No.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN WILSON,

Petitioner

v.

ROSEMARY NDOH, Warden,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# APPENDIX

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Appendix

**NOT FOR PUBLICATION**

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| JOHN K. WILSON,<br><br>Petitioner-Appellant,<br><br>v.<br><br>ROSEMARY NDOH, Warden,<br><br>Respondent-Appellee. | No. 18-17038<br><br>D.C. No.<br>3:17-cv-01040-RS<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Northern District of California
Richard G. Seeborg, District Judge, Presiding

Argued and Submitted December 11, 2020
San Francisco, California

Before: BOGGS,** M. SMITH, and BENNETT, Circuit Judges.

John Wilson appeals the district court's denial of his petition for a writ of habeas corpus. Wilson claims that his no-contest plea was not knowing, voluntary and intelligent. We have jurisdiction under 28 U.S.C. §§ 2253 and 1291. Because the parties know the facts, we do not revisit them except to provide necessary

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

context. We **AFFIRM** the decision of the district court.

Wilson was charged in California court with thirteen counts of lewd conduct upon a child under the age of fourteen (California Penal Code § 288(a)), including one count involving his daughter. On the date of the preliminary examination, Wilson's lawyer and prosecutors negotiated a plea deal. After negotiations, Wilson agreed to plead no contest to ten new counts of lewd conduct upon a child under the age of fourteen. Prosecutors agreed to dismiss one count involving a fifth victim. Wilson also agreed to exercise his right to trial on the charge involving his daughter through a bench trial, where he was later convicted. The plea deal allowed Wilson to avoid a potential sentence of life imprisonment. Ultimately, Wilson pleaded no contest to twenty-one total counts of lewd conduct upon a child under the age of fourteen and was sentenced to fifty years in prison.

Wilson later tried to withdraw his plea, claiming that his plea was involuntary because he was overwhelmed and emotionally upset at the time of his plea. The California Court of Appeal instructed the trial court to conduct a hearing to determine the voluntariness of his plea. *People v. Wilson*, No. H037600, 2012 WL 6641486, at *6 (Cal. Ct. App. Dec. 21, 2012) (*Wilson I*). After a hearing before a new judge (the original judge retired), the trial court on remand found Wilson's plea was voluntary. The ruling was upheld on appeal. *People v. Wilson*, H040185 (Cal. Ct. App. Nov. 17, 2014) (*Wilson II*). The California Supreme Court denied Wilson's

petition for review. Wilson then filed a full round of habeas petitions in California courts, which were denied. After his habeas petition was denied in federal district court, Wilson appeals to the Ninth Circuit.

1. Wilson argues that his habeas claim should be reviewed without the deference to state courts demanded by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Wilson argues the California Court of Appeal in *Wilson II* applied the wrong standard of review—"abuse of discretion" instead of de novo review. To overcome AEDPA deference, the state-court decision must have been "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the *Supreme Court* of the United States[.]" 28 U.S.C. § 2254(d)(1) (emphasis added). Wilson fails to cite any United States Supreme Court case mandating that state courts apply de novo review to the trial court's determination of the voluntariness of a plea. "[T]he phrase 'clearly established Federal law, as determined by [the Supreme] Court' refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 365 (2000). Wilson cites Ninth Circuit cases, but AEDPA does not permit reliance on such holdings. *Lopez v. Smith*, 574 U.S. 1, 7 (2014) ("Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court

has not announced."') (citation omitted); *see also White v. Woodall*, 572 U.S. 415, 420 n.2 (2014); *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013).

Further, the cases Wilson cites are not on point. *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995) and *United States v. Seng Chen Yong*, 926 F.3d 582 (9th Cir. 2019) did not involve de novo review of state cases, but federal cases. *See Sanchez*, 50 F.3d at 1451; *Seng Chen Yong*, 926 F.3d at 589. *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) is a pre-AEDPA case. In *Frantz v. Hazey*, 533 F.3d 724 (9th Cir. 2008), this court held that the state court ruled contrary to a specific Supreme Court case, *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984) (holding that pro se defendant's right to self-representation was not violated by the presence of a court-appointed standby counsel). *Frantz*, 533 F.3d at 734. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Supreme Court held that a Texas court violated the Supreme Court's clearly established law in *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986) (holding that executing insane prisoners violated the Eighth Amendment). *Panetti*, 551 U.S. at 948. We found no Supreme Court case that requires state courts to use de novo review instead of the abuse-of-discretion standard.

2. Under AEDPA's deferential standard, the state court's conclusion that Wilson's plea was knowing and voluntary was not unreasonable. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011). Wilson said at the plea hearing that he had enough

time to discuss the government's plea offer with his lawyer; that his decision to enter the plea was free and voluntary; and that he had no questions about his plea agreement. Wilson exercised his right to a trial on Count Seven (involving his daughter). That Wilson chose to plead to some counts and contest others shows he knew the strengths and weaknesses of each charge and made an informed decision to plead or not. The plea agreement was to his advantage. It resulted in the dismissal of the special allegations pursuant to California Penal Code section 667.61 (b) and (e), which allowed Wilson to avoid life imprisonment, as well as the dismissal of Count Nine, involving a fifth victim. The trial judge who took the plea did not believe Wilson was so disoriented, dazed, or confused that Wilson did not know what he was doing, contrary to the declaration of therapist Donald Wilcox, who had examined Wilson and attended the plea hearing. *See Miles v. Dorsey*, 61 F.3d 1459, 1470 (10th Cir. 1995) (rejecting claim that inevitable "deadlines, mental anguish, depression, and stress" associated with plea discussions made plea involuntary).

3. The state court's finding that Wilson's plea was knowing, voluntary and intelligent was not an unreasonable determination of the facts. Wilson contends that, under 28 U.S.C. § 2254(d)(2), we should review his claim without AEDPA deference because, "the trial court's failure [(on remand)] to conduct an evidentiary hearing[] with testimony and cross examination . . . was objectively unreasonable." We disagree.

That Wilson misspoke, out of nervousness or some other reason, stating that he was a college graduate, fails to help him here. The rest of his statements were accurate. Minor misstatements alone do not vitiate a plea. "[A] federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court [decision] was not merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004), *abrogated on other grounds by Murray v. Schiro*, 745 F.3d 984, 999–1000 (9th Cir. 2014); *see also* 28 U.S.C. § 2254(e)(1).[1]

4. This court has "held repeatedly that where a state court makes factual findings without an evidentiary hearing *or other opportunity for the petitioner to present evidence*, the fact-finding process itself is deficient and not entitled to deference." *Hurles v. Ryan*, 752 F.3d 768, 790 (9th Cir. 2014) (emphasis added) (citation omitted). Although Wilson did not have a full evidentiary hearing with live testimony and cross-examination, he had the opportunity to present evidence at the hearing on remand.

[1] "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

Wilson contends that "cross examination of the [retired plea-hearing] judge and of Dr. Wilcox was essential to expose the strengths and weaknesses of their opinions about Wilson's mental state." Even if true, that does not make the hearing "defective." Nor was the judge's decision to rely on Wilcox and Wilson's written declarations and the plea-hearing transcript, "not merely wrong, but *actually unreasonable*." *Taylor*, 366 F.3d at 999 (emphasis added). The hearing judge gave Wilson the opportunity to present evidence. First, the court accepted and examined Wilson and Wilcox's written declarations and compared them closely to the plea-hearing transcript. Second, the court asked Wilson's lawyer if he had "anything further at this time." Wilson's lawyer merely *offered* to call Wilcox as a witness "if [the court] needed further information from him." This was Wilson's opportunity to tell the court why Wilcox's testimony was necessary. Nothing in the record suggests that the trial court would have prevented Wilson from calling Wilcox if Wilson's lawyer stated a desire to do so. The onus was on Wilson's lawyer, not the judge, to advocate for Wilson. Judges are neither mind-readers nor spoon-feeders. Wilson's lawyer could have called Wilcox to testify but chose not to.

Wilson also argues that "because the [retired] plea hearing judge was not available to decide the issue on remand, the new judge assigned to the case had no independent basis to evaluate the credibility of Wilson's claim that his plea was invalid." We disagree. The independent basis to evaluate the credibility of Wilson's

claim was Wilcox's and Wilson's declarations. And, as discussed, Wilson had the opportunity to call witnesses but failed to. The trial court on remand did not rely solely on the plea transcript when it determined that Wilson's plea was voluntary. It compared its close reading of Wilcox's declaration to its close reading of the plea transcript. The court determined that Wilcox's declaration did not outweigh the other evidence showing that Wilson's plea was voluntary. That reasonable minds might disagree is not enough to show that the court's conclusion was objectively unreasonable.

5. Wilson was not entitled to a hearing with live evidence. The standard for an evidentiary hearing in federal proceedings subject to AEDPA is set out in 28 U.S.C. § 2254(e)(2): "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim . . . ."[2] Wilson "failed to develop the factual basis of the claim" in state courts. *Insyxiengmay v. Morgan*, 403 F.3d 657, 670 (9th Cir. 2005). *Fontaine v. United States*, 411 U.S. 213, 215 (1973) is not on point. In *Fontaine*, the district court denied any hearing on whether the defendant's plea was voluntary. *Id*. at 214.

[2] The statute will make an exception if the applicant shows that his claim relies on a new rule of constitutional law or on a factual predicate that could not have been previously discovered through the exercise of due diligence, or that the facts underlying the claim would show by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty. 28 U.S.C. § 2254(e)(2)(A) – (B). No exception applies here.

Here, Wilson was given a hearing to assess the voluntariness of his plea in state court. As discussed, that it did not include live testimony or cross-examination does not mean he did not have an "evidentiary hearing *or other opportunity . . . to present evidence*." *Hurles*, 752 F.3d at 790 (emphasis added).

The Supreme Court has interpreted "failure to develop" under § 2254(e)(2) as a lack of diligence or other fault attributable to the defendant or his lawyer. *Williams v. Taylor*, 529 U.S. 420, 432 (2000). "Diligence . . . depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id*. at 435. If he fails to develop the record, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other "stringent conditions" are met. *Ibid*. Here, Wilson could have, but failed to, call Wilcox as a witness. Therefore, Wilson was not entitled to a hearing with live evidence.

We AFFIRM the district court ruling.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN K. WILSON,

Petitioner,

v.

