Supreme Court No. 98540-5
Court of Appeals No. 36089-0-III

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

GAVIN WOLF,

Petitioner.

PETITION FOR DISCRTIONARY REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Gavin Wolf, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review. The decision is attached in the appendix.[1]

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Before a person is terminated from mental health court, due process requires: written notice and disclosure of the evidence, an opportunity to be heard, including the right to call witnesses and present evidence, confrontation of adverse witnesses, a neutral decision-maker, and, if termination is granted, a written statement of the evidence and reasons for termination. Although Mr. Wolf was terminated from mental health court, he received none of these due process protections. Does the termination order violation due process?

2. Defendants have a constitutional right to appear in court free of restraints. Before permitting restraints, the court must conduct an adequate hearing and the evidence must show the restraints are necessary. Without conducting a proper hearing and in the absence of evidence showing restraint was necessary, the court ordered Mr. Wolf restrained due to

[1] This consists of the unpublished opinion and the order denying Mr. Wolf's motion to reconsider. Mr. Wolf also seeks review from a separate decision from the Court of Appeals in No. 36088-1-III. The two cases concern identical issues and were decided together in the trial court.

speculative concerns about alleged "aggression" outside the courtroom. Was Mr. Wolf shackled in violation of the state and federal constitutions?

3. Did the due process errors and the unconstitutional shackling of Mr. Wolf cumulatively deprive Mr. Wolf of a fair hearing?

4. Like one who enters into a deferred prosecution agreement, a person admitted into a therapeutic court program gives up fundamental constitutional rights. For entry to be effective, there must be a knowing, intelligent, and voluntary waiver of these constitutional rights. When Mr. Wolf was admitted into the mental health court program, the court did not engage in a colloquy with Mr. Wolf to ensure his waiver was valid. Is Mr. Wolf entitled to restoration of his constitutional rights and to be placed back in his previous position because there was not a valid waiver?

C. STATEMENT OF THE CASE

Gavin Wolf was charged with various offenses based an allegation that he stole a bag left in a car parked in an attached garage. [2] 1CP 1-6.[3]

[2] This consisted of six charges: one count of residential burglary; two counts of second degree theft; two counts of second degree identity theft; and one count of first degree trafficking in stolen property. 1CP 1-2.

[3] "1CP" refers to the clerk's papers from No. 36088-1-III. "2CP" refers to the clerk's papers from No. 36089-0-III. Although separate, both cases are related.

In a separate incident, Mr. Wolf got into a dispute with security at a hospital and was charged with multiple counts of third degree assault after security officers and police officers forcibly detained him. 2CP 1-4.

Mr. Wolf entered into mental health court waivers and agreements in both cases. 1CP 11-16; 2CP 5-10. Like drug courts, mental health courts are a "therapeutic court program."[4] RCW 2.30.010(4). In exchange for successful completion of the program, which involves participation in treatment, the prosecution agreed to dismiss the charges with prejudice. 1CP 12-13; 2CP 6-7. Before accepting Mr. Wolf into the mental health court program, the trial court did not engage in a colloquy with Mr. Wolf to ensure that the waiver of his constitutional rights was knowing, intelligent, and voluntary. 3/29/16 RP 7-10.

A little less than two years later, Mr. Wolf appeared based on "Mental Health Court warrants." RP 3. The court recounted there had been an allegation that Mr. Wolf had been arrested and charged with malicious mischief. RP 4. The court stated that based on "our normal course of procedure," the court had set a "termination hearing." RP 5. The court

[4] For an overview and discussion of a drug court program, which appears to be similar to the mental health court program in this case, see State v. Sykes, 182 Wn.2d 168, 171-73, 339 P.3d 972 (2014).

stated this had been discussed during its private "staffing" meeting[5] and that the hearing would be set. RP 5. The record does not show that Mr. Wolf was provided any written notice of intent to terminate or a written statement setting out the reason or reasons termination was being sought.

At the termination hearing on March 13, Mr. Wolf was shackled. RP 13-14. Based on vague allegations about statements Mr. Wolf had made while in his jail cell, the transport officer asked that Mr. Wolf remain restrained. RP 14. Over Mr. Wolf's objection, the court ordered that Mr. Wolf remain shackled during the hearing. RP 17.

The court then proceeded with the termination hearing, which the court stated was "not an evidentiary proceeding." RP 18. The court stated that prior to the hearing, the court had discussed the matter during a private staffing with at least four individuals along with the prosecutor. RP 20.

