



28863-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER W. CONKLIN, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

APPELLANT'S BRIEF

---

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Conklin's request to withdraw his guilty plea.

2. The trial court erred by entering finding of fact number 3:

On September 29, 2008 the parties approached the original sentencing Court and agreed to recommend the Defendant be re-sentenced due to the ambiguity referred to in paragraph 2, reducing the sentence from 280 months to 240 months, without changing the firearm enhancement. The Court in 2008 who resentenced Defendant was the same Court who initially sentenced Defendant, and the deputy prosecutor at the resentence was the same deputy prosecutor who had handled the case at the 2003 proceedings. The defendant was represented by Christian Phelps at that hearing.

(CP 123)

3. The trial court erred by entering finding of fact number 7:

The "benefit of Defendant's plea bargain" as to his re-sentencing was 298 months to be served, which is computed as 15% off of his original 280 month sentence on the first degree murder charge, or 238 months, plus the firearm enhancement of 60 months to which it is undisputed Defendant knew at all times he would not receive good time on that 60 months. The 298 months is the combination of 238 months plus 60 months.

(CP 123)

4. The trial court erred by entering finding of fact number 8:

There was no showing that the Defendant was not represented by competent counsel at all hearings.

(CP 123)

5. The trial court erred by entering finding of fact number 9:

The Court finds no basis for any bad faith on the part of the State throughout these proceedings or on the part of Defendant or his counsel throughout all proceedings in 2003, 2008 and 2010.

(CP 123)

6. The trial court erred by entering finding of fact number 10.

Defendant's re-sentence on September 29, 2008 of a total of 300 months without any good time eligibility was not manifestly unfair.

(CP 123)

7. The trial court erred by entering finding of fact number 11:

There is no substantial basis presented by Defendant which would show he at any time was treated unfairly or received poor legal advice and no basis to set aside his plea nearly 7.5 years after the incident involved and 6.5 years after his guilty plea relating to said incident.

(CP 123)

8. The trial court erred by entering conclusion of law number 3:

There is no manifest injustice to defendant which would justify this Court to set aside Defendant's July 18, 2003 guilty plea under CrR 4.2 based upon the totality of facts and circumstances presented by the

parties. The operative facts do not meet the requirements set forth in *State v. Taylor*, 83 Wn. 2d 594, 596, 521 P. 2d 699 (1974) and other similar case holdings in that nothing in Defendant's motion under CrR 4.2 presents a directly observable or overt injustice to Defendant, a demanding standard as noted in *Taylor*.

(CP 124)

9. The trial court erred by entering conclusion of law number 4.

Defendant is at most entitled to relief of a two month sentence reduction in the 300 month sentence he received on September 29, 2008 and he has not asked for the same or any similar reduction, but has petitioned this Court solely under Cr 4.2.

(CP 124)

10. The trial court erred by entering conclusion of law number 5:

It would be an injustice to grant defendant's requested relief under Cr R 4.2 more than seven (7) years after the crime in which he committed and more than 6.5 years after he entered a guilty plea to said crime.

(CP 124)

11. The trial court erred by entering conclusion of law number 6:

Defendant's motion pursuant to CrR 4.2 is denied.

(CP 124)

## B. ISSUES

1. Where a defendant enters a plea based upon mutual mistake at resentencing, must the defendant be informed that he has the option to withdraw his plea?
2. At a resentencing for a plea based upon mutual mistake, does defense counsel provide ineffective assistance when counsel fails to inform the defendant that the defendant has the option of withdrawing his plea?
3. Where a criminal defendant indicates he thought he had options at resentencing other than simply re-pleading, and defense counsel fails to inform the defendant he can withdraw his plea and instead tells the defendant to be quiet and accept the deal, does trial counsel provide ineffective assistance?
4. Does a manifest injustice exist authorizing the court to withdraw a guilty plea when the criminal defendant is not advised he has the option to withdraw his plea?