D. PARAMO,

Respondent.

Case No. 17-cv-01040-RS (PR)

**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**

## INTRODUCTION

Petitioner seeks federal habeas relief from his state convictions. For the reasons stated herein, the petition for such relief is DENIED.

## BACKGROUND

In sum, petitioner pleaded no contest in state court and then sought to withdraw his plea; he was unsuccessful in doing so and appealed; the appellate court remanded the case because the trial court had failed to resolve a factual conflict when it ruled on the motion to withdraw; on remand, the trial court held a hearing on the withdrawal motion, denied it, and imposed the same sentence petitioner was originally given. A more detailed recitation of the facts is set forth below.

### i. Entry of Plea

In July 2011, in the Santa Clara County Superior Court, petitioner, pursuant to a negotiated disposition, pleaded no contest to 21 counts of committing lewd and lascivious acts on children.[1] (Ans., Dkt. No. 13-5 (State Appellate Opinion, *Wilson II*) at 4.)[2] At the

[1] There were four victims, one girl (petitioner's daughter) and three boys (the child of a woman petitioner dated; a boy whose father lived in the same apartment complex as petitioner; and petitioner's "adopted step-son"). (Ans., Dkt. No. 13-5 (State Appellate Opinion) at 3-4.)

[2] This is "*Wilson II*," the opinion rendered in response to petitioner's appeal of the decision on remand.

plea hearing, petitioner admitted without hesitation or equivocation that he was "satisfied"; he had had sufficient time to speak with his lawyer regarding the allegations, burdens of proof, possible defenses, trial tactics, and the possible sentence; he had not been threatened or coerced into entering a plea; no one had made any promises to him about the outcome, other than those stated on the record; he was a native English speaker and a college graduate; he did not have trouble understanding the language or concepts used in court; and he had not recently taken any medicine, drugs or alcohol that had adversely affected his ability to understand the proceedings. (*Id.* at 4-5.) He also stated without hesitation or equivocation that by entering a plea, he understood he was waiving his trial rights and that the trial court would sentence him to 48 years; he understood that a no contest plea was the equivalent of pleading guilty and there would be additional consequences to his plea (having to register as a sex offender, providing a DNA sample to the state for inclusion in its database, paying fines, etc.). (*Id.* at 5.)

The court then formally announced the charges and asked for his plea, which was "No contest." (*Id.* at 5.) When petitioner was asked whether he had had an opportunity to review with counsel the criminal complaint and its factual allegations, he stated, "Yes, your Honor." (*Id.* at 5-6.) Defense counsel stated he was satisfied that petitioner understood his rights and had voluntarily given them up; the prosecutor and defense counsel stipulated to a factual basis for the pleas based on offense reports; the court again asked petitioner for his plea, to which he responded "No contest"; and then the court found a factual basis for the plea and that the plea was "free, voluntary, knowing, and intelligent." (*Id.* at 6.)

In August 2011, after a bench trial, petitioner was found guilty of an additional count of lewd and lascivious behavior (Count 7). (*Id.* at 6.) An additional 2 years was then added to petitioner's sentence because of this verdict.

In September 2011, petitioner filed a motion to withdraw his pleas on grounds that he "was not in a right state of mind to understand the gravity of his decision." (*Id.* at 6.)

He pointed to time pressures, the stress of the proceedings, emotional upset, and unclear thinking as factors. (*Id.* at 8-9.)

In support of his motion, petitioner appended the declaration of Dr. Donald Wilcox, who was then employed at the Elmwood Correctional Facility for Adult Custody Mental Health. (*Id.* at 5-6.) Wilcox first saw and evaluated petitioner in February 2011, had met with him weekly after that (about 25 times overall), and was present and had spoken to petitioner in court during the plea hearing. (*Id.* at 7-8.) On the basis of observing and speaking with petitioner before and after the plea hearing, Wilcox concluded that

> In my professional opinion, [petitioner] did not have the capacity needed to make a coherent and logical decision [at the time he entered his plea], given the stressor of the courtroom environment, the immediate time constraints, and the psychological trauma of facing 48 years in prison. These stressors were more than enough stimuli to create an acute stress reaction which impaired [petitioner] at that time.

(*Id.* at 8.) Wilcox observed that at the plea hearing petitioner "was physically flushing and he reported a rapid heartbeat." (*Id.*) He seemed "confused, detached, and his judgment was impaired," was "experiencing [an] acute stress reaction or shock," and overall appeared to be in a "daze." (*Id.*) The next day Wilcox spoke with petitioner, who "presented with a common symptom of acute stress reaction of partial amnesia when trying to remember our conversation in court and some other court proceedings at the time he entered his pleas." (*Id.*)

The withdrawal motion was heard and denied during the sentencing hearing. "[E]ven assuming that the factual allegations in the declarations are true . . . defendant has failed to make the standard of proof required for such a motion." (*Id.* at 9.) The plea hearing was "very thorough," based on "court's own recollection." (*Id.* at 9-10.) Petitioner was "fully engaged [in that hearing] and [was] given the opportunity on multiple occasions to state any hesitations, reservations or qualifications to his pleas." (*Id.* at 10.) The court found that "he did know what he was doing." (*Id.*)

The court imposed a sentence of 50 years. (*Id.*) Petitioner appealed.

**ii. First Appeal**

The appellate court remanded the case to address an unresolved factual conflict between (i) the declarations from Wilcox and petitioner, and (ii) the trial court's own recollection of the plea hearing. (*Id.* at 10.) "The evidence before the trial court was clearly contradictory regarding whether defendant's no contest pleas were voluntary." (*Id.*) The trial court, then, "was required to clearly resolve the factual conflict in order to properly rule on the motion." (*Id.*) Because it was unclear how the court resolved the conflict, the appellate court remanded the case to the superior court for a further hearing on petitioner's motion. (*Id.* at 10-11.)

**iii. On Remand**

The hearing on remand was held before a different judge, the prior judicial officer having retired. (*Id.* at 11.) At the hearing, the judge announced that he had reviewed the appellate opinion and the relevant transcripts of the plea hearing, trial, and the hearing on the motion to withdraw. (*Id.*) Defense counsel was asked whether he had anything to add. (*Id.*) He offered to call Wilcox to testify, if the court would allow for a continuance, but the court stated it could rule without hearing such testimony. (*Id.*) The prosecutor submitted the matter without any argument. (*Id.*)

The motion was denied. First, the trial court found Wilcox's "cursory declaration" unpersuasive. (*Id.* at 11-12.) The part based on Wilcox's interviews with petitioner "is a relatively minor part of his declaration." (*Id.* at 11.) At least half the declaration was merely a recitation of Wilcox's educational background and work experience. (*Id.*) The judge on remand gave great weight to the observations of the original trial judge. He "was certainly party to the observations in a more direct fashion than the observer capacity that Dr. Wilcox had during the time at which the change of plea was entered." (*Id.* at 11-12.)

Second, the "unusually sophisticated and complicated" nature of the plea negated any finding that there was undue influence, confusion, duress, or "misunderstanding of

rights and consequences":

> [T]he nature of this plea was unusually sophisticated and complicated. The defendant was facing a number of charges with significant consequences. He was represented by an extraordinarily competent and experienced counsel. [¶] This plea was not a plea to all charges, it was a hybrid plea entered into on the date for the preliminary examination where there was a partial change of plea to some of the charges to an amended complaint, with an agreement that there would be a court trial to other charges.

(*Id.* at 12.)

Third, after a thorough review of the plea hearing transcript, the trial court found that petitioner's responses at the plea hearing were clear, unequivocal, and reflected a full understanding of the nature and consequences of pleading no contest. (*Id.* at 12-13.) Based on those reasons, the trial court concluded that "the evidence in this case overwhelmingly supports the fact that the observations, and more to the point the conclusions based upon the observations of Dr. Wilcox were not legally sufficient to overcome the findings correctly made by the trial court." (*Id.* at 13-14.) The withdrawal motion was denied and the sentence of 50 years to life reimposed. (*Id.* at 14.) Petitioner appealed.

**iv. After Remand**

Petitioner's appeal was rejected. The state appellate court concluded that the court on remand "conscientiously followed the directions" of the appellate court, and that the superior court's factual determinations were supported by substantial evidence. (*Id.* at 18.)

This federal habeas petition followed petitioner's attempts to obtain relief in the state courts, which included another direct appeal to the state appellate and supreme courts; and two rounds of habeas petitions in the superior, appellate and supreme courts.

**v. Federal Claims**

After a defendant has entered a plea of guilty[3], the only challenges left open on federal habeas corpus review concern the voluntary and intelligent character of the plea and the adequacy of the advice of counsel. *Womack v. Del Papa*, 497 F.3d 998, 1002 (9th Cir. 2007) (quoting *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985)). Petitioner is limited to just those two claims in the instant suit. His other claims are not remediable on federal habeas review, and therefore were not recognized in the Order to Show Cause. (Dkt. No. 4.) This restriction applies to his claim that the court on remand "abused its discretion" in refusing to allow him to withdraw his plea. This does not state a federal constitutional claim. *Wagner v. Diaz*, No. 1:12-cv-01782-LJ0-JL, 2015 WL 3563026, at *14 (E.D. Cal. May 28, 2015) (the failure of a state court to exercise its discretion to grant such a motion does not give rise to a federal due process violation). Likewise, his other claims: that the court on remand (i) did not comply with state law governing remand; (ii) violated his state constitutional rights; (iii) failed to follow "the law of the case"; and (iv) violated his trial rights.

**STANDARD OF REVIEW**

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

[3] In California, the legal effect of a plea of nolo contendere to a felony is considered the same as that of a plea of guilty for all purposes. Cal. Pen. Code § 1016.

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

## DISCUSSION

After a defendant has entered a plea of guilty, the only challenges left open on federal habeas corpus review concern the voluntary and intelligent character of the plea and the adequacy of the advice of counsel. The petition presents no basis to support such a challenge on either of those bases on this record.

### i. Voluntary and Intelligent Character of Plea

Petitioner claims that his plea was not knowing and voluntary. This claim was rejected on appeal and on collateral review. (Ans., Dkt. No. 13-5 at 18; Dkt. No. 13-9 at 34.)