Defense counsel moved to continue the hearing. RP 21-22. He stated that he was not prepared to defend Mr. Wolf and that Mr. Wolf had provided him the names of people to interview and possibly call as witnesses. RP 21. Defense counsel stated he had only been able to meet

[5] Our Supreme Court has held that the guarantee of open courts provision in article I, section 10 does not apply to adult drug court staffings. Sykes, 182 Wn.2d at 174.

with Mr. Wolf the day before and that it was not Mr. Wolf's fault he had been unable to see him until then. RP 21. Mr. Wolf personally echoed his counsel's request for a continuance, stating he wanted some time to prepare and assist defense counsel. RP 22-24. Mr. Wolf reiterated that he had witnesses he wanted the court to hear from. RP 25-26. Mr. Wolf asserted that denying him a continuance would deprive him of due process. RP 23. He remarked that the way the hearing was proceeding was "constitutionally and fundamentally wrong." RP 23.

The court denied the request to continue. RP 27-28. The court stated that notice of the hearing had been provided, that this was "not a trial," and that the court would not be hearing from witnesses. The court remarked that the "call" to terminate rested with the court and that the court was "prepared to do that." The court told Mr. Wolf he was free to "raise" any "constitutional issues" in "an appeal":

> Let's go back to the termination policy one more time just so it is clear: The decision rests solely with the Mental Health Court judge. This is not a trial. This is a hearing. In all hearings you are entitled to notice and the opportunity to be heard. We gave everyone notice of this hearing. And everyone is going to have the opportunity, as they already have, to be heard as to the particular charges.
>
> I'm not going to have witnesses come in today and talk about whether we're going to weigh out whether someone has done well in a living arrangement versus whether they have done well in a courtroom. Again, the call

> is mine to make as to whether I feel this particular Mental Health Court proceeding should continue on in this court.
>
> So I'm prepared to do that today. I don't see any impediments in proceeding on today. It's – it's certainly interesting. You can talk about constitutional issues and so forth. If somebody wants to raise those on an appeal, that is fine. But -- and I have been in this position for awhile now – I'm unfamiliar with any case law that indicates that there is any constitutional issues with us proceeding in this regard.

RP 27-28.

The court proceeded. The court read notes and made remarks about the history of the case. RP 28-38. Without swearing him in as a witness, the court briefly heard from John O'Neil—the case manager in the program who had worked with Mr. Wolf, defense counsel, and Mr. Wolf. RP 39-48. The court then informed Mr. Wolf the court was reading the police report related to the allegation of arrest on malicious mischief. RP 50-51. According to the court, the report stated that during a ride with Mr. Wolf's mother, Mr. Wolf had stepped out of the car and broken a window of the car. RP 50-51. The court stated that if Mr. Wolf had acted "volitionally," the court could not have him in mental health court. RP 51. And if Mr. Wolf was unable to control himself, the court could not have him in the program either. RP 51. Although appearing to accept what was in the report as true, the court stated "I'm not adjudicating whether you are guilty or not." RP 52.

The court remarked that the police reports related to the incident at the hospital, for which Mr. Wolf was charged with three counts of assault, showed "aggressive, inappropriate behavior." RP 52. Mr. Wolf asked if the court had viewed the video from incident.[6] RP 52. The court answered "no," stating the court was "not going to adjudicate that right now." RP 52. The court made further comments, including a comment that the court had made itself a note at 4:00 a.m. asking "Why is Gavin so angry?" RP 53-54. After letting Mr. Wolf briefly respond, but without swearing in Mr. Wolf to testify, the court made further comments. RP 55-61.

After remarking that the group in staffing had unanimously stated they were "done," the court concluded by saying it was terminating Mr. Wolf from the program. RP 61.

At a later hearing, which considered information set out in the police reports, the court adjudicated Mr. Wolf guilty of all the charged offenses in both cases. RP 141-46.

The Court of Appeals rejected Mr. Wolf's challenges to this procedure, along with his contention, raised in his statement of additional grounds, that his entry into the mental health court program was invalid.

[6] The reports state that there was body camera footage from a police officer. 2CP 33-34.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED.

1. In contravention of precedent, the Court of Appeals held that Mr. Wolf failed to show that he was terminated from the mental health court program in violation of due process. This Court should grant review and reverse the Court of Appeals.

