

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

State of Washington,

Respondent,

v.

ALVIN LEE KEYS,

Appellant.

No. 39200-3-II  
Consolidated with  
No. 39204-6-II

UNPUBLISHED OPINION

Van Deren, J. — Alvin Lee Keys appeals his Pierce County convictions of two counts of second degree burglary, two counts of second degree malicious mischief, and one count of harassment. He contends that trial counsel did not effectively represent him in his motion to withdraw his guilty plea and the trial court erred in failing to hold a hearing on the motion. We affirm.

**FACTS**

The convictions arose from two separate burglaries. The first generated charges of second degree burglary, second degree malicious mischief, and harassment, Cause No. 08-1-04127-3. The second resulted in charges of second degree burglary, second degree theft, and second degree malicious mischief, Cause No. 08-1-04541-4. The State eventually reached a plea

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agreement with Keys and it dropped the second degree theft charge.

At the plea hearing, the judge ascertained that Keys understood the elements of the crimes to which he was pleading and the possible sentences, and had read through the statements of defendant on plea of guilty. When the judge asked whether he understood everything, Keys expressed confusion about a possible forfeiture. After the judge addressed that issue, Keys said he had no other questions. The judge also pointed out the State's sentencing recommendations on the plea documents and advised Keys that she did not have to follow those recommendations. Keys indicated that he understood. He confirmed that he was making the plea freely and voluntarily, and that there were no promises other than the prosecutor's recommendation.

The court accepted his guilty pleas and proceeded to sentencing. The State recommended concurrent sentences resulting in 68 months of confinement, as provided in the plea agreements. The State also noted its opposition to a DOSA sentence, citing Keys's long criminal history, which included 33 offenses since 1982. Defense counsel argued for a DOSA sentence, stating that it was one of the first things he talked about with Keys and he agreed to pursue it, although he knew, and advised Keys, that the prosecutor would oppose it.

When the court asked Keys if he had anything to say before she sentenced him, he stated,

I'll just ask the Court to take into consideration that I -- before, I never admitted to having a drug problem, but -- I just ask that you consider that -- I just ask that you consider I need to get some help for my drug problems I've been having so that I can go home and be a father to my kids and a husband to my wife.

Report of Proceedings (RP) at 20

The Court declined the request for the DOSA alternative and sentenced Keys in accordance with the State's recommendation. Keys then asked to address the court. He said:

Your Honor, from Day 1, I was told that if I come in here and plead guilty and

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accept my responsibility that I will receive DOSSA. Now that I've come in here -- and the prosecutor has changed his mind on so many times. The last time I was in front of you, the prosecutor sent Mr. -- sent my attorney to the back to tell me that he would accept the deal for DOSSA and treatment. And now that I've come in front of you, he changes his mind. If he's not going to stick to what he had promised and for me to come in here and take the deal for a DOSSA, and now I'm finding out that I'm not even going to get DOSSA, I don't want this. This ain't what I came here for. I did come for some treatment, but I didn't come here to be lied to and to be tricked and to say that you will get this if you come in here and plead to this. This is exactly what they told me.

RP at 21-22. Defense counsel responded, reiterating what he had told the court in his prior argument for DOSA. The court pointed out that there was nothing in the plea documents about DOSA, but Keys continued to insist that he had agreed to plead guilty only because his attorney said DOSA was part of the deal. The prosecutor confirmed that throughout the lengthy negotiations, he had repeatedly told defense counsel that he would not agree to a DOSA sentence. He also noted that he knew from talking with defense counsel that Keys "makes representations that are false relating to our negotiations." RP at 25.

The court asked counsel whether they thought an evidentiary hearing was required and both said that it was not necessary. The court denied Keys's motion to withdraw his plea, and this appeal followed.

### ANALYSIS

The decision on a motion to withdraw a guilty plea rests within the trial court's discretion. *State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141 (1997). However, it must allow a defendant to withdraw his plea if necessary to correct a manifest injustice. The denial of effective assistance of counsel can constitute a manifest injustice. CrR 4.2(f); *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

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Keys argues that he was effectively denied counsel for his motion to withdraw his plea because his attorney did not advocate for the withdrawal and, in fact, argued against it. He relies on *State v. Harell*, 80 Wn. App. 802, 911 P.2d 1034 (1996) for the proposition that his counsel's conduct warrants reversal without the showing of prejudice.

His reliance is misplaced, and his argument fails for two reasons. First, in *Harell*, the court actually held a hearing on the motion to withdraw. 80 Wn. App. at 803. A defendant is entitled to counsel at such a hearing. *Harell*, 80 Wn. App. at 804. In this case, there was no hearing because Keys did not present sufficient evidence to warrant one. His bald assertions were clearly inconsistent with the record. As the court observed, none of the plea documents included a DOSA in the State's recommendation. Keys assured the court that he had read and discussed those documents with his attorney. He asked a question about one matter when given the opportunity, but did not question the absence of a DOSA recommendation. He made no objections when the prosecutor made his verbal recommendations to the court, indicating the State's opposition to DOSA. And he did not dispute his attorney's initial statement to the court that they had discussed the State's opposition to such a sentence. The court's summary decision was not an abuse of discretion. *See State v. Davis*, 125 Wn. App. 59, 68, 104 P.3d 11 (2004) (court is not required to waste valuable time on frivolous or unjustified motions).

Second, trial counsel did not act improperly. Counsel is not required to stand by while his client lies to the court. When counsel has adequate grounds to believe that his client is lying, he may so advise the court, and his actions do not constitute either a conflict of interest or a breach of the duty of advocacy. *See State v. Fleck*, 49 Wn. App. 584, 586-87, 744 P.2d 628 (1987).

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Affirmed.

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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Van Deren, J.

We concur:

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Armstrong, J.

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Worswick, A.C.J.