

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DANIEL JACKSON

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George Wood, Judge

AMENDED
BRIEF OF APPELLANT

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STATUTES, RULES AND OTHERS

RAP 2.5(a)(3).

CrR 4.2(d)

A. ASSIGNMENTS OF ERROR

1. Jackson's plea was not knowing voluntary and intelligent.
2. Jackson was denied his right to effective assistance of counsel at the plea hearing.
3. Counsel's failure to investigate a potentially exonerating video prejudiced Jackson.

Issues Presented on Appeal

1. Was Jackson's plea knowing voluntary and intelligent where his trial attorney failed to investigate a video that would have demonstrated that Jackson was the victim and not the assailant and if presented Jackson would not have pleaded guilty?"
2. Was Jackson was denied his right to effective assistance of counsel at the plea hearing by his attorney's failure to discuss self-defense in light of a video counsel failed to investigate
3. Was counsel's failure to investigate a potentially exonerating video prejudicial to Jackson where Jackson would not have pleaded guilty if the video had been produced?

B. STATEMENT OF THE CASE

Jackson was initially charged with a deadly weapon enhancement. Supp. CP sub # 8 (Information 7-10-2014). During an August 5, 2014 hearing, Jackson rejected the state's offer to plead guilty to reduced charges. RP 2 (August 5, 2014). On August 7, 2014 Jackson pleaded guilty to assault in the fourth degree. RP 3 (August 7, 2014). Jackson

affirmed that he reviewed the plea agreement and did not have any questions. RP 3-6 (August 7, 2014).

During the plea hearing, Mr. Stalker, counsel for Jackson informed the court that Jackson was severely injured when the alleged victim slammed him to the ground and Jackson was initially “very hesitant to take a deal on this and that’s because he you know, believes he did not do anything wrong, he was the one assaulted, so that’s the situation we have.” RP 8-9 (August 7, 2014). Stalker further explained that Jackson took the plea because he did not have money to post bail. RP 9. (August 7, 2014).

On September 8, 2014, Mr. Gasnick filed a notice of appeal to this Court challenging the judgment and sentence. CP 21. On that same date, Mr. Gasnick, an attorney with the public defender’s office, filed a note of issue for appointment of alternate counsel to pursue a motion to withdraw the guilty plea. CP 20. On September 19, 2014, the trial court removed Stalker from the case and appointed Ms. Unger as counsel for the motion hearing. CP 15. On October 10, 2014, Jackson filed a declaration in support of the motion to withdraw his plea. CP 12.

The trial court denied the motion to withdraw the plea following a hearing on October 23, 2014, where the trial court reviewed the declaration and listened to the argument of counsel. Supp. CP 21 (Trial Court Order Denying Motion to Withdraw Plea (11-24-2014)). The trial court ruled that Jackson failed to overcome the strong presumption that

his plea was knowing, voluntary and intelligent, and Jackson failed to demonstrate prejudice. Supp. CP 21 (Trial Court Order Denying Motion to Withdraw Plea (11-24-2014). On May 22, 2015, this Court denied Jackson's motion to file a late notice of appeal to address the trial court's denial of his motion to withdraw his appeal.

b. Jackson's Declaration In Support of Motion to Withdraw Plea.

DANIEL J. JACKSON, being first duly sworn on oath, deposes and says:

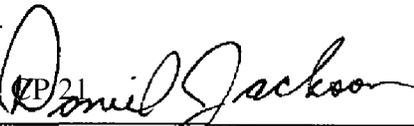
I am the defendant and make the following statement in support of my motion to withdraw my plea of guilty. I was previously represented by Alex Stalker and I do not believe that he provided me with the sufficient information to make an informed decision about pleading guilty to the reduced crime of assault in the 4th degree. I believe that there was additional evidence that would have exonerated me and proved that I was attacked by the complaining witness, which included video footage that was never reviewed. I feel as if I was coerced to change my plea, even though I wanted to go to trial and be exonerated.

