Appendix A

District of Columbia
Court of Appeals

No. 14-CF-975

JASON WHREN,
Appellant,

v.

2012 CF1 20908

UNITED STATES,
Appellee.

BEFORE: Glickman and Easterly, Associate Judges, and Nebeker*, Senior Judge.

ORDER

On consideration of appellant's motion to recall the mandate, it is

ORDERED that appellant's motion to recall the mandate is denied as untimely filed, D.C. App. R. 41(f), and, even if timely filed, appellant failed to establish a basis for the court to recall its mandate. Many of the claims and defenses appellant asserts in his motion were waived when he entered his plea, *see Collins v. United States*, 664 A.2d 1241 (D.C. 2011) (the entry of a non-conditional plea waives all non-jurisdictional defenses). Further, appellant has not established a basis for us to reconsider our previous decision affirming the trial court rejection of appellant's claim that his trial counsel was not ready for trial.

PER CURIAM

*Judge Nebeker is substituting for Judge King, who retired.

No. 14-CF-975

Copy e-served to:

Elizabeth Trosman, Esquire
Assistant United States Attorney

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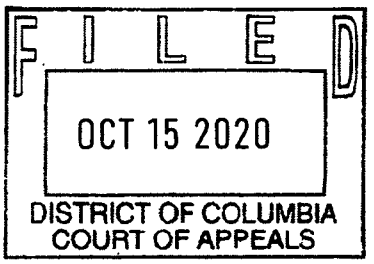
District of Columbia
Court of Appeals



No. 19-CO-226

JASON WHREN,
Appellant,

v.

2012 CF1 20908

UNITED STATES,
Appellee.

BEFORE: Beckwith and McLeese, Associate Judges, and Steadman, Senior Judge.

ORDER

On consideration of appellant's motion to recall the mandate, appellant's motion for leave to file the motion to recall mandate, and appellant's supplement to the motion to recall mandate, it is

ORDERED that appellant's motion for leave and to supplement are granted. It is

FURTHER ORDERED that appellant's motion to recall the mandate is denied. Appellant does not challenge the court's decision in this appeal but attempts to challenge appellate counsel's performance in his direct appeal, no. 14-CF-975; therefore, the Clerk shall file these pleadings in appeal no. 14-CF-975.

PER CURIAM

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District of Columbia
Court of Appeals

No. 19-CO-226

JASON C. WHREN,

Appellant,

v. **2012 CF1 20908**

UNITED STATES,

Appellee.

BEFORE: Beckwith and McLeese, Associate Judges, and Steadman, Senior Judge.

JUDGMENT

On consideration of appellee's motion for summary affirmance, appellant's motion for leave to file his lodged opposition that exceeds the page limit, appellant's brief and limited appendix, and the record on appeal, it is

ORDERED that appellant's motion is granted and the lodged opposition filed. It is

FURTHER ORDERED that the motion for summary affirmance is granted. *See Watson v. United States*, 73 A.3d 130, 131 (D.C. 2013); *Oliver T. Carr Mgmt., Inc. v. Nat'l Delicatessen, Inc.*, 397 A.2d 914, 915 (D.C. 1979). In his underlying D.C. Code § 23-110 motion, appellant argued plea counsel was ineffective for failing to confirm the complaining witness's presence for trial. Appellant has been aware of the facts giving rise to this particular claim of ineffective assistance since at least August 1, 2014, meaning he could have raised this precise iteration of ineffective assistance on direct appeal, yet failed to do so. *Head v. United States*, 489 A.2d 450, 451 (D.C. 1985). Likewise, appellant cannot demonstrate he suffered actual prejudice without requiring the court to resort to unalleged speculation that the complaining witness was, in fact, not present for trial. Thus, the trial court appropriately rejected appellant's § 23-110 motion without a hearing. *White v. United States*, 146 A.3d 101, 109 (D.C. 2016). It is

No. 19-CO-226

FURTHER ORDERED and ADJUDGED that the order on appeal is affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies mailed to:

Honorable Lynn Leibovitz

Director, Criminal Division

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 14-CF-975

JASON C. WHREN, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the
District of Columbia
(CF1-20908-12)

(Hon. Lynn Leibovitz, Trial Judge)

(Submitted April 12, 2016 Decided April 29, 2016)

Before GLICKMAN and EASTERLY, *Associate Judges*, and KING, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Jason Whren appeals the trial court's denial of his motion to withdraw his guilty plea pursuant to Super Ct. Crim. R. 32 (e). Finding no abuse of discretion, we affirm.

