

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 28928-1-III

Respondent,

v.

Division Three

JAVIER CHAVEZ JR.,

Appellant.

PUBLISHED OPINION

Sweeney, J. — This appeal follows the trial court’s refusal to allow the defendant to withdraw a plea of guilty. His lawyer asked and was permitted to withdraw based on a potential conflict of interest. Substitute counsel then filed what he explicitly characterized as an “*Anders* brief”¹ and strongly suggested that his client’s position was frivolous. Substitute counsel did not develop any potential claim of conflict following the withdrawal of the original lawyer. We conclude that this was ineffective assistance of counsel and remand for further proceedings on the defendant’s motion to withdraw his plea of guilty.

¹ *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

FACTS

The State charged Javier Chavez Jr. with first degree assault by domestic violence and unlawful possession of a firearm, on September 18, 2009. Mr. Chavez was held in the Benton County jail on these charges. The court ordered Mr. Chavez not to contact his wife. She was a witness to the events that generated the charges. Mr. Chavez, nonetheless, called his wife four times from the jail. The State then amended the charging documents to include violations of the no-contact order and witness tampering.

Mr. Chavez was represented by attorney Larry Zeigler. Mr. Zeigler talked to Ms. Chavez and apparently told her that she was not required to appear in court unless she was properly served with a subpoena, and he apparently told her that hanging around the courthouse was not helping her husband. Mr. Chavez told his wife during one of his calls from jail to, “Lay low. Don’t go out. You know, avoid being served.” Report of Proceedings (RP) at 13. The jail recorded the conversation.

In pretrial proceedings, the lawyers expressed concern over a potential conflict of interest should Mr. Ziegler represent Mr. Chavez on the witness tampering count, based on some of the conversations between Mr. Chavez and his wife in which Ms. Chavez stated that it was Mr. Ziegler who had told her to “lay low.” RP at 104. Mr. Ziegler acknowledged that the tapes contained another statement by Ms. Chavez that Mr. Ziegler

told her, “You need to get out of here before somebody sees you.” RP at 107. Mr. Ziegler assured the trial court that Ms. Chavez misunderstood him. The prosecutor agreed that it was probably a misunderstanding. Mr. Ziegler, nonetheless, shared the prosecutor’s belief that there was a conflict. The prosecutor expressed concern that with Mr. Ziegler as a purported accomplice to the witness tampering claim, any plea bargain negotiated with Mr. Chavez would be vulnerable to later challenge on the basis of conflict of interest. The court initially took the withdrawal issue under advisement until it had more information on what testimony would be provided by Ms. Chavez who, while subject to an outstanding material witness warrant, had not been located.

On the day set for commencement of the trial, the prosecutor reported that Ms. Chavez had neither appeared nor been located. At that point, the trial court agreed that Mr. Ziegler could withdraw from representing Mr. Chavez on the witness tampering count. It severed that charge from the other charges. And it continued that matter for later trial. Next, he granted Mr. Ziegler’s motion to dismiss the assault and weapons charges on speedy trial grounds. At that point, Mr. Ziegler requested a short recess to confer with Mr. Chavez. Following the conference with his client, Mr. Ziegler handed up a statement of defendant on plea of guilty. The court went through the standard protocol for a guilty plea. A few days later, the court appointed Salvador Mendoza Jr. to represent

Mr. Chavez on the witness tampering charge.

After the plea but before sentencing, Mr. Chavez wanted to withdraw his plea of guilty. On the date set for sentencing, Mr. Zeigler reported to the judge that he had now filed a motion to withdraw from representing Mr. Chavez on the four counts of violation of the no-contact order. When asked about the basis for this withdrawal, he stated:

I received a call from the alleged victim in this case after we had tendered these pleas. Without going into the contents of the conversation, I'm simply at a point—I think you may remember just exactly where I was in this case when we first started it. I really—I'm going to be—I'm probably going to end up as a witness in this case, is what's going to happen, . . .

and

[h]e wants to withdraw the plea. I just don't feel comfortable ethically arguing a Motion to Withdraw based on all my discussions with the defendant and with the defendant's wife and with the defendant's mother. There's just too much on the plate here for me to handle all at once.