In the context of parole and probation revocations, the United States Supreme Court has held that due process guarantees include, at a minimum: (1) written notice of the claimed violations; (2) disclosure of the evidence; (3) an opportunity to be heard, including the right to call witnesses and present evidence; (4) a right to confront adverse witnesses; (5) a neutral decision-maker; and, (6) if revocation is granted, a written statement of the evidence and reasons for revocation. Morrissey v. Brewer, 408 U.S. 471, 488–89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). These protections apply when the prosecution seeks to terminate a pre-trial diversion agreement. State v. Marino, 100 Wn.2d 719, 724-27, 674 P.2d 171 (1984); State v. Kessler, 75 Wn. App. 634, 636-37, 879 P.2d 333 (1994). Additionally, the State has (7) the burden to prove noncompliance with the agreement by a preponderance of the evidence. Marino, 100 Wn.2d at 725.

The Court of Appeals has held these minimal guarantees of due process extend to drug court terminations. State v. Cassill-Skilton, 122

Wn. App. 652, 657-58, 94 P.3d 407 (2004). In Cassill-Skilton, the defendant was admitted into a drug court program. Cassill-Skilton, 122 Wn. App. at 655. After she was charged with a new felony offense, the prosecution asked that she be terminated from the program. Id. The court granted the request. Id. This Court held the defendant had been terminated from the program in violation of due process. Id. at 658. The court reasoned the record did not show the basis for the termination, that the defendant had not been afforded any opportunity for a hearing on the alleged violations, and that there was a lack of findings showing what evidence the court relied on in concluding the agreement was violated. Id.

In this case, Mr. Wolf was terminated from mental health court, a type of therapeutic court program, in violation of every one of the seven basic guarantees of due process described above. Br. of App. at 13-15.

The Court of Appeals did not expressly disagree. Rather, The Court of Appeals rejected his arguments on the basis that his claims did not qualify as "manifest" within the meaning of RAP 2.5(a)(3). And, therefore, his claims were not properly before the Court for the first time on appeal. In doing so, the appellate court repeatedly cited the "collaborative nature" and "closed nature" of therapeutic court proceedings as a reason for any error not being manifest:

- "The collaborative nature and partially-closed proceedings characteristic of therapeutic courts make it particularly unreasonable to assume that a right was violated just because its protection or exercise does not appear in the record on appeal." Slip op. at 9.

- "The 'unique characteristics' of the collaborative and sometimes closed therapeutic court process adds to the importance that a claimed constitutional error either be objected to in the trial court or manifest in order to be entitled to review." Slip. op at 10.

- "It is entirely possible that uncontested procedural matters might have been addressed during the staffing process. It is entirely possible that given the ongoing, collaborative, nonadversarial nature of the process, the purpose and the parameters of the termination hearing were mutually understood before it began." Slip op. at 10.

This reasoning should be rejected by this Court. The purpose of a having collaborative and partially closed proceeding is that "in properly functioning adult drug courts, everyone has the same goal—the participant's successful completion of the program." State v. Sykes, 182 Wn.2d 168, 175, 339 P.3d 972 (2014).

But once the State seeks termination, adversarial proceedings have resumed and this model must give way. "[W]hen the focus is on removing someone from the program instead of assisting in recovery, the informality of the treatment modality must give way to the formalities of the adversarial process." State v. Snow, noted at 184 Wn. App. 1058 at *6

(2014) (unpublished).[7] The claimed errors regarding basic due process protections should not be deemed waived based on proceedings that were not open to the public and where Mr. Wolf himself was not present. While Mr. Wolf's lawyer was present at the closed proceedings, he was unable to assist his attorney and his attorney was unable to consult Mr. Wolf. Moreover, Mr. Wolf's constitutional rights belonged to him, not his lawyer. State v. Humphries, 181 Wn.2d 708, 717-18, 336 P.3d 1121, 1126 (2014).

Additionally, the Court of Appeal's view of the meaning of "manifest" conflicts with State v. A.M., 194 Wn.2d 33, 448 P.3d 35 (2019). "RAP 2.5(a)(3) requires only that the defendant make a plausible showing that the error resulted in actual prejudice, meaning there were practical and identifiable consequences at trial [or the proceedings]." A.M., 194 Wn.2d at 33.

That standard is met. But for the errors, the termination hearing would have been very different. Mr. Wolf would have received *written* notice that he was supposed to be defending against a claim of "re-arrest" and that this justified termination. This would have alleviated much of the confusion by the parties and the trial court about the scope of the hearing.

[7] Cited as persuasive authority. GR 14.1(a).

Moreover, Mr. Wolf would have received disclosure of the evidence against him (including witnesses) so he could prepare. He could have demanded to confront these adverse witnesses. And he could decide to call his own witnesses and present evidence. These are all practical and identifiable consequences of the trial court's failure to afford Mr. Wolf fundamental due protections. And with no disrespect intended to the trial court, the trial court appeared to unaware of what due process demanded. RP 27-28.