This claim is without merit. Petitioner stated under oath that his decision to enter a plea resulted from sufficiently long discussions with his trial counsel about the nature, elements of, defenses to, and consequences of pleading to, the charges. When asked

whether he understood the specifics of the charges and whether he understood that he was waiving his trial rights, petitioner clearly answered in the affirmative. Such assertions at the plea hearing carry great significance:

> [T]he representations of the defendant, his lawyer, and the prosecutor at [ ] a [plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

*Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (citations omitted).

Furthermore, the state court's rejection of petitioner's claim was reasonable. It found the trial court's recollection and description of the proceedings more reliable than Wilcox's; the unusually complicated nature of the plea and the hearing, and petitioner's clear acceptance of the terms of that complicated plea, indicated that that plea was voluntarily and intelligently made; and a thorough, independent review of the entire record also supported the conclusion that petitioner voluntarily and intelligently entered into the plea bargain.

The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

**ii. Assistance of Counsel**

Petitioner claims counsel rendered ineffective assistance by failing to **(a)** advise him that additional criminal charges would be added at the plea entry hearing; **(b)** advise him that his plea could be used in evidence against him in the subsequent trial on Count 7; **(c)** file a withdrawal motion at petitioner's request and interfered with petitioner's attempts to obtain new and effective counsel; **(d)** disclose that he had worked as a victim's advocate; and **(e)** call Dr. Wilcox to testify at the hearing on remand.

Where, as here, a petitioner is challenging his guilty plea on the basis of ineffective assistance, he must show (1) his "'counsel's representation fell below an objective standard of reasonableness,'" and (2) "'there is a reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Womack*, 497 F.3d at 1002 (quoting *Hill*, 474 U.S. at 56-57).

Under the first prong of *Womack*, a petitioner must establish that defense counsel's performance fell below an "objective standard of reasonableness" under prevailing professional norms, *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), "not whether it deviated from best practices or most common custom," *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citing *Strickland*, 466 U.S. at 690). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466 U.S. at 689). Overall, "the standard for judging counsel's representation is a most deferential one." *Id.* at 105.

As to the second *Womack* prong, a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Richter*, 562 U.S. at 111. "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112 (citing *Strickland*, 466 U.S. at 693).

**a. Addition of Criminal Counts**

Petitioner alleges defense counsel rendered ineffective assistance when he failed to inform him that his plea would include 10 additional criminal counts. This claim was rejected on state habeas review because "he does not show how this would have changed his mind about pleading guilty." (Ans., Dkt. No. 13-7 (State Superior Court Denial of Habeas Petition) at 31.)

Petitioner's claim is flatly contradicted by the record. The 10 counts were added in open court upon a motion by the prosecutor made during the plea entry hearing. Defense counsel waived formal arraignment. Petitioner said "Yes, your Honor" when asked

whether "he had had an opportunity to review with counsel 'the contents of the first amended complaint including the details regarding the time frames and alleged victims.'" (Ans., Dkt. No. 13-5 at 6.)

Also, petitioner fails to show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty *and would have insisted on going to trial*. *Womack*, 497 F.3d at 1002 (emphasis added). He does not say he would have proceeded to trial; he does not discuss or challenge the strength of the prosecution's case; nor has he mentioned any defenses or trial strategies he would have used. Only a strong showing would support the granting of habeas relief. But here, petitioner has made no showing at all.

The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

**b. Plea Bargain As Evidence in Subsequent Trial**

Petitioner claims defense counsel rendered ineffective assistance when he failed to inform him that the plea agreement could be used as evidence at his trial on count 7 and that he would likely have to testify at the trial on that charge. This claim was rejected by the state court. (Ans., Dkt. No. 13-7 at 31.)

This claim is unavailing. Even if counsel failed to inform petitioner that his plea would be used at trial, and even if such conduct constitutes deficient performance, petitioner still has not shown prejudice. That is, he has not shown that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Again, he does not say he would have proceeded to trial; he does not discuss or challenge the strength of the prosecution's case; nor has he mentioned any defenses or trial strategies he would have used. Only a strong showing would support the granting of habeas relief. But here, petitioner has made no showing at all.

The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

**c. Alleged Failure to File Withdrawal Motion**

Petitioner also claims that defense counsel rendered ineffective assistance by (i) failing to file, before the trial on count 7, a motion to withdraw the pleas; (ii) by blocking attempts to consult with new counsel; and (iii) discouraging attorneys from meeting with petitioner. These claims were rejected by the state courts. (Ans., Dkt. No. 13-7 at 32.)

These claims lack merit. First, counsel's alleged post-plea failures cannot be the basis to challenge the lawfulness of his plea — they occurred, if at all, after the plea was entered. Therefore, such acts could not have influenced counsel's advice on whether to enter a plea of no contest.

Second, his allegations regarding counsel are conclusory, and fail to show prejudice. Petitioner has not shown whether an earlier filed motion would have been successful. As the record shows, his motion was considered twice and was twice rejected. He also has not shown even a possibility that another attorney would have filed a motion that would have been successful.

The state court's rejection of these claims was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

**d. Disclosure of Alleged Conflict**

Petitioner claims that counsel provided ineffective assistance when he failed to disclose that his firm also does work as "Victim's Advocates." (Pet., Dkt. No. 1 at 33.) According to petitioner, when he asked counsel what his role as such an advocate was, counsel replied, "I get the accused as much prison time as possible." (*Id.*) Petitioner also alleges that counsel said at some unstated time, "I read the complaint against you and if

you did what your [*sic*] accused of, you deserve 50 years in prison."[4] (*Id.* at 40.) Petitioner's claim was rejected by the state courts. (Ans., Dkt. No. 13-7 at 31.)

This claim is unavailing. It is not enough to show that there might have been a conflict. Petitioner must show that the alleged conflict actually and adversely affected counsel's representation and the ways in which the performance was affected. Speculation is insufficient. "[W]e think 'an actual conflict of interest' meant precisely a conflict *that affected counsel's performance* — as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

Counsel's alleged statement about his work as a victim's advocate is unavailing. Petitioner must show exactly how the alleged conflict or bias affected counsel's performance. It is not sufficient to point to a possible conflict, and then assume the conflict necessarily negatively affected counsel's performance. A recent federal appellate case is instructive here. In *Ellis v. Harrison*, 891 F.3d 1160, 1166 (9th Cir. 2018), a state prisoner petitioned for federal habeas relief on Sixth Amendment grounds, based on his

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[4] Petitioner appends to his petition a declaration by another attorney, Jill Stallings. In that declaration, Stallings avers that on the day the plea was entered, she heard trial counsel mention that a plea deal had been reached. (Pet., Dkt. No. 1-1 at 9.) She also avers she heard him say that "if that had gone to court I would have lost my shirt." (*Id.*) She interpreted this statement to mean that trial counsel "on the day of the plea had a very strong financial interest to prejudice [petitioner] to take a plea instead of going to trial." (*Id.*) Stallings's declaration is unavailing. First, it was rejected by the state courts, a rejection to which this Court owes great deference. Second, the Court does not agree with Stallings's interpretation. Counsel's alleged statement expressed relief that a costly trial was avoided. That is all that one can reasonably infer from the statement. To infer from his words that counsel "prejudiced" petitioner is a jaundiced gloss unsupported by the statement itself. It was not an indication that he would not have proceeded to trial, or that he would not have defended his client ably. If anything, it indicates that he would have gone to trial — to his cost. Furthermore, counsel fails to detail what specific acts counsel took that actually prejudiced petitioner. Again, it is petitioner's burden to show that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

Stallings includes emails she exchanged with petitioner's counsel and asserts that the emails support her declaration. The emails do nothing of the kind. Money is mentioned only once, and then by Stallings herself. "I was just thinking . . . maybe you should tell [petitioner] how much money (if any) he will have before going to State, as that might help him weigh his options." (*Id.* at 13.)

trial attorney's alleged racism. Relief was denied. The petitioner in *Ellis* had not shown that counsel performed inadequately *because* of his racism, nor identified any acts that fell below an objective standard of reasonableness.

Counsel's alleged statement about what punishment petitioner deserved is also insufficient as a basis for relief. First, the state court rejected such evidence, a decision to which this Court owes deference. Petitioner's declaration, which lacks any outside support, is not sufficient to overcome the presumption of correctness this Court must accord factual determinations by the state court. Second, counsel's alleged statement was not an indication that his representation of petitioner's interests would be affected, nor did counsel say he in fact believed petitioner had committed such acts.

Furthermore, petitioner has not shown prejudice. He has not shown that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Again, he does not say he would have proceeded to trial; he does not discuss or challenge the strength of the prosecution's case; nor has he mentioned any defenses or trial strategies he would have used. He says only that he would not have hired this person as trial counsel. (Pet., Dkt. No. 1 at 34.)

The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

**e. Calling Wilcox to Testify on Remand**

Petitioner also claims counsel rendered ineffective assistance when he failed to call Wilcox to testify at the hearing on remand. He offers as support a declaration from the attorney who represented petitioner on his first appeal. (Pet., Dkt. No. 1-2 at 1-2.) This claim was rejected by the state courts. (Ans., Dkt. No. 13-9 at 34.)

This claim is DENIED. Petitioner's allegations and the declaration are conclusory. Both speculate that it would have helped had Wilcox testified on remand. Neither, however, states with any specificity how Wilcox's testimony would have helped. The state superior court likewise found the declarations lacking, in its order denying

petitioner's state habeas petition. (*Id.* at 34-35.) That court also pointed out that counsel offered to produce Wilcox, if the court wanted to hear from him and would agree to a continuance. (*Id.* at 34.) The trial court stated it "did not believe that it need[ed] to call as a witness Dr. Wilcox, nor have him make any further statement at this time." (*Id.*)

The state court's rejection of this claim was reasonable and therefore is entitled to AEDPA deference. This claim is DENIED.

**CONCLUSION**

The state court's denial of petitioner's claims did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, the petition is DENIED.

A certificate of appealability will not issue. Reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from the Ninth Circuit Court of Appeals.

The Clerk shall enter judgment in favor of respondent, and close the file.

**IT IS SO ORDERED.**

**Dated:** August 8, 2018

RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re JOHN KEITH WILSON on Habeas Corpus.

