

**FILED**

JUL 15 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
33

NO. 294030

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

JOSE FRANCISCO GONZALEZ

Appellant.

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

---

APPELLANT'S OPENING BRIEF

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TANESHA LA'TRELLE CANZATER  
Attorney for Appellant  
Post Office Box 29737  
Bellingham, Washington 98228-1737  
(360) 362-2435

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied the motion to withdraw a guilty plea.

2. Mr. Gonzalez received ineffective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires a guilty plea to be entered knowingly, voluntarily, and intelligently. It also requires a defendant understand the consequences of pleading guilty. A defendant is allowed to withdraw a guilty plea if necessary to correct a manifest injustice. Did the trial court violate Mr. Gonzalez's due process rights when it denied his motion to withdraw a guilty plea?

2. A criminal defendant has the right under the Sixth Amendment to effective assistance of counsel. Was Mr. Gonzalez denied effective assistance of counsel?

C. STATEMENT OF FACTS

Jose Francisco Gonzalez committed crimes in order to support his drug addictions. CP 22-23. At 32-years old, he had amassed 22 prior felonies for various crimes that ranged from delivery of controlled substances to forgery. CP 29-48; CP 54-66; 9/23/10 RP 35.

Mr. Gonzalez was under community custody supervision when he was charged with first-degree identity theft and first-degree theft. The State alleged the crimes were aggravated because Mr. Gonzalez

committed multiple current offenses and had a high offender score. CP 1-2.

Mr. Gonzalez agreed to help law enforcement officers gather evidence to convict three major drug targets in exchange for reduced sentences on the identity theft and the theft charges. CP 29-48; 6/25/10 RP 22. The State offered a guilty plea statement that included 43 to 47 months as the standard sentence range for the identity theft charge and 63 to 84 months for the theft charge. CP 10-18.

Mr. Gonzalez pleaded guilty to the charges and waited in custody until a separate contract for informant services was ready to be signed. 6/18/09 RP 6; 6/25/10 RP 23. He signed the contract and was released from custody to fulfill his contractual duties. 6/18/09 RP 7.

Less than one month after he was released, Mr. Gonzalez was stopped by police and charged with driving without a license. 9/23/10 RP 50. The conditions of his release were revoked, the contract was voided, and Mr. Gonzalez was returned to custody to await sentencing. 9/23/10 RP 50.

At sentencing, the State recommended that Mr. Gonzalez be sentenced to 120 months incarceration. 10/6/09 RP 7. The trial court questioned the State's recommendation. It pointed out that the plea agreement included standard sentence ranges of 43 to 57 months and 63 to 84 months for the two crimes. 10/6/09 RP 7-8.

The State argued that because Mr. Gonzalez was notified of its intent to seek the aggravating circumstance in both the charging document and the informant contract, it was permitted to seek the exceptional sentence. 10/16/09 RP 8; CP 29-48.

Mr. Gonzalez protested the State's claim. He told the court that if he was not going to be sentenced to 83 months as was evidenced in the plea agreement, then he wanted to withdraw the guilty plea. 10/16/09 RP 10. To sort matters, the court continued sentencing.

Some months later, Mr. Gonzalez's attorney moved the court for permission to withdraw as counsel. 5/13/10 RP 16. The court appointed new counsel to represent Mr. Gonzalez. The attorney filed a motion to withdraw the guilty plea on Mr. Gonzalez's behalf and the court scheduled a hearing. 5/13/10 RP 16.

At the motion hearing, Mr. Gonzalez testified that he did sign the informant contract, but he did not have a chance to review it with counsel. He told the court that his attorney, at that time, presented the contract to him in court and asked him to sign it. 6/25/10 RP 23. He could not read the contract and could not discuss with the attorney its terms because other inmates were seated behind him. 6/25/10 RP 23.

Mr. Gonzalez's former attorney claimed that the State made no offer in the case, but indicated that it would most likely recommend 10 years or 120 months even though the standard sentence range was 63 to 84 months. 6/25/10 RP 29. She also claimed to have relayed the information

to Mr. Gonzalez and to have reviewed with him the terms of the contract and the terms of the plea agreement at jail the day before court. 6/25/10 RP 29-32. According to the attorney, Mr. Gonzalez was to consider the consequences over night and if he wanted to proceed, he would sign the agreement in court the next day. 6/25/10 RP 32.

Mr. Gonzalez declared to the court that he would not have pleaded guilty to the new charges had he been fully informed of the terms in the informant contract. 6/25/10 RP 35-36; CP 29-48.

