IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29170-7-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
ADRIAN BENTURA OZUNA,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Adrian Ozuna challenges his guilty pleas, primarily arguing that his counsel failed him. We agree with the trial court that he has not established a manifest necessity for withdrawing the pleas and affirm the convictions.

FACTS

In the midst of jury trial, the parties reached a plea agreement. Mr. Ozuna pleaded guilty to attempting to elude a pursuing police vehicle and entered *Alford*[1] pleas to charges of first degree robbery and second degree assault. The prosecutor dismissed a charge of first degree kidnapping as well as the firearm and deadly weapon enhancements

[1] *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970).

sought on the robbery, assault, and kidnapping counts.

Prior to sentencing, Mr. Ozuna filed a motion to withdraw his guilty plea, arguing that his counsel had provided ineffective assistance and had "pressured" him into entering the guilty pleas. He alleged counsel had not visited him in jail, did not provide him with discovery prior to trial, failed to call certain witnesses, and did not have his investigator seek missing witnesses until trial had commenced. Substitute counsel appeared to argue the motion.

Trial counsel and his investigator both testified at the hearing. At the conclusion of the hearing, Mr. Ozuna also accused trial counsel of illegal drug use during trial. The trial court denied the motion, finding that counsel had investigated the case and negotiated a good plea agreement that his client understood. The court then imposed the recommended low-end sentence of 129 months on the robbery charge and lesser concurrent terms on the other two counts.

Mr. Ozuna then timely appealed to this court.

ANALYSIS

Mr. Ozuna challenges the denial of his motion to withdraw the pleas and also contests the validity of those pleas. Each argument is addressed in turn.

Plea Withdrawal. The plea withdrawal challenge is predicated on a claim that trial

counsel provided ineffective assistance by not adequately preparing for trial and not timely investigating the case. Well settled standards govern review of this argument.

Effectiveness of counsel is judged by the two prong standard of *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). That test is whether or not (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id.* Effective assistance in the plea bargain context is judged by whether the attorney "actually and substantially assisted his client in deciding whether to plead guilty." *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901, *review denied*, 96 Wn.2d 1023 (1981). Failure to assist would amount to a violation of the first prong of *Strickland*. *In re Pers. Restraint of Peters*, 50 Wn. App. 702, 703-704, 750 P.2d 643 (1988). There is a strong presumption counsel was competent. *State v. Jamison*, 105 Wn. App. 572, 590, 20 P.3d 1010, *review denied*, 144 Wn.2d 1018 (2001).

If a defendant was able to show that defense counsel's behavior was defective, he would still have to show resulting prejudice. In the context of a guilty plea, this means that the defendant must show he would not have entered the guilty plea but for his counsel's ineffectiveness. *Peters*, 50 Wn. App. at 708.

The law governing guilty plea challenges is also well settled. CrR 4.2(f) permits a guilty plea to be withdrawn whenever "necessary to correct a manifest injustice." The

appropriate standard for applying this rule was set out in *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974), as follows:

> Under CrR 4.2(f), adopted by this court, the trial court shall allow a defendant to withdraw his plea of guilty whenever it appears that withdrawal is (1) *necessary* to correct a (2) *manifest injustice, i.e.*, an injustice that is obvious, directly observable, overt, not obscure. *Webster's Third New International Dictionary* (1966). Without question, this imposes upon the defendant a demanding standard.

The written statement form itself is sufficient to establish that the plea was voluntary. *State v. Lujan*, 38 Wn. App. 735, 737, 688 P.2d 548 (1984), *review denied*, 103 Wn.2d 1014 (1985).

A trial court's ruling on a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. Olmsted*, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Discretion also is abused when a court uses an incorrect legal standard in making a discretionary decision. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), *review denied*, 129 Wn.2d 1003 (1996).

The first complaint is that counsel did not meet with his client and prepare properly for trial. The short answer to that challenge is that the trial court believed the attorney and his investigator rather than Mr. Ozuna concerning the scope of pretrial preparation—counsel did prepare and did consult with his client. The performance at

trial also supports the trial court's conclusion. Counsel performed strongly enough that the prosecutor offered a plea bargain during trial. The trial court correctly concluded that this allegation did not support the ineffective assistance argument.

