

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 67903-1-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
FAIVAFALE K. TIMALI,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>November 5, 2012</u>
)	
)	

Cox, J. — Faivafale Timali appeals the trial court’s denial of his motion to withdraw his guilty plea, arguing that the court improperly failed to appoint substitute counsel to represent him at the plea withdrawal hearing. Because Timali failed to make a prima facie showing of deficient performance by his attorney at the hearing to withdraw his guilty plea, the trial court properly denied his motion to withdraw his plea. His Statement of Additional Grounds for Review does not require reversal. We affirm.

Faivafale Timali and Tashara Hutton were involved in a romantic relationship. After a municipal court had issued a no contact order, Timali went to Hutton’s apartment in March of 2011. Hutton called 911, and law enforcement responded.

Hutton told law enforcement officers that Timali became angry when she told him that he could not be at her apartment. She claimed that Timali said he

was going to kill her and pointed a silver handgun at her stomach. Officers found a silver handgun at the scene.

By amended information, the State charged Timali with domestic violence felony violation of a court order, felony harassment with an allegation for a firearm enhancement, and second degree assault with an allegation for a firearm enhancement. The State also charged Timali, a convicted felon, with first degree unlawful possession of a firearm.

After jury selection but before opening statements, the State learned that law enforcement had video footage of the incident between Timali and Hutton. After opening statements, the State and Timali's attorney viewed the video footage. The State told the court it intended to use the video as impeachment evidence against Hutton, if necessary.

Timali eventually pleaded guilty to lesser charges of unlawful possession of a firearm in the second degree and a count of misdemeanor violation of a no contact order. His attorney represented him at the plea hearing.

Before sentencing, Timali sent a letter to the court requesting to withdraw his plea, primarily based on his claim of ineffective assistance of counsel. The court scheduled a hearing. Timali's counsel of record appeared at this hearing as well. Timali did not request substitute counsel before or during this hearing. The court denied the motion to withdraw his plea after conducting a colloquy with him on his allegations.

The court sentenced Timali to concurrent sentences of twenty-five months

for the firearm felony, 364 days for the misdemeanor, and a mental health evaluation and treatment.

Timali appeals.

RIGHT TO COUNSEL AT PLEA WITHDRAWAL HEARING

Timali argues that he was denied his constitutional right to representation at the plea withdrawal hearing because the trial court failed to appoint substitute counsel. We disagree.

A defendant has a Sixth Amendment right to appointed counsel at all critical stages of a criminal prosecution.¹ A plea withdrawal hearing is one of the critical stages.² A trial court must allow a defendant to withdraw a guilty plea only if “necessary to correct a manifest injustice.”³ A “manifest injustice” may arise where “effective counsel was denied.”⁴ But a defendant must allege sufficient facts to establish a prima facie case of an ineffective assistance of counsel claim before the trial court must appoint substitute counsel because of an alleged conflict of interest.⁵

The trial court’s determination of whether an indigent defendant’s dissatisfaction with counsel justifies substitution of counsel will not be overturned

¹ State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996).

² Id.

³ CrR 4.2(f).

⁴ State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001).

⁵ State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684 (1987).

absent an abuse of discretion.⁶ The court must consider “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.”⁷ A trial court does not abuse its discretion where the defendant neither presents a valid reason to replace appointed counsel nor offers on appeal any material reason that would have been elicited had the court inquired further.⁸

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel’s performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.⁹ The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.¹ Failure on either prong defeats a claim of ineffective assistance of counsel.¹¹

Here, the trial court correctly determined that Timali failed to allege

⁶ State v. Rosborough, 62 Wn. App. 341, 346, 814 P.2d 679 (1991).

⁷ Id. (quoting Stark, 48 Wn. App. at 253).

⁸ State v. Sinclair, 46 Wn. App. 433, 436, 730 P.2d 742 (1986).

⁹ Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

¹ McFarland, 127 Wn.2d at 336.

¹¹ Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

sufficient facts to establish an ineffective assistance of counsel claim that would provide a basis for the withdrawal of his plea. We note that the trial judge hearing the motion to withdraw his plea was the same judge who conducted the plea hearing. We also note that Timali's appointed counsel represented him at both hearings.

Timali's claims of ineffectiveness failed to establish a prima facie case of deficient performance.

First, he contends that he was denied effective assistance of counsel because his attorney failed to inform him about the penalties he faced by pleading guilty. But Timali said he understood the maximum penalties for the charges at his plea hearing. He also said that he and his attorney had reviewed the plea agreement together and his attorney answered any questions he had about the plea forms. Thus, Timali failed to show that his attorney failed to inform him about the penalties he faced.

Second, Timali contends that he was denied effective assistance of counsel because his attorney proceeded in the case without obtaining all discoverable materials.

After jury selection but before opening statements, the State informed the court it had recently learned that law enforcement had video footage of the incident, which was recorded from a patrol car. The State immediately informed Timali's attorney of the video footage. After viewing the footage, Timali's attorney made a motion to dismiss for discovery violations or in the alternative to

suppress evidence or declare a mistrial. The court denied the motion to dismiss and the motion to suppress the evidence. But the court reserved on the motion for a mistrial and allowed a recess, so that Timali's attorney could conduct further investigation based on the contents of the video footage. There was no ruling on the mistrial motion due to Timali's plea. There is nothing here to show any deficient performance by counsel.

