IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARTIN A. GOMEZ-VILLA, Appellant.	No. 39368-9-II (consolidated with 39803-6-II) UNPUBLISHED OPINION

Penoyar, J. — Martin A. Gomez-Villa appeals his convictions of first degree assault with a firearm enhancement[1] and drive-by shooting.[2] He claims the trial court abused its discretion by denying his CrR 4.2 motion to withdraw his guilty pleas to these charges because his original trial counsel denied him effective assistance of counsel and because the trial court did not hold an evidentiary hearing before ruling on his motion. In a consolidated personal restraint petition, Gomez-Villa also argues ineffective assistance of counsel, claiming that because his initial trial counsel worked for the Department of Assigned Counsel, a government funded agency, he was denied his constitutional right to independent counsel. We affirm his convictions and deny his personal restraint petition.

Facts

On October 21, 2007, Gomez-Villa and three other members of the Varro Surenos Lokotes (VLS) street gang, shot three homes and a vehicle in the 3500 block of East Howe Street in Tacoma. Police recovered .22 caliber live rounds and casings from Gomez-Villa's residence

[1] In violation of RCW 9A.36.011(1)(a); RCW 9.94A.530; and RCW 9.94A.533.

[2] In violation of RCW 9A.36.045(1).

matching those from the shooting. Gomez-Villa also told the police that he was present at the shooting as a driver. The State charged Gomez-Villa with four counts of first degree assault with firearm enhancements and four counts of drive-by shooting. On October 23, 2008, Gomez-Villa entered an *Alford* plea[3] to an amended information charging one count of first degree assault with a firearm enhancement and one count of drive-by shooting.

Before sentencing, Gomez-Villa hired new counsel and filed a motion to withdraw his guilty pleas. The trial court denied his motion to withdraw, explaining:

> I am considering what happened in the courtroom, at the time of the plea from the—what happened on the record, and I know that to have been a complete colloquy with the defendant, it was a knowing, intelligent and voluntary waiver for whatever reasons. And I'm not going to delve into reasons behind why somebody makes the decision they do. My role is to determine that they're going into it with their eyes open and I'm satisfied that that occurred. And for that reason, I am not going to take evidence and I am also not going to allow withdrawal of the plea.

Report of Proceedings (May 21, 2009) at 15. The sentencing court imposed a standard range 171-month sentence. Gomez-Villa appeals.

analysis

I. CrR 4.2(f) Motion to Withdraw

CrR 4.2(f), which governs the withdrawal of a guilty plea, provides in part:

> The 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" is "an injustice that is obvious, directly observable, overt, not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). In *Taylor*, the Supreme Court discussed four indicia, any one of which would independently establish manifest injustice:

[3] *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *State v. Newton*, 87 Wn.2d 363, 366, 552 P.2d 682 (1976).

(1) the denial of effective assistance of counsel, (2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea was not honored by the prosecution. CrR 4.2(f) places a "demanding standard" on the defendant. *Taylor*, 83 Wn.2d at 597. *See also State v. Watson*, 63 Wn. App. 854, 856-57, 822 P.2d 327 (1992). We review a trial court's decision denying a motion to withdraw for an abuse of discretion. *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006) (citing *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001)).

Gomez-Villa's claims fall under the first indicia. The test for effective assistance of counsel is whether, upon reviewing the entire record, the defendant received effective representation and a fair and impartial hearing. *State v. Ermert*, 94 Wn.2d 839, 849, 621 P.2d 121 (1980). *See State v. Butler*, 17 Wn. App. 666, 678, 564 P.2d 828 (1977) ("a serious dereliction of duty"); *State v. Perez*, 33 Wn. App. 258, 264, 654 P.2d 708 (1982) ("outside the range of competence required of attorneys representing criminal defendants"); *State v. Stephan*, 35 Wn. App. 889, 895, 671 P.2d 780 (1983) (counsel's erroneous reading of statute overcome by court's act of informing defendant of the correct interpretation).

"In a plea bargaining context, `effective assistance of counsel' merely requires that counsel `actually and substantially [assist] his client in deciding whether to plead guilty.'" *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)).

