

NO. 41880-1

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

STATE OF WASHINGTON, RESPONDENT

v.

DAVANTE NAICELL LEACH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth P. Martin

No. 10-1-01652-1

BRIEF OF RESPONDENT

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

1. Did the trial court abuse its discretion when it denied defendant's motion to substitute counsel because it determined defendant had effective representation?
2. Did the trial court deny defendant's right to counsel when it properly denied defendant's motion to substitute counsel?

B. STATEMENT OF THE CASE.

On April 16, 2010, the Pierce County Prosecuting Attorney's Office (State) charged Davante Naicell Leach (defendant) with three counts of assault in the first degree, each with a firearm enhancement and gang aggravator, and unlawful possession of a firearm in the first degree with a gang aggravator. CP 1–3.

The declaration for determination of probable cause alleges that around 5:30 p.m. on April 15, 2010, defendant was involved in a fist fight with W. Duran. CP 56. Defendant is a known East Side Piru gang member. CP 56. Duran is also gang member who defendant had been calling a "snitch." CP 56. After a brief skirmish with defendant, Duran and two other friends—including one other known gang member—began leaving the scene in a white SUV. CP 56.

Witnesses saw defendant pull a handgun from his waistband and fire five shots into the SUV's passenger door, hitting Duran in the

shoulder. CP 56. Duran was not killed in the incident. CP 56. Defendant then fled the scene to a neighborhood where officers identified him minutes later leaving in a vehicle. CP 56. When officers performed a traffic stop on the vehicle, defendant led officers on a foot chase. CP 56. After officers had apprehended defendant, they found five shell casings in his pocket. CP 56. Defendant stated that the shell casings were from a shooting that he heard, but did not see or commit. CP 56. Witnesses later confirmed that defendant was the shooter. CP 56.

Pursuant to defendant's entering a guilty plea, the State amended defendant's charges to one count of assault in the first degree with a firearm enhancement, and unlawful possession of a firearm. CP 4-5; 11/9/2010 RP 3-4.¹

The Honorable Elizabeth P. Martin conducted defendant's plea proceeding on November 9, 2010. 11/9/2010 RP 1. During the proceeding, the court stated that it did not know whether defendant had any prior strike offenses, to which defense counsel told the court that he thought the assault charge was defendant's first. 11/9/2010 RP 9. It was later discovered that the assault charge was actually defendant's second strike offense. RP 8, 20. At the plea proceeding, however, the court confirmed that defense counsel had at least reviewed with defendant what a strike

¹ The transcript of the plea proceeding is not consecutively paginated with the other proceedings. The State will refer to the plea proceeding as "11/9/2010 RP."

offense was and the consequences of such an offense. 11/9/2010 RP 10. Defendant stated that he understood the implications of a strike offense. 11/9/2010 RP 9–10. The defendant entered a fact-based guilty plea to the amended charges and the court accepted his plea. CP 36–49; 11/9/2010 RP 11–12.

Shortly before sentencing, defendant told defense counsel that he wanted to withdraw his plea and demanded that defense counsel stop working on the case. RP 4. Defense counsel made a motion to substitute counsel before the Honorable Edmund Murphy, who sent the motion back to Judge Martin. RP 4–5.² Judge Martin heard the motion on February 11, 2011. *See* RP 3.³

Defendant motioned for court-appointed counsel because he alleged his counsel was ineffective. *See* RP 9. Defendant stated that his attorney had committed fraud in inducement, misled him in taking the plea bargain by saying he would get a lesser sentence, and failed to file any motions on his behalf. RP 9–10. Defense counsel, on the other hand, stated that he had defendant’s best interest at heart. RP 10. He stated that he would not bring a motion to withdraw guilty plea because he had already told the court during defendant’s colloquy that he thought defendant

² The record does not indicate why the parties originally appeared before Judge Murphy for sentencing.

