

NO. 289281-III  
COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**  
OCT 07 2010  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

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THE STATE OF WASHINGTON, Respondent

v.

JAVIER CHAVEZ, JR., Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 09-1-00916-7

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BRIEF OF RESPONDENT

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### **STATEMENT OF THE FACTS**

Javier Chavez was charged with Assault in the First Degree and two counts of Unlawful Possession of a Firearm after being accused of getting into an argument with his wife, obtaining possession of three handguns and a bag of magazine clips, demanding that his wife drive him to another location, and then punching her in the face, arm, and side of her head during the drive, taking one of the guns and smacking her in the back of the head causing a cut, pointing an unloaded gun at her and pulling the trigger, and repeatedly threatening to kill her and her mother. (CP 3, 4-5). Mr. Chavez was arrested, and as a result of four jail phone calls between himself and the victim, the Information was subsequently amended to include four counts of no-contact order violations and one count of witness tampering. (CP 10-14). As shown by the following excerpt, at least one of those jail calls included instructions from the defendant

that the victim make herself unavailable for trial:

I don't intend to play the entire conversations. There were at least four. ... The tampering issue, though does come up. There are numerous times in the conversation where he's telling her, you know, to, 'Lay low. Don't go out. You know, avoid being served,' you know, instructing her not to basically participate in the trial.

(RP 11/30/09, 13-14).

Before trial, Mr. Chavez's attorney, Larry Ziegler, raised a potential conflict of interest concern related to his fear that the victim may have interpreted his statements to her as instructions to make herself unavailable for trial.<sup>1</sup> (RP 11/30/09, 11-12; 12/03/09, 86-89; 12/07/09, 107). In context, Mr. Ziegler was referring to a motion he made to strike portions of a jail phone call between Mr. and Ms. Chavez. (RP 11/30/09, 11). Mr. Ziegler states that Ms. Chavez states in that recorded conversation that

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<sup>1</sup> In his statement of the case, Mr. Chavez states that, "[Mr. Chavez's] lawyer, Mr. Ziegler, told Mr. Chavez's wife to flee." (Appellant's Brief at 2). The State's position is that this statement of fact is a mischaracterization of the record.

Mr. Ziegler told her, "You're better off not being here." (RP 11/30/09, 11). Mr. Ziegler then explained to the court that Ms. Chavez must have misunderstood their earlier conversation, and that in reality, he had a conversation with Ms. Chavez in which he stated that if she had been provided improper service of her subpoena by the State, then she need not comply with the subpoena. (RP 11/30/09, 11-13). The State agreed that portion of the jail phone call should be stricken, and the Court accordingly ordered that portion of the jail phone call would be stricken. (RP 11/30/09, 14).

As a result of that recorded statement by Ms. Chavez, and her subsequent absence from trial which necessitated the State's request for a material witness warrant, Mr. Ziegler feared being called as a witness in the witness tampering charge, and requested to be removed

from representing Mr. Chavez.<sup>2</sup> When the Judge asked Mr. Chavez if he wanted Mr. Ziegler removed for that reason, Mr. Chavez stated the following:

I actually enjoy having him as my attorney. I understand why these issues have been brought up, and I understand why he would want to be removed. I don't think that it would harm me any if he stayed on as my lawyer. I would really appreciate if he stayed as my lawyer because I'm very content with the way he's been handling everything, and I don't have, I guess, a gripe or complaint, if that's what you're asking. I don't -- I -- I don't know.  
(RP 12/07/09, 108).

In the end, the court severed the witness tampering charge from the rest of the charges, and appointed Mr. Mendoza to represent Mr. Chavez on the witness tampering charge only. (RP 12/07/09, 111-112). The State and Mr. Ziegler both agreed that such an approach would solve the

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<sup>2</sup> In his statement of facts, Mr. Chavez states that Mr. Ziegler's conversation with Ms. Chavez "created a serious conflict of interest, as Mr. Ziegler would likely be called as a witness by the prosecution." (Appellant's Brief at 2-3). Out of an abundance of caution, the State believes it was appropriate to disqualify Mr. Ziegler based on the potential prejudice that would result if he were to be called as a witness in the witness tampering case, however, the State does not concede that if Mr. Ziegler had remained on the case, that it would rise to the level of a conflict of interest.