I.

Whren engaged in conversations on the Internet with the complaining witness, who was a minor,[1] and convinced her to come to Washington, D.C. from her home in the state of Washington. He met the complaining witness at the airport here on December 1, 2012 and took her to his mother's house in Washington, D.C.; had multiple sexual contacts with her there, at a hotel in Silver Spring, Maryland, and at a Quality Inn hotel in Washington, D.C.; and "caused"

[1] She was fifteen-years-old at the time of these events.

her to engage in prostitution over the next three days.[2] She then gave cash and narcotics to Whren that she obtained via prostitution. As a result of these events,[3] Whren was charged with six counts of first degree child sexual abuse,[4] two counts of second degree child sexual abuse,[5] five counts of pandering of a minor,[6] and other associated charges.[7]

The government's case hinged on having the complaining witness testify at trial against Whren, but the government had difficulty producing her as she had returned to her home.[8] Whren's trial counsel, Charles O'Banion, knew the importance of the complaining witness' testimony, though he did not object to any continuances based on the government's inability to proceed to trial on the scheduled dates.

On March 31, 2014, the date set for trial, the complaining witness was

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[2] This series of events occurred over a four day period from December 1, 2012, to December 4, 2012, during which time the minor advertised for sexual services on the Internet and also "walked the track" i.e., solicited on the street in the Gallery Place area of Northwest Washington, D.C. An officer reported that she disclosed during an interview that she "believed that she had to engage in prostitution" because Whren kept control of her return flight ticket and her sister's identification card.

[3] A police investigation by the human trafficking unit discovered the minor advertising sexual services, and an undercover officer arranged to meet her at the Quality Inn on December 4, 2012. The minor was placed under arrest and asked to call Whren to come to the hotel. Her phone call was successful; Whren came to the hotel and was arrested.

[4] D.C. Code § 22-3008 (2012 Repl.).

[5] *Id.* § 22-3009.

[6] *Id.* § 22-2705.

[7] *Id.* §§ 22-2704, -22-811 (b)(3).

[8] There was also some indication that she was transient and engaged in prostitution in other states.

present, the government announced it was ready for trial, and O'Banion advised Whren to take a plea deal for one count of first degree child sexual abuse and one count of pandering of a minor for a maximum sentence of fifteen years. Part of the agreement also included dismissing charges against Whren's brother, who was alleged to have played a role in the prostitution enterprise. Judge Leibovitz engaged in a plea colloquy pursuant to Super. Ct. Crim. R. 11 and accepted Whren's guilty plea.

Shortly thereafter, Whren wrote a letter to the trial judge expressing his desire to withdraw his guilty plea. Judge Leibovitz held a hearing prior to sentencing on August 1, 2014, during which Whren and O'Banion testified. Judge Leibovitz summed up Whren's testimony as saying that he thought his attorney was planning to take the case to trial and he was "thrown off" by O'Banion's advice to enter a guilty plea instead. Whren additionally asserted that he was "punch drunk" and could not remember the plea proceeding, though he did not challenge the adequacy of the Rule 11 colloquy.

Judge Leibovitz carefully considered all the relevant factors relating to the withdrawal of a guilty plea prior to sentencing. She considered length of delay between the guilty plea and the withdrawal request, including the prejudice, if any, to the government if the withdrawal was granted, whether there was an assertion by the defendant of actual innocence, and whether he had competent counsel. *See infra* part II. First, she found that the length of delay between pleading and moving to withdraw was roughly two days, and accordingly, very short, and although it weighed in Whren's favor, it was not dispositive.

In considering whether Whren asserted actual innocence, she determined that, while his testimony was "very detailed," it was insufficient to assert innocence because most of his sworn statements during the plea proceeding admitted the underlying facts the government would have proven. At the plea withdrawal hearing, Whren, essentially, admitted all of the background facts and only denied ever having sex with the minor. Judge Leibovitz did not credit that denial especially when compared with the proffer during the plea proceeding that Whren admitted to while under oath. Finally, Judge Leibovitz rejected any claim that Whren did not remember the colloquy, remarking that he was responsive, engaged, and not dazed.

