No. 46855-7-II

Supreme COURT
OF THE STATE OF WASHINGTON

93006-6

State of Washington, Respondent,

v.

Dwayne Marcum, Petitioner,

MOTION FOR DISCRETIONARY REVIEW

Dwayne Marcum
[Name of petitioner]

Dwayne Marcum 369667
Coyote Ridge Correction Center
P.O. Box 769
Connell, WA. 99326
[Address]

A. Identity of Petitioner

Dwayne Marcum [Name] asks this court to accept review of the decision designated in Part B of this motion.

B. Decision

[Statement of the decision or parts of decision petitioner wants reviewed, the court entering or filing the decision, the date entered or filed, and the date and a description of any order granting or denying motions made after the decision such as a motion for reconsideration.]

I would like the Supreme Court to review my Appeal in the Court of Appeals Division II No. 46865-7-II filed February 9, 2016. I received the order Denying motion for reconsideration March 11, 2016.

A copy of the decision [and trial court memorandum opinion] is in the Appendix.

C. Issues Presented for Review

[Define the issues which the court is asked to decide if review is granted.]

The issues that need review are as follows;
Ineffective Assistance of counsel;
Double jeopardy;
Due process violations;
and L.F.O's

D. Statement of the Case
[The statement should be brief and contain only material relevant to the motion.]
I believe there to be serious ineffective assistance of counsel issues that were never dealt with in criminal court. I wanted to go to trial but wasn't allowed to withdraw my guilty plea. The dates the prosecuting attorney used in my case are wrong. I was wearing the same clothes in all the media. I removed my overshirt because it was the heat of summer but you can see the undershirt is the same in all the media. My case was never investigated, and my witnesses were never contacted or interviewed. I am still in double jeopardy, the crimes all happened at the same time and the victim is the same.

E. Argument Why Review Should Be Accepted
[The argument should be short and concise and supported by authority.]
please see attatched

F. Conclusion
[State the relief sought if review is granted.]
I would like to have my case remanded back to criminal court so I can take it to trial and have the double jeopardy dropped or have the charges against me dropped.

DATED this 10th day of April, 2016.

Respectfully submitted,

Petitioner

APPENDIX

Table of Authorities for Argument

Table of Authorities contd.

"A guilty plea does not preclude defendant from raising a Sixth Amendment claim of ineffective assistance of counsel", Wiley v. Wainwright, 793 F.2d 1190 (11th Cir. 1986). The ineffective assistance of counsel is throughout the case. "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel," McMann v. Richardson, 397 U.S. at 771. "[T]he special value of the right to the assistance of counsel explains why '[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel' ... the text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but 'assistance' which is to be 'for his defense.' Thus 'the core purpose of the counsel guarantee was to assure 'assistance at trial, when the accused was confronted with both the intricacies of the law, and the advocacy of the public prosecutor' ... If no actual 'assistance' 'for' the accused's 'defense' is provided, then the constitutional guarantee has been violated." U.S. v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984) (footnote and citations omitted). See also, Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). "The Sixth Amendment... guarantees more than the appointment of competent counsel. By its terms, one has a right to 'assistance of counsel [for] his defense.' Assistance begins with the appointment of counsel, it does not end there. In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to 'have assistance of counsel' is denied." United States v. Cronic, 466 U.S. at 654 n.11 quoting U.S. v. Decoster, 624 F.2d 196, 219 (D.C. Cir. 1979), judgement entered, 598 F.2d 311 (D.C. Cir. 1979) (MacKinnon, J., concurring) Defense counsel was informed that when the detective

was taking my "confession", I was high on medication. "Trial counsel's failure to investigate the fact that defendant was on medication during which time he confessed to the crime, may constitute ineffective assistance of counsel." Williamson v. Reynolds, 904 F. Supp. 1529 (E.D. OKL. 1995). Defense counsel was also informed that I was suffering from "Diminished Capacity" at the time of the crime. "Defense counsel's failure to develop evidence relevant to defendant's psychological state of mind at the time of crime constituted ineffective assistance of counsel." Johnson v. Dugger, 911 F.2d 440 (11th Cir. 1990) I have a mental disorder, that is documented by my psychologist, that with diminished capacity caused me to have mental incapacity, RCW 9A.44.010, at the time of crime. "Trial counsel's failure to present evidence that the defendant was an alcoholic and had drank too much and failure to investigate an insanity defense, which would have explained mental state of mind at the time of crime, constituted ineffective assistance of counsel." Wood v. Zahradnick, 611 F.2d 1383 (4th Cir. 1980) "Counsel's failure to investigate into defendant's mental history constituted ineffective assistance of counsel." Parkus v. Delo, 33 F.3d 933 (8th Cir. 1994), see also Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984) and Hill v. Lockhart, 28 F.3d 832, 844-45 (8th Cir. 1994). Defense counsel did not investigate my case. "Trial counsel's failure to investigate charge against defendant constitutes ineffective assistance of counsel under certian circumstances." McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974). Nor did he interview any witnesses on my behalf. "Trial counsel's failure to interview potential witnesses, whose names had been provided to counsel by defendant, amounted to ineffective assistance of counsel." U.S. v. Gray, 878 F.2d 702 (3rd Cir.

