

NO. 39828-1

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

STATE OF WASHINGTON, RESPONDENT

v.

VINCENT E. STERLING, APPELLANT

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

No. 08-1-02786-6

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**BRIEF OF RESPONDENT**

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

1. Whether defendant should be allowed to withdraw his plea, when he can show no manifest injustice (Defendant's Assignment of Error 1).

B. STATEMENT OF THE CASE.

1. Procedure

On June 12, 2008, the State charged Vincent E. Sterling, hereafter "defendant," with robbery in the first degree, aggravated by defendant's use of a firearm in the commission of the robbery (Count I), and with unlawful possession of a firearm in the second degree (Count III). CP 1-2.

On July 22, 2008, the case was continued because the defense counsel needed additional time to consult with expert witness and complete the investigation. CP 65. Defendant signed the order continuing trial. CP 65. On October 9, 2008, the parties requested and received another continuance because the defense attorney needed additional time for investigation and negotiation, and because the prosecutor was in another trial. CP 66. Defendant signed the order. CP 66. On December 15, 2008, the court granted another continuance because "counsel needs additional time to research / investigate / negotiate." CP 67. Defendant signed the order. CP 67. On January 5, 2008, the parties received another continuance because "attorneys [were] in trial" and "still preparing / negotiations." CP 68. Defendant signed the order. CP 68. On February

17, 2009, the court granted the parties a continuance because defense was preparing for the trial and the parties continued to negotiate. CP 69. Defendant signed the order. CP 69. On March 30, 2009, another continuance was granted, and the reasons listed were the three co-defendants' cases. CP 70. Defendant signed the order. CP 70.

On April 23, 2009, defendant filed Motion and Affidavit to Support Motion to Dismiss, arguing a speedy trial violation. CP 6. On May 4, 2009, both parties requested a continuance because both parties were in trial, and defendant again signed the order. CP 71.

The case was set to go to trial on June 25, 2009. RP 3. On that morning, defendant appeared in court to plead guilty. RP 3; CP 7-15. As a condition of the plea, the State agreed not to charge defendant with another crime – a burglary from a year prior. RP 3.

The defense attorney addressed the court, stating:

Your honor, I have been through the statement of defendant on plea of guilty with Mr. Sterling. He's only 17 years old and he's been through the 10th grade. He does read and write English; however, I did go through and read and explain the statement to him and he read along with me. I answered the questions that he has. This is a strike offense; he understands that and he understands that this is his first strike and he understands what that means. He understands his rights to a trial as a defendant in Pierce County. He understands he's waiving those rights. He is prepared to proceed and change his plea this morning and he's doing so intelligently and voluntarily, Your Honor.

RP 3-4. The court then inquired into defendant's understanding of his rights. RP 4-10. The court specifically addressed defendant's understanding of his standard sentence range and sentencing enhancement:

Court: With that offender score and this crime on the robbery charge, the standard range would be 36 to 48 months. It would be enhanced with the firearm which is a 60-month sentence; that 60-month sentence has to be served flat time. In other words, that complete sentence would have to be served and it's served first before you start serving the 36 to 48 months. Did you understand all of that?

Defendant: Yes, ma'am.

...

Court: With regard to the firearm charge, the possession of the firearm, the standard range is three to eight months; were you aware of that?

Defendant: Yes, ma'am.

RP 6-7.

After accepting defendant's plea, the court was ready to proceed to sentencing. RP 10. But the State asked to set it over to July 20 because "[t]his was a last minute acceptance of the plea," and the State needed time to notify the victim and have him present. RP 10. The court set the sentencing over to July 20. RP 10.

On June 28, defendant wrote a pro se motion, filed with the court on July 7, to withdraw his guilty plea. CP 16-17. Among other reasons, defendant complained that his counsel was ineffective; that "the parties were mistaken about the proper standard range sentence which was higher

than contemplated;” and that he was coerced by the prosecutor and the defense attorney. CP 16-17.

On July 7, defendant wrote another pro se motion, filed with the court on July 9, to withdraw his guilty plea. CP 18-19<sup>1</sup>. Defendant’s second motion was almost identical to the first one. CP 18-19. Defendant added, however, that his defense attorney had told him “you will go down in flames...which caught [him] off guard....” CP 18-19.