The Court of Appeals reasoned that Mr. Wolf waived any right to confront witnesses because he did not raise a confrontation clause objection. Slip op. at 17. First and foremost, the trial court never heard from any witnesses that would have permitted Mr. Wolf exercise his right. There was *no swearing* in of *any* witness. While the court briefly heard from John O'Neil, he was not sworn in as a witness. RP 38-39. Rather than Mr. O'Neil being examined by either of the parties, he simply gave a narrative statement. RP 38-48. Rather than hear from witnesses, the court just read documentary evidence, some of which was not even disclosed to Mr. Wolf until the proceeding.

Second, the confrontation right that Mr. Wolf is asserting was violated is one grounded in due process, not the Sixth Amendment right to confrontation of witnesses. State v. Marino, 100 Wn.2d 719, 724-27, 674

P.2d 171 (1984). The Court of Appeals' citation to State v. Burns, 193 Wn.2d 190, 211-12, 438 P.3d 1183 (2019) is misplaced. That case was about whether a claimed error concerning the admission of testimonial statements at a criminal trial could be raised for the first time on appeal as manifest constitutional error. The error Mr. Wolf alleged was in the trial court not swearing any witness and not providing Mr. Wolf an opportunity to examine any witnesses. This error is manifest. Further, while an objection would have been ideal, Mr. Wolf can hardly be faulted given the trial court's refusal to swear in an officer regarding the issue of shackling, RP 14-15, and the court's admonition that it was not holding "an evidentiary proceeding." RP 18.

Given the precedent, this was an easy case. The Court of Appeals got it fundamentally wrong. The decision is in conflict with precedent from the United States Supreme Court, this Court, and the Court of Appeals. RAP 13.4(b)(1), (2). The protections owed to persons in therapeutic courts concern important constitutional questions which should be addressed by this Court. RAP 13.4(b)(3). And given the prevalence of therapeutic courts and lack of precedent from this Court, the issue about what due process is owed is a matter of substantial public. RAP 13.4(b)(4). This Court should grant review.

2. The Court should review the decision which affirmed the trial court's ruling that ordered Mr. Wolf be shackled during the termination hearing. Alternatively, review should be stayed pending this Court's decision on shackling in *Jackson*.

Defendants have the constitutional right to stand before the court "with the appearance, dignity, and self-respect of a free and innocent man." State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Our state constitution entitles an accused person "to appear with the use of not only his mental but his physical faculties unfettered," unless "impelling necessity demands" restraint. State v. Williams, 18 Wash. 47, 50-51, 50 P. 580 (1897).

Thus, it is well recognized that the accused are "entitled to be brought into the presence of the court free from restraints." State v. Damon, 144 Wn.2d 686, 690, 25 P.3d 418 (2001) (citing Williams, 18 Wash. at 50). The use of restraints may deprive the accused of the full use of their facilities and negatively affect their constitutional rights, including the presumption of innocence, the right to testify, and the right to assist counsel. Id. at 691; Deck v. Missouri, 544 U.S. 622, 630-31, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005). Before a court orders restraints, the court must hold a hearing and find that the restraints are justified. State v. Walker, 185 Wn. App. 790, 800, 344 P.3d 227 (2015).

In this case, the trial court ordered that Mr. Wolf remain shackled during the termination hearing. The hearing and the court's inquiry, however, was inadequate to support the court's decision. The court did not hear testimony or receive any sworn declarations. Cf. Walker, 185 Wn. App. at 792 (in support of request to restrain defendant, court received declaration setting out defendant's criminal history, gang affiliation, his lengthy attempt to fight extradition, and various admitted infractions for violence and misconduct in jail). Mr. Wolf requested that Sergeant Purcell provide sworn testimony and sought to challenge Sergeant Purcell's representation of the facts, but the court denied his request. RP 14-15. Given the dispute and that Mr. Wolf's constitutional rights were at stake, the court should have granted Mr. Wolf's request. See In re Ross, 45 Wn.2d 654, 644-55, 277 P.2d 335 (1954) (prejudicial error for trial court to deny party's request that witnesses be sworn in; statements by witnesses were equivalent to hearsay).

Moreover, in determining that Mr. Wolf had a problem with "aggression" that justified restraining him, the court relied on unadmitted documents related to the allegation of malicious mischief, including a police report. RP 16, 26. These documents were hearsay and it was error

for the court to rely on them.[8] See Ross, 45 Wn.2d at 644-65. The court did not even make these documents part of the record.