1989). The only investigation the defense counsel did was review the investigative report that the prosecution supplied. "Trial counsel's investigation, which constituted soley of reviewing the investigative file of the prosecuting attorney, constituted ineffective assistance of counsel." Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984) see also, Hyman v. Aiken, 824 F.2d 1405 (4th Cir. 1987), Harris By and Through Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995), Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986) and Coss v. Lackawanna County District Attorney, 204 F.3d 453 (3rd Cir. 2000). "A pretrial investigation in a criminal case provides the basic foundation, on which most defense rests and is a critical stage of the lawyers performance." House v. Balkcom, 725 F.2d 608 (11th Cir. 1984). Defense counsel did not obtain medical records. "Trial counsel's failure to obtain medical reports of alleged rape victim constitutes ineffective assistance of counsel." Vick v. Lockhart, 952 F.2d 999 (8th Cir. 1991). "Trial counsel's failure to investigat facts of case is unconscionable and falls below the demands of the Sixth Amendment." House v. Balkcom, 725 F.2d 608 (11th Cir. 1984). "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to counsel... [A defendant] is unfamiliar with the rules of evidence... He lacks both skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step of the proceeding against him." Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527 (1932). Under ill advice of counsel, I, the defendant took an Alford plea of guilty. I was not advised of the I.S.R.B., what they are about or what they do. I was not told that I could possibly spend the

rest of my life incarcerated, or that I would have to do 90 percent of my sentence, or that if I did get released I would be on probation for the rest of my natural life. The only thing he did mention is that I would have to register when I got out. "Trial counsel's failure to familirize himself with the facts, law relevant to the case in relation to the guilty plea constitutes ineffective assistance and renders the plea involuntarily entered." Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974). "Defense counsel's advise must be accurate base on current law in relation to facts in order for defendant to make informed and conscious choice whether to plead guilty." Kennedy v. Maggio, 725 F.2d 269 (5th Cir. 1984), see also, Scott v. Wainwright, 698 F.2d 427, 429-30 (11th Cir. 1983), Tower v. Phillips, 979 F.2d 807 (11th Cir. 1992), and Boykins v. Alabama, 295 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969). "The Supreme Court in Hill v. Lockhart, 474 US. 52, 88 L.Ed. 2d 203, 106 S.Ct. 366 (1985), held that the two part Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2064-74, 80 L.Ed. 2d 674 (1984) test applies to challenges to guilty pleas based on ineffective assistance of counsel. The Hill court found in the plea bargaining context, a petitioner seeking to establish ineffective assistance of counsel must demonstrate that: (1) counsel's advice and performance fell below an objective standard of reasonableness; and (2) the petitioner must 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." Id. at [474 U.S. 59] (emphasis added). The Court held that a remand was required to determine whether petitioner was prejudiced by his counsel's failure to investigate a crime to which, upon counsel's advice, petitioner pled guilty. Reversed

and Remanded." Woodard v. Collins, 898 F.2d 1027 (5th Cir. 1990). "The Woodard court found that the first prong of Strickland had been satisfied but found that it could not ascertain from the record whether the second prong of Strickland has been met. First, A court generally must strongly presume that counsel has exercised reasonable profess-ional conduct. Strickland, 466 U.S. at 690, 104 S.Ct. at 2065, and, Samples, 897 F.2d at 196. No such presumption, however, is warranted when a lawyer advises his client to plea bargin to an offense, which the attorney has not investigated. Such conduct is always unreasonable, Id. at 1029. Second, the court must determine whether Woodard suffered prejudice. Woodard can show prejudice if 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." Hill, 474 U.S. at 59, 106 S.Ct. at 370. On remand, the district court must make findings to determine whether Woodard suffered prejudice. Reversed and Remanded." I belive the first prong of Strickland has been satisfied. To satisfy the second prong, I informed the court, in writing, that I wanted to fire my defense counsel, "Defense counsel's failure to confer with defendant, to seek discovery, to investigate crime charged or to interview witnesses, or to develop a working relationship in capatal case amounted to incompetent representation and required appointment of substitute counsel." Crandell v. Bunnell, 144 F.3d 1213 (9th Cir. 1998) and withdraw my guilty plea CrR 4.2(f). I received substitute counsel, so there was enough evidence to prove incompetent representation or ineffective assistance of counsel. I should have been able to with-