³ The verbatim transcript of proceedings mislabels the hearing as a “motion to withdraw guilty plea.” *See* RP 1–12. Defense counsel clarified that the motion before the court was to substitute counsel. *See* RP 3–4.

entered his plea knowingly, intelligently, and voluntarily. CP 5. The court denied defendant's motion and set over sentencing for two weeks to allow defense counsel to prepare for sentencing. RP 11.

At sentencing,⁴ defendant renewed his motion to substitute counsel so that he could enter a motion to withdraw guilty plea. RP 13. The court denied the motion to substitute counsel. RP 14. Notwithstanding the court's holding, defendant did not make a pro se motion to withdraw guilty plea. *See* RP 13–14. The standard ranges for his charges were 162–216 months for the assault charge,⁵ and 36–48 for the unlawful possession of a firearm charge,⁶ plus 60 months for the firearm enhancement. RP 18; CP 39. The court sentenced defendant to 260 months for the assault charge, and 48 for the unlawful possession charge, concurrent with the first. RP 28.

Immediately following sentencing, the court discovered that defendant's father, mother, and aunt had arrived to speak on defendant's behalf. RP 30–31. The court stated it would reconsider the sentence after hearing their statements. RP 31. The court later confirmed defendant's sentence after hearing statements made by defendant's family. RP 42.

Defendant timely filed his appeal on March 11, 2011. CP 50.

⁴ In addition to the cause number on appeal, the court sentenced defendant for a separate cause number—attempting to elude a pursuing police vehicle, cause number 10-1-00139-7. RP 14.

⁵ Offender score of 6. CP 39.

⁶ Offender score of 4. CP 39.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO SUBSTITUTE COUNSEL BECAUSE DEFENDANT FAILED TO SHOW HOW HIS COUNSEL'S PERFORMANCE WAS DEFICIENT.

A trial court's denial of a motion to substitute counsel is reviewed under an abuse of discretion standard. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). To hold that the trial court has abused its discretion, the record must show that the court's discretion was predicated upon clearly untenable grounds or manifestly unreasonable. *State v. Olmsted*, 70 Wn.2d 116, 119, 422 P.2d 312 (1966).

"Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown." CrR 3.1(e). Whether a defendant's dissatisfaction with his counsel is meritorious and justifies appointment of new counsel is a matter within the trial court's discretion. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997).

Factors to be considered in a decision to grant or deny a motion to substitute counsel are (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings." *Stenson*, 132 Wn.2d at 734 (citing *State v. Stark*, 48 Wn. App. 245, 253, 738 P.2d 684 (1987)); see also *State v. Varga*, 151 Wn.2d 179, 200–201, 86 P.3d 139 (2004) (holding that the

trial court did not abuse its discretion where it afforded the defendant an opportunity to explain his reason for dissatisfaction with counsel, and questioned counsel regarding the merits of defendant's claims). "Unsupported general allegations of deficient representation are inadequate to support a motion to substitute, particularly when the motion to substitute is brought shortly before or during trial." *State v. Staten*, 60 Wn. App. 163, 170, 802 P.2d 1384 (1991).

In this case, the trial court properly addressed the reasons defendant gave for his dissatisfaction with his counsel. Defendant stated that his counsel was ineffective because he misled him into taking a plea bargain, promised a lesser sentence than what defendant thought he would receive, did not have defendant's interests in mind when negotiating a plea bargain, and failed to bring a motion to withdraw guilty plea. RP 9–10. When defendant had finished addressing the court, the trial court specifically inquired whether defendant had any other concerns regarding his motion, but defendant did not offer any other reasons. RP 10.

The trial court later found no information that would support defendant's claims and denied defendant's motion. RP 11. For reasons discussed below in this brief, the trial court properly determined that defendant had effective assistance of counsel.

Next, the trial court conducted its own thorough evaluation of counsel. *See* RP 3–7, 10. The court first heard defense counsel's motion to withdraw counsel. RP 5–6. The trial court again heard from defense

counsel in response to defendant's allegations of ineffective assistance of counsel. *See* RP 10.

