IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRIAN ROBERT FIX, Appellant.	No. 43045-2-II UNPUBLISHED OPINION

Penoyar, J. — Brian Fix appeals his third degree theft and possession of oxycodone convictions. He argues that the trial court erred when it refused to assign him a new court-appointed attorney to represent him on a presentencing motion to withdraw his guilty pleas and when it refused to rule on his motion to withdraw his pleas. Because Fix fails to demonstrate that the trial court abused its discretion by denying his request for a new attorney and by refusing to let Fix withdraw his guilty pleas, we affirm.[1]

FACTS

On December 8, 2011, Fix pleaded guilty to possession of oxycodone and third degree theft. He signed a guilty plea statement that advised him that he was giving up his right to remain silent, his right to a speedy trial by jury, his right to hear and question witnesses, his right to testify and present witnesses, his right to be presumed innocent, and a right to appeal. The trial court also advised him orally that "[i]f you plead guilty, there will be no trial, no witnesses and no appeal." Report of Proceedings (RP) at 2. Fix stated he had no questions about his rights and asked the court to accept his plea.

[1] A commissioner of this court initially considered this appeal as a motion on the merits under RAP 18.14 and then referred it to a panel of judges.

The parties appeared for sentencing on December 20, 2011. Fix's trial counsel informed the trial court that Fix requested new counsel and wanted to withdraw his pleas. Fix stated that he spoke with "other people" who informed Fix that he was incorrectly told he "would get so much more time." RP at 7. Defense counsel clarified that when Fix pleaded guilty, as part of the plea bargain, the State agreed not to file charges for bail jumping due to previous missed court dates, "which would have carried many more months than the recommendation." RP at 7. Fix continued, "I talked to like my bail bondsman. . . . They said that [the bail jumping] really wasn't an issue because of how it happened." RP at 8.

The trial court cautioned Fix that he should not be taking legal advice from a non-lawyer and informed him that his explanation was not sufficient for the court to assign new counsel. It added, "[defense counsel] is absolutely correct, the fact that you weren't here [for court dates] is, basically, all the State has to prove." RP at 8. The court informed Fix that he was free to hire a new lawyer but that his current attorney would remain his court-appointed attorney. It delayed sentencing to allow Fix to decide how to proceed.

The parties appeared on January 3, 2012, before a different judge. Defense counsel reminded the court that Fix wanted to withdraw his pleas. He stated, "Fix believes that I gave him faulty advice." RP at 11. Defense counsel, however, added, "I would stand by that I adequately advised him and gave him decent advice." RP at 12. Defense counsel informed the trial court that Fix had not yet retained new counsel but that he may be able to do so in the next two weeks. Defense counsel also renewed Fix's motions. The court recessed to allow the judge who presided over the guilty pleas and the original sentencing date to hear the renewed motions.

When court reconvened, Fix explained that he was seeking funds from family members to hire another attorney. The court stated that Fix had "no basis whatsoever . . . to withdraw the plea" and no "credible basis to even be pursued to justify appointing an additional attorney at public expense." RP at 15. It added, "[t]he law guarantees the right to counsel, not to new counsel to fight what your old counsel did." RP at 15-16. It delayed sentencing to January 17, 2012.

At the next hearing, defense counsel again informed the court that Fix wanted new counsel and wanted to withdraw his plea. The court asked Fix if he wanted to make another statement to support his requests. Fix said:

> Um—I just—it was right before court. I really had no knowledge of any of the workings or anything and the second I left here, I immediately called some people and got some information on it. And, as soon as I did that, you know, I found out that I shouldn't have done that and it was wrong and I didn't—I always wanted to go to trial and if—if I wouldn't have been so freaked out about going for six months right then, I would have had a second to think and confer with some people that I could talk to that had some knowledge. I just was too, I guess, ignorant. I mean, had I had even an hour, I would have gotten the information I was given.

RP at 18. The court categorized Fix's explanation as a case of "buyer's remorse." RP at 18. It sentenced Fix to 15 days in custody, with 12 months of community custody for the possession of oxycodone count, and 364 days suspended for the theft count. Fix appeals.

ANALYSIS

I Appointment of New Counsel

Fix first argues that the superior court erred by failing to appoint a new attorney to represent him in his presentencing motion to withdraw his plea based on a claim of ineffective assistance. The State responds that Fix was not entitled to new counsel "simply by raising an

ineffective assistance claim." Resp't's Br. at 6 (quoting *State v. Davis*, 125 Wn. App. 59, 68 n.31, 104 P.3d 11 (2004)).