draw my guilty plea in accordance with, Rule 11(d)(2)(B), which states: withdrawing a guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere: after the court accepts the plea, but before it imposes sentence if: the defendant can show a fair and just reason for requesting the withdrawl. The request was made before sentencing and I was able to prove ineffective assistance of counsel, but I was told the court was too far invested and we were still proceeding with the sentencing at the specified date of October 29, 2014. At the sentencing hearing the court openly rejected my plea agreement.[1] According to Rule 11(c)(5)(A)(B)(C): If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera)(A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated. I was still not afforded the opportunity to withdraw my plea. The second prong has been satisfied by my attempts to withdraw my guilty plea so I could take my case to trial. "Where a defendant is denied a constitutional right in connection with his arraignment and plea, it is an abuse of discretion to deny a motion to withdraw the plea." State v. Taft, 297 P.2d 1119. "An invalid plea of guilty constitutes actual prejudice." Hews v. Evans, 660 P.2d 268. "No conviction can stand no matter how

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overwhelming the evidence of guilt if the accused is denied the effective assistance of counsel." State v. Roberts, 421 P.2d 1014, 69 Wn. 2d 921 (1966). "A conviction on a guilty plea that is entered solely as a result of faulty legal advise is a miscarriage of justice." United States v. Scott, 625 F. 2d 623 (5th Cir. 1981).

The double jeopardy exists between charges one; first degree rape of a child, and two; first degree molestation of a child. These charges are in fact the same, "Relying on State v. Dunaway, 109 Wn. 2d 207, 214-15, 743 P.2d 1237 (1987) and State v. Lessley, 118 Wn. 2d 773, 777, 827 P.2d 996 (1992), Division Two stated: 'If one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." Miller, 92 Wn. App. at 700. The prosecuting attorney says the video "was likely created on March 13, 2011" and "the photos were created on March 7, 2011." Apparently they were not sure the video was created on March 13th.[2] It was not. The photos were not created on March 7th either. "Trial counsel's failure to do basic legal research, to review the testimony of key witnesses, including his own client, and to be familiar with readily available documents necessary to understanding of their client's case, constituted ineffective assistance of counsel." Hyman v. Aiken, 824 F.2d 1405 (4th Cir. 1987). Had there been any investigation into the case defense counsel would have found out that I did not know the victim on these dates. I did not meet her until July 2011, four months after the video and pictures were

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taken. I stayed with the family less than ten weeks and moved out September 29th, 2011. My witnesses, had they been interviewed, and the mother of the victim could attest to this fact. "Due process requires the state prove every essential element of a crime beyond a reasonable doubt." State v. Dow, 253 P.3d 476, 162 Wn. App. 324. U.S.C.A. Const. Amend. 14. see also, State v. A.M., 260 P.3d 229, 163 Wn. App. 414. The prosecution says I was wearing a different T-shirt in the photograph as too the one in the video. No, it was the same t-shirt in both. It was black. The green shirt is an over-shirt and you can see the black one underneath, because I never button the green one, it's too snug, and its missing a button in the middle. I took the green one off because I was hot, after all it was in the heat of Summer. "Trial counsel's failure to investigate facts of case is unconscionable and falls below the demands of the Sixth Amendment." House v. Balkcom, 725 F.2d 608 (11th Cir. 1984). These crimes had to happen at the same because I've only had one camera that could make that kind of media. It was given to me in August, 2011 for a debt that was owed to me, and I sold it that night for a debt that I owed. Otherwise at that time I did not own anything that could create the media that I was accused of possessing. "Two offenses are considered to be the "same offense" for double jeopardy purpose if they are the same in law and in fact." State v. O'Brien (1987), 30 Ohio St. 3d 122, 30 Ohio B. 436, 508 N.E. 2d 144. The dates are wrong, either that, or the evidence is fabricated. If that is the case then I would like all the charges against

me to be dropped, because you can not meet a person for the first time, after , you meet them, and that is what the prosecution is suggesting.

My C.F.O's are an issue because they were only briefly mentioned at sentencing.[3] I was under the impression that they were to be discussed at the restitution hearing, which took place after I was sent to Shelton, so I was not able to object because I was not there.

Due process, 5th, 6th, and 14th Amendment rights have been violated. Cr.R. 8.3(b)- A defendant must make two showings to justify dismissal based on government's conduct: (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. In the: Prosecutorial Misconduct Vol. I chapter 3-Prosecutorial Abuse of the Decision to Charge § 3.33 Prosecutorial Vindictiveness states; due process prohibits a judge and/or a prosecutor from punishing a criminal defendant in retaliation for that defendant's decision to exercise a constitutional right. The judge may not punish the defendant's by enhancing the defendant's sentance. "I exercised my right to remain silent in sentencing and instead of the 240 months agreed upon, I got 300 months and told what a rotten person I am. I was not allowed to withdraw my plea 188689:: Leffler v. Andrews Nov. 15, 2012 opinion- "Court violated appellant's right under due process of law by not allowing him to withdraw plea prior to sentencing."