potential conflict of interest problem. (RP 12/07/09, 111-112). Mr. Ziegler remained as Mr. Chavez's attorney on the four no-contact order charges, and the parties agreed to go forward and proceed to trial immediately on only those four charges. (RP 12/07/09, 112). The assault and two firearm charges were dismissed based on the unavailability of the victim at trial. (RP 12/07/09, 112-113). Just prior to going forward on the four remaining no-contact order charges and after speaking to Mr. Ziegler off the record, the defendant entered a plea of guilty to all four charges of violation of a protection order. (RP 12/07/09, 116).

When the court accepted Mr. Chavez's plea of guilt, the court took numerous steps to ensure that the defendant's plea was knowing, voluntary, and intelligent, as the following excerpt shows:

*THE COURT:* [I]f the four counts of violation of protection order went to trial, the State would have to prove in each count that at the date and time in question, [the defendant] had

previously been ordered to have no contact with the named individual, and on the date and time at issue, [the defendant] initiated contact with that individual.

So do you understand that's what the State would have to prove if this went to trial?

*THE DEFENDANT:* Yes, I do.

*THE COURT:* Did I correctly state the elements in this?

*MS. WHITMIRE:* Yes

*MR. ZEIGLER:* I think the elements would be that with two prior convictions and knowledge of the order, he willfully made four separate phone calls, Judge, to the person protected by the order.

*MS. WHITMIRE:* I agree.

*THE COURT:* So, Mr. Chavez, do you understand that's what the State would have to prove if these four counts went to trial?

*THE DEFENDANT:* Yeah

(RP 12/07/09, 116-117).

Next, the court made it clear that he faced a maximum sentence of 60 months in prison for each count. When asked if he understood his potential sentence, the defendant responded, "Yes, I do." (RP 12/07/09, 119). The court followed up by asking, "And you've discussed this with Mr. Zeigler?" to which the defendant nodded

his head up and down. (RP 12/07/09, 119). Next, the following conversation takes place:

*THE COURT:* Has anybody made any other promises or representations to you to get you to plead guilty here, other than the recommendation of the prosecutor?

*THE DEFENDANT:* No. No other promises.

*THE COURT:* OK. Did you read through this nine-page Statement of Defendant on Plea of Guilty yourself?

*THE DEFENDANT:* Yes, I did.

*THE COURT:* I want to go one step back. You're entering this plea freely and voluntarily; is that correct?

*THE DEFENDANT:* Yes.

*THE COURT:* Okay. And you've read through this nine-page Statement of Defendant on plea of Guilty yourself?

*THE DEFENDANT:* (Nods head up and down.)

*THE COURT:* Okay. And have you discussed with Mr. Zeigler the consequences on entering this plea?

*THE DEFENDANT:* Yes. Yes. Yeah.

*THE COURT:* Okay. And you've also gone over with him the facts supporting each one of these four separate counts; is that correct?

*THE DEFENDANT:* That's correct.

(RP 12/07/09, 120).

The court continues with the taking of Mr. Chavez's plea and confirms that the defendant agrees to the accuracy and truth of the following statement in the Statement on Plea of Guilty:

*THE COURT:* Then your statement is, "On or between October 12<sup>th</sup> and October 27<sup>th</sup>, 2009, on four occasions, I knowingly -- knowing a protection order was in effect for my wife Rebecca Chavez, I unlawfully called her knowing those calls were a crime, and I had two previous convictions for violation of court's order prior to that, these instances. (CP 34).

Is that correct?

*THE DEFENDANT:* That's correct.

(RP 12/07/09, 122).