Judge Leibovitz also found that O'Banion was prepared for trial, communicated regularly with Whren, and advised Whren on the strengths and weaknesses of the government's case including the difficulty of winning at trial if

the "big ticket" complaining witness testified. O'Banion and Whren had little confidence that the complaining witness would be at the trial scheduled for March 31, 2014, and were both surprised by her presence. Consequently, O'Banion secured a plea deal for Whren and advised him to take the plea. Based on these factors, Judge Leibovitz found that O'Banion acted as competent counsel.

Judge Leibovitz also found that the prejudice to the government "would be extremely high" due to the difficulty the government had in producing the witness, who was a minor and who lived across the country. The complaining witness had an "extremely transient lifestyle" and could not be transported by the government without her mother accompanying her.

After considering all of these factors, Judge Leibovitz found that justice did not demand withdrawal and denied the motion. This appeal followed.

II.

We review the denial of the motion to withdraw a guilty plea for abuse of discretion. *Springs v. United States*, 614 A.2d 1, 4 (D.C. 1992). A guilty plea may be withdrawn under Rule 32 (e) if the appellant shows a fatal defect in the Rule 11 colloquy or "justice demands withdrawal in the circumstances of the individual case." *Id.* at 3. A motion to withdraw the plea made prior to sentencing is given "favorable consideration" and is granted if the "privilege seems fair and just." *Id.* at 4. In applying that standard, the trial judge must consider the three factors discussed above. Finally, the trial judge must consider whether the government would be prejudiced by a withdrawal of the plea. *Id.*

Whren argues that he made the plea under "duress," was not afforded competent counsel, and moved to withdraw his plea shortly after entering the plea, and therefore it is "fair and just" for him to withdraw the plea and the judge abused her discretion in denying the motion.

First, we agree that Whren requested the withdrawal of his motion promptly after he pleaded guilty, which is one of the factors in favor of allowing withdrawal. *See Springs*, *supra*, 614 A.2d at 4. That factor, however, is insufficient, by itself, for Whren to prevail when it is viewed together with the other factors which all weighted heavily against him. *See id.*

The trial court found that Whren failed to assert actual innocence.[9] Given that Whren admitted to the "detailed" proffered facts during his plea colloquy, his later statements that he did not have sex with the minor and did not cause her to engage in prostitution were not believed by the trial judge. *See id.* at 6. That determination is well within the province of the trial judge who set forth in detail how she arrived at that conclusion. For example, text messages that Whren admitted exchanging with the complaining witness were "fairly explicit" regarding her giving money to him as proceeds of the prostitution "at his behest," which were contrary to Whren's testimony, weighed heavily in the judge's decision to reject the claim of actual innocence. We find no error with the judge's conclusion.

The trial court also found that Whren failed to show that O'Banion was ineffective. Pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984), an appellant must show that his counsel's performance was deficient with "errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment, and that the "deficient performance prejudiced the defense." *Id.* Judge Leibovitz observed that O'Banion communicated regularly with his client and was prepared for trial. She also noted that it was a reasonable strategy to secure a plea deal when the critical witness arrived in time for trial, and given that Whren faced multiple life sentences if convicted of the charged crimes, *see* § 22-3008, it was not unreasonable for O'Banion to advise Whren to take the plea. Moreover, Whren failed to produce any evidence that O'Banion would not have been ready to proceed to trial had he refused to plead guilty or that O'Banion was ineffective at the plea hearing. For these reasons, we are satisfied the trial court did not err in finding that Whren failed to demonstrate that trial counsel was not competent during this proceeding.[10] *See Strickland*, *supra*, 466 U.S. at 687;

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[9] O'Banion testified that Whren informed O'Banion the motion to withdraw the plea was because "there's no way [Whren] could lose." From O'Banion's perspective, Whren believed that either he would be sentenced to fifteen years pursuant to the plea agreement or he could go to trial with the possibility that he could be convicted of numerous offenses resulting in a longer sentence.