In these kinds of circumstances, a "trial court may not rely on mere assertions but must develop a factual record to support" shackling or other measures that impinge the presumption of innocence. State v. Jaime, 168 Wn.2d 857, 866, 233 P.3d 554 (2010). Thus, in Jaime, where trial was held in a jail building rather than a courthouse, this Court reasoned that the unverified representations by the prosecutor that the defendant presented a security concern and escape risk were inadequate to justify the alternative arrangement. Id. at 866. Without fact-finding by the trial court, its decision was an abuse of discretion. Id. at 865-86.

The same flaw is present in this case. The court failed to conduct a fact-finding hearing and simply relied on the unverified representation by Sergeant Purcell and the allegations related to the recent charges against Mr. Wolf. RP 17-18; Br. of App. at 22-23. As in Jaime, the trial court's failure to hold a fact finding hearing was an abuse of discretion. See also Walker, 185 Wn. App. at 792 (court received declarations and these

[8] Taking judicial notice of documents in separate judicial proceedings is improper even where they involve the same party. In re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003); Swak v. Dep't of Labor & Indus., 40 Wn.2d 51, 53-54, 240 P.2d 560 (1952). Doing so may deprive a party of due process. State v. K.N., 124 Wn. App. 875, 877, 882, 103 P.3d 844 (2004).

declarations supported trial court's decision that restraints were necessary).

The Court of Appeals should have held the trial court erred, but instead affirmed the trial court's decision to shackle Mr. Wolf. The Court of Appeals also held any error was harmless because the proceeding did not involve a jury. But Mr. Wolf argued the error is structural error. The Court of Appeals did not explain why the error was subject to harmless error analysis. And even if it were subject to harmless error, the Court of Appeals should have reversed because the prosecution had not met its burden to prove the error harmless beyond a reasonable doubt.

This Court is addressing an issue concerning shackling in State v. Jackson, 194 Wn.2d 1016, 455 P.3d 122 (2020) (granting petitions for review). In Jackson, the Court of Appeals held the trial court erred in shackling the defendant without a proper inquiry, but held the error was harmless beyond a reasonable doubt. State v. Jackson, 10 Wn. App. 2d 136, 149-50, 447 P.3d 633 (2019). This Court is reviewing those rulings. This demonstrates that issues of shackling are an issue worthy of this Court's consideration as both a constitutional issue and an issue of substantial public interest. RAP 13.4(b)(3), (4). As in Jackson, this Court

should also grant review.[9] Alternatively, the petition should be stayed and considered when Jackson is decided. The Court may remand back to the Court of Appeals in consideration of Jackson.

3. Mr. Wolf did not knowingly, intelligently, and voluntarily waive his constitutional rights before being admitted into the therapeutic court program. The Court should grant review to decide whether a colloquy by the trial court is necessary for a waiver to be effective.

The Court of Appeals rejected Mr. Wolf's claim that his waiver of his constitutional rights, necessary for entry into the mental health court program, were effective. This claim was made by Mr. Wolf in his statement of additional grounds.

To summarize Mr. Wolf's contentions, Mr. Wolf contends that he did not validly waive his constitutional rights, including his jury trial rights. For a waiver of constitutional rights to be effective, the record must establish a knowing, intelligent, and voluntary waiver. Humphries, 181 Wn.2d at 717. Waiver of a constitutional right is not to be presumed and courts must indulge in a presumption of waiver. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984).

[9] Mr. Wolf argued that due process violations at the termination hearing along with the shackling cumulatively deprived him of fair hearing in violation of due process. The Court should grant review of this issue as well.

Here, while Mr. Wolf appears to have signed a document waiving his rights, and he orally stated that he was waiving his rights, the trial court did not engage in a searching inquiry with Mr. Wolf about whether he understood he was giving up his constitutional rights. 3/29/16 RP 7-8.

Further, the procedure contemplated by RCW 10.05.020 was not followed. This provision, which concerns deferred prosecutions, applies by analogy to these proceedings. Cassill-Skilton, 122 Wn. App. at 658. The violation of a statute designed to protect due process is a manifest constitutional error that is properly raised for the first time on appeal. See Matter of Det. of T.C., 11 Wn. App. 2d 51, 61-62, 450 P.3d 1230 (2019) (failure by trial court to provide statutory advisement to respondent that he would lose his firearm rights if involuntarily committed qualified as manifest constitutional error). Accordingly, given the absence of a colloquy and compliance with RCW 10.05.020, the record does not show a knowing, intelligent, and voluntary waiver of Mr. Wolf's rights. See Acrey, 103 Wn.2d at 211.