The court continued the case to December 10, 2009.<sup>3</sup> On January 7, 2010, the defendant was scheduled to be sentenced on the no-contact order violation charges. At that hearing, Mr. Ziegler asked to be removed from the case, and the defendant requested to withdraw his pleas. (CP 36-37; RP 01/07/10, 125). When the court asked Mr. Ziegler why he wished to be removed from the case, he responded by stating, "I'm probably going to end up as a witness in this case, ... I just don't feel comfortable ethically arguing a Motion to Withdraw based on all of my discussions

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<sup>3</sup> Mr. Chavez has failed to supply transcripts for the hearing that took place on December 10, 2010. Mr. Chavez has supplied transcripts for January 7, 2010.

with the defendant and with the defendant's wife and with the defendant's mother." (RP 01/07/10, 126). As a result, the court removed Mr. Ziegler from continuing to represent Mr. Chavez on the no-contact order violation charges. (RP 01/07/10, 128). Mr. Mendoza was then immediately appointed to represent Mr. Chavez on the no-contact order violation charges in addition to the witness tampering case to which he had already been appointed and had an assigned trial date in late January, 2010. (RP 01/07/10, 130-131).

On March 26, 2010, the court heard Mr. Chavez's motion to withdraw his plea. (RP 03/26/10, 132). Mr. Mendoza submitted a written Motion to Withdraw Guilty Plea.<sup>4</sup> (CP 36-47). On this date, Mr. Chavez still had not yet plead guilty on the witness tampering charge. (RP 03/26/10, 148). In support of the Motion to

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<sup>4</sup> In his statement of fact, Mr. Chavez incorrectly states that Mr. Chavez's attorney did not help him draft the motion to withdraw, that Mr. Chavez was further without counsel when he was forced to argue his motion pro se in court, and that Mr. Mendoza asked the trial court to withdraw. Those allegations are completely unsupported by the record.

Withdraw Guilty Plea, Mr. Mendoza submitted a written motion and argument which relied on the following issues: (1) the defendant's claim that he was not properly informed on the case law by Mr. Ziegler, (2) the defendant's claim that he was never served with a copy of the no-contact order, and (3) whether *State v. Madrid* is controlling, and (4) the defendant's plea was not knowing, intelligent, and voluntary, (5) the search of the defendant's cell by jail staff which occurred on March 16, 2010. (RP 03/26/10, 132-134; CP 36-47). After Mr. Mendoza presented his argument, the court reviewed a hand-written affidavit prepared by Mr. Chavez and heard his argument as well at the defendant's request. (RP 03/26/10, 133-134; CP 74). Mr. Chavez based his request to withdraw his guilty plea on: (1) *State v. Madrid*, which he argued holds that a phone call is not a criminalized act, and (2) he claimed he was unaware of all the terms of the no-contact order. (CP 134-135). After hearing

argument from Mr. Mendoza and the defendant, the court denied the Motion to Withdraw Guilty Plea and proceeded to sentencing. (RP 03/26/10, 136-137).

At sentencing, Mr. Mendoza argued in favor of a sentence under 60 months. (RP 03/26/10, 139-140). The court noted that Mr. Chavez had a "terrible" criminal history including two prior felony no-contact order violations and sentenced Mr. Chavez to 60 months on each count to run concurrent and with credit for time served. (RP 03/26/10, 141-142). Anticipating an appeal, the State entered proof regarding the fact that the defendant used other inmates' PIN numbers in order to make the four calls to the victim in this case:

[T]he defendant made some claims that he did not know the order was in effect. He didn't read it. He didn't know he couldn't make the phone calls and things to that nature, and the State's very suspect of that when he's choosing not to use his own PIN number every time he calls his wife [from the jail].

(RP 03/26/10, 144).

At the conclusion of the hearing, Mr. Mendoza argued in favor of an appeal bond on this case, and stated his intention to file a Notice of Appeal within the week. (RP 03/26/10, 145).

Approximately a month later, on April 6, 2010, Mr. Mendoza filed a Motion and Memorandum to Dismiss based on a search of Mr. Chavez's cell which occurred on March, 16, 2010.<sup>5</sup> (CP 68-70).

At approximately the same time, April 5, 2010, Mr. McCool presented a Motion and Declaration for Reconsideration of the Motion to Withdraw Guilty Plea, which was based on the following arguments:

(1) the defendant's plea was not knowing, intelligent, and voluntary because the defendant was "heavily under the influence of drugs," and (2) the defendant had not been provided with a copy of the no-contact order. (CP 65-67).<sup>6</sup>

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<sup>5</sup> Mr. Chavez has not requested that the transcripts associated with this motion, which was presented to the court by Mr. Mendoza in April 2010, be presented to the Court of Appeals for consideration.