The third factor the court had to consider was the effect of defendant's motion on the scheduled proceedings. *Stenson*, 132 Wn.2d at 734. Here, defendant discharged counsel near the conclusion of his case while counsel was preparing defendant's sentencing memorandum. RP 4.

Defense counsel stated:

The Court made the finding and did a colloquy with him. Now, when we came back, I set sentencing out, set sentencing memorandum. I had an investigator out trying to talking to family [sic]. There's a dispute. We're going to argue the range on sentencing. I'm trying to do a sentencing memorandum to convince the court that low end is correct. Mr. Leach, in the meantime, tells me he wants to withdraw his plea, tells me to stop working on his case. Under the Rules of Professional Conduct, RPC 1.16, when I'm discharged by a client, I'm kind of like, okay, I need to stop until I get guidance by the court. We came back in and told [the prosecutors] that I would not be ready for sentencing because of this.

RP 4–5. Defendant made his unsupported allegations of deficient representation immediately prior to sentencing, a time frame well after the court's standard set forth in *Staten*. *See Staten*, 60 Wn. App. at 170. Although sentencing had already been rescheduled twice, the appointment of substitute counsel would have unnecessarily delayed defendant's sentencing further.

After hearing defendant and defense counsel fully express their concerns, the trial court denied defendant's motion. RP 11. In light of

defendant's general allegations of ineffective assistance of counsel, the trial court's inquiry of counsel, and the timing of the motion, defendant fails to show that the trial court's discretion was predicated upon clearly untenable grounds or manifestly unreasonable. *Olmsted*, 70 Wn.2d at 119. This court should affirm the trial court's ruling and deny defendant's claim.

a. Defense counsel's performance was effective.

In order to establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Garcia*, 57 Wn. App. 927, 932, 791 P.2d 244 (1990). "Surmounting Strickland's high bar is never an easy task." *Premo v. Moore*, — U.S. —, 131 S. Ct. 733, 739, 178 L. Ed. 2d 639 (2011) (quoting *Padilla v. Kentucky*, — U.S. —, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010)); *Harrington v. Richter*, — U.S. —, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (citation omitted).

Counsel's performance is deficient when it falls below an objective standard of reasonableness. *Premo*, 131 S. Ct. at 739 (citation omitted). The attorney's representation must amount to incompetence. *Id.* at 740. In the plea bargaining context, counsel must actually and substantially assist

his client when deciding to plead guilty. *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981).

Washington courts have held that a defense counsel's failure to make a motion does not support an ineffective assistance of counsel claim. *See, e.g., State v. McFarland*, 127 Wn.2d 322, 336–37, 899 P.2d 1251 (1995) (holding that counsel's failure to make a motion to suppress is never per se deficient); *State v. Price*, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005) (denying defendant's claim where counsel failed to make a motion to suppress evidence). To show deficient performance in this regard, defendant must show that the motion would have been properly granted. *Price*, 127 Wn. App. at 203; *see also In re Nichols*, 151 Wn. App. 262, 273, 211 P.3d 462 (2009) (holding that even if the motion were to be properly granted, the court must still consider counsel's performance in light of all the circumstances to find deficiency).

Ordinarily, a lawyer has an ethical obligation to forbear from bringing frivolous motions without a basis in law and fact. *See, e.g.,* RPC Rule 3.1 (Meritorious Claims and Contentions); CR Rule 11 (Signing and Drafting of Pleadings, Motions, and Legal Memoranda; Sanctions). The comment to Rule 3.1 of the rules of professional conduct states, “[An] action is frivolous, . . . if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.” Comment 2.

To show prejudice, defendant must show that counsel's performance affected the outcome of the plea process. *Garcia*, 57 Wn. App. at 932–33 (citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). It is the defendant's burden to prove that but for his counsel's deficient performance, he would not have pleaded guilty and would have gone to trial. *Id.*

The Supreme Court of the United States recently addressed the high degree of deference that should be afforded to counsel's judgment during the plea-bargaining stage. *See Premo*, 131 S. Ct. at 742. It stated, “[A]t different stages of the case [deference regarding counsel's judgment] may be measured in different ways.” *Id.* at 742. It continued, “[T]he case of an early plea, . . . create[s] a risk that an after-the-fact assessment will run counter to the deference that must be accorded counsel's judgment and perspective when the plea was negotiated, offered, and entered.” *Id.* at 742; *see also Harrington*, 131 S. Ct. at 788 (emphasizing that trial counsel observed the relevant proceedings, knew of materials outside of the record, and closely interacted with the defendant).

