

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

DAVANTE NAICELL LEACH,

Appellant.

No. 41880-1-II

UNPUBLISHED OPINION

Hunt, J. – Davante Naicell Leach appeals his guilty plea convictions for first degree assault, with a firearm sentencing enhancement, and first degree unlawful firearm possession. He argues that (1) the sentencing court abused its discretion in denying his presentence motion to substitute counsel to assist him in bringing a CrR 4.2(f) motion to withdraw his guilty pleas, and (2) this error deprived him of his right to counsel at a critical stage of his proceedings. In his prose statement of additional grounds for review (SAG), Leach argues that he is entitled to withdraw his guilty pleas because (1) he did not understand that the firearm sentencing enhancement would run consecutively to the first degree assault sentence or that the first degree assault would be his second “strike” offense under the Persistent Offender Accountability Act<sup>1</sup> (POAA), rather than his

first; and (2) he received ineffective assistance when his counsel advised him that the first degree assault would be his first “strike” offense and he relied on this advice “to his serious detriment.” SAG at 7.

Holding that Leach is entitled to withdraw his guilty pleas, which he entered based on incorrect information about his prior “strike” offenses, we remand for the superior court to appoint new counsel to address Leach’s CrR 4.2(f) motion to withdraw his guilty pleas.

## FACTS

### I. Guilty Pleas and Incorrect Advice About Prior “Strike” Offense

Leach entered into a plea agreement with the State.<sup>2</sup> On November 9, 2010, he pleaded guilty to first degree assault, with a firearm sentencing enhancement, and to first degree unlawful firearm possession. His statement of defendant on plea of guilty (SDPG) stated that (1) a 60-month firearm sentencing enhancement would be added to his standard range sentence for the first degree assault; (2) this sentencing enhancement was “mandatory,” “must be served in total confinement,” and “must run consecutively to any other sentence”; and (3) the first degree assault was a “most serious offense or strike,” for which he would receive a mandatory life sentence without the possibility of parole if he had at least two prior “most serious offense” convictions. Clerk’s Papers (CP) at 10-13.

During the guilty plea hearing, Leach confirmed that he had reviewed the SDPG with his

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<sup>1</sup> RCW 9.94A.555.

<sup>2</sup> The State had originally charged Leach with three counts of first degree assault, each with a firearm sentencing enhancement and gang aggravator, and one count of first degree unlawful possession of a firearm with a gang aggravator.

counsel, who had answered his (Leach's) questions to his "full satisfaction"; that he understood the SDPG, and that he had no additional questions for the court. Report of Proceedings (RP) (Nov. 9, 2010) at 5. The superior court described the standard sentencing ranges for each offense, the mandatory 60-month firearm sentencing enhancement, and that the sentencing court did not have to follow any sentencing recommendation. The court did not, however, expressly advise Leach that he would serve the firearm sentencing enhancement consecutively to the first degree assault sentence or that the enhancement was "flat time."

The superior court also advised Leach that the first degree assault offense was a "most serious offense"<sup>3</sup> under the POAA and asked whether Leach had discussed this with counsel. RP (Nov. 9, 2010) at 9. Leach responded that he had discussed this with counsel and understood that if he had three "strike" offenses, he would get a life sentence without the possibility of parole. When the superior court commented that it did not know whether Leach had a prior "strike" offense, Leach's counsel responded, "He does not, Your Honor. *His prior strike was as a juvenile, so he is at this point with one strike.*"<sup>4</sup> RP (Nov. 9, 2010) at 9-10 (emphasis added).

The superior court then informed Leach that the first degree assault, to which he was pleading guilty, would be his first "strike" and that he would go to prison for life without the possibility of parole if he had two more "strike" convictions; Leach acknowledged that he understood this. After "confirm[ing]" with Leach's counsel that he had reviewed the plea

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<sup>3</sup> Former RCW 9.94A.030(32), (37) (2009).

<sup>4</sup> This representation was inaccurate: Leach actually had one prior strike offense, making this new first degree assault his second strike offense.

agreement and the consequences of a strike offense with Leach, the superior court accepted Leach's guilty pleas. RP (Nov. 9, 2010) at 10.