H043988
Santa Clara County No. B1050331

Court of Appeal, Sixth Appellate District
FILED
OCT 18 2016
DANIEL P. POTTER, Clerk
By _____ DEPUTY

BY THE COURT:

The petition for writ of habeas corpus is denied.

(Elia, Acting P.J.; Bamattre-Manoukian, J.; and Mihara, J. participated in this decision.)

Date: OCT 18 2016

ELIA, J.
_____ Acting P.J.

ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re JOHN KEITH WILSON on Habeas Corpus.

H043032
Santa Clara County No. B1050331

Court of Appeal, Sixth Appellate District
FILED
FEB 4 – 2016
DANIEL P. POTTER, Clerk
By _____ DEPUTY

BY THE COURT:

The petition for writ of habeas corpus is denied.

(Premo, Acting P.J.; Márquez, J.; and Grover, J. participated in this decision.)

Date: FEB 4 - 2016

_____ Acting P.J.

COPY

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN KEITH WILSON,

Defendant and Appellant.

H040185
(Santa Clara County
Super. Ct. No. B1050331)



## I. INTRODUCTION

Defendant John Keith Wilson pleaded no contest to 21 counts of lewd conduct upon a child under 14 (Pen. Code, § 288, subd. (a)).[1] Following a court trial, defendant was found guilty of one additional count of lewd conduct upon a child under 14. After the court denied defendant's motion to withdraw his pleas, the court sentenced him to 50 years in prison. On December 21, 2012, this court reversed the judgment and remanded the matter for further hearing on defendant's motion because the trial court did not clearly resolve the factual conflict of whether defendant's pleas were voluntary. (*People v. Wilson* (Dec. 21, 2012, H037600) [nonpub. opn.] (*Wilson I*).)[2]

[1] All further unspecified statutory references are to the Penal Code.

[2] By order of December 6, 2013, we have taken judicial notice of the record on appeal in *Wilson I*, *supra*, No. H037600.

Following issuance of the remittitur, a different judge reviewed the record and held a further hearing, as the original judge had since retired. The court on remand denied the motion.

In this second appeal, defendant contends that the trial court on remand abused its discretion in denying the motion because the court did not follow the law of the case and substantial evidence does not support the court's determination. Defendant further contends that the denial of the motion violated his state and federal constitutional rights.

We determine that the denial of the motion on remand was not an abuse of discretion and that defendant's constitutional rights were not violated. Therefore, we will affirm the judgment.

## II. BACKGROUND

Defendant's daughter was 14 years old at the time of trial. Her mother and defendant had divorced when she was in the third grade. Thereafter, defendant's daughter sometimes stayed with defendant, and at times she slept in his bed. On one occasion, when she was 12 years old and in the sixth grade, defendant moved his hand back and forth on her vaginal area over her pajamas. The touching also occurred on other occasions.

Regarding defendant's other offenses,[3] the police department received a tip that defendant was sexually molesting a 13-year-old boy. The boy, whose mother had dated defendant, reported that defendant had masturbated him beginning approximately two years prior, and that it occurred multiple times. After the first amended complaint was filed in this case, the boy further reported that defendant had used dildos on him, showed him child pornography, orally copulated him, and placed defendant's penis in the boy's anus. While the police were investigating the allegations, the police discovered additional victims of defendant. A 13-year-old boy, whose father lived in the same

[3] This summary of defendant's other offenses is taken from the probation report.

apartment complex as defendant, reported that defendant had given him (the boy) a massage in or near his groin area and under his shorts. Another victim, defendant's "adopted step-son," reported that he was sexually abused by defendant for more than eight years, beginning at the age of 12 or 13. The stepson, who was an adult at the time of his report to the police, indicated that the abuse included fondling and oral copulation. Defendant also showed him child and adult pornography.

### A. *The Trial Court Proceedings Before the First Appeal*

#### 1. The no contest pleas to most counts

Defendant was charged by first amended complaint filed February 14, 2011, with 13 counts of lewd conduct upon a child under 14 (§ 288, subd. (a); counts 1-13). It was further alleged as to counts 1 through 9 that the offenses were committed against more than one victim (§ 667.61, subds. (b) & (e)).

On July 14, 2011, the date set for the preliminary examination, the trial court indicated that there had been "substantial discussions" in the case that day. The following proposed disposition was set forth on the record. Ten counts of lewd conduct upon a child under 14 (§ 288, subd. (a); counts 14-23) would be added to the complaint. Defendant would plead no contest to counts 1 through 6, 8, and 10 through 23, with the understanding that count 9 would be dismissed, that all section 667.61 allegations would be dismissed, and that he would receive a determinate term of 48 years for the counts to which he pleaded no contest. Defendant would also waive his right to a jury trial on count 7 with the understanding that a court trial would be conducted regarding that count. The court subsequently granted the prosecution's motion to add ten counts.

The court asked defendant whether he was "satisfied" that he had "sufficient time to speak" with his counsel regarding the allegations in the case, the proof required of the prosecution at the preliminary examination and at trial, possible defenses and tactics, and the possible range of sentences. Defendant responded, "Yes, your Honor." The court

then asked defendant whether his decision to resolve the case that day was "a free and voluntary decision." Defendant again responded, "Yes, your Honor."

By answering the court's further questions with "No" twice and "Yes, sir" and "No, sir," defendant confirmed that he had not been threatened to enter a plea that day, that no one had made any promises to him about the outcome of the case other than as stated on the record, that he was a native English speaker and college graduate, and that he did not have trouble understanding the language or concepts used in court. When asked whether he had recently taken any medicine, drugs, or alcohol that adversely affected his ability to understand the proceedings, defendant responded, "No."

The court then explained to defendant the preliminary examination and trial rights he would be giving up by entering his plea. Defendant indicated that he understood and gave up those rights. The court also explained that a plea of no contest was the same as a plea of guilty. Regarding sentencing, the court stated that "all victims have a right to appear at sentencing and be heard to make a victim impact statement." The court further indicated that defendant would be sentenced to the agreed upon term of 48 years, unless something new was brought to the court's attention leading it to believe that the sentence was unconscionable. The court also explained the consequences of a no contest plea by defendant, including a lifetime ban on possession of firearms and ammunition, submission of samples for a DNA database, lifetime registration as a sex offender, being required to pay restitution, fines, and fees, and having prior convictions that qualified as strikes with respect to a future felony offense. The court eventually asked defendant whether he had any questions, and defendant responded, "No, sir, your honor."

Immediately thereafter, the trial court stated to defendant, "you're charged as previously stated in counts 1 through 23 and excepting count 9 which is taken under submission for dismissal at the time of sentencing and count 7 which will be set for court trial, how do you wish to plead to those enumerated charges?" Defendant responded, "No contest." The court then asked defendant whether he had had an opportunity to

review with counsel "the contents of the first amended complaint including the details regarding the time frames and alleged victims." Defendant responded, "Yes, your Honor." Thereafter, defense counsel indicated to the court that he was "satisfied" that defendant understood his rights and was "freely and voluntarily giving them up," that he was "satisfied" that defendant was "conversant with the particulars of the allegations" as to each count, and that no further voir dire was necessary. The prosecutor and defense counsel then stipulated to a factual basis for the pleas based on various "offense reports." The court then again asked defendant how he wished to plead to "all these counts except for Count 7 and 9," and defendant again stated, "No contest." The court found a factual basis and stated that "the plea is free, voluntary, knowing and intelligent."

On August 10, 2011, an information that included the 10 additional counts of lewd conduct upon a child under 14 (counts 14-23), and that reflected the removal of the section 667.61 allegations, was filed.

**2. The court trial on one count**

On August 19, 2011, a court trial was held regarding count 7. Defendant's 14-year-old daughter testified at trial. The court ultimately found defendant guilty on count 7 (lewd conduct upon a child under 14; § 288, subd. (a)).

**3. The motion to withdraw pleas**

In early September 2011, defendant filed a motion to withdraw his pleas.[4] The sole basis articulated in the motion was that defendant "was not in a right state of mind to understand the gravity of his decision" at the time he entered the pleas. Declarations by a therapist and defendant were submitted in support of the motion.

[4] The copy of the motion in the record is not file-stamped. At a September 7, 2011 hearing, the trial court indicated that the motion had been hand-delivered to the court that day, and faxed to the court the day prior. Defendant's declaration is dated September 7, 2011, and the proof of service for the motion indicates that it was personally delivered to the prosecutor on September 7, 2011.

The therapist, Donald A. Wilcox, stated in his declaration, dated September 6, 2011, that he was a licensed marriage and family therapist with a master's degree in educational psychology and a doctorate in education. He had worked "in this field for 23 years in a variety of settings," and his primary areas of expertise were substance dependence and attention deficit disorder. Dr. Wilcox had been employed by Santa Clara County since 1998, and he currently worked at Elmwood Correctional Facility for Adult Custody Mental Health on the "crisis team." As part of the crisis team, he saw inmates with a variety of mental health issues, including a "fair amount of inmates with acute stress reaction or shock." According to Dr. Wilcox, "[m]ental and emotional shocks are not uncommon in inmates, as in the death of a loved one, getting attacked by another inmate, or the prospect and/or reality of receiving a lengthy prison sentence."

Dr. Wilcox explained that on February 3, 2011, the Department of Corrections had requested that "Mental Health" evaluate defendant due to concerns about him possibly harming himself. Dr. Wilcox evaluated defendant for more than one hour. He determined that defendant should be placed on "15-minute checks" for the next 24 to 72 hours, given the nature of the charges against him, the fact that it was his first arrest, and the written expressions of hopelessness found in his cell. Dr. Wilcox was assigned to see defendant on a weekly basis, and had since seen him more than 25 times.

Dr. Wilcox indicated in his declaration that he was in court on the date set for defendant's preliminary examination. He was allowed to speak with defendant "at length while he was in the jury box contemplating a proposed disposition in his case." According to Dr. Wilcox, the disposition of defendant's case "appeared to be somewhat of a moving target, changing both in the number of counts he was to plead guilty to and the number of years he would receive as a sentence." Dr. Wilcox further stated: "In my professional opinion, [defendant] was experiencing acute stress reaction or shock during this time that I spoke with him and during the time that he was contemplating the proposed disposition. Pleading guilty to the charges proposed and receiving such a

lengthy prison sentence (in excess of 40 years) caused [defendant] to appear in the courtroom with symptoms of disorientation, poor attention span, and at time [*sic*] he was unable to understand or respond to present stimuli. This may be referred to as a daze." After referring to defendant's no contest pleas and his agreement to 48 years in prison, Dr. Wilcox stated: "In the courtroom at that time, [defendant] was physically flushing and he reported a rapid heartbeat. I noted that he was confused, detached and his judgment was impaired as I spoke with him then." Defendant indicated to Dr. Wilcox that he did not have enough time to make such an important decision.