[3] Appendix D

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE MARCUM,

Appellant.

No. 46855-7-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **February 9, 2016** opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Worswick, Lee

DATED this 11th day of March, 2016.

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

Lisa Elizabeth Tabbut
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Jesse Espinoza
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223 E 4th St Ste 11
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Appendix B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLALLAM

STATE OF WASHINGTON,)

Plaintiff,)

vs.) No. 12-1-00249-4

DWAYNE MARCUM,)

Defendant.)

_____)

BE IT REMEMBERED that on October 29, 2014, above-captioned cause came on duly for hearing before the HONORABLE GEORGE L. WOOD, Judge of the Superior Court in and for the County of Clallam, State of Washington; the following proceedings were had, to wit;

Excerpt of Proceedings of Reporter's

verbatim transcript

SENTENCING

LISA C. MC ANENY Official Court Reporter

223 E. 4th Street Dept. II Superior Court

Port Angeles, WA 98362 360-417-2243

Court sets a minimum term and then the Parole Board does their thing.

THE COURT: Okay. Mr. Marcum, do you want to say anything to the Court at all?

THE DEFENDANT: No, I don't (inaudible) --

THE COURT: Okay. Well, I've read the file, thoroughly. I've read the PSI several times.

Uh, I guess a couple observations I want to make.

First of all, Mr. Marcum in the PSI, according to the PSI writer, has denied any memory of these events. Yet, uh, I couldn't help but notice that he possessed a hard drive with the videos and photographs of his action toward the victim in this case.

Um, I think that's a little bit contradictory that I don't remember but I'm holding vidoes and photographs of my molestation of this little two year old.

So, that tells me a couple of things. It tells me that it demonstrates a lack of taking responsibility. Um, you really can't deny the video evidence that's there. And that raises a red flag to me that Mr. Marcum will continue to engage in such behavior because he refuses to accept responsibility

for what he did.

And the other thing that, uh, bothers me about the case is that -- and probably this more so than the other, is that not only did he -- did the videos represent something I think very sinister in this case, he not only abused this two year old child, but he took videos and photographs of his abuse. That tells me that -- Mr. Marcum, that you're a danger to the community, and there's really no excuse for what you did obviously, and uh, to abuse a baby in such a manner is inexcusable as far as I'm concerned. And when you memorialize it on video as if it's something for you to prize, uh, you are a danger.

And I'm not going to follow the recommendation. I'm going to impose 300 months, which is 25 years, and that will be the minimum. The maximum will be set by the State or the Parole Board and I'll give the maximum on the other counts and they'll all run concurrent of course.

Community custody will be for life.

MS. SCHODOWSKI: And that was the maximum on all the other --

THE COURT: Yes.

MR. ANDERSON: And it's my understanding is if

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vagina and anus of a female of about 2 years of age. CP 106. Det. Malone also described two photos matching the description Mr. Marcum gave to Det. Malone showing Mr. Marcum licking the vagina and anus of a female child of approximately 2 to 3 years of age. CP 106. The video was likely created on Mar. 13, 2011 at about 4:11 p.m. CP 106. The photos were created on Mar. 7, 2011 at about 8:56 p.m. CP 106. In the photo showing the Child Molestation, Mr. Marcum was wearing a different T-shirt than the one he was wearing in the video of the Rape of a Child. CP 106.

Det. Malone also described photographs on the flash drive showing an adult male having sexual contact and intercourse with a female child approximately 2 to 3 years old. CP 107. The background in the photos is the same as described in the still photo from the video where Mr. Marcum was identified by his tattoo. CP 106, 107.

On Oct. 19, 2012, the State filed an amended information which clarified Counts 1–4 and added Counts 5–14, all of which were charges for Possessing Depiction of Minor Engaged in Sexually Explicit Conduct in the First Degree.

About a year later, on Oct. 17, 2013, Mr. Marcum entered a plea of guilty to Counts 1–10. CP 53, RP 9–10. Counts 11–14 were dismissed per the plea agreement. CP11. Prior to taking the plea of guilty, the trial court specifically discussed the charges of the amended information with Mr.

Marcum. RP 8–10.

The court also inquired of Mr. Marcum if he had any questions about the statement of defendant on plea of guilty. RP 6. Mr. Marcum indicated that he did not and that he reviewed it with his attorney. RP 6. Mr. Marcum indicated that he understood the rights he was giving up (RP 7), that he understood his standard sentence range and offender score (RP 7), the state's sentencing recommendation including the dismissal of Counts 11–14 of the amended information (RP 8), and that the judge is not bound by the recommendation (RP 8).