On July 20, 2009, the day scheduled for the sentencing hearing, the parties signed a scheduling order, setting defendant’s motions to withdraw his plea and fire his counsel to August 4 and defendant’s sentencing hearing to August 20.<sup>2</sup> CP 74.

On August 10, the court received correspondence from defendant’s mother, in which defendant’s mother was complaining that defendant’s counsel had been ineffective. CP 20-22. On August 15, the court received correspondence from defendant’s father. CP 23-24. Defendant’s father was asking for a new trial counsel for defendant because defendant’s father was told by the defense counsel that, “If he does not take what that man is trying to give him, I guarantee you your son will get 20 years!” CP 23-24.<sup>3</sup>

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<sup>1</sup> In the Opening Brief of Appellant, defendant incorrectly states that the motions were filed in June. *See* Opening Brief of Appellant, p. 2.

<sup>2</sup> Subsequently, defendant’s motions were set over to August 14 and then to August 20. CP 75 and 76.

<sup>3</sup> The court subsequently noted that it had not read the correspondence from the parents. RP 23.

On August 14, 2009, the parties appeared in court. RP 12. The defense counsel explained that, on the day defendant pleaded guilty, he had been contacted by defendant's mother, who informed him that defendant wanted to withdraw his plea and consult with another attorney. RP 12-13. So, on August 14, the defense counsel expected defendant to hire private counsel or have a substitute DAC counsel assigned to the case. RP 13. The court ruled that the new defense counsel should be arguing defendant's motions on August 20. RP 14-17.

On August 20, Richard Whitehead of the Department of Assigned Counsel asked the court for additional time to appoint a new panel attorney for defendant. RP 20. The court set the matter over to September 25. RP 22. On September 24, defendant's new counsel filed Defendant[']s Motion to Withdraw Guilty Plea. CP 28-35.

On September 25, 2009, the parties were back in court to argue defendant's motions and to conduct the sentencing hearing. RP 25. The new defense counsel argued that defendant was entitled to withdraw his plea because his prior counsel coerced defendant into pleading guilty, and failed to visit defendant in jail or inform him about the case. RP 26. The State opposed defendant's motion to withdraw the plea. RP 26-27. The court noted that it reviewed the materials filed in support of defendant's motion and the transcript of the plea and found nothing in the record that would allow for the withdrawal of the plea. RP 27-28. The court also specifically addressed defendant's claim about his prior counsel:

And the basis of this motion in essence, I guess as I deduce<sup>4</sup> it, is that [counsel] was giving advice that this was a losing case from his perspective; he believed that Mr. Sterling would do worse if he went to trial, which I believe is a defense lawyer's responsibility if he believes that that's true.

RP 27-28. The parties proceeded to sentencing. RP 28.

The court sentenced defendant to 48 months, the high end of the standard range, on Count I; to 60 months for the firearm sentence enhancement, to run consecutively with Count I; and to eight months on Count III, to run concurrently with Count I. RP 28-30; CP 36-37; CP 38-51.

Defendant filed a timely notice of appeal. CP 54.

## 2. Facts

On June 12, 2008, at about 10:15 p.m., defendant and another male approached Mr. Hall, who had just gotten off a bus, and demanded his belongings while brandishing a cocked pistol. CP 3-4. While the males were robbing Mr. Hall, two females were waiting in a car parked nearby. After defendant and the other male took Mr. Hall's backpack and twenty dollars from his wallet, they fled to the car and drove away. CP 3-4.

Based on the victim's description, the police located the suspect car minutes later and detained the two females. CP 3-4. Defendant and the other male fled, but defendant was apprehended shortly thereafter. CP

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<sup>4</sup> "Reduce" in the transcript.

3-4. Mr. Hall identified defendant as one of the males who robbed him.

CP 3-4.