Although I knew that I was pleading guilty, I do not believe that it was done voluntarily. I believe that I was forced to do so by my attorney, who was unwilling to take my case to trial. I was defending myself at the time and suffered injuries to my teeth and jaw, for which I will never be able to be adequately compensated. I was never provided with the discovery from the prosecuting attorney and believe that my lawyer did not contact witnesses and failed to adequately prepare my case. I was not aware of all of the consequences of my plea of guilty, including my expulsion from the local Safeway store, where I previously shopped. I wanted to take my case to trial, and my attorney did not follow my wishes and coerced me to plead guilty.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this September.

CP 12. This timely appeal follows.



DANIEL J. JACKSON

C. ARGUMENTS

1. MR. JACKSON MUST BE PERMITTED TO WITHDRAW HIS PLEA BECAUSE IT WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT.

- a. This issue is of constitutional magnitude and can be raised for the first time on appeal.

Due process requires that a guilty plea be knowing, voluntary and intelligent. *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). Jackson asserts the trial court impermissibly accepted his *Alford*¹ plea because it was not voluntarily given. Because such a claim is of constitutional magnitude it may be raised for the first time on appeal. *State v. Deal*, 128 Wn.2d 693, 911 P.2d 996 (1996); RAP 2.5(a)(3).

- b. A plea of guilty must be knowing and voluntary.

To be “voluntary in a constitutional sense”, the defendant must understand fully his or her legal and constitutional rights and must understand that by pleading guilty, those rights are waived. *State v. Holsworth*, 93 Wn.2d 148, 156, 607 P.2d 845 (1980). Whether a plea is entered voluntarily must be decided by looking at the circumstances. *State v. Stephan*, 35 Wn. App. 889, 894, 671 P.2d 780 (1983).

The long standing test for determining the validity of a guilty plea is

¹ *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 168, 27 L.Ed.2d 162 (1970).

"whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Alford*, 400 U.S. at 31; *In re Montoya*, 109 Wn.2d 270, 280, 744 P.2d 340 (1987); *State v. Stowe*, 71 Wn. App. 182, 187, 858 P.2d 267 (1993). Under CrR 4.2(d), a court shall not accept a guilty plea "without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequence of the plea."

During the plea hearing counsel for Jackson indicated Jackson's hesitation to plead guilty but the plea hearing did not raise significant issues of voluntariness. However, Jackson filed a declaration explaining that his plea was not voluntary due to his attorney's refusal to investigate a video of the incident that would have established that Jackson was attacked and acted in self-defense. Supp. CP 12. The video would have exonerated Jackson.

Had Jackson's attorney properly investigated the case and explored self-defense, Jackson would have taken his case to trial. CP 12. Ultimately, Jackson's decision to plead guilty was not based on all the information needed to make an informed and intelligent decision. Accordingly, his guilty plea was not voluntary.

- c. Because Jackson's plea was not voluntary, the trial court erred in accepting his guilty plea.

Because Jackson's guilty plea was not voluntary, he was denied due process and his conviction must be reversed. Because the record fully

demonstrates Jackson's plea was entered without proper investigation or any advisement of a potential self-defense claim and Jackson declared he would have gone to trial had his attorney investigated the video, his plea was involuntary and his motion to withdraw his plea should have been granted.

2. DEFENSE COUNSEL'S FAILURE TO CONDUCT A REASONABLE INVESTIGATION TO ENABLE JACKSON TO MAKE AN INFORMED DECISION WHETHER TO PLEAD GUILTY, RENDERED COUNSEL'S PERFORMANCE INEFFECTIVE

- a. Defense counsel was ineffective for failing to properly investigate the video and for failing to advise Jackson about a self-defense before he pleaded guilty.

To prevail on an ineffective assistance of counsel claim in the context of a conviction following a guilty plea, a defendant must show that defense counsel's representation fell below an objective standard of reasonableness pursuant to the prevailing professional norms, and that but for counsel's unprofessional errors he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *State v. A.N. J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010); *State v. Fedoruk*, __Wn.App.__339 P.3d 233, 239 (2014). This Court reviews de novo ineffective assistance of counsel claims which present mixed questions of law and fact. *Fedoruk*, 339 P.3d at 240.