Mr. Marcum pleaded guilty one-by-one to Counts 1–3 and then guilty to Counts 4–10. RP 9–10. Mr. Marcum indicated that no threats were made to get him to plead guilty and the court found that Mr. Marcum entered his plea of guilty in a knowing, voluntary, and intelligent manner. RP 10.

Mr. Marcum's statement in the Statement of Defendant on Plea of Guilty states, "I have reviewed the evidence in this case with my attorney and discussed it fully with him. I believe there is a substantial likelihood of my being convicted should this matter go to trial and I am entering this plea to take advantage of the State's plea offer." RP 60. Then there is an unchecked box in the same section and the statement continues, "Instead of making a statement, I agree that the court may review the police reports and/or statement of probable cause supplied by the prosecution to establish a factual

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this file and the statement of defendant on plea of guilty that was entered with the Court, the prosecutor's recommendation is -- and as I understand, Mr. Marcum pled guilty to counts 1, 2, 3, 4, 5, and then 6 through 10 which were all the same counts of possessing depictions of minors, and that the State, based upon the plea of guilty to those counts is moving to dismiss counts 11 through 14.

Um, also based upon that, is that Mr. Marcum has an offender score of 9. The State's recommendation is for 240 months of incarceration which appears to be the low end of the range on Count 1. And would actually be the total that would encompass all the other counts, 2 through 10.

Specifically, the range on Count 2 is 149 months to 198 months. The range on Count 3 is 120 months. And the range on counts 4 through 10 is 87 to 116 months on each one of those, so it would be a total of 240 months.

The community custody would be the maximum, which is life for these offenses.

There is proposed legal and financial obligations of $2000, but it does say restitution to be determined. Our office is working on that. I

believe we will be seeking or asking for some crime victim's compensation fund. So I would ask the Clerk that restitution be determined and the prosecutor will set a date and send that information to Mr. Anderson and we can set a restitution hearing for that.

Also, based upon the PSI and the agreed recommendation is sex offender evaluation and follow any recommendations from that under his DOC community custody. Have no contact with children under the age of 18, and also for a post-conviction sexual assault protection order with the victim, whose initials are KIL.

Also at this time, Your Honor, State had -- we did receive a victim's -- written victim's impact statement from the victim's parents, that was given to Mr. Anderson and given to the Court for consideration today. So I won't read that into the record, just ask the Court to consider that.

And I do need to let the Court know at this time I had alerted Mr. Anderson, we do have -- there were some other investigations of some other children that were not charged. But the grandmother and the mother are present today in the courtroom of that child. It's not the victim who the charges were

Filed
Washington State
Court of Appeals
Division Two

February 9, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DWAYNE AARON MARCUM, Appellant.	No. 46855-7-II UNPUBLISHED OPINION

LEE, J. — Dwayne Aaron Marcum appeals his convictions for one count each of first degree child rape, first degree child molestation, and sexual exploitation of a minor, and seven counts of first degree possession of a depiction of a minor engaged in sexually explicit conduct. Marcum argues that his guilty plea to these offenses is invalid because it lacked a factual basis. Marcum also argues that the trial court lacked authority to impose a community custody condition requiring him to undergo a chemical dependency evaluation and recommended treatment, as well as a condition prohibiting him from using or possessing any drugs without a prescription. In addition, Marcum challenges the discretionary legal financial obligations (LFOs) that the trial court imposed. Finally, in a pro se statement of additional grounds (SAG), Marcum argues that his convictions of child rape and child molestation violate the prohibition against double jeopardy and that his attorney refused to allow him to plead diminished capacity before his arraignment, requiring him to plead not guilty instead.

Because the amended statement of probable cause on which the trial court relied contains factual information supporting Marcum's charges, his factual basis challenge fails. The record also supports a finding that Marcum's drug use contributed to his offenses. Consequently, the community custody condition requiring him to obtain a chemical dependency evaluation and treatment is crime related and therefore lawfully imposed. The State concedes that the condition barring Marcum from using or possessing any drug without a prescription is overbroad, and we accept the State's concession. Marcum failed to object to the imposition of LFOs during sentencing, so we do not address this issue on appeal. His child rape and child molestation offenses occurred on different dates and do not constitute double jeopardy, and Marcum fails to show that his attorney's pre-arraignment advice entitles him to relief. Accordingly, we affirm the convictions but remand for the sentencing court to address the community custody condition prohibiting all drug use and possession without a prescription in a manner consistent with this opinion.

FACTS

On July 27, 2012, the State charged Marcum with first degree child rape, first degree child molestation, sexual exploitation of a minor, and first degree possession of a depiction of minor engaged in sexually explicit conduct. The probable cause statement explained that Detective Kori Malone had interviewed Marcum about a digital camera and flash drive found in the woods. Marcum said that the camera looked like one that was missing from his apartment and admitted that he had possessed the flash drive for several years.