C. ARGUMENT.

1. DEFENDANT SHOULD NOT BE ALLOWED TO  
WITHDRAW HIS PLEA BECAUSE NO  
MANIFEST INJUSTICE HAS OCCURRED.

This Court reviews a trial court's denial of defendant's motion to withdraw his guilty plea for abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001); *State v. Robinson*, 150 Wn. App. 934, 937, 210 P.3d 1045 (2009).

When a defendant pleads guilty, he waives the right to appeal the determination of guilt. CrR 4.2(g)(5)(f). Defendant may only challenge that plea by attacking the circumstances surrounding the taking of the plea. *State v. Saylor*, 70 Wn.2d 7, 9, 422 P.2d 477 (1966).

To be constitutionally valid, a guilty plea must be knowing, voluntary, and intelligent. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). In addition, Washington has a statutory procedural requirement that "[t]he 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." CrR 4.2(d).

There is no absolute right to withdraw the defendant's plea - relief is a matter of the trial court's discretion. *In re Clements*, 125 Wn. App.

634, 640, 106 P.3d 244 (2005); *State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141 (1997).

“Washington law is clear that a defendant moving to withdraw a guilty plea bears the burden of proving manifest injustice.” *State v. Teshome*, 122 Wn. App. 705, 714, 94 P.3d 1004 (2004), *see also* CrR 4.2(f)(defendant can withdraw his guilty plea only when “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); *see also State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003); *State v. Branch*, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996); *State v. Armstead*, 13 Wn. App. 59, 62, 533 P.2 147 (1975).

Defendant can only prove manifest injustice by showing that (1) the plea was not voluntary; (2) defendant was denied effective assistance of counsel; (3) the plea was not ratified or authorized by defendant; and (4) the plea agreement was not kept by the prosecution. *State v. Osborne*, 102 Wn.2d 87, 684 P.2d 683 (1984); *Taylor*, 83 Wn.2d 594, 597; *State v. Paul*, 103 Wn. App. 487, 494, 12 P.3d 1036 (2000).

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). Because of all of the safeguards surrounding an acceptance of a guilty plea, a court

should exercise great caution before setting aside a guilty plea. *Taylor*, 83 Wn.2d at 597.

On appeal, defendant does not argue that his plea was constitutionally invalid. *See* Opening Brief of Appellant, p. 1. Rather, defendant assigns error to the trial court's denial of his motion to withdraw his guilty plea without holding "an evidentiary hearing." *Id.* However, defendant's argument fails, because the court properly considered his motion to withdraw and acted within its discretion when it denied the motion, having found no tenable grounds to support it.

- a. No manifest injustice has occurred because defendant's plea was voluntary.

CrR 4.2(d) insures "voluntariness" of a plea by requiring that the court "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." Thus, to prove that his plea was involuntary, the defendant had to show (1) that he either did not know a direct consequence of his plea or understand the nature of the charge, or (2) that the plea was the product of coercive threat, fear, persuasion, promise, or deception. *Taylor*, 83 Wn.2d 594, 597; *State v. Frederick*, 100 Wn.2d 550, 556-557, 674 P.2d 136 (1983)(overruled on other grounds). This defendant failed to meet his burden because he presented nothing more than bare and general allegations, and thus, never overcame the presumption of voluntariness of a plea.

In determining whether the plea was voluntary, courts look closely at the record of the plea hearing and give substantial weight to defendant's plea statement. See, e.g., **Branch**, 129 Wn.2d at 642; **State v. Perez**, 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982). For example, the **Perez** court held that:

When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, *the presumption of voluntariness is well nigh irrefutable.*

33 Wn. App. 258, 261-262 (internal citations omitted, emphasis added);

see also **In re Ness**, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993)

(generally, when 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)(internal citation omitted); **State v. Stephan**, 35 Wn. App. 889, 893, 671 P.2d 780 (1983)(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").

Nothing in this record suggests that defendant lacked a proper understanding of the charges, or did not realize he was giving up certain

rights, or did not know his minimum sentence. On the contrary, the court's inquiry during the plea hearing, combined with defendant's plea statement, created a practically irrefutable presumption that the plea was voluntary - the presumption defendant could not overcome during his motion to withdraw and cannot overcome on appeal. *See* RP 4-10; CP 7-15. The record has no indication of an overt, manifest injustice.

