IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRAD CHRIS BROWER, Appellant.	No. 39779-0-II UNPUBLISHED OPINION

Van Deren, J. — Brad Chris Brower appeals the denial of his motion to withdraw his *Alford/Barr* plea[1] to attempted indecent liberties. He argues that his plea was not knowing, intelligent, and voluntary because his counsel was ineffective by misinforming him that

[1] In an *Alford* plea, the defendant concedes that the State's evidence is strong and most likely would result in a conviction. *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 162 (1970); *see also State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976). In *In re Pers. Restraint of Barr*, 102 Wn.2d 265, 269-70, 684 P.2d 712 (1984), our Supreme Court held that a plea can be voluntary and intelligent absent a factual basis for the ultimate charges, as long as the plea is based on informed review of all the alternatives and the defendant understands the nature of the consequences of the plea.

attempted indecent liberties was not a strike offense.[2] We reverse the trial court's denial of Brower's motion to withdraw his *Alford* plea and remand for further proceedings.

FACTS

On March 25, 2009, the Lewis County prosecutor charged Brower with two counts second degree attempted rape or, in the alternative, indecent liberties with forcible compulsion. On May 22, by second amended information, the State charged Brower with one count of attempted indecent liberties. Brower entered an *Alford/Barr* plea to the amended charge. The trial court asked Brower a series of questions to confirm that Brower (1) received the second amended information, (2) understood the elements of attempted indecent liberties and the State's burden regarding those elements, and (3) reviewed the affidavit of probable cause and the plea statement with his attorney.[3] It then accepted Brower's *Alford* plea and found that Brower entered the plea "voluntarily, competently, [and] with an understanding of the nature of the charge and the consequences of the plea." Report of Proceedings (May 22, 2009) at 19.

On July 23, Brower moved to withdraw his *Alford* plea. He argued that his attorney affirmatively and incorrectly advised him that the attempted indecent liberties charge was not a strike offense. Brower asserted that, had he known that it was a strike offense, he would not have

[2] Brower also argues on appeal that he had a reading deficiency that prevented him from understanding the consequences of the plea and that the plea statement omitted certain elements of the crime. Additionally, Brower submitted a statement of additional grounds for review under RAP 10.10, appearing to argue that his plea was not voluntary due to prosecutorial misconduct. We briefly address his request for relief based on his failure to read the plea document but do not further address the other claims because we remand to the trial court to allow him to withdraw his plea.

[3] The clerk's papers do not contain an affidavit of probable cause.

accepted the plea offer.

The trial court heard both testimony and argument on Brower's motion to withdraw his plea. Brower testified that his attorney told him that attempted indecent liberties was not a strike offense and that he relied on this information in deciding to accept the plea offer. Brower stated that he would not have accepted the offer had he known it was a strike offense. Brower's mother testified that Brower's attorney also told her that attempted indecent liberties was not a strike offense and that she had discussed this with Brower so he could consider that fact in deciding whether to accept the State's plea offer. Brower's original trial attorney confirmed that he told both Brower and his mother that attempted indecent liberties was not a strike offense.

On August 25, the trial court entered its memorandum decision denying Brower's motion to withdraw his guilty plea. The trial court stated that (1) Brower was "mis-advised by his attorney that attempted indecent liberties was not a strike offense"; (2) the "mistaken position on the classification of [attempted indecent liberties] was shared by both the defense attorney and the prosecuting attorney"; (3) "[i]t was only after being assured that this was not a strike offense that [Brower] agreed to plead guilty"; (4) "[w]hile the statement contains a paragraph that indicates that this was a strike offense, defense counsel specifically did not discuss that with [Brower] because in his mind, it did not apply"; and (5) Brower "did not read the plea form." Clerk's Papers (CP) at 40-41. The trial court found no manifest injustice because the misinformation provided by Brower's attorney did not involve a direct consequence of the plea.

