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STATE OF COLORADO

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COURT OF APPEALS, STATE OF COLORADO	
2 East 14 th Avenue Denver, CO 80203	JOHN P. DOERNER CLERK COURT OF APPEALS
Larimer County District Court Honorable Terence A. Gilmore, Judge Case No. 01CR456	
THE PEOPLE OF THE STATE OF COLORADO,	▲ COURT USE ONLY ▲
Plaintiff-Appellee,	Case No.: 05CA2168
v.	
JASON L. PECCI,	
Defendant-Appellant.	
JOHN W. SUTHERS, Attorney General ROGER G. BILLOTTE, Assistant Attorney General* 1525 Sherman Street, 7 th Floor Denver, CO 80203 (303) 866-5785 Registration Number: 16782 *Counsel of Record	
PEOPLE'S ANSWER BRIEF	

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INTRODUCTORY STATEMENT

The People request that this court take judicial notice of its files in People v. Pecci, Case No. 01CA2512. See CRE 201(b) and (f); Hatch v. Wagner, 41 Colo. App. 35, 590 P.2d 973 (1978); Torbit v. Griffith, 37 Colo. App. 460, 550 P.2d 350 (1976).

STATEMENT OF THE CASE AND FACTS

In April of 2001, the defendant shot and killed Marc Bender.¹ The killing stemmed from problems between the defendant and his wife Cari Pecci. They were married in 1989, while the defendant was serving in the United States Air Force. The couple moved to Fort Collins in 1996 when the defendant left the military and began attending Colorado State University. He earned a degree in electrical engineering and was working as a software engineer for Advanced Energy, Inc. in Fort Collins at the time of the crime.

In 2000, Cari Pecci began working two nights a week at a tavern called the Canyon Grill. Around November of 2000, Cari Pecci began a relationship with Marc Bender, who was a customer at the bar. Two weeks before the shooting, the

¹ Unless otherwise stated, the statements of this portion of the answer brief are taken from the presentence report (v. 1, pp. 128-139).

defendant began dating another woman. The defendant and his wife were making plans to divorce.

Around Christmas of 2000, Cari Pecci described an incident in which the defendant was carrying a firearm and told her that he had gone to kill Bender's dogs and that if he could find Bender, he would kill him also (v. 1, pp. 166-167). Testimony at the sentencing hearing indicated that Bender's dogs disappeared around the time the defendant made the statements to his wife, and the dogs were never found (v. 1, pp. 167-168).

On the night of the offense, the defendant had dinner with the woman he was dating and another friend. The friend became intoxicated, and the defendant took him to the Canyon Grill. After a conversation with his woman friend, the woman went home and the defendant went into the bar to get his friend. Inside the bar, the defendant saw his wife with Bender. In his statement to police after the shooting, the defendant described the Canyon Grill as a "scandalous" place, and stated that he and his wife had agreed to avoid going there while they began divorce proceedings. The defendant felt his wife had violated this agreement when he saw her with Bender in the bar.

The defendant approached them, and told them they could use the house belonging to him and Cari because he was going to stay somewhere else. Cari Pecci told the defendant she was not planning on being at their home, and this comment angered the defendant.

The defendant left the Canyon Grill, returned to his home, and gathered some belongings. The defendant placed his things in his pickup truck and drove back to the bar. The defendant drove into the parking lot and considered ramming Cari Pecci's car with his truck. The defendant then saw his wife and Bender leave the bar and get into her car. The defendant parked his truck behind them. Cari Pecci got out of her car, walked to the truck, and became involved in an argument with the defendant.

The defendant took a .357 revolver from under the seat of the truck and pointed it at Cari Pecci. The defendant later told police he did not intend to shoot his wife, but wanted to show her how angry he was about the violation of their agreement regarding the Canyon Grill. Cari Pecci went back to her car and told Bender that the defendant had a gun. The defendant got out of his truck, and his wife and Bender approached him. The defendant fired a shot into the ground in front of Bender. Cari Pecci ran into the bar. The defendant then fired a shot at Bender that struck him in the chest and killed him.

The defendant was originally charged with one count of first degree murder and one count of menacing. In exchange for dismissal of the menacing charge, the defendant pleaded guilty to an amended count of second degree murder, a class two felony (v. 1, pp. 272-288). The trial court sentenced the defendant to the Colorado Department of Corrections for a term of forty-eight years (v. 1, p. 238).

The defendant appealed his sentence, contending that the trial court abused its discretion by imposing the maximum sentence possible. A panel of this court affirmed the judgment of conviction. See People v. Pecci, (Colo. App. No. 01CA251, Feb. 27, 2003) (Not Published Pursuant to C.A.R. 35(f)).