First, the court below properly relied on defendant's plea statement because the statement, signed by defendant, listed defendant's charges and their elements, the rights defendant was giving up by pleading guilty, and his standard range sentences. CP 7-15. The standard range table was filled out by hand and contained the standard range, enhancements, and community custody range for both counts. *Id.* at 2. Also handwritten in the statement was the prosecuting attorney's expected sentence recommendation to the judge. *Id.* at 4.

Second, one of the sections of the statement indicated that defendant received a copy of the Information. *Id.* at 8. The Information notified defendant of the nature of the crimes to which he pleaded guilty and created a presumption that the plea was knowing, voluntary, and intelligent. *See, e.g., In re Ness*, 70 Wn. App. at 821. Further, the following handwritten language appeared in the plea form and was initialed V.S.:

*On 6/12/08 in Pierce Co WA – I took personal property from J. Hall, in his presence with intent to steal by displaying a firearm threatening to use it – I was under 18 years of age [sic].*

CP 7-15.

Third, the judge went further than a mere reliance on defendant's plea statement and carefully questioned defendant during the plea hearing. CP 7-15. The judge asked defendant if he understood the elements of the charges; if he carefully went through his plea statement with his attorney; if there was anything his attorney could not answer or anything that confused defendant. RP 4-5. The judge told defendant about the maximum term of imprisonment and amount of fine that came with each charge and emphasized the 60-month mandatory sentence enhancement. RP 6-7. The court underscored that robbery in the first degree was a most serious offense and counted as a strike offense by the legislature. RP 8. The court read defendant's handwritten plea statement aloud and asked defendant if it was true, and defendant confirmed that it was. RP 9. Finally, the judge confirmed that defendant was making his guilty plea freely and voluntarily, and that no one, other than the prosecutor, made any promises in exchange for a guilty plea. RP 9.

In sum, the detailed plea colloquy combined with defendant's plea statement created an almost irrefutable presumption that the plea was voluntary.

Even if defendant could show some irregularities before or during the taking of his plea, he would not automatically be entitled to withdraw

the plea. Defendant must show overt injustice - some actual prejudice - beyond bare assertion that there was a technical violation of CrR 4.2. *See In re Ness*, 70 Wn. App. 817, 822; *State v. Ridgley*, 28 Wn. App. 351, 357-358, 623 P.2d 717 (1981). *See also Wood v. Morris*, 87 Wn.2d 501, 502, 554 P.2d 1032 (1976)(Wood argued that he was not adequately informed of the consequence of his plea because he did not realize that his sentence carried a five-year mandatory minimum). But this defendant is not claiming any actual prejudice. In fact, while in his pro se statement defendant argued that “parties were mistaken about the proper standard range sentence,” defendant never specified the actual mistake, and this argument does not subsequently appear in Defendant’s Motion to Withdraw Guilty Plea or in Opening Brief of Appellant. CP 16-17, 18-19; CP 28-35.

Defendant also argued that he had not been reasonably informed about the merits of his case, and that he was coerced into pleading guilty. However, defendant’s argument, again, rested on bare allegations and showed no actual prejudice; and therefore, defendant could not prove any manifest injustice to the trial court. *State v. Osborne* is on point. 102 Wn.2d 87, 684 P.2d 683 (1984).

In *State v. Osborne*, defendants were charged with felony murder of their daughter, and both entered *Alford* pleas of guilty. 102 Wn.2d 87, 90, 91. After the pleas were accepted by the court and before sentencing, the Osbornes retained new counsel and filed a motion to withdraw both

guilty pleas, claiming that Mrs. Osborne pleaded guilty while she was having suicidal inclinations and suffering from depression, and that Mr. Osborne pleaded guilty because his wife threatened to kill herself if he did not. *Osborne*, 102 Wn.2d 87, 92. The trial court denied the defense's motion and entered judgments and sentences on both pleas, and the Osbornes appealed. *Osborne*, 102 Wn.2d at 92.