The Court of Appeals' decision rejecting Mr. Wolf's claims were contrary to precedent. RAP 13.4(b)(1), (2). Whether a colloquy is necessary for an effective waiver is a constitutional issue that should be decided by this Court. RAP 13.4(b)(3). Given the growth of therapeutic

courts, it is also an issue of substantial public interest, further meriting review. RAP 13.4(b)(4).

E. CONCLUSION

For the foregoing reasons, Mr. Wolf respectfully asks this Court grant his petition for review.

Respectfully submitted this 14th day of May, 2020.

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Appendix

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Clerk/Administrator

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CASE # 360890
State of Washington v. Gavin David Wolf
SPOKANE COUNTY SUPERIOR COURT No. 151030371

Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review electronically through the court's e-filing portal or if in paper format, only the original motion need be filed, in this Court within 30 days after the Order Denying Motion for Reconsideration is filed. RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Attachment

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GAVIN DAVID WOLF, Appellant.	)	No. 36089-0-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and the record and file herein, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of February 11, 2020, is hereby denied.

PANEL: Judges Siddoway, Lawrence-Berrey, Fearing

FOR THE COURT:

REBECCA L. PENNELL
CHIEF JUDGE

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February 11, 2020

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CASE # 360890
State of Washington v. Gavin David Wolf
SPOKANE COUNTY SUPERIOR COURT No. 151030371

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Attachment

c: **E-mail**—Hon. Harold D. Clarke III

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FILED
FEBRUARY 11, 2020
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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. GAVIN DAVID WOLF, Appellant.	)))))))))	No. 36089-0-III UNPUBLISHED OPINION

SIDDOWAY, J. — After being permitted to participate in Spokane County mental health court for two years in lieu of criminal prosecution, Gavin Wolf was terminated from the court program and convicted of three counts of third degree assault. Incorporating much from an opinion filed today in another appeal by Mr. Wolf, we reject his contention that he was denied due process and find no abuse of discretion by the mental health court judge in ordering that Mr. Wolf wear waist restraints during the termination hearing. We affirm the convictions but grant Mr. Wolf's request for *Ramirez*[1] relief from some of the terms of his judgment and sentence.

[1] *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

FACTS AND PROCEDURAL BACKGROUND

Just before midnight on an evening in August 2015, officers responded to a report of a disorderly male at a movie theater in downtown Spokane. On their arrival, theater personnel identified Gavin Wolf as the individual who had threatened staff and who they wanted trespassed. Officers escorted him out of the theater. Once outside, Mr. Wolf told the officers he needed medical treatment for a toe injury he suffered on a theater escalator. When medical help responded, the officers left.

About two hours later, the officers were on a scheduled break and stopped at Deaconess Hospital to eat. Upon entering the hospital, they saw that hospital security guards were having trouble with Mr. Wolf. The guards told the police officers that Mr. Wolf had caused problems and they wanted him trespassed from the hospital. In response to the officers telling him he was trespassed, Mr. Wolf was belligerent and yelled obscenities, but he eventually left—only to return, pound on the hospital's glass doors, and flip off the officers as they watched from inside. The officers decided to place Mr. Wolf under arrest. When they stepped outside and attempted to place Mr. Wolf in handcuffs, he strenuously resisted. In the course of being forcibly restrained, Mr. Wolf suffered a bloody nose. As his nose bled heavily, Mr. Wolf both spat blood and purposefully blew blood from his nose at the police and security officers.

In his dealings with police officers on the evening of his arrest, Mr. Wolf informed two officers that he was infected with MRSA[2] and was hepatitis C positive. The two police officers and one security officer who were struck by Mr. Wolf's blood spray were required to go through exposure protocols.

Mr. Wolf was charged with three counts of third degree assault. Prior to these charges, Mr. Wolf had successfully applied for drug court in lieu of prosecution to resolve burglary and burglary-related charges in *State v. Wolf*, Spokane County Superior Court cause no. 14-1-01937-9. (We refer to that case, both in the trial court and on appeal (Court of Appeals No. 36088-1-III (Wash. Ct. App., Feb. 11, 2020 (unpublished)) as *Wolf* I). In March 2016, he was permitted to transfer to mental health court with the opportunity to resolve the charges in that case, and he opted into mental health court to resolve the three third degree assault charges in this case as well. He signed a mental health court waiver and agreement that required him to participate in treatment, to refrain from using or possessing drugs or alcohol, and to commit no new criminal law violations. The agreement notified him of acts or omissions on his part that would subject him to termination from the mental health court program, one being "[r]e-arrest during the treatment program." Clerk's Papers (CP) at 8. He agreed that if he was terminated from the mental health court program, he would proceed to a bench trial on the charges against

[2] Methicillin-resistant Staphylococcus aureus.

him, and the court's decision would be based solely on the information in the police reports.