In June and July of 2005, the defendant filed a Petition for Postconviction Relief Pursuant to Crim. P. 35(c) and a supplement to that petition (v. 1, pp. 17-294). The district court denied the motion without a hearing by written order in September of 2005 (v. 1, pp. 295-301). The defendant has appealed the order denying his request for postconviction relief.

SUMMARY OF THE ARGUMENT

The district court correctly denied the defendant's motion for postconviction relief without a hearing. The record shows that before the defendant entered his

plea of guilty, defense counsel was not ineffective in terms of investigating a possible provocation defense and other defenses that could be used at a trial.

The district court correctly found that there was an adequate factual basis for accepting the defendant's guilty plea. The statements made by the defendant at the providency hearing and transcript of the preliminary hearing establish that there was a sufficient factual basis.

ARGUMENT

I. The district court correctly denied the defendant's motion for postconviction relief without a hearing.

The defendant argues on appeal that he stated sufficient grounds in his motion to warrant an evidentiary hearing (Opening Brief, pp. 7-19). The claim fails.

A. Standard of Review

A district court may summarily deny a postconviction claim if, among other things, the factual allegations fail to state a constitutional claim for relief. People v. Rodriguez, 914 P.2d 230, 255 (Colo. 1996); People v. Zuniga, 80 P.3d 965, 972-73 (Colo. App. 2003). Whether a motion states a claim for relief is a legal determination subject to de novo review. Cf. Verrier v. Colo. Dept's Corr., 77

P.3d 875, 877 (Colo. App. 2003) (reviewing motion to dismiss for failure to state a claim under C.R.C.P. 12(b)(5)).

In addition, if the grounds alleged by the defendant lack merit as a matter of law, a trial court's ruling will not be disturbed on review, even if the court failed to make adequate findings. People v. Mershon, 874 P. 2d 1025 (Colo. 1994).

B. Discussion

A motion under Crim. P. 35(c) may be dismissed without a hearing if the motion, the files, and the record clearly establish that the defendant is not entitled to relief. White v. Denver District Court, 766 P.2d 632 (Colo. 1988); People v. Hartkemeyer, 843 P.2d 92 (Colo. App. 1992).

To establish a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was outside the wide range of professionally competent assistance; and (2) the defendant was prejudiced by counsel's errors. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); People v. Cole, 775 P.2d 551 (Colo. 1989).

The Strickland test also applies to the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The voluntariness of a guilty plea depends in part upon whether counsel's advice was within the

range of competence demanded of attorneys in criminal cases. See People v. Pozo, 746 P.2d 523 (Colo. 1987).

Here, the defendant argues that he was entitled to a hearing on his claim that trial counsel was ineffective because she failed to adequately investigate a provocation defense (Opening Brief, pp. 8-19).

However, the trial court found, and the record supports that, defense counsel considered the provocation defense and other types of defenses and explored these theories with the defendant, his estranged wife, and the defendant's mother and others (v. 1, pp. 120-126, 141-146, 148-149, 151-152, 154-156, 158, 160, 296-297). Defense counsel interviewed the defendant's mother about the defendant's mental and emotional condition as it related to the impending divorce and obtained the defendant's mental health records (v. 1, pp. 147-149, 151-152, 154, 155-156, 160, 297).

The record establishes that the provocation defense and other defenses were explored with the defendant and were sufficiently considered by counsel. Therefore, the court was correct in concluding that defense counsel had not been ineffective in investigating the provocation defense. See Strickland, supra; Lockhart, supra.

The record also supports the trial court's finding that the defendant was not prejudiced by the alleged ineffectiveness. The record shows that the defendant became involved in a verbal altercation with Cari Pecci and Bender at the Canyon Grill. The defendant left the scene, but returned armed with a loaded hand gun. The defendant spoke with Carri Pecci, pointed the gun at her face and asked if she wanted him to kill her (v. 1, p. 47). During the conversation, the defendant made a statement to the effect that he wanted to kill Bender. As the district court found, the facts significantly reduced the probability that a provocation defense would be successful and the defendant would elect to proceed to trial on that defense (v. 1, pp. 297-298). The record also indicates that the defendant was interested in a disposition of the case when he entered his guilty plea because he wanted to avoid the stress of a trial (v. 1, p. 160).

In summary, the record support the district court's denial, without an evidentiary hearing, of the defendant's claim of ineffective assistance of counsel.

II. The district court correctly found that there was an adequate factual basis for accepting the defendant's guilty plea.

The defendant argues on appeal that there was an inadequate factual basis for the trial court to accept his guilty plea (Opening Brief, pp. 19-22). The claim fails.

A. Standard of Review

Whether a guilty plea was entered properly under Crim. P. 11 is a matter of de novo review. See People v. Wilson, 708 P.2d 792, 796-97 (Colo. 1985).