## C. STATEMENT OF THE CASE

According to the police probable cause statement, on August 28, 2002, two cars collided on Division Street in Spokane. A large SUV hit a

white van twice, and then blocked the van from driving away. (Supp CP 2) A man got out of the SUV with a gun, and approached the van driver. (Supp CP 2) The man fired one shot, and hit the passenger. (Supp CP 2) The passenger later died. (Supp CP 2)

The parties did not know one another, but through witness information, the police identified the man with the gun as Christopher W. Conklin. (Supp CP 4) Mr. Conklin's girlfriend told police that she was in the car, and that when Mr. Conklin and his friends returned to the car, they were yelling at each other about the gun going off. (Supp CP 4)

In 2003, Christopher W. Conklin agreed to a plea that the parties later discovered was premised upon a mutual mistake. (CP 83; 122) Specifically, Mr. Conklin agreed to plead guilty to first degree murder with a firearm enhancement, and in exchange the State promised to recommend 240 months, plus 60 months for the weapons enhancement. (CP 14) The plea agreement also stated, "It is agreed and stipulated that the defendant is eligible for 15% off the 240 months for aggregate earned release time under this plea agreement?" (CP 14)

The sentencing court, Spokane Superior Court Hon. Linda Tompkins, was unwilling to follow the State's recommendation, and instead imposed a sentence of 280 months on the murder charge, along with an additional 60 months' firearm enhancement, to be served

consecutively. (CP 122) The mutual mistake in the plea was the erroneous assurance from both the State and defense counsel that Mr. Conklin would receive 15% good time on his sentence. (CP 122)

Subsequently, the State acknowledged the error and Mr. Conklin returned to court again before the Hon. Linda Tompkins. (CP 89; 98) During this hearing, Mr. Conklin was represented by defense counsel Christian Phelps. (RP 80) At the hearing, the State requested that the court correct the error by resentencing Mr. Conklin by calculating a 15% reduction off the 280 months:

MR. DUGGAN:...The short version of the argument is I believe Mr. Conklin is of the mind that he did not knowingly enter this plea based on his assumption of what the good time would be.

It turns out the Department of Corrections is calculating it differently than what was anticipated so basically we are back here before the Court requesting the Court to resentence Mr. Conklin to the exact same charge, the same deadly weapon enhancement. All portions of the sentence would remain the same, but we would ask the Court to sentence him to a term 300 months which includes the 60-month firearm enhancement.

THE COURT: Mr. Phelps.

MR. PHELPS: Nothing to add to that.

(CP 81-82)

The resentencing found that the plea agreement was based upon "a mutual mistake." (CP 83) The court stated that the State's proposed remedy

would be “appropriate” and gave defense counsel the opportunity to raise any objection or suggest an alternative remedy:

THE COURT: ... Counsel, that would be the only modification I would be contemplating unless there is any other area you would wish the Court to address and I haven't heard that or seen that. Mr. Phelps.

MR. PHELPS: No, Your Honor.

(CP 83)

When the court asked Mr. Conklin if he wished to make a statement, he stated that he was under the impression he would have his choice of remedies, and would not be forced to simply accept the State's 15% reduction proposal:

THE DEFENDANT: My only question is the fact it was initially 300 months minus the 15 percent which was a little less than I would get now, but I just kind of understood I would have a choice of remedy over accepting this or nothing, but I understand.

THE COURT: Well, you can certainly request some alternatives, but the Court will be making the final decision.

THE DEFENDANT: Okay.

THE COURT: But that is what this is all about.

THE DEFENDANT: Okay.

THE COURT: So being specific, is there anything else that you need me to consider?

THE DEFENDANT: I guess my ----

(Off-the-record-discussion between Defendant and Counsel.)

THE DEFENDANT: Okay, that will be it, Your Honor.

THE COURT: Okay. I am satisfied that that is appropriate then. The computation will not set 300 months, 240 plus the 60.

(CP 83-84)

On September 22, 2009, Mr. Conklin filed a *pro se* motion to withdraw his guilty plea pursuant to CrR 4.2(f). (CP 68) He explained that neither the court nor his attorney ever advised him that he could withdraw his plea:

During my conversation with the judge my attorney Chris Phelps leaned in and whispered that I should just take what I could get and be thankful. He never informed me that I could withdraw my plea at any time during this hearing. As a matter of fact, at no time did he ever tell me that I had the right to choose my remedy such as withdrawing my plea.