[10] Whren argues that he was prejudiced when the government engaged in ex parte communications with Judge Leibovitz in November 2013. During those conferences the government informed the trial court that it was not ready to proceed because it was having difficulty obtaining the complaining witness, who was a minor, and would be requesting a continuance. Whren asserts that because the particular reason the government was unprepared was not disclosed, it

(continued...)

Springs, *supra*, 614 A.2d at 4.

Finally, it cannot be seriously doubted that the government would have had a difficult time in again producing the complaining witness after she left the jurisdiction considering the government's history of two continuances. The trial court found defense counsel accepted the government's proffer[11] that securing the complaining witness for trial was "extremely difficult." We find no error in the judge's conclusion that the prejudice to the government would be significant.

For the foregoing reasons, we affirm the trial court's denial of Whren's motion.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

(...continued)
prevented him from making a motion to dismiss for want of prosecution. Although he does not frame this argument as an issue with his counsel, we note that counsel could have moved for want of prosecution irrespective of knowing the precise reason that the government was unprepared. We also note, that under the circumstances, it is fair to conclude that the trial court would not have erred in denying such a motion.

[11] During Whren's closing argument, Judge Liebovitz asked, "The government has proffered the efforts it made to get the complainant here in [] November . . . and [in] May . . . . Do you have any reason to, I guess, challenge that proffer?" Whren's counsel responded, "I have no reason to challenge that . . . ." before remarking that the "government has not indicated" that it would be unable to obtain the complaining witness in the future.

Appendix G

District of Columbia
Court of Appeals

02/18/2020

No. 19-CO-226

JASON C. WHREN,

Appellant,

CF1-20908-12

v.

UNITED STATES,

Appellee.

Zabrina Dempson, Clerk
Superior Court of the District of Columbia

Dear Ms. Dempson:

The attached certified copy of the Decision in this case, pursuant to Rule 41(a) of the Rules of this Court, constitutes the mandate issued this date.

JULIO A. CASTILLO
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH

UNITED STATES	:	**Case No: 2012 CF1 20908**
	:	
v.	:	
	:	
JASON C. WHREN	:	**Judge Lynn Leibovitz**
	:	

ORDER

Before the court is defendant's *pro se* Brief of Law for D.C. Code § 23-110 Motion, filed Feb 12, 2019. For the following reasons, the court will deny defendant's motion.

PROCEDURAL HISTORY

Defendant Jason Whren pled guilty to first degree child sexual abuse and pandering of a minor on March 31, 2014. On April 14, 2014, chambers received correspondence from defendant in which defendant declared intent to withdraw his guilty plea. Following this, defendant's attorney filed a motion withdraw as counsel on May 7, 2014. On June 16, 2014, defendant, through his new counsel, filed a motion to withdraw his guilty plea pursuant to Super Ct. R. 32 (e). The Court held a motion hearing on June 20, 2014. On August 1, 2014, the Court denied defendant's motion in an oral ruling. On September 2, 2014, defendant was sentenced to concurrent terms totaling to a sentence of fifteen years of incarceration. The District of Columbia Court of Appeals affirmed the denial of defendant's motion to withdraw his guilty plea on April 29, 2016.

On February 12, 2019, the defendant filed a *pro se* Motion to Set Aside, Vacate, or Correct Sentence and Judgment Pursuant to D.C. Code § 23-110. In the instant motion, defendant claims trial counsel was ineffective for failing to "investigate" whether the

complainant was present at the start of the trial. Defendant then requests the court withdraw his guilty plea and grant him a full evidentiary hearing. The defendant's claims are without merit.

ANALYSIS

A prisoner in custody under sentence of the Superior Court may move the court to vacate his sentence if it was imposed in violation of the United States Constitution or the laws of the District of Columbia. *See* D.C. Code § 23-110(a). Under D.C. Code § 23-110(c), "the court 'shall' grant a hearing '[u]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief.'" *Bellinger v. United States*, 127 A.3d 505 (D.C. 2015). The court may deny the motion without a hearing only if the claims are 1) palpably incredible, 2) vague and conclusory, or 3) do not entitle the movant to relief even if true. The court may conclude that no evidentiary hearing is necessary only "if no genuine doubt exists about the facts that are material to motion." *Id.* at 515.