<sup>6</sup> Mr. Chavez has not requested the transcripts associated with this motion, which was presented to the Court by Mr. McCool in April 2010, be presented to the Court of Appeals for consideration.

## ARGUMENT

1. Mr. Chavez's plea was knowing, intelligent, and voluntary. The allegation that Mr. Ziegler persuaded Mr. Chavez to plead guilty to four counts of a no-contact order violation due to a conflict of interest is unsupported by the record.<sup>7</sup>

Mr. Chavez's plea was knowing, intelligent, and voluntary. Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily. *Matter of Montoya*, 109 Wn.2d 270, 277, 744 P.2d 340 (1987); *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Court rules prohibit the court from accepting a plea without first assuring the defendant understood the "nature of the charge and the consequences of

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<sup>7</sup> Whether the defendant plead guilty to witness tampering is not a part of the record that Mr. Chavez has chosen to present to the Court of Appeals. Mr. Chavez has not designated as part of the record any transcripts of proceedings related to his plea of guilt to witness tampering, nor has he designated the Judgment and Sentence related to that plea. Mr. Chavez plead guilty to witness tampering after his Motion to Withdraw Guilty Plea had been denied, and Mr. Mendoza was his attorney when he plead guilty to witness Tampering.

the plea" as required by CrR 4.2(d), among other things.

The lower court record shows that Mr. Chavez's plea was knowing, intelligent, and voluntary. When the court accepted Mr. Chavez's plea of guilt, the court took numerous steps to ensure that the defendant's plea was knowing, voluntary, and intelligent. (RP 12/07/09, 116-124). For example, the court explained to Mr. Chavez that: "[I]f the four counts of violation of protection order went to trial, the State would have to prove in each count that at the date and time in question, [the defendant] had previously been ordered to have no contact with the named individual and on the date and time at issue, [the defendant] initiated contact with that individual." (RP 12/07/09, 116). Subsequently, the court asked Mr. Chavez if he understood what the State would have to prove, to which the defendant responded by stating, "Yes, I do." (RP 12/07/09, 116). After this colloquy took

place, Mr. Ziegler stated, "I think the elements would be that with two prior convictions and knowledge of the order, he willfully made four separate phone calls, Judge, to the person protected by the order." (RP 12/07/09, 117). The court then asked Mr. Chavez if that is what he understood, to which Mr. Chavez responded, "Yeah." (RP 12/07/09, 117). Next, the court made it clear that he faced a maximum sentence of 60 months in prison for each count. When asked if he understood his potential sentence, he responded, "Yes, I do." (RP 12/07/09, 119). The court followed up by asking, "And you've discussed this with Mr. Zeigler?" to which the defendant nodded his head up and down. (RP 12/07/09, 119). Next, the court poses the following questions to the defendant:

*THE COURT:* Has anybody made any other promises or representations to you to get you to plead guilty here, other than the recommendation of the prosecutor?

*THE DEFENDANT:* No. No other promises.

*THE COURT:* OK. Did you read through this nine-page Statement of Defendant on Plea of Guilty yourself?

*THE DEFENDANT:* Yes, I did.

*THE COURT:* I want to go back one step. You're entering this plea freely and voluntarily; is that correct?

*THE DEFENDANT:* Yes.

*THE COURT:* Okay. And you've read through this nine-page Statement of Defendant on plea of Guilty yourself?

*THE DEFENDANT:* Nods head up and down.

*THE COURT:* Okay. And have you discussed with Mr. Zeigler the consequences on entering this plea?

*THE DEFENDANT:* Yes. Yes. Yeah.

*THE COURT:* Okay. And you've also gone over with him the facts supporting each one of these four separate counts; is that correct?

*THE DEFENDANT:* That's correct.

(RP 12/07/09, 120).

The court continues with the taking of Mr. Chavez's plea and confirms that the defendant agrees to the accuracy and truth of the following statement in the Statement on Plea of Guilty:

*THE COURT:* Then your statement is, "On or between October 12<sup>th</sup> and October 27<sup>th</sup>, 2009, on four occasions, I knowingly -- knowing a protection order was in effect for my wife Rebecca Chavez, I unlawfully called her knowing those calls were a crime, and I had two previous convictions for violation of court's order prior to that, these instances. (CP 34).