On September 11, the trial court entered its findings of fact and conclusions of law and "adopt[ed] and incorporate[d] all facts outlined in the Memorandum Decision RE: Motion to Withdraw Plea entered on August 25, 2009." CP at 37. The trial court found that the

misinformation that attempted indecent liberties was not a strike offense concerned a collateral consequence of the plea and did not constitute a manifest injustice. Thus, the trial court determined that Brower failed to show a manifest injustice as required under CrR 4.2(f). The trial court followed the State's recommendation and sentenced Brower to 30.75 months' confinement. Brower appeals the denial of his motion to withdraw his *Alford* plea.

ANALYSIS

Withdrawal of a Guilty Plea Before Sentencing

A. Standard of Review

We review a trial court's decision on a motion to withdraw a guilty plea for abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

B. Guilty Plea

After a trial court accepts a guilty plea, it shall allow withdrawal of the plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f); *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). A manifest injustice is "'obvious, directly observable, overt, [and] not obscure.'" *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984) (quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). A defendant can prove a manifest injustice by showing that (1) the defendant received ineffective assistance of counsel, (2) the plea was not voluntary, (3) the prosecution did not honor the plea agreement, or (4) the defendant did not ratify the plea. *Taylor*, 83 Wn.2d at 597; *State v. Paul*, 103 Wn. App. 487, 494, 12 P.3d 1036 (2000). "A written statement on plea of guilty in compliance with CrR

4.2(g) provides prima facie verification of its constitutionality, and when the written plea is supported by a court's oral inquiry on the record, 'the presumption of voluntariness is well nigh irrefutable.'" *State v. Davis*, 125 Wn. App. 59, 68, 104 P.3d 11 (2004) (quoting *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982)).

Additionally, "[d]ue process requires that a defendant's guilty plea must be knowing, intelligent, and voluntary." *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). "When a defendant makes an *Alford* plea, the trial court must exercise extreme care to ensure that the plea satisfies constitutional requirements." *In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 277-78, 744 P.2d 340 (1987).

C. Motion To Withdraw Guilty Plea Based on Ineffective Assistance of Counsel

Brower argues that his motion to withdraw his plea should have been granted to avoid a manifest injustice because he received ineffective assistance of counsel when his original attorney erroneously advised him that attempted indecent liberties was not a strike offense.[4] He claims

[4] Brower also argues that his "guilty plea was not voluntary because his reading deficiency prevented him from understanding the consequences of the plea, and prevented him from reading the form in the time allocated in court." Br. of Appellant at 17. We reject this argument because "[a] written statement on plea of guilty in compliance with CrR 4.2(g) provides prima facie verification of its constitutionality, and when the written plea is supported by a court's oral inquiry on the record, 'the presumption of voluntariness is well nigh irrefutable.'" *Davis*, 125 Wn. App. at 68 (quoting *Perez*, 33 Wn. App. at 262). To support this argument, Brower relies only on cases dealing with mental incompetence and the difficulties encountered in interpreting Washington's Sentencing Reform Act of 1981, chapter 9.94A RCW.

Brower provides no authority to support his arguments that a reading deficiency amounts to mental incompetence or that a defendant must understand the sentencing statute in order to enter a voluntary plea. Thus, we need not consider these arguments. RAP 10.3(a)(6), (b) (The parties' briefs should provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record."); *see also Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned arguments is insufficient to merit judicial consideration.").

Even in addressing this argument, it clearly lacks any merit, and we agree with the trial court. Although Brower states that "he is a slow reader who ha[d] difficulty with big words," he

that, had he known that attempted indecent liberties was a strike offense, he would not have accepted the plea offer and would have gone to trial on the charge. The State argues that whether attempted indecent liberties was a strike offense was a collateral consequence of the plea and, thus, Brower's attorney was not ineffective because he was only required to inform Brower of the direct consequences of his plea.