In his declaration in support of his motion to withdraw his guilty pleas, Gomez-Villa asserts that (1) communications with his attorney prior to the plea hearing were "virtually non-existent" (Clerk's Papers (CP) at 16); (2) he did not have an opportunity to review the discovery materials; (3) counsel repeatedly told him and his family that the charges would likely be dropped

or, at worst, reduced to a lesser offense; (4) he was shocked when counsel told him about the State's plea offer of 12 to 17 years in prison; (5) counsel advised him to take the plea bargain because he would lose at trial and receive a life sentence because a co-defendant had agreed to testify against him; (6) counsel asked his mother and pastor to convince him to take the plea offer; (7) he gave names and contact information to alibi witnesses but counsel never contacted any of them; (8) he asked counsel to obtain a surveillance video tape that would show he was at a store at the time of the shooting but counsel did not do so; and (9) "due to what I perceived as a total lack of investigation and preparation on the part of Mr. Mosley, and, at the 11th hour, given the 100% change in what he had been telling me would be the result of my case, I felt I had absolutely no alternative but to plead guilty as I did." CP at 18.

After the State filed its response to this motion, Gomez-Villa filed two declarations. The first, from Seong Kim, explained that she owned a small store in Tacoma, was a friend of Gomez-Villa, and that he was at her store helping her out when the shooting took place. She explained that she has video surveillance in her store but by the time Gomez-Villa's sister contacted her to obtain it, it had already been overwritten. She also explained that neither Gomez-Villa's attorney nor an investigator contacted her about her statement.

The second declaration is from Carmen Benson, Gomez-Villa's sister. In it, she explained that when she obtained Seong Kim's statement, she gave it to her brother's attorney. She further explained that Gomez-Villa told her that he had asked his attorney repeatedly to get the surveillance tape and when counsel did not, Gomez-Villa asked her to obtain it but by then it was no longer available.

Gomez-Villa argues that these declarations demonstrate the denial of his right to effective

assistance of counsel in his decision to plead guilty, demonstrate a manifest injustice, and the court's refusal to allow these witnesses to testify denied him his due process right to be heard.

Gomez-Villa does not dispute that the trial court engaged in extensive colloquy with him about his guilty pleas and that it only accepted his pleas when being satisfied that his decision to plead guilty was knowing, voluntary, and intelligent.[4] Thus, the only procedural issue is whether the trial court erred in not granting him an evidentiary hearing to consider evidence beyond that of what occurred at the plea hearing.

The record shows that the trial court read the motion to withdraw, the State's response,

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[4] Gomez-Villa claims that counsel's lack of preparation, misleading characterization of his case, misinformation about his potential sentence, sudden change in strategy, and blind-siding him into a plea bargain rendered his pleas involuntary and unknowing. This court has observed:

> When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. *In re Keene*, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); *In re Teems*, [28 Wn. App. 631, 626 P.2d 13 (1981)]; *State v. Ridgley*, 28 [Wn. App.] 351, 623 P.2d 717 (1981). When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.

Perez, 33 Wn. App. at 261-62; *State v. Hystad*, 36 Wn. App. 42, 45, 671 P.2d 793 (1983).

Here, the trial court had before it Gomez-Villa's nine-page Statement of Defendant on Plea of Guilty. The court questioned Gomez-Villas to determine if he understood an *Alford* plea. The court asked him if he understood the sentencing possibilities. The court questioned Gomez-Villa about the constitutional rights he was giving up. The court questioned Gomez-Villa about whether he understood the consequences of pleading guilty. And the court questioned Gomez-Villa about whether his pleas were freely given or the product of coercion. The court asked him to explain why he was making the plea. The court explained the elements of the crime and that the State would have to prove them beyond a reasonable doubt. *See In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 278, 744 P.2d 340 (1987). Finally, the court found that the plea was "knowingly, intelligently, and voluntarily" given. To overturn such a finding, we would need to consider the finding to be "manifestly erroneous". *State v. McLaughlin*, 59 Wn.2d 865, 870, 371 P.2d 55 (1962). There is no evidence justifying such a finding.