(CP 78) Mr. Conklin stated that it always was and remains his intention to withdraw his plea:

During the resentencing hearing Judge Tompkins never made an attempt to properly inform me that I could withdraw my guilty plea, if she would have informed me that I was permitted to make this choice, I would have informed her in open court that I wanted to withdraw my guilty plea.

(CP 77-78)

Mr. Conklin was appointed new defense counsel, Keri Reardon, who filed a response brief supporting Mr. Conklin's motion to withdraw his plea. (CP 97-111) Defense counsel argued that Mr. Conklin was not given his choice of remedies – instead, the State apparently decided for him. (CP 101) Mr. Conklin also argued that both his prior defense

attorneys provided ineffective assistance: the first for giving erroneous advice about the 15% good time, and the second for failing to inform Mr. Conklin the remedy choice was his. (CP 101)

In the State's response memorandum, it argued that at the resentencing, Mr. Conklin received an even better deal than he initially bargained for, and therefore no manifest injustice should be found:

It seems to this writer that such difference between an "expectation" of no less than 298 months in 2003, with an agreed re-sentence in 2008 of 300 months total is by no means a sufficient basis or "manifest injustice" to set aside a plea on a serious charge which is more 6.5 years old.

More importantly, the Defendant thought at his 2003 plea and sentencing he was eligible for 15% good time on the non-enhanced portion of the sentence. The reduction of 40 months in the re-sentence is actually more than his expectation of what good time allowed would be, as 15% of 240 months (the plea recommendation) would have only yielded him a total of 36 months good time.

(CP 91) The State also urged the court to ensure the finality of judgments, and because two judgments had already been entered, the court should find that was sufficient. (CP 92)

The parties appeared again before the Hon Linda Tompkins to consider Mr. Conklin's motion to withdraw his guilty plea. (CP 122) The court found that on resentencing, Mr. Conklin received "the benefit of Defendant's plea bargain," he was "represented by competent counsel at all hearings," and "no substantial basis [was] presented by Defendant which

would show he at any time was treated unfairly or received poor legal advice and no basis [exists] to set aside his plea.”(CP 123)

Mr. Conklin appeals.

#### D. ARGUMENT

1. MR. CONKLIN WAS ENTITLED TO BE INFORMED THAT HE COULD CHOOSE TO WITHDRAW HIS GUILTY PLEA.

Where a defendant enters a guilty plea based on misinformation caused by mutual mistake about the plea agreement sentence, the defendant generally may choose between specific performance or plea withdrawal. *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001). Once a defendant has chosen, the State bears the burden of showing compelling reasons why the court should not accept the defendant's choice of remedy. *Walsh*, 143 Wn.2d at 9 (*citing State v. Miller*, 110 Wn.2d 528, 536, 756 P.2d 122 (1988)).

In *Walsh*, the court noted that the record failed to affirmatively show an election of remedies by the defendant, and the court concluded that “on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.” *Walsh*, 143 Wn.2d at 9. Mr. Walsh was entitled to withdraw his guilty plea. *Id.* at 10.

In the *Walsh* case, as in this case, the State did not argue it would be prejudiced by withdrawal of the plea. *See Miller*, 110 Wn.2d at 536

(State bears the burden of showing defendant's choice of remedy is unjust) *State v. Moore*, 75 Wn. App. 166, 173, 876 P.2d 959 (1994) (defendant was allowed his choice of remedy where the State did not argue it would be prejudiced by withdrawal of the plea).

In this case, the record reveals that Mr. Conklin did not know he had the option of withdrawing his plea at the second hearing. He attempted to ask the sentencing court, but the court failed to directly answer him. Instead, the court told Mr. Conklin that he could "request some alternatives" but when read in context, that statement appeared to relate only to the actual sentence, not alternatives to simply entering the plea.