The Supreme Court rejected Mr. Osborne's argument, holding that:

[T]here is nothing in the record to indicate that Osborne's plea was coerced, except for the bare allegation in his affidavit. Osborne specifically stated, several times during the plea proceedings, that his guilty plea was voluntary and free of coercion. *More should be required to overcome this "highly persuasive" evidence of voluntariness than a mere allegation by the defendant.*

*Id.* at 97 (emphasis added).

Similarly, in deciding whether Mrs. Osborne was competent during the plea hearing and whether her alleged mistreatment in the county jail rendered her plea involuntary, the court again looked at the record of the plea colloquy. *Id.* at 98. The court emphasized that during the plea proceedings defendant displayed no signs of incompetency; responded intelligently to questioning; and indicated that she was in full possession of her judgment. *Id.* While noting that Mrs. Osborne must have been under great stress, the Supreme Court found that no manifest injustice had occurred and affirmed the trial court's denial of Mrs. Osborne's motion to withdraw. *Id.* at 99.

Like the Osbornes, defendant in the instant case made bare allegations that he felt coerced and that he was not reasonably informed about his case, but he presented nothing to refute the presumption of voluntariness arising from his plea colloquy, during which defendant showed no signs of fear, confusion, or misunderstanding.

Defendant also alleged that he had been coerced into pleading guilty by the prosecutor who had promised to add a gang enhancement to defendant's charges if the case went to trial. CP 16-17; 18-19; CP 28-35. However, threats by a prosecutor made during plea negotiations to re-indict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged have been held not to be coercive. See *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *State v. Music*, 40 Wn. App. 423, 429, 698 P.2d 1087 (1985); *State v. Cameron*, 30 Wn. App. 229, 231, 633 P.2d 901 (1981).

For example, Hayes was indicted on a charge of forgery or counterfeiting, an offense then punishable by a term of 2 to 10 years in prison. 434 U.S. 357, 358. During the plea negotiations, the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. 434 U.S. at 358. He also said that if Hayes did not plead guilty and "save[d] the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act, which would

subject Hayes to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. *Id.* at 358-359.

The *Hayes* court held that “the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.” *Id.* at 365. The *Hayes* court reasoned:

Plea bargaining flows from “the mutuality of advantage” to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.

While confronting a defendant with the risk of more severe punishment clearly may have a “discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable”-and permissible-“attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

*Hayes*, 434 U.S. at 363-364 (internal citations omitted); *see also Music*, 40 Wn. App. 423, 429 (“it is well settled that a guilty plea induced by a prosecutorial threat to file increased charges ... does not necessarily vitiate an otherwise voluntary plea”)(internal citations and quotations marks omitted); *Cameron*, 30 Wn. App. 229, 231 (Cameron’s allegations, without more, did not overcome the presumption that a prosecutor acts in good faith and bases his or her criminal allegations and complaints on good grounds).

The prosecutor in this case presented defendant with a permissible, although difficult, choice. Defendant chose to plead guilty and not risk being charged with and convicted of an additional aggravating factor and an additional offense of burglary. Buyer’s remorse is not a valid ground to disturb the finality of this plea agreement.

- b. No manifest injustice has occurred because defendant received effective 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. *State v. Saas*, 118 Wn. 2d 37, 42, 820 P.2d 505 (1991).

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. *Strickland*, 466 U.S. 668, 687. Second, a defendant must show that he was prejudiced by the deficient representation. *Strickland*, 466 U.S. at 687.

When applying the *Strickland* test, the court must engage in a strong presumption that the counsel's assistance was reasonable and effective and scrutinize the counsel's performance with a high degree of deference. See *Strickland*, 466 U.S. 668, 699; *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); *McFarland*, 127 Wn.2d 322, 335; *Thomas*, 109 Wn.2d 222, 226.

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).

Generally, to properly evaluate the merits of a plea, a defense counsel must evaluate the State's evidence. *State v. A.N.J.*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2010) (2010 WL 314512).

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. 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.” *Clements*, 125 Wn. App. 634, 646 (internal quotes omitted).

