

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

XAVIER MICHAEL MAGANA,
Appellant.

No. 42036-8-II

UNPUBLISHED OPINION

Van Deren, J. — Xavier Michael Magana pleaded guilty to first degree murder. Magana later moved to withdraw his plea, asserting that he was not competent to enter a guilty plea, which motion the trial court denied. Magana appeals, contending that the trial court erred by denying his motion without conducting a competency hearing. In his statement of additional grounds for review (SAG), Magana asserts that his defense counsel was ineffective. Because the trial court did not abuse its discretion by denying Magana’s motion to withdraw his guilty plea and because Magana cannot meet his burden to prove his counsel was ineffective, we affirm.

Facts

On July 13, 2009, the State charged Magana with first degree murder and second degree unlawful possession of a firearm. The State later amended the charges to allege aggravating factors on each count. In April 2010, Magana wrote a letter to the trial court expressing

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dissatisfaction with his defense counsel and seeking new counsel. Magana complained that his defense counsel was not staying in contact with him and was not working in his best interests. At a hearing on Magana's motion to substitute counsel, Magana's defense counsel testified that he believed he was keeping adequate contact with Magana. Defense counsel further stated, "[Magana] has indicated that he doesn't like the options that I have explained to him. And so, I can understand why he may not like the options, but I am willing to consider, or continue to work as his attorney." Report of Proceedings (RP) (Apr. 21, 2010) at 6. The trial court denied Magana's motion.

In February 2011, the State amended the charges against Magana to remove the unlawful possession of a firearm charge and the aggravating factor allegations in exchange for Magana's agreement to plead guilty to the first degree murder charge. At the hearing on Magana's plea, the trial court held the following colloquy:

[The court]: . . . Mr. Magana, before I accept your plea, I want to ask you a couple of questions. I see you're 20 years old, and you've completed a GED; is that correct?

[Magana]: Yes.

. . . .

[The court]: Do you understand that when you plead guilty, you give up your right to a jury trial, you give up your right to confront witnesses against you, and other important constitutional rights that you may have?

[Magana]: Yes.

[The court]: Okay. Has anyone done anything to force you to enter this plea against your will?

[Magana]: No.

[The court]: Okay. So it's your decision to plead guilty?

[Magana]: Yes.

RP (Feb. 9, 2011) at 4.

After the colloquy affirmed that Magana understood the trial court's questions, that his

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answers were appropriate, and that he did not have questions about the process, the trial court advised Magana of further consequences of his guilty plea; Magana indicated that he understood the consequences and that he wished to plead guilty. The trial court reviewed Magana's statement on plea of guilty and asked Magana if he adopted the statement as his own, to which Magana responded affirmatively. The trial court accepted Magana's guilty plea and set a sentencing date.

At sentencing, defense counsel presented the trial court with Magana's handwritten statement requesting withdrawal of his guilty plea. Magana's written statement asserted that he was incompetent when he entered his plea due to his father's recent death and because he likely suffered from mental illnesses. Magana's statement also asserted that his defense counsel pressured him into accepting the State's plea agreement. Magana's defense counsel stated to the trial court:

[Magana] alleges that perhaps I did improper things in regards to my representation of him. I think at a minimum, as an abundance of caution, it's appropriate to set over this sentencing to get another attorney to talk to Mr. Magana about these allegations, also to get a psychologist to meet with him, perhaps to address his issues in regards to competency.

RP (Mar. 25, 2011) at 3.

Magana's defense counsel also directed the trial court to a psychological evaluation attached to defense counsel's sentencing memorandum. This psychological evaluation was completed to assess whether Magana had a viable mental health defense to the charges. The psychological evaluation stated in part:

On the occasion of four interviews . . . occurring in custody over a four-month period, Mr. Magana provided an above average amount of information about his life and relationship with the victim of the alleged offenses, in tones that appeared open and non-defensive.