Marcum explained that the flash drive contained "child pornography," including two photographs of him with his mouth against a child's vagina. Clerk's Papers (CP) at 105. Detective

Malone viewed the video and pictures on the flash drive, and she provided descriptions of content that supported the existing and additional charges.

On October 19, the State filed an amended information that clarified the original four counts while adding six counts of first degree possession of a depiction of a minor engaged in sexually explicit conduct and four counts of second degree possession of a depiction of a minor engaged in sexually explicit conduct. The State dismissed the latter four counts after Marcum agreed to plead guilty to the initial ten counts: first degree child rape, first degree child molestation, sexual exploitation of a minor, and seven counts of first degree possession of a depiction of a minor engaged in sexually explicit conduct.

Marcum entered an *Alford* plea,[1] and the trial court relied on the probable cause statement to find a factual basis for his plea. Before sentencing, Marcum moved to withdraw his plea. In a supporting declaration, Marcum argued that he was not given the opportunity to review the entire discovery before he pleaded guilty and that he had not understood the significance of his indeterminate sentence, including the possibility that he could spend the rest of his life in prison. The trial court heard argument, took the matter under advisement, and issued a written ruling denying the motion.

At sentencing, the trial court imposed a term of 300 months in custody and several community custody conditions, including a list of conditions recommended in the presentence investigation (PSI) report. One condition from the report required Marcum to "abstain from the

[1] An *Alford* plea allows a defendant to plead guilty to take advantage of a plea bargain even if he is unable or unwilling to admit guilt. *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976) (citing *N. Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)).

possession or use of drugs and drug paraphernalia unless prescribed by a medical professional," and to provide copies of all prescriptions to his community corrections officer (CCO) within 72 hours. CP at 22. Another condition from the PSI report required Marcum to obtain a chemical dependency evaluation and to complete any recommended treatment. The trial court also imposed discretionary LFOs of $717.40 for defense costs and "jail incidentals" to which Marcum did not object. CP at 15.

On appeal, Marcum challenges his guilty plea, the two community custody conditions described above, and the discretionary LFOs imposed.[2]

ANALYSIS

A. FACTUAL BASIS

Marcum argues that his guilty plea is invalid because it fails to establish a factual basis for any of the charges. He adds that his plea was involuntary because the State did not present any facts to establish a lawful basis for each count.

The State responds that Marcum cannot raise this issue for the first time on appeal because the requirement in CrR 4.2(d) that there be a factual basis for a plea is a procedural rather than constitutional requirement. *See* RAP 2.5(a)(3) (party may raise manifest error affecting constitutional right for first time on appeal); *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 592 n.2, 741 P.2d 983 (1987) (establishment of factual basis is procedurally required). Although

[2] Appellant purports to appeal "the court's denial of his motion to withdraw his guilty plea and every part of his judgment and sentence." Br. of Appellant at 4. However, Marcum only assigns error to and provides argument on the issues addressed in this opinion. Therefore, to the extent there are any other issues Marcum intended to challenge with his broad statement, we do not address them. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Marcum did not specifically challenge the factual basis of his plea in his motion to withdraw, he did complain that his attorney had not provided him with a review of the facts sufficient to allow him to make an informed decision about a guilty plea. Even if this assertion is not sufficient to preserve Marcum's factual basis challenge, we may address this challenge for the first time on appeal because of its constitutional implications. *Hews*, 108 Wn.2d at 592.

Constitutional due process requires that a defendant's guilty plea must be knowing, intelligent, and voluntary. *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). A guilty plea is not truly voluntary unless the defendant knows the elements of the offense and understands how his conduct satisfies those elements. *State v. R.L.D.*, 132 Wn. App. 699, 705, 133 P.3d 505 (2006). An inadequate factual basis may affect this understanding. *In re Pers. Restraint of Clements*, 125 Wn. App. 634, 645, 106 P.3d 244, *review denied*, 154 Wn.2d 1020, *cert. denied*, 546 U.S. 1039 (2005). Thus, the requirement of a factual basis is constitutionally significant insofar as it relates to the voluntariness of Marcum's plea. *Hews*, 108 Wn.2d at 592.

A trial court's determination that a factual basis exists for the plea does not require that the court be convinced of a defendant's guilt beyond a reasonable doubt, but only that sufficient evidence exists to sustain a jury finding of guilt. *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976); *State v. Amos*, 147 Wn. App. 217, 228, 195 P.3d 564 (2008), *abrogated sub silentio on other grounds*, *State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009). In determining factual basis, the trial court may consider any reliable source as long as it is in the record. *Amos*, 147 Wn. App. at 228; *In re Pers. Restraint of Fuamaila*, 131 Wn. App. 908, 924, 131 P.3d 318 (2006).