We review a trial court's decision to deny a motion for new court appointed counsel for abuse of discretion. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). "Factors to be considered include 'the reasons given for the defendant's dissatisfaction, together with [the trial court's] own evaluation of the competence of existing counsel and the effect of substitution upon the scheduled proceedings.'" *State v. Rosborough*, 62 Wn. App. 341, 346, 814 P.2d 679 (1991) (quoting *State v. Stark*, 48 Wn. App. 245, 253, 738 P.2d 684 (1987)).

We have not adopted a blanket rule that requires new counsel upon *any* claim of ineffective assistance. "[I]f a defendant could force the appointment of substitute counsel simply by expressing a desire to raise a claim of ineffective assistance of counsel, then the defendant could do so whenever he wished, for whatever reason." *Stark*, 48 Wn. App. at 253 (citing *State v. Sinclair*, 46 Wn. App. 433, 436-37, 730 P.2d 742 (1986)). A mere allegation of ineffective assistance does not create an inherent conflict of interest requiring substitute counsel. *Rosborough*, 62 Wn. App. at 346.

Fix relies on *State v. Harell* to support his contention that he was entitled to new counsel to assist in his motion to withdraw his plea. 80 Wn. App. 802, 911 P.2d 1034 (1996). In *Harell*, the trial court granted a hearing on the motion to withdraw, based on an allegation of ineffective assistance of counsel. 80 Wn. App. at 803. Harell's attorney did not assist at the plea withdrawal hearing and even testified as a witness for the State. *Harell*, 80 Wn. App. at 803. Division One of this court reversed the trial court's denial of counsel to Harell during the hearing because "a plea withdrawal hearing is a critical stage giving rise to the right to assistance of counsel."

Harell, 80 Wn. App. at 804.

We disagree with Fix that the facts of his case "precisely mirror those from *Harrell* [sic]." Appellant's Br. at 8. Rather, Fix's complaints about defense counsel more resemble mere allegations of poor representation insufficient to trigger a right to new counsel. *Rosborough*, 62 Wn. App. at 346. Specifically, in *Harell*, the defendant had persuaded the trial court that he alleged sufficient facts to warrant a hearing on the claim of ineffective assistance of counsel and a related motion to withdraw the plea before triggering his right to new representation.[2] 80 Wn. App. at 804. In the present case, in contrast, the court repeatedly inquired as to the reasons for Fix's dissatisfaction with defense counsel but it was never persuaded that Fix's claims required an evidentiary hearing.

In light of the fact that Fix's sole reason for requesting new counsel was that his bail bondsman and other unidentified non-attorneys thought defense counsel misadvised him about his potential bail jumping charges, we cannot conclude that the superior court erred when it refused to appoint Fix new counsel to pursue whether defense counsel was ineffective. Fix's unsupported "desire" to raise an ineffective assistance of counsel claim is insufficient to conclude that the trial court abused its discretion by denying his request for new appointed counsel. *Stark*, 48 Wn. App. at 253.

II. Guilty Plea Withdrawal

Fix further argues that trial court denied him due process both because it refused to

[2] In *Harell*, "the State did not assign error to the trial court's decision to have a hearing. Nor did the State allege that the trial court abused its discretion by holding the hearing." 80 Wn. App. at 804. The court, therefore, concluded that "[i]mplicit in the trial court's decision to hold a hearing is a finding that sufficient facts were alleged to warrant a hearing." *Harell*, 80 Wn. App. at 804.

appoint new counsel[3] and failed to rule on his guilty plea withdrawal motion. The State responds that the court correctly denied Fix's motion to withdraw his plea because he failed to demonstrate withdrawal was necessary to correct a manifest injustice.

We review a 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 (1997)). CrR 4.2(f) states that a superior court shall allow a defendant to withdraw a plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." *See also State v. Wakefield*, 130 Wn.2d 464, 472, 925 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,[4] (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.

Fix assigns error to the trial court's denial of his motion to withdraw his plea on the sole basis that the court never ruled on his motion to withdraw his plea. A review of the record, however, shows that at the hearing on January 3, 2012, the court ruled that Fix presented "no basis whatsoever . . . to withdraw the plea." RP at 15. And, on January 17, 2012, after allowing Fix to restate the reasons for his motion, the court found that it was based simply on a case of "buyer's remorse." RP at 18. Accordingly, Fix cannot show that the court denied him due process by failing to rule on his motion to withdraw his plea of guilty.[5] It initially denied his

[3] We addressed the issue of new counsel above and need not do so further.

[4] 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)).

[5] Although Fix does not otherwise assign error to the merits of the trial court's decision, we note

motion on January 3, and again denied it on January 17, immediately prior to sentencing.

We affirm.

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 in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.

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that Fix signed a written statement on plea of guilty and stated he had no questions when the trial court advised him of his rights. "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 (2004) (quoting *State v. Perez*, 33 Wn. App. 258, 261–62, 654 P.2d 708 (1982)).