Ineffective assistance of counsel constitutes a manifest injustice sufficient to allow a defendant to withdraw his guilty plea. *Taylor*, 83 Wn.2d at 597. "During plea bargaining, counsel has a duty to assist the defendant 'actually and substantially' in determining whether to plead guilty." *State v. Stowe*, 71 Wn. App. 182, 186, 858 P.2d 267 (1993) (internal quotation marks omitted) (quoting *Osborne*, 102 Wn.2d at 99). To establish ineffective assistance of counsel in the plea process, an appellant must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722 (1986); *Stowe*, 71 Wn. App. at 186. In applying this

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does not cite to the record to support his contention. Additionally, during the plea colloquy, the trial court asked Brower if he reviewed and understood the plea statement and Brower answered affirmatively. If Brower needed additional time to review the plea form, he had the opportunity to express that need to the trial court during the colloquy. Moreover, Brower's plea statement states that he completed grade 12 in school. Although Brower's mother stated that Brower had reading issues, she also acknowledged that he can read and write English. Brower admitted that even though he has problems reading and writing English, he can do both. The trial court determined that Brower "speaks, writes, and understands the English language." CP at 37. The trial court's plea colloquy with Brower was thorough and supports the trial court's acceptance of his plea based on his representation that he read and knew what he was signing. Based on our review of the record, we agree with the trial court that Brower's failure to demonstrate that his reading limitations, if any, rendered his plea involuntary. Thus, the trial court did not abuse its discretion in denying Brower's motion to withdraw his plea based on his alleged reading deficiency.

test, courts indulge in a strong presumption that counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

"During plea bargaining, counsel has a duty to assist the defendant 'actually and substantially' in determining whether to plead guilty[,] . . . . aid the defendant in evaluating the evidence against him and in discussing the possible direct consequences of a guilty plea." *State v. S.M.*, 100 Wn. App. 401, 410-11, 996 P.2d 1111 (2000) (quoting *Osborne*, 102 Wn.2d at 99). But defendant's counsel need not advise him of all collateral consequences of the plea. *State v. Ward*, 123 Wn.2d 488, 512, 869 P.2d 1062 (1994). A consequence is direct and not collateral if it "'represents a definite, immediate[,] and largely automatic effect on the range of the defendant's punishment.'" *Ward*, 123 Wn.2d at 512-13 (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)).

As we stated in *State v. Lewis*, 141 Wn. App. 367, 395, 166 P.3d 786 (2007), whether a crime is a strike offense is a collateral consequence of the defendant's sentence because it "neither increases the punishment for that crime nor automatically subjects a defendant to a future sentence of life without parole." But, here, Brower's counsel did not merely fail to inform Brower that attempted indecent liberties was a strike offense, he affirmatively and incorrectly stated that it was not a strike offense. Brower testified and the trial court found that, had Brower known attempted indecent liberties was a strike offense, he would not have entered the plea.

An attorney may provide ineffective assistance by making an affirmative misrepresentation regarding a collateral consequence if the defendant relies on that information in pleading guilty. *Stowe*, 71 Wn. App. at 187-88. In *Stowe*, we held that the trial court erred in not allowing Stowe to withdraw his guilty plea based on an affirmative misrepresentation from his trial attorney

regarding a collateral consequence, namely, whether pleading guilty would affect his military career. 71 Wn. App. at 188-89. We stated that, although "defense counsel does not have an obligation to inform his client of all possible collateral consequences of a guilty plea," the question before us was "not whether counsel failed to inform defendant of collateral consequences, but rather whether counsel's performance fell below the objective standard of reasonableness when he affirmatively misinformed Stowe of the collateral consequences of a guilty plea." *Stowe*, 71 Wn. App. at 187. "'[D]ifferent considerations may arise when counsel affirmatively misinforms the defendant of the collateral consequences of a guilty plea.'" *Stowe*, 71 Wn. App. at 187 (quoting *In re Pers. Restraint of Peters*, 50 Wn. App. 702, 707 n.3, 750 P.2d 643 (1988)). We also noted that misinformation relied on by a defendant when entering an *Alford* plea was especially troubling. *Stowe*, 71 Wn. App. at 187-88. We found that Stowe's "[c]ounsel's performance fell below an objective standard of reasonableness and constitute[d] deficient performance" because his counsel (1) knew of Stowe's desire to continue his military career, (2) misinformed Stowe that entering an *Alford* plea would allow him to maintain his military career, and (3) failed to conduct any research before inaccurately advising Stowe. *Stowe*, 71 Wn. App. at 188. And, because Stowe had specifically asked about his ability to continue his military career and relied on his attorney's misinformation in deciding to plead guilty, he was prejudiced by his attorney's deficient performance. *Stowe*, 71 Wn. App. at 188-89. Thus, Stowe met both prongs of the *Strickland* test. *Stowe*, 71 Wn. App. at 189.