Is that correct?

*THE DEFENDANT:* That's correct.  
(RP 12/07/09, 122).

Subsequent to entry of this plea of guilt, the defendant argued several reasons why his plea should be withdrawn, including that he was not informed of the case law by Mr. Ziegler, and that he was not aware of the terms of the no-contact order. (CP 36-47, 74; RP 03/26/10, 132-135). Later, with the help of a retained attorney, Mr. Chavez also argued that the plea should be withdrawn because he was under the influence when he entered the plea. (CP 65-67). Not once at the trial-court level did Mr. Chavez argue, despite the many opportunities he had to raise this issue, that his plea was the result of pressure from Mr. Ziegler and the related conflict of interest issue. In fact, before entering the plea, the court asked Mr. Chavez if he wanted Mr. Ziegler removed due to the conflict of interest to which he responded:

I actually enjoy having him as my attorney. I understand why these issues have been brought up, and I understand

why he would want to be removed. I don't think that it would harm me any if he stayed on as my lawyer. I would really appreciate if he stayed as my lawyer because I'm very content with the way he's been handling everything, and I don't have, I guess, a gripe or complaint, if that's what you're asking. I don't -- I -- I don't know.

(RP 12/07/09, 108).

Whether Mr. Ziegler instructed Mr. Chavez to plead guilty due to the proclaimed conflict of interest is an unfounded allegation raised for the first time by Mr. Chavez on appeal. There is no evidence in the record to suggest that Mr. Ziegler persuaded Mr. Chavez to plead guilty to the four no-contact order violations. In fact, Mr. Chavez was given many opportunities to express any concerns he had with that plea, and never raised this issue in the lower court. Instead, and with the help of two separate attorneys, Mr. Mendoza and Mr. McCool, and after speaking on his own behalf, Mr. Chavez only raised the following reasons why his plea should be withdrawn: (1) Mr. Ziegler did not inform him of all the case law, specifically, *Madrid*, (2) he

did not know the terms of the no-contact order, and (3) he was intoxicated. (CP 66-67; RP 03/26/10, 134-136).

Even if the court were to determine that Mr. Ziegler did persuade Mr. Chavez to plead guilty, there is no evidence in the record to suggest that Mr. Ziegler provided such advice in order to avoid the possibility that he would be called to testify at the trial. The record clearly establishes the belief of the court and the parties that at the time the conflict issue was raised, it was settled by the court's decision to sever the witness tampering charge from the rest of the charges, and appoint Mr. Chavez a new attorney on that charge. (RP 12/07/09, 111-112). Many times in the transcript, the parties made references to statements made by Ms. Chavez that she believed Mr. Ziegler told her to make herself unavailable for service of a subpoena for trial. (RP 11/30/09, 11-12 12/03/09, 86-89; 12/07/09,

107). Such an allegation is relevant to a witness tampering charge only.

There is no evidence in the record that would support an inference that any other testimony by Mr. Ziegler would be at all relevant to any of the four no-contact order violation charges. Even in appellant's own brief, Mr. Chavez has given no explanation for why Mr. Ziegler would reasonably fear being called as a witness on the no-contact order violation charges other than a brief statement made by Mr. Ziegler at sentencing that he did not feel comfortable arguing the Motion to Withdraw Guilty Plea on the no-contact order violation, and when asked why, he stated, "I'm probably going to end up as a witness in this case, ... I just don't feel comfortable ethically arguing a Motion to Withdraw based on all of my discussions with the defendant and with the defendant's wife and with the defendant's mother." (RP 01/07/10, 126).

The basis for the no-contact order violations was four jail phone calls made by the defendant in order to call his wife, the protected party. (CP 22-23). There was no allegation that Mr. Ziegler provided Mr. Chavez, for example, with access to phones, with the victim's phone number, or in any way assisted Mr. Chavez in contacting the victim. At a minimum, such a foundation is necessary before the Court of Appeals can consider whether Mr. Ziegler had any motivation to convince Mr. Chavez to decide to plead guilty in order to avoid being called as a witness at his trial. As such, Mr. Chavez has not proven that Mr. Ziegler convinced him to plead guilty, and further, that if he did so, he was motivated by his fear of being called as a witness in that trial.