Because “[e]ffective assistance of counsel includes assisting the defendant

in making an informed decision as to whether to plead guilty or to proceed to trial,” an attorney’s failure to adequately investigate the merits of the State’s case and possible defenses may constitute deficient performance. “ *Fedoruk*, 339 P.3d at 239 (quoting *A.N. J.*, 168 Wn.2d at 111). *Savino v. Murray*, 82 F.3d 593, 599 (4th Cir.), cert. denied, 117 S.Ct.1 (1996); see *Via v. Superintendent, Powhatan Correctional Ctr.*, 643 F.2d 167, 174 (4th Cir. 1981) (discussing the duties and obligations of defense counsel).

Defense counsel must, "at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." *In re Personal Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (quoting *In re Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001)); *Fedoruk*, 339 P.3d at 240.

An effective counsel must investigate a case and interview witnesses. *Id.* In *Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir. 2003), Johnny Riley claimed he was denied the effective assistance of counsel because his defense counsel failed to interview a key witness and introduce that testimony at trial. *Id.* Mr. Riley submitted evidence that his defense counsel never contacted Edward Pettis to interview him about the case, and Mr. Pettis filed a declaration stating he would have testified the victims threatened Mr. Riley before the shooting. *Id.* Citing *Strickland*², the *Riley* Court ruled defense counsel:

² *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

“has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* at 691. We have held that “a lawyer who fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client’s factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.” *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002) (quoting *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999)); *see also Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999) (counsel’s performance was deficient where counsel failed to interview three witnesses who had material evidence as to their client’s innocence).

Riley, 352 F.3d at 1818. Although a defense counsel has no obligation to interview each and every potential witness:

“However, where (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness. The reason for this is simple: A lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor – factors we are not in a position to second-guess.”

Riley, 352 F.3d at 1818, quoting *Lord*, 184 F.3d at 1095 n.8 (parenthetical in original). In reversing his conviction for ineffective assistance of counsel, the *Riley* Court found defense counsel’s:

performance fell below an “objective standard of reasonableness” because he failed to interview Pettis. Having never spoken with Pettis, [defense counsel] could not have fully assessed Pettis’s version of the events, Pettis’s credibility and demeanor, or any other aspect of his involvement that might have reinforced *Riley*’s defense.

352 F.3d at 1318-19.

The Court in *Strickland* held that at times “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable

professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690-91. In *Riley*, counsel did not follow up with Pettis after Riley told counsel Pettis had been with him when the dispute with Jaramillo and Calloway erupted. And the record does not disclose any reason for the failure of counsel to contact Pettis. Thus, the rule of *Strickland* requiring “reasonable professional judgments” before limiting investigation is offended here. *Riley*, 352 F.3d at 1318-19.

Similarly in *Brett*, counsel was ineffective for failing to conduct adequate investigation:

Counsel did not conduct a reasonable investigation into Brett’s medical conditions and the possible mental effects of such severe conditions. Thus, Brett’s counsel was unable to make informed decisions about how to best represent him in both the guilt and penalty phases of the trial.

Brett, 142 Wn.2d at 883. This Court in *Fedoruk* relied on *Brett* to hold counsel ineffective for failing to investigate a mental health defense for Fedoruk. *Fedoruk*, 339 P.3d at 241. Accordingly, before a defense counsel decides to bring a case to trial or advise his client to plead guilty to an offense, a reasonable investigation should be conducted to ensure the client is fully advised and makes an informed decision regarding which action to take.

Based on an objective standard of reasonableness, there is no practical distinction between a failure to investigate a video that would exonerate a defendant and a failure to call a witness or to conduct a mental health or other medical defense investigation when that would investigation could provide a viable defense to the charges filed.

- b. Defense counsel had sufficient information before him that reasonably required him to investigate the video of the fight.

In the instant case, defense counsel had sufficient information before him that a reasonable attorney would have realized the video could have exonerated Jackson by demonstrating that he was the victim rather than the aggressor. Jackson could have raised a self-defense claim based on the video in which Jackson suffered serious injury. Mr. Stalker was removed as counsel for Jackson's motion to withdraw his plea hearing and did not testify. However, at the hearing, Jackson presented a declaration made under oath that he pleaded guilty to fourth degree assault based on a lack of investigation and information: Jackson specifically declared under oath:

1. I was previously represented by Alex Stalker and I do not believe that he provided me with the sufficient information to make an informed decision about pleading guilty to the reduced crime of assault in the 4th degree.
2. I believe that there was additional evidence that would have exonerated me and proved that I was attacked by the complaining witness, which included video footage that was never reviewed.
3. I feel as if I was coerced to change my plea, even though I wanted to go to trial and be exonerated.
4. Although I knew that I was pleading guilty, I do not believe that it was done voluntarily.
5. I believe that I was forced to do so by my attorney, who was unwilling to take my case to trial.
6. I was defending myself at the time and suffered injuries to my teeth and jaw, for which I will never be able to be adequately compensated.