Our Supreme Court recently applied the same analysis in *State v. A.N.J.*, 168 Wn.2d 91, 116, 225 P.3d 956 (2010). The court stated that "the failure [of counsel] to advise A.N.J. that the juvenile sex conviction would remain on his record forever, in and of itself, would not rise to a

manifest injustice. But if A.N.J. was misinformed that his conviction could be removed from his record, then he should be allowed to withdraw his plea." *A.N.J.*, 168 Wn.2d at 116 (internal citations omitted). The court reaffirmed that "[w]hen there are 'additional consequences of an unquestionable serious nature . . . , it may be manifestly unjust to hold the defendant to his earlier bargain.'" *A.N.J.*, 168 Wn.2d at 116 (quoting *Stowe*, 71 Wn. App. at 188). The court concluded that because "A.N.J. was misinformed as to the consequences of his plea[, he was] entitled to withdraw it." *A.N.J.*, 168 Wn.2d at 117.

Moreover, the United States Supreme Court held in *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473, 1481, 1486, 176 L. Ed. 2d 284 (2010) that regardless of whether deportation was a collateral or direct consequence[5] of the client's plea, an attorney "must inform her client whether his plea carries a risk of deportation." Padilla's attorney had improperly informed him that "he 'did not have to worry about immigration status since he had been in the country so long.'" *Padilla*, 130 S. Ct. at 1478 (internal quotation marks omitted) (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008)). The United States Supreme Court stated that it was "not a hard case in which to find [the] deficiency [prong of the *Strickland* test]: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Padilla*, 130 S. Ct. at 1483.

Brower's attorney mistakenly informed Brower that attempted indecent liberties was not a strike offense. "It was only after being assured that [attempted indecent liberties] was not a strike

[5] Washington courts have held that the possibility of deportation is "merely a collateral consequence" of a guilty plea. *See In re Pers. Restraint of Yim*, 139 Wn.2d 581, 588, 989 P.2d 512 (1999); *State v. Martinez-Lazo*, 100 Wn. App. 869, 876, 999 P.2d 1275 (2000).

offense that [Brower] agreed to plead guilty." CP at 40. Whether the crime was a strike offense was a "serious concern" for Brower. CP at 40. Additionally, Brower did not read the paragraph in his plea statement that indicated the crime was a strike offense because his attorney mistakenly believed the paragraph did not apply to Brower and Brower signed the plea form at his attorney's direction.

Brower's attorney's affirmative misstatement that attempted indecent liberties was not a strike offense fell below an objective standard of reasonableness and Brower relied on his attorney's advice to his serious detriment in entering his *Alford* plea to a crime that he vigorously denied committing. Both prongs of *Strickland* are satisfied and Brower should have been allowed to withdraw his *Alford* plea. We remand with directions to the trial court to allow him to withdraw his plea based on ineffective assistance of counsel and for further proceedings.

We remand only because Brower has shown that his attorney was ineffective in incorrectly advising him that he was not pleading to a strike offense and because he and his counsel both admit that they did not read the paragraph that would have informed Brower of the strike offense. Brower presents no other evidence or argument entitling him to withdraw his plea.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

No. 39779-0-II

Quinn-Brintnall, J.

Worswick, A.C.J.