IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LEONARD CARPENTER DeWITT Appellant.	**CONS. NOS.** 39125-2-II 39198-8-II UNPUBLISHED OPINION

Worswick, J. — Leonard DeWitt appeals from the denial of his motion to withdraw his pleas of guilty, arguing that the trial court erred by summarily denying his motion because he had not made it in writing and that he received ineffective assistance of counsel because his attorney did not advocate for his request to withdraw his pleas. DeWitt raises additional issues in a Statement of Additional Grounds (SAG). Finding no errors, we affirm.[1]

FACTS

On October 8, 2008, the State charged DeWitt with second degree identity theft and unlawful possession of a controlled substance. Two and a half months later, the State charged DeWitt with second degree robbery, second degree theft, and three counts of third degree assault.

On February 25, 2009, the State and DeWitt reached a plea agreement under which

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

DeWitt would enter *Alford*[2] pleas of guilty to second degree identity theft, second degree theft, third degree assault, and two counts of attempted third degree assault in return for an agreed sentencing recommendation for 30 days of confinement, with credit for time served, and a first time offender waiver. DeWitt signed Statements on Plea of Guilty attesting that the pleas had been explained to him and that his pleas were knowing and voluntary. After conducting a colloquy with DeWitt, the trial court accepted his pleas of guilty.

On March 26, 2009, DeWitt appeared before a different judge for sentencing. After the State made its recommendation that the court grant a first time offender waiver and impose a standard sentence, DeWitt's counsel responded, stating, "I am at a bit of a lack as to what to tell the Court this morning." 2 RP 4-8. Dewitt's counsel explained further, stating;

> About 10 after 9:00, Mr. DeWitt informed me that he no longer wished to proceed to sentencing and he wished to withdraw his guilty plea. I informed him that -- I advised him of his rights to appeal, and told him that I was going to be ready for sentencing, and I believe that the State would be as well.
>
> What I can tell you about Mr. DeWitt is that he is 28 years old, he has no prior criminal history whatsoever. He has a nine-year old son that he is the primary caretaker for, and I have spent a considerable amount of time with Mr. DeWitt discussing this case, and I have found him to be a fairly smart individual, a caring person, and that -- and I will tell the Court that he was, you know, fairly reluctant in the beginning to enter a plea to any of these charges, but considering the Prosecutor's offer and the global resolution of these cases, the risk of being convicted at trial of more serious offenses and doing more jail time, Mr. DeWitt agreed to accept the State's offer and plead guilty.
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> It is an agreed recommendation, Your Honor, and we are asking the Court to follow it. I do believe that Mr. DeWitt would like to allocute for himself, and I believe that his partner is here on his behalf, and would like to address the court.

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[2] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). *See also State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

The judge requested a statement from DeWitt, who explained, "I am basically asking to take back my plea. The last plea I took on advise [sic] of counsel, and due to the fear of either, you know, consistently hearing 45 months versus 30 days, and last time I was in court, I really didn't get what really happened." 2 RP 9. DeWitt continued, trying to explain the circumstances surrounding the incidents that gave rise to the charges. After his explanation, he stated, "And I just feel as if it shouldn't be 45 months, or 30 days." 2RP 12.

After noting that such is "the nature of the plea bargain," the judge again addressed DeWitt's counsel, noting the discrepancy between his recommendation and what DeWitt was requesting, but also noting that he had heard no legal basis from DeWitt for withdrawing the plea. 2 RP 12-13. The State argued that DeWitt had put forth no legal basis for a plea withdrawal and requested that the court proceed with the sentence. DeWitt's counsel noted that he had already told the court that he believed DeWitt "was doing this knowingly, voluntarily and intelligently." 2 RP 13. DeWitt requested that his partner be allowed to speak on his behalf, but the trial court refused his request because his partner was not a lawyer.

The judge decided to proceed to sentencing. DeWitt made a final statement, claiming that he didn't "understand any of this" and that he "didn't do any of these things." 2 RP 14-15. The judge stated that he had not heard a legal basis for withdrawal of DeWitt's pleas, a motion to terminate DeWitt's counsel or a motion to withdraw by DeWitt's counsel. He then sentenced DeWitt to 30 days of confinement with credit for time served.

ANALYSIS

DeWitt argues that the trial court erred in denying his motion to withdraw his pleas of guilty. This court reviews a trial court's denial of a motion to withdraw a guilty plea for an abuse of discretion. *State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141, *review denied*, 132 Wn.2d 1002 (1997). However a trial must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice, which may arise where a defendant received ineffective assistance of counsel, where he or she did not ratify the agreement, where the plea was involuntary, or where the State breached the plea agreement. CrR 4.2(f); *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

DeWitt contends that the trial court denied his motion because it was not in writing. But the record does not support that contention. The trial court denied his motion because DeWitt did not put forth a legal basis that would support the withdrawal of his plea. He does not demonstrate that withdrawal of his pleas was necessary to correct a manifest injustice because he ratified the plea agreement, because he indicated in writing and during the colloquy that his pleas were voluntary, and because the State adhered to the plea agreement.

DeWitt argues that he was effectively denied counsel for his motion to withdraw his plea. He relies on *State v. Harell*, 80 Wn. App. 802, 911 P.2d 1034 (1996), because his counsel did not advocate for the withdrawal of his pleas. His reliance is misplaced, however. Harell moved to withdraw his plea, claiming ineffective assistance of counsel leading up to the plea. *Harell*, 80 Wn. App. at 803. The trial court held a hearing on his motion, but his counsel did not advocate

for him and instead testified on behalf of the State. *Harell*, 80 Wn. App. at 803. The court held that Harell was denied his right to effective counsel at the hearing on the motion to withdraw his plea and vacated the judgment and sentence.

But DeWitt never presented a legal basis for withdrawing his pleas, so there was no basis for a hearing. DeWitt claimed he had not understood what was going on when he entered his guilty pleas. But that was in direct contradiction to his statements, both in writing and during the plea hearing colloquy. Counsel is not required to advocate for a position he knows to be false, and in fact, may inform the court when his client insists on doing so; such actions do not constitute either a conflict of interest or a breach of a duty of advocacy. *See State v. Fleck*, 49 Wn. App. 584, 586-87, 744 P.2d 628 (1987), *review denied*, 110 Wn.2d 1004 (1988). In this case, DeWitt's counsel did not advocate against DeWitt's interests. He only informed the court that DeWitt had understood the plea agreements when he entered his pleas. The federal cases on which DeWitt relies, *United States v. Gonzalez*, 113 F.3d 1026, 1028-29 (9th Cir. 1997), *cert. denied*, 526 U.S. 1057 (1999) (defendant claimed plea was coerced by counsel), *United States v. Wadsworth*, 830 F.2d 1500, 1510-11 (9th Cir. 1987) (defendant claimed counsel was incompetent), and *United States v. Ellison*, 798 F.2d 1102, 1107 (7th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987) (defendant claimed counsel gave him bad advice), are inapposite. DeWitt's claim of having been denied effective assistance of counsel fails.

In his SAG, he claims that separate allegations were handled together. But there is no evidence that any request to sever charges was made. Nor is there evidence that the lack of

severance had any effect on the trial court's decision to deny DeWitt's motion to withdraw his pleas. He also claims that video evidence was destroyed or withheld by the store in which one of the incidents arose. But again, there is no evidence that the absence of such video evidence had any effect on the trial court's decision to deny DeWitt's motion to withdraw his pleas.

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 pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

VanDeren, J.

Penoyar, C.J.