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COLORADO COURT OF APPEALS Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
Larimer County District Court Honorable Terence A. Gilmore Case Number 01CR465	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee, v. JASON L. PECCI, Defendant-Appellant.	▲ COURT USE ONLY ▲
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REPLY BRIEF	

The most noteworthy aspect of the *Answer Brief* filed by the prosecution is the fact that does not actually "answer", or even address, any of the arguments advanced by Mr. Pecci in support of reversal. Rather than responding to any of the legal arguments raised by Mr. Pecci, and instead of addressing any of the evidence presented by Mr. Pecci in support of his motion for postconviction relief, the prosecution merely summarizes the very holdings of the trial court that Mr. Pecci argues are erroneous and require reversal by this Court.

So, for example, while Mr. Pecci argues that the trial court was wrong to deny a hearing on his motion for postconviction relief on grounds that trial counsel was aware that provocation might be a defense in this case – an argument premised upon the fact that Mr. Pecci's claim of ineffective assistance is not based upon a claim of ignorance but, rather differently, a claim that trial counsel failed to investigate the defense -- the prosecution on appeal says only that the trial court correctly ruled that trial counsel was aware of the provocation issue.

As such, the *Answer Brief* raises no issues that are not raised by the trial court's ruling itself and, as a consequence, it raises no issues that have not already been addressed by Mr. Pecci in his *Opening Brief.* Nevertheless, and at the risk of belaboring the points, we summarize below the arguments advanced in Mr. Pecci's

Opening Brief and we explain why the *Answer Brief* filed by the prosecution constitutes no "answer" to those arguments at all.

1. The District Court Erred In Refusing To Hold A Hearing On Mr. Pecci's Motion For Postconviction Relief.

In his postconviction motion, Mr. Pecci argued that his trial lawyer was ineffective in failing to investigate and develop the defense of provocation. There is no dispute about the fact that trial counsel conducted virtually no investigation of the issue. Nor is there any dispute concerning the fact that, had counsel undertaken such an investigation, she would have uncovered a wealth of compelling evidence in support of a provocation defense. *See Opening Brief* at pp. 10-16.

In order to prevail on this claim, Mr. Pecci must show both: (1) that "counsel's advice was [not] within the range of competence demanded of attorneys in criminal cases"; and (2) that there "is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." *People v. Garcia,* 815 P.2d 937, 941, 943 (Colo.1991). *See also Hill v. Lockhart,* 474 U.S. 52, 59-60 (1985) (same).

There can be little question that Mr. Pecci's trial counsel was ineffective in failing to investigate and develop a provocation defense. *See, e.g., People v. Dillon*, 739 P.2d 919, 922 (Colo.App.1987) (defense counsel must conduct "a

pretrial investigation of sufficient thoroughness to develop potential defenses, to reveal weaknesses in the prosecution's case, and to uncover all facts relevant to the issues of guilt and/or penalty"); *People v. White,* 514 P.2d 69, 71 (1973) ("[i]n the absence of adequate pre-trial investigation -- both factual and legal -- knowledgeable preparation for trial is impossible [and w]ithout knowledgeable trial preparation, defense counsel cannot reliably exercise legal judgment and, therefore, cannot render reasonably effective assistance to his client").

There also is little doubt that, had a provocation defense been fully developed, there is a "reasonable probability" that Mr. Pecci would not have pled guilty and would have insisted on going to trial.[1]

Nevertheless, the trial court denied Mr. Pecci's motion without conducting a hearing on grounds that he could not conceivable satisfy either prong of his ineffective assistance claim. First, the court concluded that trial counsel was not ineffective because she had "considered the potential use of the provocation defense" and discussed the issue with Mr. Pecci and his mother. (296-97). In the alternative, and according to the court, "more persuasively", the court ruled that

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[1] Mr. Pecci's plea to second degree murder with no recommendation concerning the appropriate sentence exposed him to a maximum term of imprisonment of forty-eight years (the sentence he actually received), whereas a conviction for second degree murder coupled with a finding of provocation would have exposed him to a maximum sentence of only thirty-two years incarceration.

Mr. Pecci could not establish prejudice in the sense of "a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." (298).

On appeal, Mr. Pecci's explains why neither of these conclusions have merit, and why neither can justify denying Mr. Pecci's motion without a hearing. In particular, Mr. Pecci points out that his claim of ineffective assistance is not premised upon the contention that his trial lawyer was ineffective because she was oblivious to the possibility of raising a provocation defense but rather, that counsel was ineffective in failing to investigate and develop facts that would support the defense. As to that claim, Mr. Pecci observes that the trial court says nothing at all, and it certainly says nothing that could support the conclusion that the record "*clearly establish[ed]* that the allegations presented in the defendant's motion are without merit." *White v. District Court,* 766 P.2d 632, 634 (Colo.1988) (emphasis added).