“The alleged infrequency or brevity of counsel’s meetings with defendant is not enough to demonstrate ineffective assistance of counsel.” *Cameron*, 30 Wn. App. 229, 232 (internal citation omitted). The alleged failure to investigate or misinformation by a defense counsel is also insufficient when defendant cannot state what counsel failed to investigate or show specific resulting prejudice. See *State v. Lockhart*, 474 U.S. 52, 55, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), *Cameron*, 30 Wn. App. at 232.

In *State v. Lockhart*, 474 U.S. 52, 55, Lockhart claimed that his plea was involuntary by reason of ineffective assistance of counsel because his attorney had misinformed him as to his parole eligibility date. The Supreme Court in *Lockhart* did not reach the issue of whether counsel’s alleged erroneous advice could be deemed unconstitutionally ineffective and resolved the case based on the second prong of the *Strickland* test, holding that Lockhart’s allegations were insufficient to show prejudice. *Lockhart*, 474 U.S. 52, 60.

The *Lockhart* court explained that:

In many guilty plea cases, the “prejudice” inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error “prejudiced” the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of 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.

*Id.* at 59. The court reasoned that Lockhart failed to meet his burden because he never alleged that had counsel correctly informed him, he would have pleaded not guilty and insisted on going to trial, and never presented any special circumstances to show that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty. *Id.* at 60. In the concurrence, Justice White pointed out that Lockhart also failed to allege that his attorney had known about his prior conviction that affected his parole eligibility. *Id.* at 61-63.

In *State v. Cameron*, Cameron pleaded guilty to first degree theft for his alleged embezzlement of moneys from a hotel during his tenure as manager. 30 Wn. App. 229, 230. Much like this defendant, on appeal Cameron argued that he did not enter a knowing and voluntary plea because, among other things, his counsel was ineffective. *Cameron*, 30 Wn. App. at 230-231. According to Cameron, he felt compelled to plea

because his counsel's alleged failure to investigate the case left him in a "no win" situation. *Id.* at 232.

Division Two rejected Cameron's complaints that his counsel did not thoroughly investigate the case, holding that, "[w]ithout specific allegations which would, if believed, demonstrate resulting prejudice, the plea is not vitiated nor is a hearing on the plea's voluntariness warranted." *Id.* at 231 (internal citations omitted).

Similarly, in this case, defendant merely alleged that his counsel failed to keep him reasonably informed and failed to meet with him in jail to discuss the evidence. However, defendant never showed how his counsel's alleged failures prejudiced him: how a review of the police reports or a meeting in jail, as opposed to a courthouse, would convince him to plead not guilty; or what exactly counsel had failed to investigate and find out that would convince defendant to go to trial.<sup>5</sup> Defendant never even alleged that had his counsel met with him in jail or informed him better about the case he would have not pleaded guilty and gone to trial.

In *State v. Osborne*, *supra*, defendants claimed they received ineffective assistance of counsel when entering their guilty pleas because counsel failed to come up with a viable defense or to conduct adequate pretrial investigation. 102 Wn.2d 87, 99. The Supreme Court rejected

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<sup>5</sup> Counsel did meet with defendant on at least four occasions in the attorney/client booths in the courthouse. CP 28-35, p. 3.

defendants' argument, holding that they received effective assistance of counsel, where counsel interviewed state witnesses, obtained independent evaluations of the autopsy report, and thoroughly reviewed the evidence with defendants. *Osborne*, 102 Wn.2d at 99. The court also emphasized that defendants' counsel were "merely trying to make the best out of a bad situation by taking advantage of the State's sentence offer", and that "such tactics" were not incompetent in light of the State's evidence against defendant. *Id.* at 99-100.<sup>6</sup>

Similarly, in this case the defense counsel was trying to make the best out of a bad situation when he recommended that defendant take the State's offer and plead guilty. Indeed, the record shows that had defendant not taken the State's offer, he would also be charged with a burglary and the State would add an additional aggravating factor to his robbery charge. In light of the State's evidence in this case - where the victim definitively identified defendant as one of his robbers shortly after the robbery, and where the police found the victim's items and a pistol inside a car occupied by defendant and his co-defendants - the counsel's statement that defendant would go down in flames if he went to trial was valid, albeit strongly worded, legal advice, and a valid trial tactic. CP 3-4.