1. First Degree Rape of a Child

First degree rape of a child requires proof that the defendant had sexual intercourse with a child under 12 years of age who was not married to the defendant, and that the defendant was more than 24 months older than the victim. RCW 9A.44.073(1). RCW 9A.44.010(1) defines sexual intercourse as any penetration and as "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.010(1)(a), (c).

Marcum argues that the probable cause statement provided an inadequate factual basis for the child rape charge because it did not contain any facts showing that he committed the required conduct with a child younger than 12 years of age. The probable cause statement explains that the child rape charge is supported by a video showing Marcum licking the vagina and anus of a female child of approximately two years of age. It provides an adequate factual basis for the child rape charge.

2. First Degree Child Molestation

Child molestation in the first degree requires proof of sexual contact with a person less than 12 years of age who is not married to the defendant and is at least 36 months younger than the defendant. RCW 9A.44.083(1). "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

Marcum argues that the probable cause statement does not show that the molestation victim was younger than 12 years of age. The probable cause statement explains that the child molestation charge is supported by photographs of Marcum licking the vagina and anus of a female child who is approximately two or three years old. The statement explains that Marcum is dressed differently

than he was in the video supporting the rape charge and that the dates of the photographs and video are different. The probable cause statement provides an adequate factual basis for the molestation charge.

3. Sexual Exploitation of a Minor

A person is guilty of sexual exploitation of a minor if he caused a person under 18 years of age to engage in sexually explicit conduct, knowing that such conduct would be photographed. RCW 9.68A.040(1)(b); RCW 9.68A.011(5). "Sexually explicit conduct" means actual or simulated:

> (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
> (b) Penetration of the vagina or rectum by any object;
> (c) Masturbation;
> (d) Sadomasochistic abuse;
> (e) Defecation or urination for the purpose of sexual stimulation of the viewer;
> (f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and
> (g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

RCW 9.68A.011(4).

Marcum argues that the probable cause statement does not show that he engaged in sexually explicit conduct with a child under age 18 with the knowledge that the conduct would be photographed. The probable cause statement identifies him as the adult photographed with a two-to-three-year-old child. Marcum admitted that the flash drive was his. The statement adds that

close-up photographs show Marcum's tongue extended and visible. This is sufficient evidence of the victim's age and of the fact that Marcum knew his conduct with her was being photographed.

4. First Degree Possession of a Depiction of a Minor Engaged in Sexually Explicit Conduct

This offense requires proof that the defendant knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e). RCW 9.68A.070(1)(a). (A second degree charge requires proof that the minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g). RCW 9.68A.070(2)(a).)

Marcum argues that there was no evidence that he possessed photographs of minors engaged in sexually explicit conduct sufficient to prove six counts of first degree possession of a depiction of a minor engaged in sexually explicit conduct. Marcum pleaded guilty to seven counts of this offense. The probable cause statement explains that videos and photographs on the flash drive show Marcum and "an adult male" having sexual intercourse with a female child of two to three years of age. The statement refers to six different files containing such videos and photographs and adds that other images and videos on the flash drive appear to depict child pornography. Marcum admitted possessing the flash drive and acknowledged that it contained child pornography. The probable cause statement is sufficient to establish the factual basis for seven counts of first degree possession of a depiction of a minor engaged in sexually explicit conduct. Marcum's challenge to his guilty plea fails.

B. COMMUNITY CUSTODY CONDITIONS

Marcum challenges two of his community custody conditions. He contends that the trial court exceeded its statutory authority in imposing the chemical dependency evaluation and

treatment condition, as well as the condition restricting his use or possession of any drug without a prescription.

A trial court lacks authority to impose a community custody condition unless the legislature has authorized it. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009). Although Marcum did not object during sentencing to the conditions he now challenges, an unlawful community custody condition may be challenged for the first time on appeal. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013). Because Marcum's claim involves construction of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A. RCW, our review is de novo. *Warnock*, 174 Wn. App. 611.

1. Condition Requiring Chemical Dependency Evaluation and Treatment

Marcum challenges the community custody condition requiring him to "obtain a chemical dependency evaluation and enter into, comply with and successfully complete any treatment program recommended therefrom." CP at 22. RCW 9.94A.703 authorizes trial courts to require an offender to participate in crime-related treatment or counseling services as a condition of community custody and to participate in "rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(c), (d).

The SRA specifically authorizes trial courts to order an offender to obtain a chemical dependency evaluation and to comply with recommended treatment if it finds that the offender has a chemical dependency that contributed to the offense:

> Where the court finds that the offender has any chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative

> programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

RCW 9.94A.607(1).[3] An express finding that the defendant had a chemical dependency that contributed to the offense is not required as long as the record supports such a finding. *State v. Powell*, 139 Wn. App. 808, 819, 162 P.3d 1180 (2007), *rev'd on other grounds*, 166 Wn.2d 73, 206 P.3d 321 (2009).