The remaining challenge is an argument that counsel did not acquire an investigator to begin looking for two potential witnesses until trial had started.[2] The prosecution had sought to subpoena two of the missing men long before trial, but was unable to do so. The defense likewise had no success. Mr. Ozuna likens this situation to *State v. Visitacion*, 55 Wn. App. 166, 173-174, 776 P.2d 986 (1989). There, based on their statements to the police, defense counsel did not contact two witnesses to a shooting who had identified his client as the shooter. The prosecution was unable to subpoena the two witnesses and they did not testify at trial. *Id*. at 167, 172. In a personal restraint petition, the defendant filed statements from the two witnesses that contradicted their statements to the police and supported the defendant's theory. *Id*. at 172. The court concluded that counsel had performed ineffectively by not contacting the two witnesses prior to trial. *Id*. at 174.

Mr. Ozuna argues that as in *Visitacion*, his counsel's failure to contact the two

[2] Mr. Ozuna also complains about the failure to call two other witnesses whom counsel did interview and decided they would not help the defense case. This tactical decision by counsel does not supply a basis for finding ineffective assistance. *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987).

missing witnesses in this case should likewise result in a determination that counsel was ineffective. Unlike *Visitacion*, Mr. Ozuna had not provided statements from the two missing witnesses that indicate they would have given favorable testimony. Nothing in the record suggests that they would have done so. There also is no basis in this record to believe that counsel could have found the two even if he had started looking for them earlier than he did. In short, unlike *Visitacion*, the two missing witnesses do not establish that counsel performed ineffectively here.

Mr. Ozuna has not established that his counsel failed to live up to the standards of the profession. To the contrary, the record establishes that counsel did help Mr. Ozuna decide whether or not to plead guilty. Counsel therefore performed effectively. *Cameron*, 30 Wn. App. at 232.

The claim of ineffective assistance of counsel does not establish a manifest necessity for withdrawing the guilty plea. The trial court did not abuse its discretion by denying the motion.

Validity of Plea. For largely the same reasons that he argued his pleas should have been withdrawn, Mr. Ozuna also argues that his pleas were involuntary. The record likewise does not support this argument.

"Due process requires that a guilty plea be voluntary, knowing, and intelligent."

State v. DeRosia, 124 Wn. App. 138, 149, 100 P.3d 331 (2004). Whether a plea is knowingly, intelligently and voluntarily made is determined by the totality of the circumstances. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). A defendant's signature on a plea statement is strong evidence of a plea's voluntariness, and a judge's on-record inquiry of a defendant who signs a plea bargain strengthens the inference of voluntariness. *Id.* at 642-643; *Lujan*, 38 Wn. App. at 737. The defendant must present some evidence of involuntariness beyond his self-serving allegations. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

Agreeing that he was properly advised of the elements of the offenses, Mr. Ozuna argues that his counsel did not provide him with adequate information to make a proper cost-benefit analysis before pleading guilty and that the matter was made worse when the prosecutor only gave two hours for Mr. Ozuna to decide whether to accept the offer or not. Once again, the record does not support Mr. Ozuna.

It is Mr. Ozuna's burden here to show counsel failed to provide enough information to make an intelligent choice. *Id*. That has not been done. The record does reflect that counsel and Mr. Ozuna conferred, and that Mr. Ozuna also conferred with his family. Mr. Ozuna then signed the plea form and engaged in a colloquy with the trial court. If Mr. Ozuna was not given sufficient information to make a decision, he should

have said something at that time. He did not. Instead, the record reflects only that he conferred with counsel and subsequently pleaded guilty. There is no basis for finding that counsel failed to help his client in making the decision to enter the guilty pleas.

Similarly, the allegation that two hours was insufficient time to weigh the offer does not establish coercion. The case was in the middle of trial and a jury was waiting. The prosecutor and the trial judge understandably could not afford to keep the matter an open question for long. Either the trial needed to continue or the pleas needed to enter so that the jury could be dismissed. Mr. Ozuna has not provided any authority suggesting that there is some minimal amount of time needed to weigh a plea offer. Indeed, since there is no constitutional right[3] to a plea bargain, it is difficult to conclude that there is some minimum amount of time necessary to thoughtfully consider a plea offer.

Mr. Ozuna has not established that his plea was involuntary.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

[3] *State v. Ford*, 125 Wn.2d 919, 923, 891 P.2d 712 (1995).

WE CONCUR:

_____ _____

Kulik, C.J. Sweeney, J.