B. Discussion

During the providency hearing, the following occurred:

THE COURT: Amended Count I, second degree murder, a Class 2 felony. On or about April 1, 2001, in the County of Larimer, State of Colorado, Jason L. Pecci did feloniously, unlawfully, knowingly and not after deliberation cause of the death of Marc Stevens Bender, contrary to Colorado Revised Statutes 18-3-103(1)(a), as amended. To the amended information, how do you plead?

THE DEFENDANT: Guilty, your Honor.

THE COURT: Mr. Pecci, is anyone forcing you to plead guilty today?

THE DEFENDANT: No, your Honor.

THE COURT: And you're doing this of your own free will?

THE DEFENDANT: Yes sir.

THE COURT: Mr. Pecci, I'd like you to tell me in your own words what happened on April 1st of this year that caused this charge to be placed against you.

THE DEFENDANT: There was an emotional episode, and it resulted in Mr. Bender's death.

...

THE COURT: Do you acknowledge that you caused the death of Marc Bender?

THE DEFENDANT: I do.

THE COURT: You did that knowing what you were doing?

THE DEFENDANT: Without prior deliberation, but knowingly, yes.

THE COURT: And how did you cause the death of Marc Bender?

THE DEFENDANT: Gunshot.

THE COURT: And you knew the gun was loaded when you fired it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the People are required to prove that the mental culpability, as your attorney has discussed it with you, in this particular case, knowingly, that you're aware of what your conduct was and practically certain to cause that result?

THE DEFENDANT: Yes.

THE COURT: This happened on April 1st in Larimer County?

THE DEFENDANT: Yes, it did.

THE COURT: [PROSECUTOR], and additional factual basis?

[PROSECUTOR]: Your Honor, for any additional factual basis, I ask the Court to take judicial notice of the preliminary hearing. It was heard May 21st, 2001.

THE COURT: The Court will find a legal and factual basis exists for the defendant's plea. Court will base that on the statements of the defendant as well as the evidence brought forth at the preliminary hearing on May 21st, there being no objection from the defense as to the findings at the preliminary hearing?

[DEFENSE COUNSEL]: No, your Honor.
(v. 1, pp. 275-278)

Crim. P. 11 requires the trial court to determine whether a sufficient factual basis exists for a guilty plea before accepting it, unless the finding of a factual basis is waived. People v. Fleming, 781 P.2d 1384, 1388 (Colo. 1989). A factual basis determination has been upheld when the defendant admits to the date, time, and elements of the crime. Id. Similarly, a factual basis exists when the defendant admitted to “that with which you are charged.” People v. Cushon, 650 P.2d 527, 528 (Colo. 1982). Also, admissions by the defendant during questioning by the trial judge related to criminal conduct support a factual basis determination. People v. Carino, 566 P.2d 1061 (Colo. 1977). Further, a defendant can stipulate to a factual basis. See Wilson v. People, 708 P.2d 792, 798-99 (Colo. 1985).

Here, as the district court found (v. 1, p. 299), the defendant made admissions and statements during the providency hearing that establish a sufficient basis for a factual basis to accept the plea as knowing, intelligent, and voluntary. The statements the defendant made to the probation department for the presentence report, after the plea was entered, do not negate the factual basis for the plea. The sufficiency of the factual basis is further supported by the transcript of the

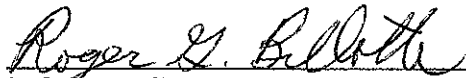
preliminary hearing, which the defendant stipulated to as part of the factual basis.
(v. 1, pp. 35-93, 277-78, 299).

In summary, the record supports that there was an adequate factual basis for
the defendant's guilty plea.

CONCLUSION

For the above reasons and authorities, the order of the district court denying
the defendant's motion for postconviction relief under Crim. P. 35(c) should be
affirmed.

JOHN W. SUTHERS
Attorney General

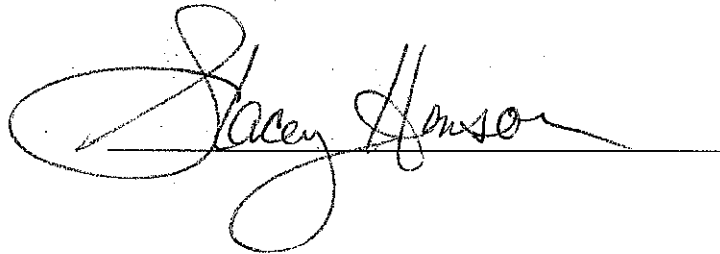


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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 22nd day of February 2007 addressed as follows:

Barrett Weisz
Robert Fishman, Of Counsel
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1800 Fifteenth Street, Suite 101
Denver, CO. 80202

A handwritten signature in black ink, reading "Stacy Hanson", is written over a horizontal line. The signature is fluid and cursive, with the first name "Stacy" being more prominent than the last name "Hanson".