## II. Motion for Substitution of Counsel and To Withdraw Pleas

A different judge presided over Leach's sentencing hearing scheduled for January 6, 2011. Noting that Leach had "discharged" him, Leach's retained counsel filed a motion to withdraw and to substitute assigned counsel to assist Leach with moving to withdraw his guilty pleas. CP at 16. Despite opposing the motion, the State revealed that during the plea colloquy, Leach's counsel and the previous court had misadvised Leach that his previous juvenile adjudication was *not* a strike offense and that Leach had entered his guilty pleas erroneously believing that the current first degree assault would be his first and only strike offense. Nevertheless, the State argued that this incorrect advice was not a "lawful basis to withdraw the knowing, intelligent, and voluntary plea" because the misadvice related to a collateral consequence of the pleas. CP at 17. This second judge declined to address Leach's motion to substitute counsel; but it instructed Leach's counsel to submit a "rationale for the withdrawal of [Leach's] guilty plea" to provide the previous court, which had accepted Leach's guilty pleas, "a factual basis upon which to" evaluate this motion. CP at 33-34.

Leach's counsel submitted the requested "rationale," which reflected Leach's own arguments, "not the position of counsel." CP at 33. Leach's counsel described (1) having assisted Leach with his SDPG and the previous court's accepting the guilty pleas, (2) Leach's mid-December 2010 request for new counsel and having informing counsel that he (Leach) wanted to withdraw his guilty pleas, and (3) the January 6 presentation of Leach's motion for new counsel

“for the purpose of moving to with draw [sic] his guilty plea.” CP at 34. Leach’s counsel also stated that after this January 6 hearing, Leach had clarified that he wanted to argue that (1) his guilty pleas were not knowing because he had been unaware that the sentencing enhancement was “flat-time,”<sup>5</sup> which had to be served consecutively to the sentence for the substantive assault offense; and (2) his guilty pleas were based on misinformation about the direct consequences of his pleas because both the State and defense counsel had miscalculated his offender score.

The previous superior court, which had taken Leach’s guilty pleas, presided over a February 11 hearing and stated it understood that Leach “would like to withdraw his plea of guilty.” RP (Feb. 11, 2011) at 3. Leach’s counsel explained that it was “not really . . . a motion to withdraw the guilty plea at this time,” there was no “formal motion” to withdraw the plea before the court, and the only motion at issue was for substitution and appointment of new counsel to assist Leach with his motion to withdraw his guilty pleas. RP (Feb. 11, 2011) at 3.

Leach’s counsel told the superior court that when he was working on Leach’s sentencing memorandum, Leach had said that he wanted to withdraw his guilty pleas, that he wanted new counsel, and that defense counsel should stop working on the case. Leach’s counsel stated that (1) he had advised Leach and the court that Leach’s “plea was knowing, intelligent and voluntary” and, therefore, “a new attorney would have to” argue otherwise; (2) it was counsel’s “understanding” that Leach had understood the sentencing enhancement would be “flat time” and

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<sup>5</sup> “Offenders serving mandatory minimums, also known as ‘flat time,’ are not eligible for community custody, earned early release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release.” *In re Pers. Restraint of Tran*, 154 Wn.2d 323, 326, 111 P.3d 1168 (2005).

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run consecutively to the assault sentence; and (3) it was “unlikely” that the offender score calculation was incorrect because both he and the State had arrived at the same offender score. RP (Feb. 11, 2011) at 5-6.

Contending that Leach’s proposed grounds for withdrawing his guilty pleas lacked merit, the State acknowledged, however, that “[t]he only procedural error that occurred at any point in the colloquy” was that counsel and *the trial court had incorrectly advised Leach that the first degree assault he was pleading to was his first strike offense*. RP (Feb. 11, 2011) at 8. Defense counsel and the State agreed that any potentially incorrect advice about the “strike” offense issue was “collateral” and would not support Leach’s motion to withdraw his guilty pleas.

Although not specifically mentioning the “strike” issue, Leach himself stated,

I believe I have ineffective assistance of counsel. I also believe my attorney committed fraud in inducement. He misled me in [sic] taking the plea bargain by saying I would get less time, and my attorney didn’t have my best interest in mind when he offered the plea bargain. He also told my family one thing and told me another. He threatened if I didn’t take the deal, I would lose and get 60 years. He said he wouldn’t represent me in trial, if I didn’t take the deal. He coerced me into taking the deal.