Dr. Wilcox stated that he also spoke to defendant the next day at Elmwood Correctional Facility. According to Dr. Wilcox, defendant "presented with a common symptom of acute stress reaction of partial amnesia when trying to remember our conversation in court and some other court proceedings at the time he entered his pleas." Dr. Wilcox concluded: "In my professional opinion, [defendant] did not have the capacity needed to make a coherent and logical decision, given the stressor of the courtroom environment, the immediate time constraints, and the psychological trauma of facing 48 years in prison. These stressors were more than enough stimuli to create an acute stress reaction which impaired [defendant] at that time."

In a declaration signed on September 7, 2011, defendant stated that the preliminary examination was scheduled for July 14, 2011. He had not received "an offer of a term of years before that date, and had been informed of many new developments in terms of discovery in the two days preceding that court date." While he was in court on July 14, his counsel attempted to "negotiate a settlement of a term of years as opposed to the life sentence which was what [he] would have received had [he] been convicted of all the charges." He was "overwhelmed by the need to make a decision in such a short period of time" and asked to speak with Dr. Wilcox. He was allowed to speak privately with Dr. Wilcox for "perhaps 15 minutes." According to defendant: "That whole morning and afternoon was such a blur to me, and I was confused and in shock at the

number of years I was asked to accept, and I was not able to think clearly and to comprehend what I was doing at the time. [¶] . . . Due to the fact that I did not have enough time to make this life-changing decision, and due to the fact that I was also overcome with emotion about seeing people in the courtroom that I hadn't seen for a long time, including my brother, and due to the fact that I was not thinking clearly, I made a decision to accept the offer which I now believe was an erroneous decision, and I ask the court to allow me to withdraw my pleas and go ahead with the preliminary hearing in this case."

**4. The hearing on the motion and sentencing**

On September 7, 2011, the date set for sentencing, a hearing was held on defendant's motion to withdraw his no contest pleas. The trial court observed that defendant's motion did not "cite any [ineffective assistance of counsel] issues or any defect in the *Boykin-Tahl* waiver procedures[5]" but rather was based "primarily on [defendant's] psychology and state of mind at the time the plea was taken." Defense counsel stated that it was his recollection that the court conducted "a full and complete voir dire" of defendant at the time the no contest pleas were entered. The prosecutor and defense counsel subsequently agreed that there was no allegation in defendant's motion concerning "constitutional infirmity . . . or defect in the change of plea itself" or concerning ineffective assistance of counsel. The prosecutor and defense counsel also indicated that they were submitting the matter on defendant's motion papers.

The trial court then ruled as follows: "[T]he court having read and reviewed the declarations *even assuming that the factual allegations in the declarations are true* and noting that . . . they've not at all been tested by cross-examination of the parties and that there is no live witness testifying to what the declarants testify to, based upon the case law of the State of California, based upon the court's own recollection of the very

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[5] *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

thorough voir dire process in which the defendant was fully engaged and given the opportunity on multiple occasions to state any hesitations, reservations or qualifications to his pleas and supported by the transcript which will be placed in the court file soon, now the court finds that the defendant has failed to make the standard of proof required for such a motion, that is proof by clear and convincing evidence that the defendant didn't know what he was doing at the time. The court finds he did know what he was doing, accordingly the motion will be denied." (Italics added.) The trial court sentenced defendant to 50 years in prison.

**B. *The First Appeal – Wilson I***

In his first appeal, defendant contended that the trial court abused its discretion in denying his motion to withdraw his pleas, and that his state and federal constitutional rights were violated.

The *Wilson I* court made the following determination. The declarations by Dr. Wilcox and defendant, if "assum[ed]" to be "true" as stated by the trial court, could have provided sufficient support for the court to conclude that defendant's no contest pleas were involuntary. However the trial court also considered its own recollection of the plea hearing, and the court believed that a "very thorough voir dire process" had occurred; that "defendant was fully engaged and given the opportunity on multiple occasions to state any hesitations, reservations or qualifications to his pleas"; and that defendant "did know what he was doing." The evidence before the trial court was thus clearly contradictory regarding whether defendant's no contest pleas were voluntary, based on the declarations of Dr. Wilcox and defendant and the trial court's own recollection of the plea hearing. Where the evidence is contradictory, a trial court is entitled to resolve the factual conflict against the defendant. Here, the trial court was required to clearly resolve the factual conflict in order to properly rule on the motion because the declarations could have presented a sufficient basis upon which to grant defendant's motion. Because it was not clear from the trial court's comments how the

trial court resolved the factual conflict, the *Wilson I* court remanded the matter for further hearing on defendant's motion. The *Wilson I* court stated that the further hearing "may include live testimony and cross-examination" but "express[ed] no opinion as to how the court should resolve the factual conflicts, or as to the outcome of the motion." (*Wilson I*, *supra*, H037600, at p. 14.)

**C. *Trial Court Proceedings after Remand***

On remand, a different judge conducted the further hearing on defendant's motion, as the judge who originally took defendant's pleas and heard the motion to withdraw the pleas had since retired. At the further hearing on May 14, 2013, the trial court indicated that it had reviewed this court's opinion in *Wilson I*, as well as the transcripts related to the motion, the court trial, and the plea hearing. The court asked whether defense counsel had "anything further at this time." Defense counsel responded, "if the court needed to hear from . . . Dr. Wilcox, I would be happy to put this matter over and get him to court if you needed further information from him." The court turned its attention to the prosecutor, who submitted the matter without any argument. The court stated that it had reviewed defendant's notice of motion, motion to withdraw pleas, and attached documents, including Dr. Wilcox's declaration. The court stated that it did "not believe that it need[ed] to call as a witness Dr. Wilcox, nor have him make any further statement to the court on the defendant's behalf."

The trial court subsequently discussed Dr. Wilcox's declaration. The court observed that the declaration consisted of three pages – one full page and two partial pages. One-third to one-half of the declaration set forth Dr. Wilcox's background and experience, while approximately one-fourth of the declaration reflected his observations on the date of the plea hearing. Dr. Wilcox's ultimate conclusion occupied the final five to seven lines of his declaration. The court found that "[t]he portion of [Dr. Wilcox's] opinion which is based upon interviews that he had with the defendant is a relatively minor portion of his declaration." The court believed that the original judge who took

defendant's pleas was presumably "more familiar with the legal standard necessary to render a judgment on whether or not the motion to withdraw the plea should be granted. And, more importantly, was directly engaged in conversation with the defendant at the time the plea was taken, and was certainly party to the observations in a more direct fashion than the observer capacity that Dr. Wilcox had during the time at which the change of plea was entered."

The trial court also discussed the nature of the plea. The court explained that "the nature of this plea was unusually sophisticated and complicated. The defendant was facing a number of charges with significant consequences. He was represented by an extraordinarily competent and experienced counsel. [¶] This plea was not a plea to all charges, it was a hybrid plea entered into on the date for the preliminary examination where there was a partial change of plea to some of the charges to an amended complaint, with an agreement that there would be a court trial to other charges."

The trial court found that, "[b]ecause of the unusual and sophisticated nature of the plea, . . . the oral voir dire taken of the defendant by [the original judge] was exceptionally thorough, and on a number of occasions made sure, not only that the defendant understood what was going on, but that there was no undue influence, confusion, or misunderstanding of rights or consequences, that there was no duress with regard to any aspect of the plea." In this regard, the court observed that the original judge "asked questions that were not leading. Meaning, that of the various questions that were asked in the voir dire, . . . [the] answers given by [defendant] to the court's inquiry were both 'yes's' and 'no's.' That there was no suggestion as to the answers. That in each instance in reviewing this transcript that [defendant] answered directly, answered succinctly, and answered correctly."

The trial court explained as follows: "Specifically, when the [original judge] asked, 'So is your decision then to resolve these cases as I have just stated today a free and voluntary decision?' The defendant responded directly, 'Yes, your Honor.' [¶] The

[original judge] then asked 'has anyone threatened you . . . personally or anyone close to you to get you to enter into this plea today?' The defendant answered directly, 'No.' [¶] Later on when the [original judge] inquires 'have you had any trouble understanding the language or the concepts used in the court so far?' The defendant says 'no, sir.' [¶] The next question 'have you taken any medicine or alcohol recently which is in any way adversely affecting your ability to understand these proceedings?' 'No.' "

The trial court further observed that defendant engaged in varied responses, including, " 'yes, your Honor,' " " 'no,' " " 'no, sir,' " and " 'yes, sir.' " The court stated that "it appear[ed] that [the original judge], in taking the plea, took note of the fact that the defendant was engaged not with a rote recitation of one word single syllable answers, but was, in fact, engaged with the court."

The trial court referred to some of the particular questions posed to defendant and to counsel. The court noted that the original judge asked defendant whether he had any questions he wanted to ask the judge before his plea was taken on the amended complaint, and defendant responded " 'no, sir, your Honor.' " Further, the original judge asked defense counsel and the prosecutor whether " 'any further voir dire' " was " 'suggested at this point,' " and neither counsel suggested any. Defense counsel was asked by the original judge whether he was " 'satisfied' " that defendant understood his rights and was " 'freely and voluntarily giving them up,' " and counsel responded affirmatively. Defense counsel was again asked whether he would suggest any further voir dire, and counsel again responded in the negative. Defense counsel also indicated that he was satisfied that defendant was " 'conversant with the particulars of the allegations as to each of these many counts.' " Defense counsel and the prosecutor also stipulated to a factual basis for the pleas based on several " 'offense reports.' "

The trial court concluded: "Based upon the overwhelming amount of the evidence. Based upon an impartial review by this court at the time of the plea. Based upon what the court believes is a cursory declaration by Dr. Wilcox in support of the

motion to withdraw that any factual discrepancy that may have been alluded to when [the original judge] said that he was going to take the findings of Dr. Wilcox and assume they were true, was incorrect or was a misstatement inadvertently made by [the original judge], and that the evidence in this case overwhelmingly supports the fact that the observations, and more to the point the conclusions based upon the observations of Dr. Wilcox were not legally sufficient to overcome the findings correctly made by the trial court. And, in fact, they were not assumed to be true but were, in fact, found to be insufficient to overcome the factual findings of the court and the application of law which caused [the original judge] to deny the motion. [¶] And as the result . . . this court will again deny the motion to withdraw the plea"

On September 3, 2013, defendant was resentenced to 50 years in prison. Defendant filed a notice of appeal and obtained a certificate of probable cause.