The trial court found Mr. Gonzalez voluntarily, knowingly, and freely pleaded guilty to one count first-degree identity theft and one count first-degree theft. 6/25/10 RP 38-39. The trial court further concluded that Mr. Gonzalez reviewed the cooperation of the plea agreement and that he understood its terms. Based on those findings, the trial court denied Mr. Gonzalez's motion to withdraw the plea and sentenced him to 120 months. 6/25/10 RP 38-39; CP 54-66. This appeal followed. CP 68-69; CP 70-71; CP 73-74.

#### D. ARGUMENT

##### 1. THE TRIAL COURT VIOLATED MR. GONZALEZ'S CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN IT DENIED HIS MOTION TO WITHDRAW A GUILTY PLEA.

a. The trial court abused its discretion when it denied the motion to withdraw a guilty plea. This Court will review a trial court's refusal to allow a defendant to withdraw his plea for an abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). A court abuses its

discretion when it adopts a position that is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); State v. Thang, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002). Alternatively, this Court will consider whether any reasonable judge would rule as the trial judge did. Thang, 145 Wash.2d at 642, 41 P.3d 1159.

“Ordinarily, a plea of guilty constitutes a waiver by the defendant of his right to appeal, regardless of the existence of a plea bargain.” State v. Majors, 94 Wash.2d 354, 356, 616 P.2d 1237 (1980) (citing Young v. Konz, 88 Wash.2d 276, 283, 558 P.2d 791 (1977)). But, “a guilty plea in Washington does not usually preclude a defendant from raising collateral questions such as the validity of the statute, sufficiency of the information, jurisdiction of the court, or as here, the circumstances in which the plea was made.” Id; State v. Saylor, 70 Wash.2d 7, 9, 422 P.2d 477 (1966); See also State v. Aman, 11 Wash.App. 536, 524 P.2d 418 (1974).

b. The circumstances under which Mr. Gonzalez pleaded guilty suggest the plea was involuntary. The Due Process Clause of the Fourteenth Amendment requires that a plea of guilty be entered knowingly, voluntarily and intelligently. Const. amend XIV; Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L.Ed. 2d 274 (1969); Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); Henderson v. Morgan, 426 U.S. 637, 644-45, 49 L.Ed.2d 108, 96 S.Ct. 2253 (1976); Wood v. Morris, 87 Wash.2d 501, 506, 554 P.2d 1032

(1976); CrR 4.2. Even where a defendant does not admit guilt, the plea must represent a voluntary and intelligent choice. North Carolina v. Alford, 400 U.S. 25, 31, 27 L.Ed.2d 162, 91 S.Ct. 160 (1970).

At all times, a defendant must understand the consequences of pleading guilty. The trial court “shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d); *See also* State v. Miller, 110 Wash.2d 528, 531, 756 P.2d 122 (1988).

A trial court must allow a defendant to withdraw his guilty plea if necessary to correct a manifest injustice. CrR 4.2(f); State v. Marshall, 144 Wash.2d 280-81. The burden is on a defendant to establish that the withdrawal of his or her plea of guilty is necessary in order to correct a manifest injustice. State v. Frederick, 100 Wash.2d 550, 558 P.2d 136 (1983).

A manifest injustice is one that is obvious, directly observable, overt, and not obscure. State v. Taylor, 83 Wash.2d 594, 596, 521 P.2d 699 (1974). An involuntary plea is one of several circumstances that constitutes a manifest injustice. State v. Wakefield, 130 Wash.2d 464, 472, 925 P.2d 183 (1996).

If a defendant is not apprised of a direct consequence of his plea, the plea is considered involuntary. State v. Ross, 129 Wash.2d 279, 284, 916 P.2d 405 (1996). A direct consequence is one that has a “definite,

immediate and largely automatic effect on the range of the defendant's punishment.” Id. The length of a sentence is a direct consequence of a guilty plea. State v. Mendoza, 157 Wash.2d 582, 590, 141 P.3d 49 (2006); State v. Moon, 108 Wash.App. 59, 63, 29 P.3d 734 (2001).

Therefore, misinformation about the length of a sentence renders a plea involuntary, even where the correct sentence may be less than the erroneous sentence included in the plea. Mendoza, 157 Wash.2d at 591, 141 P.3d 49. However, a defendant is not required to show that the misinformation was material to the plea. In re Isadore, 151 Wash.2d 294, 302, 88 P.3d 390 (2004).

In State v. Moon, 108 Wash.App. 59, 61, 29 P.3d 734 (2001), this Court allowed a defendant to withdraw an involuntary plea. The defendant in that case pleaded guilty to first degree rape. At a change of plea hearing, the court informed the defendant that his standard sentence range was 209 to 277 months. This information was also reflected in the plea agreement. The agreement stated that the prosecutor would recommend a sentence of 209 months.

The court asked the defendant if he understood that the standard range sentencing for the crime was 209 to 277 months. The defendant stated that he understood. The court concluded that a factual basis existed for the plea and deemed the plea was freely and voluntarily made. State v. Moon, 108 Wash.App. at 61.