He painted a picture before me, before the trial was lost or even begin with [sic]. I feel I should have the chance to see my trial all the way through, with effective counsel. He also never scheduled any time for me, and he failed to file any motions to help my case.

RP (Feb. 11, 2011) at 9-10. The superior court stated it could not conclude there had been ineffective assistance of counsel, denied Leach’s motion to dismiss counsel, and set the matter over to allow Leach’s counsel time to prepare for sentencing.

### III. Sentencing

The February 25 sentencing was held before the superior court that had accepted Leach's pleas and had denied Leach's motion to substitute counsel. Leach's counsel advised the court that (1) Leach wanted to "renew his motion to have the Court appoint counsel, so that he may bring a motion before the Court to withdraw his plea"; and (2) Leach believed that his plea was not knowing, voluntary, and intelligent and that he was being denied his right to bring his motion to withdraw his plea.<sup>6</sup> RP (Feb. 25, 2011) at 13. Refusing to revisit the matter, the superior court sentenced Leach to 200 months of confinement on the first degree assault charge and 48 months on the first degree unlawful firearm possession charge, to run concurrently; and it imposed a 60-month firearm sentencing enhancement to run consecutively to the assault sentence, for a total of 260 months of confinement. Leach appeals.

### ANALYSIS

Leach argues that the superior court abused its discretion in denying his motion to substitute counsel, which effectively denied him his right to counsel on his CrR 4.2(f) motion to withdraw his guilty pleas. In his SAG, Leach argues that his guilty pleas were not knowing, intelligent, and voluntary because his counsel (1) did not explain that the mandatory firearm sentencing enhancement would run consecutively to his assault sentence, (2) incorrectly advised him that the first degree assault was his first "strike" offense, and (3) ineffective assistance justifies withdrawal of his guilty pleas because his counsel affirmatively misadvised him that he did not have any previous "strike" offenses. Holding that the superior court misapplied the law in

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<sup>6</sup> Counsel did not, however, specify what claims Leach wished to raise.

considering whether the incorrect prior “strike” advice could be grounds for Leach’s withdrawing his guilty pleas, we remand to the superior court to allow Leach to substitute counsel and to move to withdraw his guilty pleas.

### I. Standards of Review

An indigent defendant must show good cause before the trial court will allow substitution of counsel. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998)). We review a trial court’s denial of a motion to substitute counsel for abuse of discretion. *Stenson*, 132 Wn.2d at 733. A decision based on an erroneous view of the law or other legal error constitutes an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007) (citing *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.2d 350 (2005)). To determine whether the superior court abused its discretion in denying a defendant’s request for substitute counsel, we consider (1) the nature and extent of the alleged conflict, (2) the adequacy of the court’s inquiry, and (3) the timeliness of the motion and the effect of any substitution on the scheduled proceedings. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001); *Stenson*, 132 Wn.2d at 734.

Similarly, we review a trial court’s denial of a motion to withdraw a guilty plea for abuse of discretion. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000) (citing *State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141, *review denied*, 132 Wn.2d 1002 (1997)). A court shall allow withdrawal of a guilty plea “whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f); *see also State v. Wakefield*, 130 Wn.2d 464, 472, 925



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P.2d 183 (1996); *State v. Taylor*, 83 Wn.2d 594, 598, 521 P.2d 699 (1974). Four nonexclusive indicia of per se manifest injustice are (1) ineffective assistance of counsel, (2) defendant's failure to ratify the guilty plea, (3) an involuntary plea, or (4) the State's breach of the plea agreement. *Taylor*, 83 Wn.2d at 597. Ineffective assistance of counsel can constitute a manifest injustice that will support a motion to withdraw a guilty plea because "[d]uring 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) (quoting *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984)).

When a defendant raises a factual claim of ineffectiveness or a conflict with counsel, the superior court must conduct a thorough examination of the circumstances to determine whether the court must appoint new counsel. *See State v. Dougherty*, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982), *review denied*, 99 Wn.2d 1023 (1983). "[A] trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully." *State v. Schaller*, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007) (citing *Varga*, 151 Wn.2d at 200-01; *In re Stenson*, 142 Wn.2d at 731), *review denied*, 164 Wn.2d 1015 (2008).