In this case, defense counsel's performance satisfied, if not exceeded, an objective standard of reasonableness. Defense counsel negotiated a plea offer that essentially mitigated a potential life sentence for defendant down to approximately 20 years. If defendant had opted to

go to trial, he faced two additional counts of assault in the first degree,⁷ four gang aggravators,⁸ and 10 additional years of flat time for the firearm enhancements.⁹ CP 1–3. It is unreasonable to infer that defense counsel did not have defendant’s best interest in mind when securing such a plea bargain.

The plea bargain is particularly advantageous when considering the alleged facts of defendant’s case. According to the declaration for determination of probable cause, the shooting victim and several witnesses positively identified defendant as the shooter. CP 56. Moreover, defendant was caught after a foot pursuit while carrying the bullet casings from the shooting in his own pocket. CP 56.

Defendant alleged to the trial court that defense counsel was ineffective in part because counsel misled him in taking the plea bargain by saying he would get less time, and that counsel refused to make any motions on defendant’s behalf. RP 9–10. Regarding defendant’s alleged confusion regarding time of his sentence, defense counsel stated, “As I understand it, he said he did not understand that the enhancement on the firearm was flat time and consecutive. I’ll let him address that. It’s my understanding he did know that. It’s written in the plea, and we talked

⁷ If convicted, each assault charge constitutes a serious violent offense that would multiply defendant’s offender score, and require the defendant to serve each charge consecutive to the other. *See* RCW 9.94A.589(1)(a).

⁸ Each aggravator allows the court to impose an exceptional sentence under RCW 9.94A.537(6).

about in the colloquy.” RP 6. As proof of defense counsel’s claims, defendant initialed the plea form where it states:

I understand that the offense(s) I am pleading guilty to include a deadly weapon or firearm enhancement. Deadly weapon or *firearm enhancements are mandatory, they must be served in total confinement, and they must run consecutively to any other sentence* and to any other deadly weapon or firearm enhancements.

CP 6-14 (page 7–8) (emphasis added). Defendant also reiterated his understanding of the plea when questioned by the court during the colloquy. 11/9/2010 RP 6–11.

Next, defense counsel provided a reasonable explanation for not making a motion to withdraw guilty plea on defendant’s behalf. Counsel explained, “I had already told the Court that the plea was knowing, intelligent and voluntary. I can’t bring a motion and say, ‘No, it’s not knowing, voluntary and intelligent.’ Number one, I’ve already represented it wasn’t, and I stand by that, so I really can’t.” RP 5. Counsel was unable to make a good faith argument on the merits of a motion to withdraw guilty plea, and properly concluded it would be unethical for him to proceed with such action. *See* RPC 3.1, Comment 2. Even the trial court concluded that defendant had entered his plea knowingly, intelligently, and voluntarily when it accepted his plea. *See* 11/9/2010 RP 12; *see also* CP 14 (Statement of Defendant on Plea of Guilty).

⁹ *See* RCW 9.94A.533(3)(a).

Defense counsel's refusal to make a meritless motion does not satisfy a claim of ineffective assistance of counsel. *See, e.g., McFarland*, 127 Wn.2d at 336–37; *Nichols*, 151 Wn. App. 273. In his appeal, defendant does not offer a single legal authority that supports the notion that his motion to withdraw guilty plea would have been properly granted otherwise, but insists that this court remand to appoint substitute counsel to bring that motion. Brief of Appellant at 7–8.