and the declarations. The trial court was also aware that Gomez-Villa had admitted being the driver, that another co-defendant had implicated him as well, and that the police had recovered the gun used in the shooting when searching Gomez-Villa's home. Gomez-Villa argues that Seong, Benson, and he should have testified, and the State should have put on rebuttal testimony (ostensibly from Gomez-Villa's initial attorney). But there were no factual issues to resolve and the court need not put these witnesses on the stand in order to determine if Gomez-Villa carried his burden of showing that his pleas were a manifest injustice. It could rely solely on the written documents. It properly exercised its discretion in doing so. The court did not violate Gomez-Villa's due process rights. *See State v. Kilgore,* 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002) (trial court need not take testimony in ruling on ER 404(b) evidence); *State v. McLaughlin*, 74 Wn.2d 301, 444 P.2d 699 (1968) (whether to hear testimony in pretrial suppression hearing is within trial court's discretion).

We are concerned, however, about the trial court's statement that it could not consider any evidence about the events preceding the plea hearing. As Gomez-Villa correctly argues, the only way a defendant can show that counsel did not meaningfully represent him is with evidence other than the plea colloquy. *See State v. Teshome* 122 Wn. App. 705, 94 P.3d 1004 (2004) (took evidence to decide if non-native English speaking defendant understood the plea proceedings and had adequate interpreter services); *State v. Williams*, 117 Wn. App. 390, 71 P.3d 686 (2003) (took evidence on whether defendant was subjected to undue threats or promises); *State v. Smith*, 74 Wn. App. 844, 875 P.2d 1249 (1994) (took evidence on whether counsel pressured defendant to accept pleas). In none of those cases was the inquiry limited to simply the colloquy itself. Nonetheless, our review of these documents does not demonstrate a manifest

injustice.

The State's plea offer reduced Gomez-Villa's sentence from a potential 886 months of incarceration to 171 months, reducing the number of potential convictions from 8 to 2. In light of Gomez-Villa's admission and the other incriminating evidence, it seems highly unlikely that any attorney would recommend going to trial rather than accepting the plea offer. While the declarations show that there was a potential alibi available, defense counsel would have had to adjudge the credibility of these witnesses in assessing the plea offer. In that one witness was a friend and the other a sibling and in that both witnesses' declarations contradict Gomez-Villa's admission to participating in the offense, it seems unlikely that counsel would have advised Gomez-Villa to go to trial rather than accepting a favorable plea offer. *In re Pers. Restraint of Clements*, 125 Wn. App. 634, 646, 106 P.3d 244 (2005) (petitioner must show counsel would have changed his recommendation as to the plea).

II. Personal Restraint Petition

In his personal restraint petition, which we consolidated with Gomez-Villa's direct appeal, Gomez-Villa makes similar ineffective assistance of counsel claims but adds an additional claim that his original trial counsel suffered a conflict of interest because counsel works for a publicly funded agency.[5] Gomez-Villa claims he is entitled to "independent counsel who is free of Washington State governmental controlling 'interest's' who is 'loyal' to Martin A. Gomez-Villa's United State's constitutional and legal 'right's/interest's." Personal Restraint Petition at ground

[5] The State has included two declarations in its response to the personal restraint petition. While we could not consider them in resolving the issues from the direct appeal, we note that they severely undercut Gomez-Villa's claims about Moseley's representation. Because Gomez-Villa fails to establish a manifest injustice, resolving the factual disputes these declarations create is unnecessary.

3.

Other than this broad claim, Gomez-Villa gives no support for his claim that counsel compromised his representation of Gomez-Villa because of mixed loyalties. "[I]f the defendant does not make a timely objection in the trial court, a conviction will stand unless the defendant can show that his lawyer had an actual conflict that adversely affected the lawyer's performance." *State v. Regan*, 143 Wn. App. 419, 426, 177 P.3d 783 (2008) (citing *Cuyler v. Sullivan,* 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Wood v. Georgia,* 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)). Gomez-Villa makes no such showing.

We affirm his convictions and deny the personal restraint petition.

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.

Penoyar, C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.