DATE FILED: July 23, 2018 12:20 PM
FILING ID: C51A5502F63C3
CASE NUMBER: 2016CA2147

COURT OF APPEALS, STATE OF COLORADO

2 E. 14th Avenue
Denver, CO 80203

El Paso County District Court
Honorable David Lee Shakes, Judge
Case No. 11CR1232

PLAINTIFF-APPELLEE:
PEOPLE OF THE STATE OF COLORADO

DEFENDANT-APPELLANT:
ERIC MANLY

Attorney for Defendant-Appellant:

Tara Jorfald, Reg. No. 46193 (ADC)
THE NOBLE LAW FIRM, LLC
215 Union Boulevard, Suite 305
Lakewood, CO 80228
Tel: (303) 232-5160
Fax: (303) 232-5162
Email: tara@noble-law.com

▲ COURT USE ONLY ▲

Case No. 16CA2147

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements in these rules. Specifically, the undersigned certifies that:

1. The brief complies with the word limit in C.A.R. 28(g). It contains 1,236 words.

2. C.A.R. 28(a)(7)(A) does not apply to this brief. For each issue raised, the opening brief contains under a separate heading before the discussion, a concise statement: (1) of the standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

The undersigned acknowledges that the brief may be stricken if it violates the requirements of C.A.R. 28 and C.A.R. 32.

s/ Tara Jorfald

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. The district court erred in finding that defense counsel was not ineffective for failing to ensure that Mr. Manly understood the consequences of pleading guilty

A. Defense counsel's performance was deficient.

The attorney general first argues that Mr. Manly's claim fails because he did not call an expert in criminal defense to testify that defense counsel's performance was deficient. (Answer Brief, pp 37-38.)

To establish deficiency, a defendant must prove that counsel's representation "fell below an objective standard of reasonableness." *Dunlap v. People*, 173 P.3d 1054, 1062 (Colo. 2007). Prevailing norms of practice as reflected in defense standards provide guidance on what is reasonable. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

A defense expert is unnecessary to determine deficiency. Unlike an expert in criminal defense, whose credibility is easily questioned, the standards provide an objective standard of reasonableness. In the opening brief, Mr. Manly listed the criminal and juvenile defense standards that require defense attorneys to take extra steps to ensure their *juvenile* clients are able to make a meaningful decision as whether to plead guilty—including appointing a guardian-ad-litem. (Opening Brief, pp 12-24.) The attorney general does not address or dispute the contents of

the standards listed in the opening brief.

Defense counsel was deficient for failing to take additional steps to ensure Mr. Manly understood the consequences of pleading guilty given his juvenile status and trouble understanding. (Opening Brief, pp 12-24.)

The attorney general further states that counsel was not deficient for failing to request a guardian-ad-litem because the district court did not have to appoint a guardian-ad-litem or require a parent or guardian-ad-litem to attend the providency hearing. (Answer Brief, pp 44.) Counsel agrees that the district court did not have to appoint or require the presence of a guardian-ad-litem.

The attorney general, however, confuses the court's requirements with defense counsel's. The roles are separate and distinct. *See People v. Birdsong*, 958 P.2d 1124, 1128 (Colo. 1998). It was defense counsel's job to ensure that Mr. Manly could make a meaningful decision as whether to plead guilty. *Birdsong,* 958 at 1128; *see also* Opening Brief, pp 12-13.

Counsel could not do this herself due to her lack of rapport with Mr. Manly and his trouble understanding. (Opening Brief, pp 12-18.) The prevailing standards and norms required her to take additional steps to ensure Mr. Manly was understanding her advice. (Opening Brief, pp 18-20.) Her failure to do so was deficient performance.

B. Mr. Manly was prejudiced by his attorney's deficient performance.

The attorney general states that Mr. Manly risked eighty years if he were convicted and the only evidence of prejudice was his "self-serving" allegations. (Answer Brief, p 49.)

The attorney general does not address the objective corroborative evidence that supports Mr. Manly's prejudice claim. Mr. Manly wanted to withdraw his plea and take on the risks of going to trial prior to sentencing and before any motivation to fabricate—as demonstrated by his request to counsel to withdraw his plea before setnencing. (CF, p 258; EX, p. 23.)