## II. "Strike" and Ineffective Assistance of Counsel Issues<sup>7</sup>

We agree with Leach that the superior court misapplied the law in refusing to allow substitute counsel to assist with his CrR 4.2(f) motion to withdraw his guilty pleas based on defense counsel's misadvice about Leach's having no preexisting "strike" offense. Although

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<sup>7</sup> Because we hold that Leach established good cause for substitution of counsel on this ground, we do not address his alternative grounds.

Leach did not initially identify this specific ground, the record shows that (1) Leach clearly advised the superior court that he had received ineffective assistance of counsel, with whom he had discussed his prior “strike” offenses before his change of plea hearing; (2) during the plea colloquy, defense counsel and the superior court had misadvised Leach that he had no previous “strike” offenses for POAA life sentence purposes; (3) the superior court and counsel misapprehended the law in concluding that incorrect information about the number of Leach’s prior strike offenses could not be grounds for withdrawing a guilty plea because it related to a “collateral consequence”; and (4) defense counsel would have been a potential witness about whether the lack of a previous “strike” offense was material to Leach’s original decision to plead guilty.

Where, as here, there may be a factual dispute between a client and counsel that forms the basis for an ineffective assistance of counsel claim, the superior court should allow counsel to withdraw to avoid being placed in the conflicting situation of serving as a witness against a client. *See United States v. Del Muro*, 87 F.3d 1078, 1080-81 (9th Cir. 1996). Although a defendant cannot force substitution simply by alleging ineffective assistance of counsel, the record here establishes a plausible ineffective assistance claim, especially in light of defense counsel’s belief that there was not merit to Leach’s desire to withdraw his guilty pleas entered based on the prior “strike” misinformation. *State v. Sinclair*, 46 Wn. App. 433, 436-37, 730 P.2d 742 (1986), *review denied*, 108 Wn.2d 1006 (1987). Thus, this conflict was potentially significant to whether Leach entered his guilty pleas knowingly, voluntarily, and intelligently and, thus, to whether he was entitled to withdraw them.

Here, the superior court allowed Leach and his counsel to express their concerns that defense counsel had misadvised Leach about the “strike” issue. But the superior court, the State, and Leach’s counsel had all misapprehended the law about whether this type of misinformation could support a CrR 4.2(f) motion to withdraw a guilty plea based on ineffective assistance of counsel. Furthermore, the superior court did not conduct a full inquiry into whether this misinformation had been material to Leach’s decision to plead guilty. And because Leach’s counsel required a continuance to prepare for sentencing, nothing in the record shows that any additional delay to conduct such an inquiry would have been detrimental.

Most importantly, contrary to the superior court’s, the State’s, and defense counsel’s beliefs, defense counsel’s affirmative misrepresentation of a collateral consequence of a guilty plea *can* be grounds for plea withdrawal if the defendant “materially relied on that misinformation when deciding to plead guilty.” *In re Pers. Restraint of Reise*, 146 Wn. App. 772, 787, 192 P.3d 949 (2008) (citing *State v. Conley*, 121 Wn. App. 280, 285, 87 P.3d 1221 (2004)).<sup>8</sup> Such was the case here: The potential conflict was significant. The superior court’s inquiry about the basis for Leach’s plea was inadequate because of a legal error. The record does not show that any additional delay would have been detrimental. And Leach has established sufficient facts to justify a hearing on whether he should be allowed to withdraw his guilty pleas based on the incorrect advice he received about his prior “strike” offense. Therefore, we reverse the superior court’s denial of Leach’s motion to substitute counsel, and we remand for appointment of new counsel to represent Leach at a CrR 4.2(f) hearing on the issue of whether

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<sup>8</sup> See also *State v. A.N.J.*, 168 Wn.2d 91, 116, 225 P.3d 956 (2010); *Stowe*, 71 Wn. App. at 188-89.

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the incorrect information about his prior “strike” offense status merits allowing him to withdraw his guilty pleas.

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.

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HUNT, J.

We concur:

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WORSWICK, C.J.

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JOHANSON, J.