Interestingly, defendant never even made a motion to withdraw guilty plea, but instead petitioned the trial court to appoint new counsel. *See* RP 13. Only after his judgment and sentence, in his statement of additional grounds for review, does he actually allege manifest injustice and request this court to withdraw his guilty plea. The only issue that the trial court had to resolve was whether defendant made a meritorious and justified claim for the appointment of substitute counsel. After the trial court's inquiry, however, it determined that there were no grounds to base an ineffective assistance of counsel claim. RP 11. There is no evidence the trial court abused its discretion in this regard.

To find that defense counsel's performance was deficient for not bringing defendant's motion would necessarily infer that no other competent attorney in defense counsel's situation would have behaved similarly. *See Premo*, 131 S. Ct. at 741 (holding that the relevant question when analyzing deficiency is whether any competent attorney would behave similarly).

Defendant also failed to show the trial court how counsel's performance prejudiced the defense. Considering both the generous plea offer and the alleged facts pertaining to defendant's case, it seems highly unlikely that defendant would have gone to trial but for his counsel's performance. *Garcia*, 57 Wn. App. at 932–33.

Defendant failed to satisfy either prong of the *Strickland* inquiry. After questioning defendant and defense counsel, the trial court concluded, "I have not seen information for me to conclude that there has been ineffective assistance of counsel in this case. I deny the motion to dismiss counsel." RP 11. Accordingly, the trial court did not err when it denied defendant's motion to substitute counsel because it properly assessed the reasons for defendant's dissatisfaction with his counsel.

2. THE TRIAL COURT DID NOT DENY
DEFENDANT'S RIGHT TO COUNSEL WHEN IT
PROPERLY DENIED DEFENDANT'S MOTION
TO SUBSTITUTE COUNSEL.

A criminal defendant has a constitutional right to counsel at all critical stages of a criminal proceeding, including sentencing. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); *see also* CrR 3.1(b)(2). However, a defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004); *Stenson*, 132 Wn.2d at 733. When a defendant fails to provide the court with a legitimate reason for substitute

counsel, the court may require the defendant to continue with current counsel or represent himself. See *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991) (citing *State v. Sinclair*, 46 Wn. App. 433, 437–38, 730 P.2d 742 (1986)).

In this case, defendant alleges that the court violated his right to representation when it denied his motion to substitute counsel. Brief of Appellant at 4. Defendant relies on *State v. Davis*, 125 Wn. App. 59, 64, 104 P.3d 11 (2004), to argue that he was entitled to have counsel represent him in bringing a motion to withdraw guilty plea. Brief of Appellant at 7. A comparison to *Davis* is unwarranted in this case. In *Davis*, the defendant repeatedly made a motion to withdraw his guilty plea to the trial court, alleging that a manifest injustice had occurred. *Davis*, 125 Wn. App. at 61. Defendant made his motion after the court's oral pronouncement of his sentence, but before the court secured defendant's fingerprints for the judgment and sentence. *Id.* at 61–62. The court refused to hear his motion because it considered its oral pronouncement to be final judgment. *Id.* The issue the court had to determine was whether the defendant made his motion prior to final judgment, thus reserving his right to counsel. *Id.* at 62–63.

Defendant's case is distinguishable because, as discussed above, defendant never made a motion to withdraw guilty plea. He only motioned the court to substitute counsel, and the trial court heard and denied his motion. See RP 3, 9, 11, 13. Defendant fails to point to anything in the

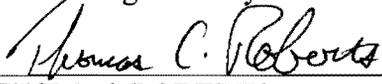
record that would indicate the trial court abused its discretion. Absent a legitimate reason for substitute counsel, the trial court properly required defendant to continue with his current counsel. *State v. Deweese*, 117 Wn.2d at 276.

D. CONCLUSION.

The trial court did not err when it denied defendant's motion for substitute counsel. The trial court properly determined that defense counsel was effective, and that defendant's motion on the eve of sentencing was neither meritorious nor justified. Furthermore, defendant was not denied his constitutional right of counsel when the trial court denied his motion to substitute counsel. The State respectfully requests this court to affirm defendant's conviction and deny defendant's claim.

DATED: OCTOBER 10, 2011

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