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<sup>6</sup> See also *Williams v. Kaiser*, 323 U.S. 471, 475-76, 65 S. Ct. 363, 366, 89 L. Ed. 398 (1945): "Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

c. The court properly considered and denied defendant's motion to withdraw his plea.

This Court reviews a trial court's ruling on a motion to withdraw a guilty plea for abuse of discretion. *State v. Olmsted*, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). A trial court abuses its discretion only if its decision is based on clearly untenable or manifestly unreasonable grounds. *Olmsted*, 70 Wn.2d 116, 119.

On appeal, defendant argues that the court should have held an evidentiary hearing to determine whether his claims about the invalidity of his plea were substantiated. His argument fails because there is no authority requiring the court to hold such a hearing after it determines that defendant's allegations have no merit and after defendant proffers no evidence to overcome a strong presumption of voluntariness of a plea.

When a defendant self-servingly asserts that his plea was not voluntarily or intelligently made, or that his counsel was ineffective, it does not automatically entitle him to an evidentiary hearing. Defendant must first make a strong showing in support of those claims to refute the "well nigh irrefutable" presumption of voluntariness and the "high-degree of deference" presumption of effective assistance. *See, e.g., State v. Davis*, 125 Wn. App. 59, 68, 104 P.3d 11 (2004)("a trial court is not required to waste valuable court time on frivolous or unjustified CrR 4.2 motions").

*State v. Cameron* is on point. 30 Wn. App. 229.<sup>7</sup> Much like this defendant, Cameron argued that he did not enter a knowing and voluntary plea because he had felt compelled to plead guilty and because his counsel was ineffective. *Cameron*, 30 Wn. App. at 230-231. But Division Two rejected both arguments as reasons to justify a hearing to determine the voluntariness of Cameron’s plea of guilty, holding that, “[w]ithout specific allegations which would, if believed, demonstrate resulting prejudice, the plea is not vitiated *nor is a hearing on the plea’s voluntariness warranted.*” *Id.* at 231 (emphasis added, internal citations omitted). See also *Lockhart*, 474 U.S. 52, 60 (“[b]ecause petitioner in this case failed to allege the kind of “prejudice” necessary to satisfy the second half of the *Strickland v. Washington* test, the District Court did not err in declining to hold a hearing on petitioner’s ineffective assistance of counsel claim”); *In re Detention of Scott*, 150 Wn. App. 414, 427-433, 208 P.3d 12 (2009) (a defendant must present some evidence of involuntariness beyond his self-serving allegations in order for a trial court to allow him to withdraw his guilty plea).

In this case, defendant did not present any evidence beyond his self-serving allegations that his trial counsel was ineffective, and that his counsel and the prosecutor coerced him into taking the plea. Moreover, defendant’s allegations conflicted with his statements made during the plea colloquy with the court and did not amount to proper legal grounds

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<sup>7</sup> Discussed in greater detail *supra*.

for a withdrawal of a plea.<sup>8</sup> Simply, defendant did not meet his burden and give the court any legitimate grounds to find manifest injustice or even warrant further inquiry.

Defendant's reliance on *State v. Davis* is misplaced. 125 Wn. App. 59, 104 P.3d 11 (2004). In that case, the trial court completely failed to even consider Davis's motion to withdraw his plea of guilty. *Davis*, 125 Wn. App. 59, 60.

Much like this defendant, Davis claimed that "his attorney had coerced him and that he was under duress when he entered the plea." *Davis*, 125 Wn. App. at 61. The court refused to consider Davis's motion and also denied the defense attorney's request to withdraw. *Id.* The Court of Appeals remanded the case, holding that the trial court erred by not considering the merits of Davis's motion to withdraw his guilty plea. *Id.* at 68.

In this case, however, the court considered defendant's motion on its merits, but rejected defendant's allegations as proper grounds for granting defendant's motion to withdraw his guilty plea. RP 27-28. Additionally, although defendant was not automatically entitled to substitute counsel, *see Davis*, 125 Wn. App. at 68, the court below allowed for the substitution.

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<sup>8</sup> See subsection A *supra*.

