federal due process clauses, all guilty pleas must be “knowing, voluntary and intelligent.” *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); Fourteenth Amendment; Article I, § 3. The State bears the burden of proving the validity of a guilty plea. *State v. Knotek*, 136 Wn.App. 312, 423, 149 P.3d 676 (2006).

The voluntariness of a guilty plea is a conclusion of law which is reviewed de novo. *State v. Brandshaw*, 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)).

CrR 4.2 reflects the requirements of due process and further mandates that a court must allow withdrawal of a plea before sentencing if that withdrawal is necessary in order to “correct a manifest injustice”. *State v. Mendoza*, 157 Wn.2d at 587, CrR 4.2(f).

A manifest injustice exists when, inter alia, the defendant was deprived of effective assistance in entering the plea or when the plea was not voluntary. See State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

In Taylor, the Court set forth four indicia of manifest injustice which would allow withdrawal of a guilty plea: (1) the denial of effective assistance of counsel, (2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea agreement was not honored by the prosecution. Any of the four indicia listed above would independently establish a “manifest injustice” and would require a trial court to allow a defendant to withdraw his plea. State v. Taylor, 83 Wn.2d 5594, 597, 521 P.2d 699 (1974); see also State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

At the onset, it is important to distinguish between the motion Mr. Sterling brought and similar motions which are not brought until after sentencing. As noted, presentencing motions such as the one here are governed by CrR 4.2(f), rather than CrR 7.8, and the two types of

motions are substantively and procedurally distinguishable. See State v. Davis, 125 Wn.App. 59, 63, 104 P.3d 11 (2004). CrR 7.8 motions are considered a collateral attack on a judgment, must be made in writing, and must be supported by affidavits stating precise facts or errors justifying relief. Davis, 125 Wn.App. at 63. By contrast, a defendant making a CrR 4.2(f) motion need not make the request in writing, nor is he or she required to submit affidavits or other evidence in order to be entitled to a hearing. Davis, 125 Wn.App. at 63.

Another significant difference between the two types of motions are the rights of the defendant in each. Unlike a motion to set aside a plea brought under CrR 7.8 after sentencing, a CrR 4.2(f) motion is considered a critical stage of the criminal proceedings. State v. Harrell, 80 Wn.App. 802, 804, 911 P.2d 1034 (1996); see also State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). While a defendant bringing a CrR 7.8 motion is not entitled to counsel at public expense, a defendant bringing a motion under CrR 4.2(f) is. See State v. Winston, 105 Wn.App. 318, 321, 19 P.3d 495 (2001); see also

Harrell, 80 Wn.App. at 804; Robinson, 153 Wn.2d at 694.

Thus, a defendant like Mr. Sterling who brings a presentencing motion to withdraw pleas under CrR 4.2(f) is entitled to certain rights in the presentation of and hearing on that motion. He need not make the threshold showing required for a CrR 7.8 motion. See e.g. Robinson, 153 Wn.2d at 696 (a court may summarily deny a CrR 7.8 motion without a hearing on the merits if the affidavits and written pleadings do not establish grounds for relief decided under former version of the rule); see also. State v. Smith, 144 Wn.App. 860, 863, 184 P.3d 666 (2008) (noting 2007 changes to CrR 7.8 which eliminate that provision and mandate transfer to the Court of Appeals in such cases).

Indeed, when a defendant files a CrR 4.2(f) motion, the trial court abuses its discretion if it fails to consider that motion on its merits. Davis, 125 Wn.App. at 64.

In the case at bar, the trial court failed to consider Mr. Sterling's motion to withdraw his guilty pleas on its merits when it summarily denied the motion in the absence of an evidentiary hearing. The trial

court limited the scope of its inquiry to whether the court's colloquy and the plea statement were complete. The question of whether to allow withdrawal of a plea, however, requires consideration of not only whether the plea was entered knowingly, voluntarily, and intelligently, but also whether withdrawal is necessary to correct a "manifest injustice." *State v. Taylor, Supra*. Those questions are not answered *ipso facto* by merely reviewing the plea statement and colloquy where claims of coercion and ineffective assistance of counsel are made.

Our Supreme Court has held that, while a complete colloquy may be strong evidence of a valid plea, it is not conclusive on that point. See *State v. Frederick*, 100 Wn.2d 550, 557, 674 P.2d 136 (1983), overruled in part and on other grounds by, *Thompson v. Department of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999). Instead, the colloquy is only one part of the equation and even a complete, thorough colloquy will not be sufficient to establish the validity of a plea where there is other evidence indicating that the plea was, in fact, invalid. See *Wakefield*, 130 Wn.2d at 474-76 (plea colloquy where defendant was told she could receive an exceptional

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sentence not dispositive because trial court had previously told defendant she would likely get a standard range sentence). Further, extrinsic evidence is admissible and relevant when it would prove the invalidity of a plea. See e.g. *Frederick*, 100 Wn.2d at 553-54.