Third, Timali argues that he did not have counsel to address the impact of his medication when he entered his guilty plea. As the State points out, Timali failed to raise this claim before or during the plea withdrawal hearing, so the trial court was not able to consider this particular claim before denying his motion to withdraw his plea. In a letter sent to the court after the hearing, Timali alleged that he was not in the "appropriate state of mind due to [his] medication." But even if Timali had raised this claim during the hearing, the record does not support his claim. The record shows that Timali's attorney and the trial court were aware that Timali had a history of mental health issues and required daily medication. There is nothing in this record to show that his medication adversely affected him when he pleaded guilty to the reduced charges at the plea hearing. Thus, he fails to show any deficient performance by his counsel at that hearing.

Timali failed to allege sufficient facts to establish a prima facie case of deficient performance of counsel. Without this showing, it is unnecessary to address the prejudice prong of ineffective assistance of counsel.

Because Timali failed to establish a prima facie case for an ineffective assistance claim, there was no conflict of interest by his appointed attorney representing him at the plea hearing. Under these circumstances, the trial court was not required to appoint substitute counsel. Thus, there was no abuse of discretion in denying his motion to withdraw his plea.

Timali argues that State v. Harell¹² requires that this case be remanded. Harell is distinguishable.

In Harell, the defendant was denied the right to counsel outright because his attorney declined to assist him with his motion to withdraw his guilty plea, and his attorney testified as a witness for the State at the plea withdrawal hearing.¹³ Here, in contrast, Timali's attorney represented him at the hearing and did not testify against him.

Moreover, in Harell, the trial court was persuaded that the defendant had alleged sufficient facts to establish an ineffective assistance of counsel claim, which warranted a full evidentiary hearing.¹⁴ Here, the trial court conducted a hearing, but correctly concluded that Timali did not demonstrate a prima facie case for a claim of ineffective assistance of counsel. Thus, there was no conflict of interest and substitute counsel was not necessary.

Finally, the Harell court did not address the specificity required to be

¹² 80 Wn. App. 802, 911 P.2d 1034 (1996).

¹³ Id. at 805.

¹⁴ Id. at 804-05.

shown by one who seeks to withdraw a guilty plea based on alleged ineffectiveness of counsel.¹⁵ But in this case it is clear that Timali has not made out a prima facie case of ineffective assistance of counsel.

STATEMENT OF ADDITIONAL GROUNDS

Timali raises three issues in his statement of additional grounds. None are persuasive.

First, he argues that there was no factual basis to support the unlawful possession of a firearm in the second degree charge. Specifically, Timali contends that the State “never had any evidence of [him] having a gun, no finger prints.” We disagree.

CrR 4.2(d) provides that “[t]he court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.” Under CrR 4.2(d), the judge must determine that the defendant’s conduct constitutes the charged offense before accepting a plea.¹⁶ A factual basis exists if there is sufficient evidence from which a jury could conclude the defendant is guilty.¹⁷ “[T]he factual basis for the plea may come from any source the trial court finds reliable, and not just the admissions of defendant”¹⁸ But the source the trial court relies upon must be “made [a] part of the record.”¹⁹

¹⁵ Id.

¹⁶ In re Pers. Restraint of Crabtree, 141 Wn.2d 577, 585, 9 P.3d 814 (2000).

¹⁷ State v. Newton, 87 Wn.2d 363, 370, 552 P.2d 682 (1976).

¹⁸ Id.

Here, Timali entered into an Alford plea for unlawful possession of a firearm in the second degree. As part of his Alford plea, Timali agreed that the court could “review police reports and the certification for probable cause to form a factual basis to find [him] guilty of this crime.”² According to the certification, Hutton told law enforcement that she saw Timali throw a gun over a railing, and law enforcement found a gun in this location. This evidence was sufficient for a jury to conclude that Timali unlawfully possessed a firearm.

Second, Timali argues that his rights were violated because he was not charged within seventy-two hours of his arrest. We disagree.

Although Timali fails to cite authority for his argument, it appears that his argument is based on CrR 3.2.1(f). According to that rule, the State has seventy-two hours after arrest to file charges. But “[c]omputation of the 72 hour period shall not include any part of Saturdays, Sundays or holidays.”²¹

Here, Timali was arrested in the evening on Saturday, March 12, 2011. The State filed an information in the afternoon on Wednesday, March 16, 2011. Since Saturday and Sunday are not included in the computation of the seventy-two hour period, Timali fails in his burden to show a violation of CrR 3.2.1(f).

Third, Timali argues that he did not voluntarily enter into a guilty plea because the State was threatening to issue warrants to arrest Hutton and his

¹⁹ State v. Osborne, 102 Wn.2d 87, 96, 684 P.2d 683 (1984).

² Clerk’s Papers at 48.


²¹ CrR 3.2.1(f).

son. We disagree.

“Due process requires that a defendant’s guilty plea be knowing, voluntary, and intelligent.”²² A court determines whether these criteria are satisfied based on the totality of the circumstances.²³ CrR 4.2 provides procedural safeguards to ensure the defendant’s constitutional rights are protected. Under CrR 4.2(d), the court cannot accept a defendant’s guilty plea without first determining that the defendant has entered into the plea voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea.

When Timali moved to withdraw his guilty plea, he raised concerns about the court issuing material witness warrants for Hutton and his son. He stated, “[T]hat’s what forced me to plead guilty and that’s like a threat.” But when Timali originally entered his plea, the court conducted a colloquy with him on the record. He agreed that no one had “threatened [him] in any way or made any promises other than what the prosecutor [would] recommend.” The court thus properly found that Timali entered into the guilty plea “voluntarily and competently.”

We affirm the judgment and sentence.



²² In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004).

²³ State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).

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WE CONCUR:

Appelwick, J

Schiveller, J