## III. DISCUSSION

Defendant contends that the trial court abused its discretion on remand in denying his motion to withdraw his pleas because the court did not follow the law of the case and its ruling was not supported by substantial evidence. Defendant further contends that the denial of his motion violated his state and federal constitutional rights.

The Attorney General contends that the trial court did not abuse its discretion and that defendant's constitutional rights were not violated.

We first set forth the general principles of law governing a motion to withdraw a plea before considering the specific contentions made by defendant in this appeal.

### A. *General Legal Principles Regarding a Motion to Withdraw a Plea*

Section 1018 allows the trial court to grant a defendant's request to withdraw his or her plea of guilty or no contest "before judgment . . . for a good cause shown." "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. [Citations.] But good cause must be shown by clear and convincing evidence. [Citations.]" (*People v. Cruz* (1974) 12 Cal.3d 562, 566;

accord *People v. Sandoval* (2006) 140 Cal.App.4th 111, 123; *People v. Mickens* (1995) 38 Cal.App.4th 1557, 1561.)

A plea "is 'involuntary' if done without choice or against one's will." (*People v. Knight* (1987) 194 Cal.App.3d 337, 344.) A plea may not be withdrawn simply because the defendant has changed his or her mind (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456), or because the plea was made reluctantly or unwillingly by the defendant (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208-1209 (*Huricks*); *People v. Hunt* (1985) 174 Cal.App.3d 95, 103-104 (*Hunt*); *People v. Urfer* (1979) 94 Cal.App.3d 887, 892-893). Further, a defendant claiming that he or she was pressured into the plea must demonstrate that it was more than the pressure experienced by "every other defendant faced with serious felony charges and the offer of a plea bargain." (*Huricks*, *supra*, at p. 1208.)

In ruling on a motion to withdraw a plea, the trial court may consider the court's own observations of the defendant, as well as "take into account the defendant's credibility and his interest in the outcome of the proceedings. [Citations.]" (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 918.) Where the evidence is contradictory, the trial court is "entitled to resolve the factual conflict against" the defendant. (*Hunt*, *supra*, 174 Cal.App.3d at p. 104.) "Where two conflicting inferences may be drawn from the evidence, it is the reviewing court's duty to adopt the one supporting the challenged order. [Citation.]" (*Ibid.*)

We review the trial court's denial of a motion to withdraw a plea for abuse of discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 (*Fairbank*).) In making that determination, we adopt the trial court's factual findings if supported by substantial evidence. (*Ibid.*) We " 'will not disturb the denial of a motion unless the abuse is clearly demonstrated.' " (*People v. Wharton* (1991) 53 Cal.3d 522, 585 (*Wharton*).) "A discretionary order based on the application of improper criteria or incorrect legal assumptions is *not* an exercise of *informed* discretion and is subject to reversal even

though there may be substantial evidence to support that order. [Citations.]" (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 26; accord *In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *People v. Knoller* (2007) 41 Cal.4th 139, 156.)

**B. *Law of the Case***

In contending that the trial court abused its discretion on remand in denying his motion to withdraw his pleas, defendant first argues that the court did not follow the law of the case regarding the "value" or "legal standing" of the supporting declarations, particularly with respect to Dr. Wilcox's declaration. According to defendant, the original judge assumed Dr. Wilcox's and defendant's declarations were true, but the trial court on remand "degrade[d] the Wilcox declaration" by pointing out flaws in that declaration. Defendant contends that the fact that the original judge "assumed both declarations to be true was part of the record" before the court on remand, and that "the *prima facie* validity of the declarations . . . is the law of the case" because no new evidence was introduced at the hearing on remand.

"Under the law of the case doctrine, when an appellate court ' "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case's] subsequent progress, both in the lower court and upon subsequent appeal . . . ." ' [Citation.] . . . As its name suggests, the doctrine applies only to an appellate court's decision on a question of law; it does not apply to questions of fact. [Citation.]" (*People v. Barragan* (2004) 32 Cal.4th 236, 246 (*Barragan*).)

In defendant's prior appeal, the *Wilson I* court determined that Dr. Wilcox's and defendant's declarations "could have provided sufficient support for the [original judge] to conclude that defendant's no contest pleas were involuntary." (*Wilson I*, *supra*, H037600, at p. 13.) The *Wilson I* court observed, however, that the original judge's expressed recollections of the plea hearing conflicted with those declarations. The *Wilson I* court explained that, because the evidence was contradictory regarding whether

defendant's no contest pleas were voluntary, the court below "was required to clearly resolve the factual conflict in order to properly rule on the motion." (*Id.* at pp. 13-14.) In remanding the case for further hearing on the motion, the *Wilson I* court expressed "no opinion" as to how the trial court "should resolve the factual conflicts, or as to the outcome of the motion." (*Id.* at p. 14.)

On remand, therefore, the trial court was obligated to conduct a new hearing to clearly resolve the factual conflict. Nothing in *Wilson I* required the trial court on remand to accept Dr. Wilcox's declaration as true on the issue of the voluntariness of defendant's pleas. Further, nothing in *Wilson I* precluded the trial court on remand from giving certain sources or pieces of evidence—declarations or otherwise—less or more weight than other evidence on the issue of whether defendant's pleas were voluntary. To the contrary, because the evidence was conflicting, the trial court on remand necessarily had to evaluate and weigh the evidence in order to reach a proper determination of the motion. Accordingly, the trial court on remand properly resolved the factual conflict when it evaluated the evidence and decided that Dr. Wilcox's declaration was entitled to less weight on the issue of the voluntariness of defendant's pleas. (See *Barragan*, *supra*, 32 Cal.4th at p. 246; *Hunt*, *supra*, 174 Cal.App.3d at p. 104.)

**C. *Substantial Evidence***

Defendant also contends that there is not substantial evidence to support the following determination by the trial court on remand: "when [the original judge] said that he was going to take the findings of Dr. Wilcox and assume they were true, [this] was incorrect or was a misstatement inadvertently made by [the original judge] . . . ." Defendant argues that this determination by the trial court on remand "was not based upon any new evidence."

As we have just explained, the trial court was obligated on remand to conduct a new hearing to clearly resolve the factual conflict presented by the motion. Nothing in *Wilson I* required the trial court on remand to adhere to factual determinations that the

original judge may have made, or to try to explain the basis for the original judge's ruling. Further, the *Wilson I* court did not require on remand live testimony or the presentation of additional evidence. The trial court on remand was simply obligated to resolve the factual conflict concerning voluntariness after evaluating and weighing the evidence presented.

In sum, the record reflects that the trial court on remand conscientiously followed the directions in *Wilson I* and carefully considered the evidence concerning defendant's motion, including the declarations and transcripts of the plea hearing and motion hearing. The court on remand determined that Dr. Wilcox's declaration was "cursory," and that he was not "directly engaged in conversation" with defendant, as the trial judge had been, when the pleas were actually entered. Further, defendant was represented by "an extraordinarily competent and experienced counsel" during the plea hearing, and defendant did not enter no contest pleas to all the counts but rather exercised his right to trial on one of the counts. The voir dire of defendant during the plea hearing was "exceptionally thorough," and defendant responded "directly," "succinctly," and "correctly" with varied answers. It thus appeared that defendant was engaged with the court when the pleas were taken, rather than in shock, confused, disoriented, with poor attention span, and unable to understand or respond to stimuli, as Dr. Wilcox in a declaration had characterized defendant, and as stated in defendant's declaration. The trial court's factual determinations on remand are supported by substantial evidence (see *Fairbank*, *supra*, 16 Cal.4th at p. 1254), and we find no abuse of discretion in the denial of defendant's motion to withdraw his pleas (see *ibid.*; *Wharton*, *supra*, 53 Cal.3d at p. 585). We accordingly determine that defendant's constitutional claims, which are premised on his pleas not being voluntary, are without merit.

## IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

*People v. Wilson*
**H040185**

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

| | |
|---|---|
| **JOHN K. WILSON,**<br>Petitioner,<br>**v.**<br>**D. PARAMO, Warden,**<br>Respondent. | 17-cv-01040-RS (PR)<br>**EXHIBIT C**<br>**California Court of Appeal Opinion (filed December 21, 2012)** |

Filed 12/21/12 P. v. Wilson CA6

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOHN KEITH WILSON,<br><br>Defendant and Appellant. | H037600<br>(Santa Clara County<br>Super. Ct. No. B1050331) |

Defendant John Keith Wilson pleaded no contest to 21 counts of lewd conduct upon a child under 14 (Pen. Code, § 288, subd. (a)).[1] Following a court trial, defendant was found guilty of one additional count of lewd conduct upon a child under 14. After the court denied defendant's motion to withdraw his pleas, the court sentenced defendant to 50 years in prison.

On appeal, defendant contends that the trial court erred in denying his motion to withdraw his pleas. As we will explain, we will reverse the judgment and remand the matter to the trial court for further hearing.

## BACKGROUND

Defendant was charged by first amended complaint filed February 14, 2011, with 13 counts of lewd conduct upon a child under 14 (§ 288, subd. (a); counts 1-13). The

[1] All further unspecified statutory references are to the Penal Code.

information further alleged as to counts 1 through 9 that the offenses were committed against more than one victim (§ 667.61, subds. (b) & (e)).

On July 14, 2011, the date set for the preliminary examination, the complaint was amended on motion of the prosecution to add 10 counts of lewd conduct upon a child under 14 (§ 288, subd. (a); counts 14-23). Defendant pleaded no contest to counts 1 through 6, 8, and 10 through 23. Defendant entered his pleas with the understanding that count 9 would be dismissed, that all section 667.61 allegations would be dismissed, and that he would receive a determinate term of 48 years for the counts to which he pleaded no contest. Defendant also waived his right to a jury trial on count 7 with the understanding that a court trial would be conducted regarding that count. On August 10, 2011, an information that included the 10 additional counts of lewd conduct upon a child under 14 (counts 14-23), and that reflected the removal of the section 667.61 allegations, was filed.