**2. Mr. Chavez was not denied counsel.**

The record establishes that Mr. Chavez was granted a court-appointed attorney at every stage of his case. Once Mr. Ziegler was removed from

the witness tampering charge and then subsequently from the no-contact order violation charges, Mr. Mendoza was immediately appointed. The record establishes that at no point in the proceedings did Mr. Chavez appear on a pro se basis. In fact, the record shows that he was provided with an appointed attorney at the time of his guilty plea, during argument to withdraw his plea, during sentencing, and even during argument for an appeal bond and the filing of the Notice of Appeal. (RP 03/26/10, 152).

**3. Mr. Chavez did not receive ineffective assistance of counsel.**

Mr. Diaz did not receive ineffective assistance of counsel as a result of the conflict of interest claimed by Mr. Ziegler. Mr. Ziegler claimed a conflict of interest existed because of the victim's apparent belief that Mr. Ziegler instructed her to make herself unavailable for trial. Specifically, he feared being called as a witness for trial. In reality, the likelihood

that Mr. Ziegler would have actually been called to testify for trial on the witness tampering case was very low because the State agreed to not present evidence related to Mr. Ziegler's communications to Ms. Chavez to the jury, and the court granted Mr. Ziegler's motion to strike those portions of the jail phone calls from the record. (RP 11/30/09, 14).

In support of the State's allegation that Mr. Chavez committed witness tampering, the State was planning on presenting the recorded phone calls the defendant made at the jail to Ms. Chavez. The State, referring to those recordings states, "The tampering issue, though, does come up. There are numerous times in the conversation where he's telling her, you know, to, 'Lay low. Don't go out. You know, avoid being served,' you know, instructing her not to basically participate in the trial." (RP 11/30/09, 13-14). The presentation of such evidence would be sufficient to prove the defendant committed

witness tampering, and whether Mr. Ziegler also told her to make herself unavailable for trial would be irrelevant to that determination. Therefore, no conflict of interest existed.

Alternatively, if a conflict of interest did exist, Mr. Chavez did not receive ineffective assistance of counsel as a result of that conflict. In order to prevail on an ineffective assistance of counsel claim, Mr. Chavez bears the burden of showing that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "The mere possibility of a conflict of interest is not sufficient to 'impugn a criminal conviction.'" *State v. Davis*, 141 Wn.2d 798, 861, 10 P.3d 977 (2000) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)).

Thus, the possibility that an attorney may have to testify against the client in the future does not create an actual conflict of interest, particularly where such testimony would occur only after the attorney ceased active representation or where there is no certainty that such testimony will occur at all. See *U.S. v. Ettinger*, 344 F.3d 1149, 1161 (11th Cir.2003). In *Dhaliwal*, our Supreme Court held that automatic reversal is not required when the trial court does not inquire about a possible conflict of interest unless the conflict adversely affects the attorney's performance. "[T]o show a violation of the Sixth Amendment right to counsel free from conflict, the defendant must always demonstrate that his or her attorney had a conflict of interest that adversely affected his or her performance." *State v. Dhaliwal*, 150 Wn.2d 559, 570, 79 P.3d 432 (2003). For example, in *State v. A.N.J.*, the failure of his attorney to advise A.N.J. that a juvenile sex conviction

would remain on his record forever, in and of itself, would not rise to a manifest injustice. *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010). See, e.g., *State v. Oseguera Acevedo*, 137 Wn.2d 179, 195, 970 P.2d 299 (1999).

Mr. Chavez has not shown that the potential conflict in this case resulted in him receiving ineffective assistance of counsel. Mr. Chavez has not shown how Mr. Ziegler's performance fell below an objective standard of reasonableness nor has he shown how he was prejudiced. *State v. McFarland*, 127 Wn.2d 322, 334-35. Mr. Chavez has claimed that as a result of the conflict, Mr. Ziegler convinced him to plead guilty, but the record does not show that allegation to be credible or reasonable based, in part, on his failure to raise that claim despite having more than one opportunity to do so in the lower court. Furthermore, as mentioned in *Davis*, the mere possibility of a conflict is not enough to 'impugn a criminal conviction.' *State v. Davis*,

141 Wn.2d at 861; *U.S. v. Ettinger*, 344 F.3d at 1161. In sum, Mr. Chavez has not shown that a conflict of interest between himself and Mr. Ziegler actually existed, and further, he has not met the burden necessary to prove that Mr. Ziegler's representation of him fell below an acceptable standard, nor that he was actually prejudiced by that representation.