The attorney general points out that Mr. Manly will be risking the original charges and consecutive sentences if his plea is withdrawn and he were convicted. (Answer Brief, p 33.) Mr. Manly is now 23 years old and is not eligible for YOS. § 18-1.3-407.5, C.R.S. 2018; (CF, p 5.) His continued adamancy to withdraw his plea without the benefit of YOS further supports his claim.

The attorney general further does not address that a twenty-five-year sentence for a fifteen-year-old boy differs from a twenty-five-year sentence for an adult. The plea offer risked a sentence that was more than twice Mr. Manly's age that would cause him to miss the integral years of his adolescent and young-adult development. (TR 10/6/16, p 23:16-23.)

While defense counsel was not optimistic at his chances at trial, his possible defenses were were not meritless. (TR 8/3/16, pp 7:6-7, 53:9-24.)

A reasonable probability is that but for defense counsel's errors, Mr. Manly would not have pleaded guilty.

II. The district court erred in denying Mr. Manly's claim that his plea was not knowingly, voluntarily, or intelligently entered.

The attorney general argues that Mr. Manly knew the possible penalties of his plea offer and the court unequivocally advised him of the penalties. (Answer Brief, pp 54-55.) The attorney general further argues that this court should defer to the district court's similar conclusions. (Answer Brief, pp 54-55.)

While it is true that this court generally defers to findings of fact, the court should reverse the order denying postconviction relief because the district court relied on the speculation of lead counsel and ignored the other more substantive evidence in reaching its conclusion.

A lower court's factual findings are given deference by this court unless they are "clearly erroneous" or "lack the support of competent evidence in the record." *People v. Kyler*, 991 P.2d 810, 818 (Colo. 1999). A finding is clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been

committed. *People v. Harlan*, 109 P.3d 616, 635 n4 (Colo. 2005). A finding that is clearly erroneous may be set aside by the reviewing court. *People v. Platt*, 81 P.3d 1060, 1065 (Colo. 2004).

The district court's determination that Mr. Manly understood lead counsel's advice about the plea, and that Mr. Manly was incredible for testifying otherwise was based on lead counsel's testimony that she would have tried to advise him of the plea offer. (CF, p 339.)

At the evidentiary hearing, however, lead counsel forgot what advice she gave to Mr. Manly. She did not know how often they met to discuss the plea. (TR 7/25/16, p 44:19.) She was not sure if co-counsel was there. (TR 7/25/16, p 45:1-4.) She forgot what Mr. Manly's goals were. (TR 7/25/16 p 49:9-25.)

She was not sure if she took her extra measures to make him understand. (TR 7/25/16, p 59:12-18.) She was not sure what specific advice she provided him. (TR 7/25/16, p 99:6-7.)

The district court's speculation that she conformed with her practice in advising Mr. Manly or that her standard practice was sufficient to make him understand is refuted by the other evidence presented at the evidentiary hearing. Specifically, the evidence showed that Mr. Manly had trouble communicating with counsel, had a poor rapport with lead counsel, showed signs he did not understand

counsels' advice "more often than not," asked for his mother to help him understand lead counsel's advice, was upset, stormed off, and unable to verbalize why when he was upset while he was deciding to plead guilty, and read and wrote at a sixth-grade level. (Opening Brief, pp 12-17, 24, 27-33.)

The district court did not address that the plea was written at a twelfth-grade level, the language in the plea agreement would have been difficult for any juvenile and particularly Mr. Manly to understand, and, at one point, the court misadvised him that if he were accepted to YOS he would be sentenced to YOS. (Opening Brief, pp 27-33.)

The district court erred in finding that Mr. Manly knowingly, intelligently, and voluntarily entered his guilty plea by not addressing all the evidence presented and instead relying on defense counsel's speculations.

CONCLUSION

Defendant-Appellant Eric Manly therefore respectfully requests that this court reverse the order denying postconviction relief and reverse the judgment of conviction.

Respectfully submitted,
THE NOBLE LAW FIRM, LLC

s/ Tara Jorfald

_____
Tara Jorfald, Reg. No. 46193
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I certify that on the 23rd day of July 2018, this **REPLY BRIEF** was served via Colorado Courts E-Filing on Senior Assistant Attorney General Joseph Michaels.

s/ Tara Jorfald