Finally, in the “case after case” that defendant cites in support of his argument on appeal, the courts did exactly what the court below did. *See* Opening Brief of Appellant, p. 11.

The trial court in *State v. Williams*, just like the court below, held a hearing on the motion to withdraw the guilty plea and reviewed defendant’s four-page statement attached to the motion. 117 Wn. App. 390, 397, 71 P.3d 686 (2003). Finding no legitimate basis for withdrawing the plea, the trial court denied Williams’s motion and did not hold any additional evidentiary hearing. *Williams*, 117 Wn. App. 390, 397. In fact, the *Williams* court’s also relied on the plea colloquy and its ruling sounded almost exactly as the ruling of the court below: “But quite frankly, and I have got to tell you, Mr. Williams, from a legal perspective, I don’t see any legitimate basis for withdrawing the plea...” (the court below stated: “I don’t see anything in this record that would allow the plea to be withdrawn”). 117 Wn. App. at 397; RP 28.

While the court’s opinion in *State v. Smith* indicates that the attorney who represented Smith during his plea testified at the hearing on Smith’s motion to withdraw his pleas, the court’s opinion also indicates that, unlike this defendant, Smith raised legitimate and specific issues regarding the voluntariness of his plea. 74 Wn. App. 844, 850-851, 875 P.2d 1249 (1994). Thus, among other things, Smith alleged that counsel had made false promises and had given him erroneous information

regarding the possibility of a change in the law, a pardon by the Governor, and the sale of his artwork. *Smith*, 74 Wn. App. 844, 850-851.

The court's analysis also confirms that defendant has the burden of disproving the strong presumption of voluntariness of the plea:

Although the record contains a report that indicates that Smith was diagnosed with several disorders, it contains no information about how any of these disorders might have interfered with his ability to voluntarily plead guilty. Absent some link between the claimed disorders and Smith's capacity during the plea proceedings, Smith cannot establish that the trial court erred in not permitting him to withdraw his guilty pleas on this ground.

The allegation of pressure from Smith's counsel is also totally unsubstantiated. The attorney who represented Smith when he entered the pleas, testified at the hearing on Smith's motion to withdraw his pleas. Her testimony does not support Smith's allegation that false promises were made and/or that pressure was applied. Indeed, the attorney's testimony was not refuted, Smith not having testified.

*Id.*

In *State v. Teshome*, Teshome wanted to withdraw her plea based on the incompetence of her interpreter. 122 Wn. App. 705. In that case, Teshome argued that the court had appointed a non-certified interpreter to interpret the plea colloquy without following proper statutory procedures. *Teshome*, 122 Wn. App. at 710-711. Teshome's specific and valid allegation put at issue whether her plea was informed; so, the court allowed a second interpreter to interpret the recording of the plea colloquy into English to create a bilingual transcript and allowed Teshome to testify during the hearing on the motion to withdraw the plea. *Id.* at 708-709.

In contrast to Teshome, defendant never proffered any specific, valid allegation that would put at issue the validity of his plea and alert the court that an evidentiary hearing was needed.

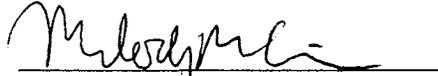
In sum, a trial court is not required to hold a separate evidentiary hearing every time a defendant moves to withdraw his plea of guilty - especially after the court considers defendant's motion to withdraw, hears the parties' arguments, and finds the motion meritless - because "a trial court is not required to waste valuable court time on frivolous or unjustified CrR 4.2 motions." *Davis*, 125 Wn. App. at 68. The court below found no grounds in support of defendant's allegations that his plea was involuntary and that he received ineffective assistance of counsel; and therefore, it acted within its discretion in denying defendant's motion to withdraw his guilty plea.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm the trial court's denial of defendant's motion to withdraw his plea.

DATED: APRIL 1, 2010

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



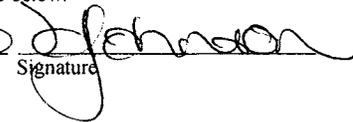
MELODY M. CRICK  
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Aryna Anderson  
Rule 9

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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.

4/10/10   
Date Signature