Moreover, the court's statement certainly does not arise to a clear statement that informs Mr. Conklin he has the right to withdraw his plea. Mr. Conklin's questions clearly indicated to the court that he did not know that he had the choice of withdrawing his plea, yet inexplicably the court failed to inquire and advise him.

Mr. Conklin also attempted to ask his lawyer, but was told to be quiet and take the deal. Mr. Conklin unequivocally asserts that his attorney did not inform him that he could withdraw his plea, and yet that was the option he wished to exercise. Mr. Conklin had his choice of remedy, but he was never provided with the choice.

The court seems to indicate in its findings that too much time has passed for Mr. Conklin to choose to withdraw his plea. But it is the burden of the State to establish compelling reasons why the court should not accept Mr. Conklin's choice of remedy. In fact, the State did not address this at the hearing, and did not brief or orally argue that Mr. Conklin's choice to withdraw the plea would be prejudicial to the State.

As in the *Walsh* case, because Mr. Conklin was not advised of his available remedies, the court should reverse and remand for a hearing in which Mr. Conklin is given his option of withdrawing the plea or specific enforcement.

2. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO ASSIST MR. CONKLIN IN DETERMINING WHETHER TO PLEAD GUILTY ON RESENTENCING.

An attorney is ineffective for Sixth Amendment purposes if (1) his or her performance is deficient and (2) the deficiency prejudices the client. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). The *Strickland* test applies to claims of ineffective assistance of counsel in the plea process. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985).

During plea bargaining, counsel has a duty to assist the defendant “actually and substantially” in determining whether to plead guilty. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)). A guilty plea must be knowing, intelligent, and voluntary in order to satisfy due process requirements. *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976); *In re Hews*, 108 Wn.2d 579, 590, 741 P.2d 983 (1987).

When a lawyer and client are considering whether the client should plead guilty, the lawyer must objectively evaluate the evidence and its legal effect (or lack thereof); objectively inform the client of the evaluation’s results; and objectively recommend a course of action. *State v. Holley*, 75 Wn. App. 191, 197, 876 P.2d 973 (1994) (“in the context of plea bargains, effective assistance of counsel means that defense counsel actually and substantially assist his client in deciding whether to plead guilty”); *State v. Stowe*, 71 Wn. App. 182, 187, 858 P.2d 267 (1993) (“Counsel has an obligation to inform a defendant of all ‘direct consequences of a guilty plea’”); 1 ABA Standards for Criminal Justice, commentary to § 4-5.2 (when deciding whether to plead guilty, “accused should have the full and careful advice of counsel”).

Deficient performance is prejudicial if “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” *State v. Acevedo*, 137 Wn.2d 179, 198-99, 970 P.2d 299 (1999); *In re Riley*, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993); *State v. Stowe*, 71 Wn. App. 188. The lawyer’s goal is to equip the client with the tools needed to make a knowing, voluntary and intelligent decision. *Id.*<sup>1</sup>

The failure to explore, discuss or even mention the option of withdrawing the plea was ineffective assistance of counsel. Mr. Conklin’s statement that his lawyer never told him that he had this option is un rebutted. His assertion is also supported by his attempt to ask the trial court if he had other options.

In this case, defense counsel failed to actually and substantially assist Mr. Conklin in determining whether to plead guilty because counsel failed to discuss the other alternative: that Mr. Conklin could choose to withdraw his plea. This failure was prejudicial because Mr. Conklin has indicated that it was his intent to withdraw his plea, and he would have

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<sup>1</sup> See also RPC 1.2(a), which provides in part: A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to sections (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered.

done so, if given the option. The court's finding that "[t]here was no showing that the Defendant was not represented by competent counsel at all hearings" is not supported by the evidence because the unchallenged evidence is that Mr. Conklin was not informed he had the option to withdraw his plea.

Moreover, the court's finding misses the point. Whether counsel is competent is not the standard. Instead, the court must focus on whether counsel provided effective assistance. In this case, defense counsel is likely a competent lawyer, but failed to provide effective assistance in this case because he failed to inform Mr. Conklin of all his available remedies.

Similarly, the court's finding of fact number 11 that "there is no substantial basis presented by the Defendant which would show he at any time was treated unfairly or received poor legal advice" is not supported by the evidence.