As recounted in greater detail in this panel's opinion filed today in *Wolf* I, Mr. Wolf was arrested for a new charge of second degree malicious mischief in January 2018. As a result of the new arrest, the State sought to terminate his participation in the mental health court program. A termination hearing was held on March 13, 2018, at which the mental health court judge granted a State motion that Mr. Wolf remain in waist restraints during the hearing. At the conclusion of the hour-and-a-half long hearing, the mental health court judge terminated Mr. Wolf's participation in mental health court.

Mr. Wolf agreed to have the mental health court judge preside at his stipulated facts trial in this matter, which took place the following month. He was found guilty as charged and was sentenced to a prison-based drug offender sentencing alternative. In entering judgment, the trial court imposed three then-mandatory legal financial obligations (LFOs) and ordered Mr. Wolf to pay supervision costs. He appeals.

ANALYSIS

I. MR. WOLF FAILS TO DEMONSTRATE A VIOLATION OF HIS RIGHT TO DUE PROCESS

Mr. Wolf's first assignment of error is to alleged denials of due process at his termination hearing.

Both the federal and state constitutions guarantee a criminal defendant the right to due process of the law. U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3. For parole

revocation decisions, the United States Supreme Court long ago identified some minimal due process guarantees: written notice, disclosure to the parolee of evidence against him, opportunity to be heard, right to confront adverse witnesses, a neutral decisionmaker, and a written statement of evidence considered. *Morrissey v. Brewer*, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Washington decisions have held the guarantees to apply in analogous contexts, including termination from a therapeutic court program. *See Wolf* I, slip op. at 7 (citing cases).

Mr. Wolf contends he was not provided with written notice of claimed violations, the prosecution did not disclose the evidence it was relying on in seeking termination, he was not permitted to call witnesses or present evidence, he was not given the right to confront or cross-examine witnesses, he did not receive a decision from a neutral decisionmaker, the court did not require the prosecution to prove by a preponderance of the evidence that Mr. Wolf had violated his agreement, and it did not enter adequate written findings and conclusions.

As explained in *Wolf* I, RAP 2.5(a) states the general rule that we will not review an error that is raised for the first time on appeal, and Mr. Wolf failed to preserve all but one of the due process arguments advanced in his opening brief. *Wolf* I, slip op. at 7-18. He argues that the deprivations he asserts qualify as manifest constitutional error reviewable under RAP 2.5(a)(3), but we disagree. If there was error, it was not manifest.

We incorporate the analysis set forth in *Wolf* I. *See Wolf* I, slip op. at 7-18. The due process errors asserted on appeal are not manifest or fail for other reasons. No violation of Mr. Wolf's due process right is shown.

II. THE TRIAL COURT CONDUCTED AN ADEQUATE HEARING BEFORE GRANTING THE STATE'S MOTION THAT MR. WOLF REMAIN IN WAIST RESTRAINTS

Mr. Wolf's next assignment of error is to the court's order that he remain in waist restraints during the termination hearing.

A trial court has a duty to provide for courtroom security, and measures needed to protect the safety of court officers, parties, and the public, are within the court's discretion. *State v. Hartzog*, 96 Wn.2d 383, 396, 635 P.2d 694 (1981). In exercising discretion, the trial court must bear in mind a defendant's right "to be brought before the court with the appearance, dignity, and self-respect of a free and innocent" individual. *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). This includes a defendant's right "to be brought into the presence of the court free from restraints." *State v. Damon*, 144 Wn.2d 686, 690, 25 P.3d 418 (2001). Restraints should be allowed "only after conducting a hearing and entering findings into the record that are sufficient to justify their use on a particular defendant." *State v. Walker*, 185 Wn. App. 790, 800, 344 P.3d 227 (2015). We review a trial court's decision to keep a defendant restrained for abuse of discretion. *State v. Turner*, 143 Wn.2d 715, 724, 23 P.3d 499 (2001).

As explained in *Wolf* I, we find no abuse of discretion by the trial court in ordering that Mr. Wolf remain in waist restraints during the hour-and-a-half long hearing. As further explained in that opinion, we hold that even if the court's discretion was abused, the error was harmless beyond a reasonable doubt.

III. *RAMIREZ* RELIEF

Finally, Mr. Wolf asks this court to remand this case to the trial court to strike the criminal filing and DNA[3] collection fees imposed by his judgment and sentence as well as the provisions requiring Mr. Wolf to pay the costs of community custody and accruing interest. He relies on *Ramirez*, which held that relief from LFOs that became effective in June 2018 apply to cases then pending on direct appeal. 191 Wn.2d at 735.