RP at 126. The court agreed, allowed Mr. Zeigler to withdraw, continued sentencing and hearing on the motion to withdraw the plea, and appointed Mr. Mendoza, the attorney who represented Mr. Chavez on the witness tampering charges, to represent him on his motion to withdraw the plea on the four counts of violation of the no-contact order.

Mr. Mendoza thereafter filed what was styled in the caption as a “Motion to Withdraw Guilty Plea” and at the bottom of each page as “Defendant's Anders Brief.” He characterized the motion as Mr. Chavez's alone and without merit, and submitted “for

consideration of possible errors made by his attorney pursuant to *Anders v. California*.” Clerk’s Papers (CP) at 36-37. Mr. Mendoza represented that he had reviewed the “police reports, statutes, and case law” and could not “find any assignment of error that would support a meritorious challenge to the entry of the guilty plea.” CP at 36. At the hearing on the motion to withdraw the guilty plea, counsel again referred to the motion as “really in the sense of an *Anders* brief.” RP at 132. The court denied the motion to withdraw the guilty plea and sentenced Mr. Chavez to 60 months of confinement.

Ten days later, attorney William McCool filed a “Motion and Declaration for Reconsideration” on Mr. Chavez’s behalf. CP at 65-67. This record does not show why Mr. McCool became involved since Mr. Mendoza had not withdrawn. Mr. Chavez’s declaration supported the motion and stated that at the time the no-contact order was entered Mr. Chavez was under the influence of drugs and did not understand the order’s contents. Mr. Chavez also states he did not receive a copy of the order until January 2010, after his calls from the jail were made.

A day later, Mr. Mendoza filed a “Motion and Memorandum to Dismiss”; he alleged that the jail’s confiscation of Mr. Chavez’s legal papers constituted a due process violation requiring dismissal of the charges against him. There is nothing in the record indicating whether the trial court ruled on either the motion for reconsideration or the

motion to dismiss.

DISCUSSION

Mr. Chavez contends that he was denied the right to counsel or, at least, effective assistance of counsel because his first lawyer had an apparent conflict of interest that made it impossible to give objective advice on whether or not to plead guilty. Indeed, his original lawyer asked to withdraw because of concerns over a conflict. And Mr. Chavez contends that Attorney Mendoza essentially abandoned him during proceedings subsequent to the plea by filing an *Anders* brief, despite the fact that there simply is no such procedure in a trial court because *Anders* briefs are strictly an appellate procedure.

The State responds that this record is devoid of any showing that Attorney Zeigler had a conflict or even if he did have a conflict that it influenced any advice he gave Mr. Chavez prior to his plea of guilty. And the State responds that Attorney Mendoza continued to represent Mr. Chavez throughout the post-plea proceedings; that is, he did not withdraw in keeping with the usual *Anders* procedure.

We review a claim of ineffective assistance of counsel de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). We begin with a strong presumption of effective representation. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). So the burden is on the defendant to show he was not effectively represented. *Id.*

The conflict of interest was not raised by Mr. Chavez below as the basis for the motion to withdraw the plea. But the parties agreed at oral argument that a conflict of interest on the part of defense counsel that constitutes ineffective assistance is an issue that can be raised for the first time on appeal.

Mr. Chavez must show that his lawyer's representation fell "below an objective standard of reasonableness" and the "deficient representation prejudiced the defendant," meaning the result in the superior court would have been different but for counsel's ineffective representation. *Id.* at 334-35. A conflict of interest may amount to ineffective assistance of counsel where it adversely affects a client's interests. *State v. Regan*, 143 Wn. App. 419, 426, 177 P.3d 783 (2008).

There are a couple of situations in which a lawyer's conflict of interest may require reversal without a showing of actual prejudice—either an actual conflict adversely affecting his lawyer's performance or a situation in which the court should know of a particular conflict but then fails to inquire. *White*, 80 Wn. App. at 411.