Mr. Conklin's questions at the hearing clearly indicate he did not know what options were available to him. Instead, the court, the State and defense counsel simply sought to follow the most expedient route and resentence Mr. Conklin with 15% reduction in time. Notwithstanding the fact that the State and defense counsel believed this was a good deal for Mr. Conklin, the fact remains that the choice of remedies belonged only to

Mr. Conklin. He was not given the opportunity to choose, and the trial court's findings to the contrary are untenable and should be reversed.

3. A MANIFEST INJUSTICE EXISTED BECAUSE DEFENSE COUNSEL FAILED TO INFORM MR. CONKLIN THAT HE COULD WITHDRAW HIS PLEA.

Contrary to the trial court's finding, a manifest injustice existed which requires Mr. Conklin's plea be vacated. The trial court held that "[t]he operative facts do not meet the requirements set forth in *State v. Taylor*, 83 Wn. 2d 594, 596, 521 P. 2d 699 (1974)." The trial court is mistaken.

CrR 4.2(f) provides that "[t]he court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." A manifest injustice is one "that is obvious, directly observable, overt, not obscure." *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). The defendant has the burden of showing a manifest injustice. *State v. Osborne*, 102 Wn.2d at 97.

In *Taylor*, the Supreme Court described four "indicia of 'manifest injustice'" as: including: (1) denial of effective counsel, (2) a plea not ratified or authorized by the defendant, (3) an involuntary

plea, and (4) a plea agreement was not kept by the prosecution. *Taylor*, 83 Wn.2d at 597 (quoting Washington Proposed Rules of Criminal Procedure, p. 50 (1971)); accord, *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

Any one of the indicia would independently establish “manifest injustice and would require a trial court to allow a defendant to withdraw his [or her] plea.” *Taylor*, 83 Wn.2d at 597. But the four listed indicia are “nonexclusive,” and the trial court must examine the “totality of circumstances” when deciding whether a manifest injustice exists. *See Wakefield*, 130 Wn.2d at 472.

In this case, Mr. Conklin received ineffective assistance of counsel, which is the first *Taylor* indicia. Moreover, the plea was involuntary—Mr. Conklin was never told that one consequence of pleading was that he would lose the option to withdraw his plea. He could not have known this important direct consequence, because he was never told that he even had the option to withdraw his plea. The *Taylor* indicia are easily met. The trial court’s conclusion to the contrary should be reversed.

4. IN THE ALTERNATIVE, MR. CONKLIN WAS ENTITLED TO ENTER HIS PLEA IN FRONT OF A DIFFERENT JUDGE ON RESENTENCING.

If a plea agreement is breached and the defendant seeks specific performance of the plea, the defendant is entitled to a new sentencing hearing in front of a new judge. *State v. Van Buren*, 101 Wn. App. 206, 217-218, 2 P.3d 991 (2000). In this case, Judge Tompkins accepted the first plea as well as the second plea. This right of Mr. Conklin's was particularly important, since the court rejected the State's recommendation under the plea, and imposed more time. Mr. Conklin was entitled to have a different judge examine the record and the plea to determine the appropriate sentence.

E. CONCLUSION

The original plea was based upon the mutual mistake that Mr. Conklin was eligible for 15% good time credit on a first degree murder conviction. But instead of giving Mr. Conklin the option of withdrawing his plea or specific performance, the lawyers decided that the sentence would simply be modified, by the same judge. The evidence unequivocally supports the fact that Mr. Conklin was never informed he could withdraw his plea. Because he was never given the option, the plea is involuntary, and not made intelligently. These circumstances also indicate ineffective assistance of counsel. When a plea is based upon

mutual mistake, the choice is not the prosecutor's, nor defense counsefs to make – the choice belongs solely to the defendant. Mr. Conklin was precluded from making a choice. This is a manifest injustice under CrR 4.2, and the trial court erred by denying the motion to withdraw the plea. The court should be reversed and the case remanded for a new hearing in front of a different judge.

Dated this 17th day of August, 2010.

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