On August 19, 2011, a court trial was held regarding count 7. Defendant's daughter, who was 14 years old at the time of trial, testified that defendant and her mother divorced when she was in the third grade. Thereafter, she sometimes stayed with defendant, and at times she slept in his bed. She testified that on one occasion, when she was 12 years old and in the sixth grade, defendant moved his hand back and forth on her vaginal area over her pajamas. She indicated that the touching had occurred on other occasions. The court took judicial notice of the fact that defendant entered "pleas to other counts in the complaint which [were] memorialized in the information" that was filed. The court ultimately found defendant guilty on count 7 (lewd conduct upon a child under 14; § 288, subd. (a)).

On September 7, 2011, a probation report was filed with the court. The following summary of defendant's offenses (excluding count 7) is taken from the probation report. The police department received a tip that defendant was sexually molesting a 13-year-old boy. The boy, whose mother had dated defendant, reported that defendant had

masturbated him beginning approximately two years prior, and that it occurred multiple times. On July 12, 2011, after the first amended complaint had been filed in this case, the boy further reported that defendant had used dildos on him, showed him child pornography, orally copulated him, and placed defendant's penis in the boy's anus. While the police were investigating the allegations, the police discovered additional victims of defendant. A 13-year-old boy, whose father lived in the same apartment complex as defendant, reported that defendant had given him (the boy) a massage in or near his groin area and under his shorts. Another victim, defendant's "adopted step-son," reported that he was sexually abused by defendant for more than eight years, beginning at the age of 12 or 13. The stepson, who was an adult at the time of his report to the police, indicated that the abuse included fondling and oral copulation. Defendant also showed him child and adult pornography.

On September 7, 2011, the date set for sentencing, a hearing was held on a motion by defendant to withdraw his no contest pleas.[2] The basis for the motion was that he was "not in a right state of mind to understand the gravity of his decision" at the time he entered the pleas. Declarations from defendant and a therapist, who was employed by the county and who had been present at the hearing when defendant entered his pleas, were filed in support of the motion. Both defendant and the prosecution submitted the matter on defendant's moving papers. The trial court denied the motion. The court then sentenced defendant to 50 years in prison, with 380 days custody credits. The sentence was calculated as follows. Pursuant to the plea bargain, defendant received the aggravated term of eight years on count 1, and consecutive terms of two years each, or

[2] The copy of the motion in the record is not file-stamped. At the September 7, 2011 hearing, the trial court indicated that the motion had been hand-delivered to the court that day, and faxed to the court the day prior. Defendant's declaration is dated September 7, 2011, and the proof of service for the motion indicates that it was personally delivered to the prosecutor on September 7, 2011.

one-third the midterm, on counts 2 through 6, 8, and 10 through 23. On count 7, defendant received a consecutive term of two years, or one-third the midterm. The remaining count was dismissed. Defendant filed a timely notice of appeal and obtained a certificate of probable cause.

## DISCUSSION

### *Background*

#### The no contest pleas

On July 14, 2011, before the trial court accepted defendant's no contest pleas, the record reflects the following. The trial court indicated that there had been "substantial discussions" in the case that day, and the proposed disposition was set forth on the record. After the court granted the prosecution's motion to add ten counts, defense counsel waived formal arraignment on the amended complaint. The court proceeded to ask defendant whether he was "satisfied" that he had "sufficient time to speak" with his counsel regarding the allegations in the case, the proof required of the prosecution at the preliminary examination and at trial, possible defenses and tactics, and the possible range of sentences. Defendant responded, "Yes, your Honor." The court then asked defendant whether his decision to resolve the case that day was "a free and voluntary decision." Defendant again responded, "Yes, your Honor." In response to the court's questions, defendant also confirmed that he had not been threatened to enter a plea that day, that no one had made any promises to him about the outcome of the case other than as stated on the record, that he was a native English speaker, and that he had not had trouble understanding the language or concepts used in court. Defendant also denied taking recently any medicine, drugs, or alcohol that adversely affected his ability to understand the proceedings. The court then explained to defendant the preliminary examination and trial rights he would be giving up by entering his plea. Defendant indicated that he understood and gave up those rights. The court also explained that a plea of no contest was the same as a plea of guilty, and explained the consequences of the plea. Regarding

sentencing, the court stated that "all victims have a right to appear at sentencing and be heard to make a victim impact statement." The court also indicated that defendant would be sentenced to the agreed upon term of 48 years, unless something new was brought to the court's attention leading it to believe that the sentence was unconscionable. The court eventually asked defendant whether he had any questions, and defendant responded, "No, sir, your honor."

Immediately thereafter, the trial court stated to defendant, "you're charged as previously stated in counts 1 through 23 and excepting count 9 which is taken under submission for dismissal at the time of sentencing and count 7 which will be set for court trial, how do you wish to plead to those enumerated charges?" Defendant responded, "No contest." The court then asked defendant whether he had had an opportunity to review with counsel "the contents of the first amended complaint including the details regarding the time frames and alleged victims." Defendant responded affirmatively. Thereafter, defense counsel indicated to the court that he was "satisfied" that defendant understood his rights and was "freely and voluntarily giving them up," that he was "satisfied" that defendant was "conversant with the particulars of the allegations" as to each count, and that no further voir dire was necessary. The prosecutor and defense counsel then stipulated to a factual basis for the pleas based on various "offense reports." The court then again asked defendant how he wished to plead to "all these counts except for Count 7 and 9," and defendant again stated, "No contest." The court found a factual basis and stated that "the plea is free, voluntary, knowing and intelligent."

**The motion to withdraw pleas**

In early September 2011, defendant filed the motion to withdraw his pleas. The sole basis articulated in the motion was that defendant "was not in a right state of mind to understand the gravity of his decision" at the time he entered the pleas. Declarations by a therapist and defendant were submitted in support of the motion.

The therapist, Donald A. Wilcox, stated in his declaration, dated September 6, 2011, that he was a licensed marriage and family therapist with a master's degree in educational psychology and a doctorate in education. He had worked "in this field for 23 years in a variety of settings," and his primary areas of expertise were substance dependence and attention deficit disorder. Dr. Wilcox had been employed by Santa Clara County since 1998, and he currently worked at Elmwood Correctional Facility for Adult Custody Mental Health on the "crisis team." As part of the crisis team, he saw inmates with a variety of mental health issues, including a "fair amount of inmates with acute stress reaction or shock." According to Dr. Wilcox, "[m]ental and emotional shocks are not uncommon in inmates, as in the death of a loved one, getting attacked by another inmate, or the prospect and/or reality of receiving a lengthy prison sentence."

Dr. Wilcox explained that on February 3, 2011, the Department of Corrections had requested that "Mental Health" evaluate defendant due to concerns about him possibly harming himself. Dr. Wilcox evaluated defendant for more than one hour. He determined that defendant should be placed on "15-minute checks" for the next 24 to 72 hours, given the nature of the charges against him, the fact that it was his first arrest, and the written expressions of hopelessness found in his cell. Dr. Wilcox was assigned to see defendant on a weekly basis, and had since seen him more than 25 times.

Dr. Wilcox indicated in his declaration that he was in court on the date set for defendant's preliminary examination. He was allowed to speak with defendant "at length while he was in the jury box contemplating a proposed disposition in his case." According to Dr. Wilcox, the disposition of defendant's case "appeared to be somewhat of a moving target, changing both in the number of counts he was to plead guilty to and the number of years he would receive as a sentence." Dr. Wilcox further stated: "In my professional opinion, [defendant] was experiencing acute stress reaction or shock during this time that I spoke with him and during the time that he was contemplating the proposed disposition. Pleading guilty to the charges proposed and receiving such a

lengthy prison sentence (in excess of 40 years) caused [defendant] to appear in the courtroom with symptoms of disorientation, poor attention span, and at time [*sic*] he was unable to understand or respond to present stimuli. This may be referred to as a daze." After referring to defendant's no contest pleas and his agreement to 48 years in prison, Dr. Wilcox stated: "In the courtroom at that time, [defendant] was physically flushing and he reported a rapid heartbeat. I noted that he was confused, detached and his judgment was impaired as I spoke with him then." Defendant indicated to Dr. Wilcox that he did not have enough time to make such an important decision.

Dr. Wilcox stated that he also spoke to defendant the next day at Elmwood Correctional Facility. According to Dr. Wilcox, defendant "presented with a common symptom of acute stress reaction of partial amnesia when trying to remember our conversation in court and some other court proceedings at the time he entered his pleas." Dr. Wilcox concluded: "In my professional opinion, [defendant] did not have the capacity needed to make a coherent and logical decision, given the stressor of the courtroom environment, the immediate time constraints, and the psychological trauma of facing 48 years in prison. These stressors were more than enough stimuli to create an acute stress reaction which impaired [defendant] at that time."

In a declaration signed on September 7, 2011, defendant stated that the preliminary examination was scheduled for July 14, 2011. He had not received "an offer of a term of years before that date, and had been informed of many new developments in terms of discovery in the two days preceding that court date." While he was in court on July 14, his counsel attempted to "negotiate a settlement of a term of years as opposed to the life sentence which was what [he] would have received had [he] been convicted of all the charges." He was "overwhelmed by the need to make a decision in such a short period of time" and asked to speak with Dr. Wilcox. He was allowed to speak privately with Dr. Wilcox for "perhaps 15 minutes." According to defendant: "That whole morning and afternoon was such a blur to me, and I was confused and in shock at the

number of years I was asked to accept, and I was not able to think clearly and to comprehend what I was doing at the time. [¶] . . . Due to the fact that I did not have enough time to make this life-changing decision, and due to the fact that I was also overcome with emotion about seeing people in the courtroom that I hadn't seen for a long time, including my brother, and due to the fact that I was not thinking clearly, I made a decision to accept the offer which I now believe was an erroneous decision, and I ask the court to allow me to withdraw my pleas and go ahead with the preliminary hearing in this case."