Sometime after he pleaded guilty, the defendant learned that his offender score had been improperly calculated. If the correct offender score was utilized, his sentencing range was 175 to 236 months, instead of 209 to 277 months. The defendant moved then the court for permission to withdraw his plea agreement and to request new counsel because his attorney withheld information and moved too fast. The State objected and argued that because the mistake benefited the defendant he could not demonstrate a manifest injustice.

The court denied the defendant's motion and sentenced him to 236 months based on his extensive criminal history and based upon the "horrible" facts.

On appeal, this Court reversed the trial court's decision. This Court found that because the defendant was given an incorrect sentencing range and because there was nothing in the record to prove he was advised that the range given was incorrect or tentative, the defendant could choose to either specifically enforce the plea agreement, or withdraw the plea. State v. Moon, 108 Wash.App. at 64.

This case is somewhat analogous to Moon. Like the defendant in Moon, Mr. Gonzalez was not informed that the standard range sentence presented in the plea agreement was tentative. When the trial court accepted the agreement, it did not inform Mr. Gonzalez that the State could change its recommendation based on the aggravated nature of the case. 6/18/09 RP 5-7. Even Mr. Gonzalez's attorney neglected to inform

him that according to the terms of the informant contract, the State could recommend 120 months because of alleged aggravating factors. Had Mr. Gonzalez been fully informed of the terms in the contract, he would not have pleaded guilty to the charges. 6/25/10 RP 35-36.

c. Remand is the only appropriate remedy. Where a plea agreement is based on “misinformation,” a defendant may choose his remedy. This choice of remedy is not limited to the situation where the defendant is informed of a standard range and subsequently becomes aware that the range is greater. Rather, the remedy is triggered when the defendant enters a plea that is based on misinformation. State v. Moon, 108 Wash.App. at 64, citing State v. Walsh, 143 Wash.2d 8-9, 17 P.3d 591(2001).

Because Mr. Gonzalez entered a plea based on misinformation, he is entitled to either specifically enforce the plea agreement or withdraw his guilty plea. Id. citing, State v. Miller, 110 Wash.2d 535, 756 P.2d 122 (1988).

2. MR. GONZALEZ WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A criminal defendant has the right under the Sixth Amendment to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. State v. McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either

prong, the court need not inquire further. State v. Hendrickson, 129 Wash.2d 61, 78, 917 P.2d 563 (1996). When reviewing a claim of ineffective assistance of counsel, there is a strong presumption that counsel's representation was effective and competent. State v. McNeal, 145 Wash.2d 352, 362, 37 P.3d 280 (2002).

Here, Mr. Gonzalez's attorney rendered deficient performance. To establish deficient performance, a defendant must show that his attorney made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. State v. Howland, 66 Wash.App. 586, 594, 832 P.2d 1339 (1992) (*quoting* Strickland, 466 U.S. at 687)). A defendant may meet this burden by establishing that given all the facts and circumstances, his lawyer's conduct failed to meet an objective standard of reasonableness. State v. Huddleston, 80 Wash.App. 916, 926, 912 P.2d 1068 (1996).

Although Mr. Gonzalez's attorney claimed to have reviewed with him the terms of the contract, Mr. Gonzalez testified to the contrary. 6/25/10 RP 29. He told the court that signed the informant contract, but that his attorney did not review with him its terms. She simply handed the contract to him in open court and asked him to sign it. 6/25/10 RP 23.

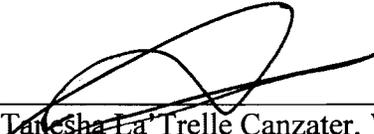
A reasonable attorney would have visited with Mr. Gonzalez in a setting conducive for confidential conversations and would have thoroughly reviewed with him both the contract and the plea agreement.

Furthermore, Mr. Gonzalez was prejudiced by the attorney's performance. Because his attorney neglected to adequately inform him, he pleaded guilty to charges that allowed the State recommend a sentence higher than the standard range. At sentencing, Mr. Gonzalez professed his innocence of the crimes and told the court that if he knew the State could ask for 120 months, he would have taken the case to trial. 6/25/10 RP 26. Because the attorney's performance was less than reasonable, Mr. Gonzalez received ineffective assistance of counsel.

E. CONCLUSION

For the reasons set forth above, Mr. Gonzalez respectfully asks this Court to reverse the trial court's decision and to allow him to either specifically enforce the plea agreement or withdraw his guilty plea.

Respectfully submitted this 12<sup>th</sup> day of July, 2011.

  
\_\_\_\_\_  
Tanesha La'Trelle Canzater, WSBA# 34341  
Attorney for Appellant