The trial court did not check the box in Marcum's judgment and sentence stating that his chemical dependency contributed to his offenses. Nor did the trial court refer to Marcum's drug use during sentencing. But the record contains considerable support for a finding that Marcum's drug use contributed to his offenses. In a letter to the trial court supporting his motion to withdraw his plea, Marcum admitted that he was under the influence of drugs and alcohol at the time of his offenses. The probable cause statement reveals that he told the investigating detective that he was "very 'high'" when the photographs at issue were taken. CP at 105. The PSI report contains several references to Marcum's drug use, including his statements that (1) he was so high on drugs he didn't remember his offenses, (2) he was taking handfuls of drugs at the time, (3) he had been using drugs regularly since the seventh grade, (4) he loved hallucinogens, including Ecstasy, which

[3] The State argues that this statute does not apply to Marcum because he was sentenced to a term of total confinement. As support, it cites former RCW 9.94A.607(2), which provides that the statute applies "to sentences which include any term other than, or in addition to, a term of total confinement, including suspended sentences." Because the trial court imposed a term of community custody as well as one of total confinement, RCW 9.94A.607 applies to Marcum. *See In re Postsentence Review of Childers*, 135 Wn. App. 37, 41, 143 P.3d 831 (2006) (RCW 9.94A.607(1) authorizes court to impose affirmative conditions such as participation in chemical dependency treatment when it sentences offender to term of community custody).

promoted hypersexualization in him, and (5) he was using methamphetamine and intravenous bath salts at the time of his offenses. CP 78-79, 83. The trial court did not exceed its statutory authority by requiring Marcum to undergo a chemical dependency evaluation and treatment as a condition of community custody.

2. Condition Restricting the Possession or Use of Drugs Without a Prescription

Marcum also challenges the condition requiring him to "abstain from the possession or use of drugs and drug paraphernalia unless prescribed by a medical professional" and to provide copies of all prescriptions to his CCO within 72 hours. CP at 22. The State concedes that this condition is overbroad, as it prohibits Marcum from using or possessing over-the-counter drugs without a prescription.[4] We accept the State's concession. On remand, the sentencing court should address the challenged community condition by striking the condition or modifying the condition to require Marcum to "abstain from the possession or use of controlled substances unless prescribed by a medical professional and to provide copies of all prescriptions to his CCO within 72 hours."

C. LFOs

Marcum argues that the trial court erred in imposing discretionary LFOs for defense and jail costs without considering his ability to pay.[5] Marcum contends that he may challenge the assessment of these obligations for the first time on appeal.

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[4] Marcum's judgment and sentence has an additional community custody condition prohibiting him from consuming controlled substances except pursuant to lawfully issued prescriptions. This condition is mandatory unless waived. RCW 9.94A.703(2)(c). This community custody condition has not been challenged and is not an issue in this appeal.

[5] Marcum does not challenge the $800 imposed for mandatory LFOs. *See State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (legislature has divested courts of discretion to consider defendant's ability to pay when imposing mandatory LFOs).

Marcum's judgment and sentence states that the trial court considered his ability to pay the LFOs imposed. Marcum did not challenge this language or his LFOs during sentencing, so he may not do so on appeal. *State v. Lyle*, 188 Wn. App. 848, 850, 355 P.3d 327 (2015) (citing *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), *remanded*, 182 Wn.2d 827, 344 P.3d 680 (2015) (affirming Court of Appeals' exercise of discretion to refuse to address issue raised for the first time on appeal, but exercising its own discretion to reach the issue and remand to trial court for further proceedings). Our decision in *Blazina*, issued before Marcum's sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal. 174 Wn. App. at 911. As our Supreme Court noted, an appellate court may use its discretion to reach unpreserved claims of error. *Blazina*, 182 Wn.2d at 830. We decline to exercise such discretion here.

D. SAG

Marcum raises two additional issues in his SAG. The first alleges that his child rape and child molestation convictions violate his right to be free from double jeopardy.

The double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution prohibit the imposition of multiple punishments for a single offense. *State v. French*, 157 Wn.2d 593, 612, 141 P.3d 54 (2006). Because the conduct supporting the rape and molestation convictions occurred on separate days, Marcum was not punished twice for a single offense. *See State v. Fuentes*, 179 Wn.2d 808, 825, 318 P.3d 257 (2014) (prosecution for separate acts of child rape and child molestation did not constitute double jeopardy).

Marcum also asserts that his attorney refused to allow him to plead diminished capacity before his arraignment and instead required him to enter a plea of not guilty. Marcum does not explain why this advice was either faulty or of consequence, given his subsequent decision to plead guilty. We need not discuss this issue further.

We affirm the convictions and remand for the sentencing court to address the community custody condition prohibiting all drug use and possession without a prescription in a manner consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, J.

Johanson, C.J.