7. I was never provided with the discovery from the prosecuting attorney and believe that my lawyer did not contact witnesses and failed to adequately prepare my case.

8. I was not aware of all of the consequences of my plea of guilty, including my expulsion from the local Safeway store, where I previously shopped.

9. I wanted to take my case to trial, and my attorney did not follow my wishes and coerced me to plead guilty.

CP 12.

Even though Mr. Stalker never admitted his failure to obtain the Safeway video, the prosecutor in his argument to the court did reveal that no video was ever obtained. RP 7 (10-23-14). Without a doubt had the video footage been reviewed and confirmed that Jackson was the victim and the not the aggressor, he would have been exonerated of the charges.

However, Mr. Stalker's inexcusable failure to investigate the video violated Jackson's right to the effective assistance of counsel. *Riley*, 352 F.3d at 1318-19. A defense counsel has a duty to adequately investigate the case by reasonably interviewing people who could assist and reinforce a defense. *Riley*, 352 F.3d at 1318-19.

An "objective standard of reasonableness" required Mr. Stalker to interview the Safeway security staff to obtain a copy of the store video footage of the incident. Following such an interview and review of the video, had Jackson not wanted to go to trial, he would have been in a position to make a knowing, voluntary and intelligent decision. Because Stalker failed to investigate, he was ineffective to Jackson's prejudice. Without the investigation Jackson could not make an informed decision. *Savino*, 82 F.3d at 599.

- c. Reversal is required because Jackson was prejudiced by counsel's

deficient performance.

Although the standard for reversing a conviction following a guilty plea based on ineffective assistance of counsel announced in *Hill* is based upon the "general" framework for proving ineffective assistance of counsel under *Strickland*, the "prejudice" analysis contained in *Hill* is materially different from *Strickland*. To prove ineffective assistance of counsel under *Strickland*, a defendant must show that the result of his trial would have been different. *Strickland*, 466 U.S. at 694. However, when the conviction at issue has followed a guilty plea, the defendant must show that "there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Jackson had more than a colorable defense based on self-defense as the victim of an attack. The viability of that defense was a jury question. *Hyde v. United States*, 225 U.S. 347, 371, 32 S.Ct. 793, 56 L.Ed.1114 (1912); *United States v. Wooten*, 688 F.2d 941, 946 (4th Cir.1982); *United States v. Grubb*, 527 F.2d 1107, 1109 (4th Cir. 1975). Jackson stated under oath that had he been provided the video and a self-defense option, he would not have taken a plea offer and would have taken his case to trial. CP 12.

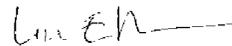
Jackson was never given the opportunity to present his colorable defense to the jury because counsel told him to plead guilty after conducting an ineffective and cursory investigation into the circumstances surrounding the incident. Accordingly, Jackson requests this Court find that trial defense counsel was ineffective, and that but for defense counsel's errors, Jackson would not have pled guilty and would have insisted on going to trial.

D. CONCLUSION

Jackson respectfully requests this Court find that Jackson did not make a knowing, voluntary and intelligent decision plead guilty and permit Jackson to withdraw his plea.

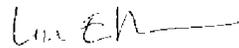
DATED this 22nd day of May 2015

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I Lise Ellner, a person over the age of 18 years of age, served Clallam County Prosecutor Appeals Department prosecutor@co.clallam.wa.us. And Daniel Jackson DOC # 372172 Clallam Bay Correctional Center 1830 Eagle Crest Way Clallam Bay, WA 98326 a true copy of the document to which this certificate is affixed, On June 3, 2015. Service was made by depositing in the mails of the United States of America, properly stamped and addressed and electronically.



Signature

ELLNER LAW OFFICE

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