In *State v. Frederick*, the Supreme Court specifically held that a defendant who denied coercion during the plea colloquy was not precluded from raising a claim of coercion later and “should not be denied the opportunity to at least present evidence on the issue.” 100 Wn.2d at 558. The *Frederick* ruling and its reasoning is sound because when a defendant moves to withdraw a plea based upon coercion or ineffective assistance evidence other than the transcript of the plea colloquy will almost certainly be required.

In the context of a plea, counsel renders ineffective assistance when he or she fails to assist the client, actually and substantially, in deciding whether to enter the plea. *State v. McCollum*, 88 Wn.App. 977, 982, 947 P.2d 1235 (1997), *review denied*, 137 Wn.2d 1035 (1999). Further, to show prejudice by counsel’s failures, a defendant must establish that, but for those failures, he or she would not have

entered the plea. *Id.* It is unlikely that the facts and circumstances relating to those claims will ever be established on the record at the plea colloquy or by the plea statement alone.

Thus, in case after case where the defendant had made a presentencing motion to withdraw a plea, trial courts have heard evidence in support of that motion. See, e.g., *State v. Teshome*, Wn.App. 705, 94 P.3d 1004 (2004), *review denied*, 153 Wn.2d 1028 (2005) (presentencing motion to withdraw plea; hearing at which evidence was presented on whether non-native English speaking defendant understood the plea proceedings and had adequate interpreter services); *State v Williams*, 117 Wn.App. 390, 71 P.3d 686 (2003), *review denied* 151 Wn.2d 1011 (2004) (presentencing motion to withdraw plea; hearing was held at which evidence was allowed to be presented on whether defendant was subjected to undue threats or promises); *State v. Smith*, 74 Wn.App. 844, 875, P.2d 1249 (1994) *review denied*, 125 Wn.2d 1017 (1995) (trial court heard evidence on presentencing motion to withdraw pleas regarding, *inter alia*, whether counsel pressured defendant to accept pleas). In none of those cases

was the inquiry limited to simply the colloquy itself.

Here, the trial court erred as a matter of law in limiting its inquiry to the plea statement and colloquy for the pleas. Furthermore, that limitation violated Mr. Sterling's due process rights. At a minimum, due process mandates that a defendant be afforded "the right to be heard at a meaningful time and in a meaningful manner." See, e.g., *Lungu v. Department of Licensing*, 146 Wn.App. 485, 488, 186 P.3d 1067 (2007), *review denied*, 163 Wn.2d 1051 (2008). Even in situations where, unlike here, the defendant has only limited, minimal due process rights, the ability to present relevant evidence is an important part of due process. See *State v. D.D.C.*, 145 Wn.App. 621, 627-28, 186 P.3d 1166 (2008).

Mr. Sterling was deprived of even the most minimal of due process protections by the trial court's decision not to hear witnesses or consider evidence on his motion to withdraw his guilty pleas particularly because his claims of coercion and ineffective assistance received, at least facially, support from his new counsel and his parents. By depriving him of the opportunity to present witnesses who could

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have established the relevant facts in support of his motion and limiting its consideration solely to the completeness of the plea statement and colloquy, the court denied Mr. Sterling any kind of meaningful hearing of his claims of coercion or ineffective assistance. The court, therefore, effectively deprived him consideration of the merits of his motion, in violation of both CrR 4.2(f) and his due process rights. See, e.g., *Davis*, 125 Wn.App. At 63. This Court should so hold and should reverse.

V. CONCLUSION

For all of the foregoing reasons and conclusions Mr. Sterling respectfully requests that this Court reverse the trial court's ruling denying his motion to withdraw his guilty pleas, and remand his case for an evidentiary hearing.

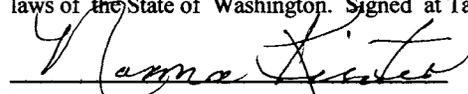
Respectfully Submitted this 22nd day of February, 2010.



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CERTIFICATE OF SERVICE

The undersigned certifies that on February 22, 2010, she delivered by U.S. Mail to: the Pierce County Prosecutor, 930 Tacoma Avenue South, Tacoma, Washington 98402, and appellant Vincent E. Sterling, DOC # 334590, Washington Corrections Center, Post Office Box 900, Shelton, Washington 98584, true and correct copies of this Opening Brief. 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 February 22, 2010.


Norma Kinter

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