4. **Mr. Diaz did not receive ineffective assistance of counsel when he submitted the motion to withdraw his guilty plea, and the court did not error in denying that motion.**

The lower court properly denied Mr. Chavez's Motion to Withdraw Guilty Plea. Mr. Mendoza never submitted an "Anders brief" and Mr. Mendoza never requested to be removed from representing Mr. Chavez. The defendant has chosen to define Mr. Mendoza's Motion to Withdraw Guilty Plea as an "Anders Brief" and inexplicably describes it as a motion to withdraw from representation, despite there being nothing in the record to support that claim. The record may suggest that Mr. Mendoza

was not convinced that Mr. Chavez's basis for requesting the court to withdraw the guilty plea was compelling, however, when counsel has adequate grounds to believe that his client is mistaken, he may so advise the court, and his actions do not constitute either a conflict of interest or a breach of the duty of advocacy. See *State v. Fleck*, 49 Wn. App. 584, 586-87, 744 P.2d 628 (1987). A review of the record reveals that contrary to requesting to be removed from representing Mr. Chavez, Mr. Mendoza represented him zealously by preparing a motion in support of Mr. Chavez's Motion to Withdraw Guilty Plea, arguing in favor of that motion, and after the motion was denied, continuing to represent Mr. Chavez during sentencing. Furthermore, he continued on to represent Mr. Chavez to argue for an appeal bond, he filed a Notice of Appeal for him, and even submitted a Motion to Dismiss, and continued representing Mr. Diaz on the witness tampering charge long after the court denied the

Motion to Withdraw Guilty Plea on the no-contact order violations. (CP 36-47, 64, 68-70; RP 03/26/10, 139-140, 152).

The court made no error in reviewing and denying Mr. Chavez's Motion to Withdraw Guilty Plea. The decision on a motion to withdraw a guilty plea rests within the trial court's discretion and is reviewed under an abuse of discretion standard. *State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141 (1997); *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001) (citing *State v. Olmsted*, 70 Wn.2d 116, 422 P.2d 312 (1966)). Under the criminal rules, "The 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." CrR 4.2(f). The injustice must be "obvious, directly observable, overt, [and] not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). The defendant's burden when seeking to withdraw a plea is

demanding because ample safeguards exist to protect the defendant's rights before the trial court accepts the plea. *Id.* at 596-97. The Court of Appeals should review such challenges for substantial evidence. *Soltero v. Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 942, 845 P.2d 1331 (1993)). Mr. Chavez, therefore, bears the burden of showing that there is not sufficient evidence to persuade a reasonable person of the trial Judge's findings. *Nordstrom Credit, Inc. v. Department of Revenue*, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993) (citing *Grein v. Cavano*, 61 Wn.2d 498, 507, 379 P.2d 209 (1963)).

Mr. Chavez's argument fails because he has not met that burden. A review of the record shows that the lower court appropriately relied on sufficient evidence that could persuade a reasonable person of the trial Judge's findings. The trial Judge engaged in a long colloquy with

Mr. Chavez, and Mr. Chavez showed no indication that he did not understand the proceeding. The defendant admitted on the record several times, that he committed the no-contact order violations and was aware that his actions constituted a crime at the time he committed them. As such, the guilty plea to the no-contact order violations was a knowing, intelligent, and voluntary plea. The trial court did not abuse its discretion when it chose to deny Mr. Chavez's motion to withdraw his plea.

**CONCLUSION**

Based on the forgoing facts and argument, the State encourages this Court to affirm the trial court on all issues and dismiss the appeal.

**RESPECTFULLY SUBMITTED** this 5th day of  
September 2010.

**ANDY MILLER**  
Prosecutor



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