Here, the court was faced with representations by the lawyer who actually represented Mr. Chavez that the lawyer was concerned about a conflict of interest, an ethical conflict, and that lawyer wanted to withdraw from further representation, based on that concern. The court permitted Mr. Ziegler to withdraw but then did not inquire

further; nor did Mr. Mendoza develop a factual basis for the court to pass on any potential conflict. While there had been an earlier discussion by the prosecutor and Mr. Ziegler of the reasons he wished to withdraw from representing Mr. Chavez on the witness tampering count, there is little information and no fact finding on why Mr. Ziegler concluded he had a conflict representing Mr. Chavez on the withdrawal of the plea. The State argues there is no evidence in the record to support any conflict of interest. The State is correct and that is, at least, part of the problem here. All we do know is that in representing that he had a conflict, Mr. Ziegler, as defense counsel, was “in the best position to determine when a [disabling] conflict exists.” *Mickens v. Taylor*, 535 U.S. 162, 167, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) (describing the rationale of the automatic reversal rule of *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978), applied where trial court refuses, without inquiry, to accept defense counsel’s representation of a conflict).

Mr. Chavez’s motion to withdraw his plea was a critical stage of these proceedings and no one contends otherwise. *State v. Davis*, 125 Wn. App. 59, 63-64, 104 P.3d 11 (2004) (CrR 4.2(f) presentence motion to withdraw a guilty plea is a critical stage of a criminal proceeding for which a defendant has a constitutional right to be represented by counsel). He was therefore entitled to representation. Yet substitute counsel said he

could not find any assignment of error that would support a meritorious challenge and then went on to lay out Mr. Chavez's objections in a way that clearly distanced counsel from his client and suggested, at least as we read it, that his client's position was frivolous. Counsel concluded by submitting "this motion to the court for consideration of possible errors made by his attorney pursuant to *Anders v. California*." CP at 37.

Ultimately, we conclude that Mr. Chavez was not represented. Denial of counsel during a critical stage of the proceedings is presumptively prejudicial. *United States v. Cronin*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

A so-called *Anders* brief is an appellate procedure that is not appropriate for a trial court. Mr. Chavez represented in his opening brief that a search of published cases from all 50 states and the federal circuit courts reveals no case in which an *Anders* brief was filed at trial, Br. of Appellant at 15; the State has identified no such case in response, nor have we located one. The *Anders* procedure covers the appellate situation where an attorney feels an entire appeal is without merit and therefore wants to withdraw. See *Anders*, 386 U.S. at 744; *State v. Theobald*, 78 Wn.2d 184, 185, 470 P.2d 188 (1970). Applying this procedure to a discrete issue in a trial court is a misapplication, no matter how an attorney characterizes the motion. A criminal defense lawyer may decline to assert an issue that he or she considers frivolous. RPC 3.1 However, in light of the

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constitutional right of a criminal defendant to assistance of counsel, he or she may assert issues that would otherwise be prohibited under professional rules of conduct. RPC 3.1 cmt. 3. But here we have more than that. We conclude this was ineffective assistance. And, just as significantly, the concern raised here on appeal was over a suggested conflict of interest, which, of course, was not developed at all in the trial court.

We review the court's refusal to allow a defendant to withdraw a guilty plea for abuse of discretion. *State v. Olmsted*, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). We are unable to say one way or the other whether the judge here abused his discretion because there is no record on the essential complaint, the essential grounds, that counsel had a conflict of interest.

Unlike a court of review, the trial judge here was not required to develop Mr. Chavez's arguments. The attorney originally representing Mr. Chavez was concerned that he had a conflict and asked to withdraw but was required, nonetheless, to represent Mr. Chavez on his guilty plea. The lawyer who substituted filed what he styled as an "*Anders* brief," a procedure permitted on appeal but with no precedent or other authority for use in the trial court. The combination raises enough concern here in this court of review to warrant a second look at the motion to withdraw this guilty plea.

We therefore reverse and remand for further proceedings on Mr. Chavez's motion

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to withdraw his plea.

I CONCUR:

Sweeney, J.

Siddoway, J.