Mr. Magana was consistently alert and oriented to person, place, date and situation. Social skills appeared adequate, and rapport was established without difficulty. Speech was fluent and normal in rhythm, pace, and volume. Mr. Magana responded in a goal-directed manner to all of the undersigned's queries. No deficits in cognitive intactness were noted in Mr. Magana.

Mr. Magana did not evidence gross functional psychopathology, though he appeared mildly depressed and notably anxious, especially when recounting his history of victimization . . . Mood was largely dysphoric. Mr. Magana denied the experience of hallucinations and other perceptual anomalies, and none could be reasonably inferred. He voiced no delusional material or paranoia, and there was nothing in his verbal production suggestive of any deficit of memory, concentration, or organic impairment.

Clerk's Papers (CP) at 76. It concluded:

Results of this assessment indicate that Mr. Magana experiences several severe mental health conditions, including *Post-traumatic stress disorder* [(PTSD)], believed to derive from his reported history of victimization.

. . . While Mr. Magana's experience of PTSD may have precipitated a panic reaction, at no time did it appear that this level of disturbance resulted in his being unable to tell right from wrong or from being unable to appreciate the nature and quality of his behavior. After all, Mr. Magana was aware that he shot [the intended victim], and not some innocent bystander. His post-event behavior — running away and hiding out for more than a day — reflects a consciousness of his actions and a recognition of wrongfulness. As a result, we cannot support a defense of insanity in the current matter.

. . . A defense of diminished capacity, however, appears appropriate. If the shooting derives from a panic reaction derivative of PTSD, then Mr. Magana would have been unable to form the mental element of premeditated intent necessary for the charge of Murder in the First Degree.

. . . .

. . . Mental health mitigation is clearly present in this matter, given the degree of disturbance see[n] in Mr. Magana and the nature and degree of victimization he reports by [the victim] over a lengthy period.

CP at 78-79.

The trial court denied Magana's motion to withdraw his guilty plea, finding that Magana did not make the requisite showing of manifest injustice. The trial court also found that Magana did not prove that his plea was involuntary or that his counsel was ineffective. Magana timely

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appeals the trial court's denial of his motion to withdraw his guilty plea.

Discussion

Competency Hearing/Voluntariness of Plea

Magana first contends that the trial court erred by denying his motion to withdraw his guilty plea without conducting a competency hearing. We disagree. Because Magana did not present evidence sufficient to call his competency into doubt, the trial court did not abuse its discretion by denying Magana's motion to withdraw his guilty plea without conducting a competency hearing.

We review a trial court's ruling on a defendant's motion to withdraw a guilty plea for an abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). Under CrR 4.2(f), a trial 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 sufficient to withdraw a guilty plea exists where the plea was not voluntary. *Marshall*, 144 Wn.2d at 281.

Under former RCW 10.77.010(14) (2005), "'Incompetency' means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." If a defendant supports a motion to withdraw a guilty plea with substantial evidence that the defendant lacked competence to enter the plea, "the trial court must either grant the motion to withdraw guilty plea or convene a formal competency hearing required by RCW 10.77.060." *Marshall*, 144 Wn.2d at 281. Conversely, if the defendant does not support an incompetency claim with substantial evidence, a trial court may deny the defendant's motion to withdraw a guilty plea without holding a formal competency hearing under RCW 10.77.060.¹ *State v. DeClue*, 157 Wn. App. 787, 793, 239 P.3d 377 (2010).

Here, Magana did not present substantial evidence that the recent death of his father or a potential mental illness caused him to “lack[] the capacity to understand the nature of the proceedings against him . . . or to assist in his . . . own defense.” Former RCW 10.77.010(14). Although Magana’s psychological evaluation indicated that he may have suffered from “mild[] depress[ion]” and that “a panic reaction derivative of PTSD” may have contributed to his offense, nothing in the evaluation showed that such mild depression or PTSD symptoms rendered him incompetent to enter a guilty plea. CP at 76, 78. Instead, Magana’s psychological evaluation indicated that he was able to respond to the evaluator’s questions “in a goal-directed manner” that was free from any “deficits in cognitive intactness.” CP at 76. Magana’s psychological evaluation also noted that Magana “voiced no delusional material or paranoia, and there was nothing in his verbal production suggestive of any deficit of memory, concentration, or organic impairment.” CP at 76.