In its *Answer Brief*, the prosecution's only response to this claim is to say that the record supports the trial court's conclusion that trial counsel "considered the provocation defense" and "explored" the defense with Mr. Pecci and his mother. *Answer Brief* at p. 7. The prosecution (like the trial court) says nothing about counsel's failure to investigate the defense and nothing about the evidence

submitted by Mr. Pecci that establishes the compelling evidence of provocation that could have been uncovered by trial counsel. As such, the prosecution's brief (like the trial court's ruling) does not address the merits of Mr. Pecci's claim and obviously cannot justify rejecting that claim without conducting a hearing.

With respect to the trial court's alternative ruling -- that "prejudice does not exist" because "there is significant evidence of deliberation and premeditation, which would support the charge of First Degree Murder, a Class 1 felony [and that t]hese facts additionally negate the effectiveness of the provocation defense" (297) – Mr. Pecci explains that this conclusion is erroneous because, in the context of a plea agreement, Mr. Pecci need not speculate about the *outcome* of his trial, he need only establish 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." *Garcia,* 815 P.2d at 943.

In response to this claim of error, the prosecution argues that, "[a]s 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". *Answer Brief* at p. 8. The first part of this statement – the probability that the defense of provocation would be successful at trial -- is nothing but a restatement of the trial court's conclusion, and the prosecution fails to

respond to any of Mr. Pecci's arguments about why that conclusion is wrong, and why it cannot support the ultimate holding that Mr. Pecci cannot make out a claim of ineffective assistance.

The second part of this statement – that the district court "found" a reduced probability that Mr. Pecci would have proceeded to trial with a provocation defense – is unsupported by the record; the district court said nothing at all about the issue in its ruling, and that is precisely the problem with the court's analysis. (297-98).

Thus, for the reasons set forth in Mr. Pecci's *Opening Brief* – none of which are disputed or even addressed by the prosecution -- the trial court erred in refusing to conduct an evidentiary hearing on Mr. Pecci's motion for postconviction relief.

2. The District Court Erred In Ruling That There Was An Adequate Factual Basis For Accepting Mr. Pecci's Guilty Plea.

In his postconviction motion, Mr. Pecci argued that the trial court erred in failing to insure that there was an adequate factual basis for his guilty plea given the undisputed fact that, while he had stated to the court that he "knowingly" committed the offense, he later stated in connection with the presentence report

that he had acted "recklessly" and he made other statements consistent with the defense of provocation. *See Opening Brief* at pp. 20-22.

This inconsistency, Mr. Pecci argues, required the court to inquire further into the factual basis for the plea. *See, e.g., People v. Carino*, 566 P.2d 1061, 1063 (Colo.1977) (trial court has "the authority to vacate the guilty plea and enter a not guilty plea if the charges were not supported by facts appearing in the record of all court appearances and in the pre-sentencing report"); *People v. Denton*, 539 P.2d 1309, 1312 (Colo. App. 1975) (where defendant entered his plea "reluctantly" pursuant to a plea bargain, the court should have taken precautions to assure itself beyond question that there was a factual basis for the plea).

The district court rejected the claim by ruling, without explanation and without the benefit of any supporting authority, that because Mr. Pecci stated that he "knowingly" committed the offense at sentencing, there was an adequate factual basis for the plea, and that the statements made by Mr. Pecci in the presentence report had no affect on his plea. (292). This, Mr. Pecci argues on appeal, was error because *Carino* plainly requires a court to inquire into the factual basis for a plea where doubts are raised based upon the contents of the presentence report.

The prosecution in its *Answer Brief* again ignores the argument advanced by Mr. Pecci, and simply restates the ruling of the trial court. *See Answer Brief* at p.

11 ("defendant made admission and statement during the providency hearing . . . [and t]he statements made to the probation department for the presentence report, after the plea was entered, do not negate the factual basis for the plea").

As explained in Mr. Pecci's *Opening Brief,* the trial court erred in failing to ensure that a sufficient factual basis existed for the guilty plea, and the plea should be withdrawn as not knowingly, intelligently and voluntarily entered in violation of Crim.P. Rule 11.

* * *

For the reasons discussed in Mr. Pecci's *Opening Brief,* the trial court's order denying Mr. Pecci's motion for Postconviction relief should be reversed with instructions that an evidentiary hearing be held on Mr. Pecci's motion or, in the alternative, that this case be remanded to the trial court with instructions that Mr. Pecci be permitted to withdraw his plea.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 10th day of April, 2007, a copy of foregoing REPLY BRIEF was placed in the United States mails, properly addressed and postage prepaid, to:

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