To prevail on a claim of in effective assistance of counsel, a defendant must show that his attorney's conduct was deficient, and such deficiency actually had an adverse effect on the defense. *See Strickland v. Washington*, 466 U.S. 668, 693 (1984). In order to prove that counsel's performance was deficient, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Even where a defendant shows deficient performance by counsel, prejudice must also be found. To prove that counsel's performance prejudiced the defense, a defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial. Id. At 687. In the context of a guilty plea, the prejudice prong is satisfied by showing that but for counsel's errors, the defendant would not have pled guilty, and would have instead

elected to go to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Goodall v. United States, 759 A.2d 1077, 1083 (D.C. 2000).

Super. Ct. Crim. R. 32(e) provides that "a motion to withdraw a plea of guilty . . . may be made only before sentence is imposed. . . ; but to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea." *See Williams v. United States*, 656 A.2d 288, 293 (D.C. 1995). In order to succeed on a motion to withdraw a guilty plea, a defendant must establish either that 1) there was a fatal defect in the plea colloquy, or 2) that justice demands withdrawal under the circumstances. *See Pierce v. United States*, 705 A.2d 1086, 1089 (D.C. 1997). In evaluating a motion to withdraw guilty plea under the "fair and just" standard, the court must consider: 1) whether the defendant has asserted his legal innocence[1]; 2) the length of the delay between entry of the plea and expression of desire to withdraw it[2]; 3) whether the defendant had the full benefit of competent counsel at all relevant times. Bennett v. United States, 726 A.2d 156, 166 (D.C. 1999) (quoting Springs v. United States, 614 A.2d 1, 4 (D.C. 1992)). No factor is controlling and the factors must be considered cumulatively. Springs, 614 A.2d at 4. The court may also consider other facts of the individual case. Bennett, 726 A.2d at 166.

In the instant motion, defendant claims ineffective assistance of counsel in that his attorney did not "investigate" the physical presence of the complainant, who was to serve as the prosecution's key witness, at defendant's trial on March 31, 2014. The trial ultimately did not occur as defendant entered a plea deal that same day after the government represented that the witness in question was present. In light of the defendant's claims, and pursuant to *Strickland v.*

[1] When faced with a claim of legal innocence, "the plea judge should consider the strength of the government's proffer and, if there has been a valid assertion of innocence, the reason the claimed defense was not put forward at the time of the plea." Bennett v. United States, 726 A.2d 156, 158 (D.C. 1999).
[2] When considering the length of delay, "the court should consider whether the government would be prejudiced by a withdrawal of the plea measured as of the time the defendant sought to withdraw it." Id.

Washington, counsel's failure to "investigate" the presence of the complainant at the trial, after the government declared ready, was not an error sufficiently serious as to deprive the defendant of a fair trial. As such, defendant cannot claim ineffective assistance of counsel.

The defendant has previously brought the same claim of ineffective assistance of counsel before this Court, claiming that his plea was not knowing and voluntary. The issue was fully litigated at the time of the defendant's initial motion hearing in 2016 regarding his intent to withdraw his guilty plea. After a full evidentiary hearing on August 1, 2014, defendant's claim was denied and this finding was later affirmed on appeal. In his § 23-110 motion, defendant claims ineffective assistance of counsel anew, adding a sole factual claim that his counsel did not "investigate" the presence of the complainant at his trial on March 31, 2014. This is not a legal basis for claiming ineffective assistance of counsel or withdrawal of a guilty plea. Contrary to defendant's claims, the Court has already established that defendant had full benefit of competent counsel at all relevant times. Furthermore, defendant's new factual claim that his attorney didn't see the complaining witness when the government announced ready for trial is not a basis to challenge the knowing and voluntary nature of his plea or establish a fatal defect in the plea colloquy. Thus, defendant has no basis to withdraw his guilty plea.

For these reasons, defendant's claim does not warrant relief and his sentence was lawful.

Therefore it is this 25th day of **February 2019**, hereby

ORDERED that defendant's *pro se* Brief of Law for D.C. Code § 23-110 Motion is **DENIED**.

Lynn Leibovitz
Associate Judge
(Signed in chambers)

Additional material from this filing is available in the Clerk's Office.