Rather than calling Magana’s competency to plead guilty into question, the psychological evaluation tends to show that Magana was fully capable of understanding the proceedings against him and assisting in his own defense. Moreover, at the plea hearing, the trial court engaged Magana in a discussion to assure that he understood the consequences of pleading guilty, during which Magana indicated he was knowingly and voluntarily pleading guilty. Accordingly, Magana did not present evidence sufficient to require the trial court to conduct a competency hearing and we affirm the trial court’s denial of Magana’s motion to withdraw his guilty plea.

Ineffective Assistance of Counsel

¹ Magana’s claim that he lacked competence to enter a guilty plea is equivalent to a claim that his plea was involuntary. *State v. DeClue*, 157 Wn. App. 787, 792, 239 P.3d 377 (2010) (citing *Marshall*, 144 Wn.2d at 281).

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Next, Magana argues in his SAG that the trial court erred by denying his motion to withdraw his guilty plea based on defense counsel's ineffective assistance. We disagree and affirm Magana's conviction.

We review claims of ineffective assistance of counsel de novo. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To prevail on an ineffective assistance of counsel claim, Magana must show that his defense counsel's performance was deficient and that the deficient performance prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. Prejudice results if the outcome of the trial would have been different had defense counsel not rendered deficient performance. *McFarland*, 127 Wn.2d at 337. We strongly presume that counsel is effective and the defendant must show the absence of any legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland*, 127 Wn.2d at 336. To rebut this presumption, the defendant bears the heavy burden of "establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'" *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (emphasis added) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Here, Magana asserts that his defense counsel provided ineffective assistance by pressuring him to plead guilty to first degree murder. To the extent that Magana is asserting that his defense counsel forced him to take a plea deal against his will, there is no evidence in the record to support his claim. Furthermore, at the hearing on Magana's guilty plea, he denied that "anyone [had] done anything to force [him] to enter th[e] plea against [his] will." RP (Feb. 9,

2011) at 4.

Magana also appears to argue that his defense counsel was ineffective for advising him to accept the State's plea agreement in light of the psychological evaluation's conclusion that he could mount a viable defense to first degree murder based on his mental state at the time he committed his offense. Specifically, Magana's SAG states that "he was prejudiced by his attorney's p[er]formance because he was advised to plea[d] guilty to a crime he did not have the mental capacity to premeditate, and or knowingly commit." SAG at 6. Magana thus appears to interpret the psychological evaluation's conclusion that he could mount a diminished capacity defense as evidence that his counsel's advice about entering a plea to the State's offer fell below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35.

First, Magana does not assert that his defense counsel failed to advise him of the availability of this defense and how it affected his decision to plead guilty before he decided to accept the State's plea agreement. Second, there was a legitimate strategic or tactical reason supporting defense counsel's advice regarding the plea in that the State agreed to dismiss the aggravating factors and the unlawful possession of a firearm charge in exchange for Magana's plea to the one remaining charge of first degree murder, thus favorably affecting the sentencing consequences. *McFarland*, 127 Wn.2d at 336.

Moreover, to demonstrate ineffective assistance, Magana needed to show that the outcome of a trial would have been different had defense counsel not advised him to enter the plea, i.e., he had to show prejudice. *McFarland*, 127. Wn.2d at 337. Under these circumstances, we are not persuaded that Magana has shown that the consequences of a trial, rather than a guilty plea, would have differed in a way favorable to Magana following a trial in which Magana could

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have argued that his capacity to form intent to commit first degree murder was diminished.

Magana has not shown that his defense counsel's performance was deficient or that such deficient performance affected his decision to plead guilty. Accordingly, the trial court did not err when it denied Magana's motion to withdraw his guilty plea and we affirm his conviction.

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:

Hunt, J.

Worswick, C.J.