**The trial court's ruling**

At the hearing on the motion, the trial court observed that defendant's motion did not "cite any [ineffective assistance of counsel] issues or any defect in the *Boykin-Tahl* waiver procedures[3]" but rather was based "primarily on [defendant's] psychology and state of mind at the time the plea was taken." Defense counsel stated that it was his recollection that the court conducted "a full and complete voir dire" of defendant at the time the no contest pleas were entered. The prosecutor and defense counsel subsequently agreed that there was no allegation in defendant's motion concerning "constitutional infirmity . . . or defect in the change of plea itself" or concerning ineffective assistance of counsel. The prosecutor and defense counsel also indicated that they were submitting the matter on the defendant's motion papers.

The trial court then ruled as follows: "[T]he court having read and reviewed the declarations *even assuming that the factual allegations in the declarations are true* and noting that . . . they've not at all been tested by cross-examination of the parties and that there is no live witness testifying to what the declarants testify to, based upon the case law of the State of California, based upon the court's own recollection of the very thorough voir dire process in which the defendant was fully engaged and given the

[3] *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

opportunity on multiple occasions to state any hesitations, reservations or qualifications to his pleas and supported by the transcript which will be placed in the court file soon, now the court finds that the defendant has failed to make the standard of proof required for such a motion, that is proof by clear and convincing evidence that the defendant didn't know what he was doing at the time. The court finds he did know what he was doing, accordingly the motion will be denied." (Italics added.)

***Contentions on Appeal***

Defendant contends that the trial court abused its discretion in denying his motion to withdraw his pleas, and that his state and federal constitutional rights were violated. Defendant characterizes Dr. Wilcox as a "disinterested third-party expert witness" who established through his declaration that defendant was "incapable of making a voluntary plea" given his state of mind at the time. Defendant argues that, if Dr. Wilcox's declaration is "taken as true on its face, as the court did, it would be factually solid proof of involuntariness." Defendant acknowledges that the court's factual findings also included the court's own observations concerning the taking of the plea. However, according to defendant, the trial court's factual findings "make no sense in connection with the conclusion reached, unless the court found that Dr. Wilcox was not credible or otherwise untruthful. However it is clear from the record that that is not the case."

The Attorney General contends that substantial evidence supports the trial court's factual determination that defendant's plea was voluntary. In making this contention, the Attorney General refers specifically to the court's own observations of defendant during the taking of the plea. The Attorney General also argues that defendant fails to show that any stress he was under at the time was "different" than the distress any other individual in a similar situation might experience. The Attorney General further argues that, although Dr. Wilcox believed that defendant was experiencing acute stress when they spoke before defendant entered his plea, Dr. Wilcox's "concern was not so great that he deemed it necessary to alert the court or defense counsel of any concern he had that

[defendant] was unable to knowingly and voluntarily continue with the proceedings." The Attorney General contends that, under the circumstances, defendant fails to demonstrate an abuse of discretion in the denial of the motion to withdraw the pleas.

In reply, defendant acknowledges that the trial court "could have discounted the Wilcox testimony" but contends that the court "did not do so." Defendant argues that the "record shows that the court intended to give credence to Wilcox, but erred in believing that the Wilcox declaration was insufficient as a matter of law to controvert the court's own observations."

***Analysis***

Section 1018 allows the trial court to grant a defendant's request to withdraw his or her plea of guilty or no contest "before judgment . . . for a good cause shown." "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. [Citations.] But good cause must be shown by clear and convincing evidence. [Citations.]" (*People v. Cruz* (1974) 12 Cal.3d 562, 566 (*Cruz*); accord *People v. Sandoval* (2006) 140 Cal.App.4th 111, 123; *People v. Mickens* (1995) 38 Cal.App.4th 1557, 1561.)

A plea "is 'involuntary' if done without choice or against one's will." (*People v. Knight* (1987) 194 Cal.App.3d 337, 344 (*Knight*).) A plea may not be withdrawn simply because the defendant has changed his or her mind (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456), or because the plea was made reluctantly or unwillingly by the defendant (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208-1209 (*Huricks*); *People v. Hunt* (1985) 174 Cal.App.3d 95, 103-104 (*Hunt*); *People v. Urfer* (1979) 94 Cal.App.3d 887, 892-893). Further, a defendant claiming that he or she was pressured into the plea must demonstrate that it was more than the pressure experienced by "every other defendant faced with serious felony charges and the offer of a plea bargain." (*Huricks*, *supra*, at p. 1208.)

In ruling on a motion to withdraw a plea, the trial court may consider the court's own observations of the defendant, as well as "take into account the defendant's credibility and his interest in the outcome of the proceedings. [Citations.]" (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 918 (*Ravaux*).) Where the evidence is contradictory, the trial court is "entitled to resolve the factual conflict against" the defendant. (*Hunt*, *supra*, 174 Cal.App.3d at p. 104.)

We review the trial court's denial of a motion to withdraw a plea for abuse of discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) In making that determination, we adopt the trial court's factual findings if supported by substantial evidence. (*Ibid.*) We " 'will not disturb the denial of a motion unless the abuse is clearly demonstrated.' " (*People v. Wharton* (1991) 53 Cal.3d 522, 585.) "A discretionary order based on the application of improper criteria or incorrect legal assumptions is *not* an exercise of *informed* discretion and is subject to reversal even though there may be substantial evidence to support that order. [Citations.]" (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 26; accord *In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *People v. Knoller* (2007) 41 Cal.4th 139, 156.)

In this case, the trial court "assum[ed]" that Dr. Wilcox's and defendant's statements were "true." If the declarations were true, they could have been sufficient to show by clear and convincing evidence that defendant's exercise of free judgment had been overcome, such that there was good cause to grant defendant's motion to withdraw his pleas. (§ 1018; *Cruz*, *supra*, 12 Cal.3d at p. 566.) Dr. Wilcox, a licensed therapist, was employed by the county and worked at the correctional facility. He had seen defendant multiple times for therapy while defendant was in custody. He was physically present at defendant's plea hearing, and he spoke with defendant before and after the no contest pleas were entered. In his declaration, Dr. Wilcox stated that defendant "was experiencing acute stress reaction or shock" at the time he was contemplating the proposed disposition. According to Dr. Wilcox, defendant exhibited "symptoms of

disorientation, poor attention span," and at times "he was unable to understand or respond to present stimuli." Dr. Wilcox characterized defendant as being in a "daze." He also found defendant to be "confused, detached," and suffering from impaired judgment when he spoke to defendant. Dr. Wilcox ultimately concluded that defendant "did not have the capacity needed to make a coherent and logical decision" at the time, that he suffered from an "acute stress reaction," and that he was "impaired." Defendant's declaration was consistent with Dr. Wilcox's declaration, including defendant's statement that he was "not able to think clearly and to comprehend what [he] was doing at the time" he entered the no contest pleas. These declarations by Dr. Wilcox and defendant, if "assum[ed]" to be "true" as stated by the court, could have been sufficient support for the court to conclude by clear and convincing evidence that defendant's no contest pleas were involuntary and had been entered "without choice" by him. (*Knight*, *supra*, 194 Cal.App.3d at p. 344.)

We are not persuaded by the Attorney General's reliance on *Huricks* and the argument that defendant "made no showing that any stress he may have been under was of a type different from the normal distress any individual might go through in agreeing to a 48-year prison sentence." In *Huricks*, the defendant contended he was subjected to " 'overbearing duress' " when he entered his no contest plea. (*Huricks*, *supra*, 32 Cal.App.4th at p. 1208.) The only evidence supporting the defendant's contention was "his statement at the hearing on the motion to withdraw his plea that he was 'asked by [his] family to take this plea bargain' and, according to his counsel, was 'confused and indecisive' as to whether to follow their advice." (*Huricks*, *supra*, 32 Cal.App.4th at p. 1208.) In rejecting the defendant's assertion of duress, the appellate court reasoned: "Huricks's claim that his family pressured him into the plea is not enough to constitute duress. Nothing in the record indicates he was under any more or less pressure than every other defendant faced with serious felony charges and the offer of a plea bargain." (*Ibid.*) In contrast, in this case, defendant's claim of involuntariness was supported by a

declaration from a county-employed therapist, who had previously evaluated defendant at the request of the Department of Corrections due to concerns about him possibly harming himself, and who had talked to defendant on multiple occasions and had interacted with him during the plea hearing, and whose conclusions included that defendant was "impaired" such that he "did not have the capacity needed to make a coherent and logical decision." Based on the declarations submitted in support of defendant's motion to withdraw his pleas, and assuming that the statements contained in the declarations are true, those declarations could have provided sufficient support for the court to conclude that defendant's no contest pleas were involuntary.

The record reflects that, in addition to considering the declarations of Dr. Wilcox and defendant, the trial court also considered the court's own recollection of the plea hearing. (See *Ravaux*, *supra*, 142 Cal.App.4th at p. 918 [trial court may consider its own observations of the defendant in ruling on a motion to withdraw a plea].) The court believed that a "very thorough voir dire process" had occurred; that "defendant was fully engaged and given the opportunity on multiple occasions to state any hesitations, reservations or qualifications to his pleas"; and that defendant "did know what he was doing."

The evidence before the trial court was thus clearly contradictory regarding whether defendant's no contest pleas were voluntary, based on the declarations of Dr. Wilcox and defendant and the court's own recollection of the plea hearing. Where the evidence is contradictory, the trial court is entitled to resolve the factual conflict against the defendant. (*Hunt*, *supra*, 174 Cal.App.3d at p. 104.) Here, however, the trial court ruled that, "even assuming that the factual allegations in the declarations are *true*," and based on the court's own recollection of the plea hearing, defendant did not meet his burden of proof on the motion. (Italics added.) As we have explained, because the declarations could have presented a sufficient basis upon which to grant defendant's motion, the court was required to clearly resolve the factual conflict in order to properly

rule on the motion. (See *ibid.*) Because it is not clear from the court's comments how the court resolved the factual conflict, we will remand the matter to the trial court for further hearing on defendant's motion, which may include live testimony and cross-examination. We express no opinion as to how the court should resolve the factual conflicts, or as to the outcome of the motion.

**DISPOSITION**

The judgment is reversed, and the case is remanded to the trial court for further hearing on defendant's motion in accordance with the views expressed in this opinion.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.