For reasons explained in *Wolf* I, we will direct the trial court to strike the challenged LFOs from Mr. Wolf's judgment and sentence, a ministerial correction that will not require Mr. Wolf's presence. *See Wolf* I, slip op. at 21-22.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Wolf raises the same four issues raised in the SAG he filed in *Wolf* I. We reject the first three grounds,[4] incorporating our analysis in *Wolf* I. *See Wolf* I, slip op. at 22-24.

[3] Deoxyribonucleic acid.

[4] The first three grounds raised by Mr. Wolf's SAG deal with his allegedly improper admission to the mental health court program; his contention that at the termination hearing, the burden of proof was improperly shifted to him; and an

Mr. Wolf's fourth ground for relief alleges that he was improperly denied a contested competency hearing. We address that issue here, since the relevant record was filed only in this matter.

At the outset of Mr. Wolf's stipulated facts trials for the assault charges in this case and the burglary and burglary-related charges in *Wolf* I, Mr. Wolf sought to represent himself, telling the court that his court-appointed defender was unwilling to advance an argument that Mr. Wolf was mentally incompetent to stand trial. The trial court satisfied itself that Mr. Wolf's request for self-representation was unequivocal, explained to Mr. Wolf the incongruity between asking to proceed pro se and claiming to be incompetent, and engaged in a *Faretta*[5] colloquy, before granting Mr. Wolf's request to proceed pro se. In the process—and as part of concluding that Mr. Wolf could represent himself—the trial court found Mr. Wolf competent, pointing to Mr. Wolf's presumed competency, a contemporaneous finding in a separate criminal case that Mr. Wolf was competent to stand trial,[6] the trial court's several years' experience with Mr. Wolf in therapeutic courts, and Mr. Wolf's discussions with the court, his tracking of the issues, and his legal research. A criminal defendant's motion to proceed pro se may be

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appearance of fairness challenge.

[5] *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[6] A competency evaluation was ordered and a finding of competency was made in the prosecution of the 2018 charge of second degree malicious mischief that triggered the State's request that Mr. Wolf's participation in mental health court be terminated.

granted only if (among other things) the defendant is competent to stand trial. *State v. Coley*, 180 Wn.2d 543, 560, 326 P.3d 702 (2014). When Mr. Wolf sought to call witnesses to contest his competency, the trial court would not allow it, pointing out that it was deciding a self-representation issue; it was not engaged in a competency proceeding.

Citing *Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975), Mr. Wolf now argues that when there is conflicting evidence of competency to stand trial and competency is contested, a full and fair hearing must be held. What *Drope* actually held is that where evidence suggested that a Missouri criminal defendant was not competent, an examination under the state's statutory proceeding for competency determinations should have been ordered. *Id.* at 177-78, 181.

In Washington State, chapter 10.77 RCW prescribes the procedures and standards trial courts use to investigate and judge the competency of defendants to stand trial. *Coley*, 180 Wn.2d at 551. When there is reason to doubt the competency of the defendant, the court on its own motion or on the motion of any party must order that a qualified expert or professional evaluate and report on the defendant's mental condition. RCW 10.77.060(1). No one ever requested that Mr. Wolf's competency be evaluated in this matter.

This is not to say that if the process provided by chapter 10.77 RCW is never initiated, a defendant who is or was truly incompetent to stand trial has no redress. Case law holds that if a defendant claiming incompetency supports a motion with substantial

evidence of incompetency, the trial court must either grant the motion or hold a formal competency hearing. *State v. DeClue*, 157 Wn. App. 787, 792, 239 P.3d 377 (2010). "In contrast, when an incompetency claim is not supported by substantial evidence, the defendant has not demonstrated a manifest injustice and the trial court may deny the motion without holding a formal competency hearing." *Id.* at 793. Mr. Wolf did not present the court with substantial evidence of incompetency.[7]

Additionally, if evidence *following* conviction indicates that a defendant was incompetent at trial, there could be a violation of due process; in such a case, we would remand for a fact finding hearing. *State v. Wright*, 19 Wn. App. 381, 387, 575 P.2d 740 (1978). Before we would order that relief, however, a defendant must present evidence that he was incompetent at the time of trial. There is no such evidence in our record. *See id.*, at n.7. If Mr. Wolf has evidence outside the record that would indicate he was

[7] In proceedings below, Mr. Wolf pointed to record evidence that he had been found eligible for mental health court, transport officers had referred to his mental health issues in asking that he be restrained during the termination hearing, and his case manager addressed his mental health struggles at the termination hearing. The trial court responded:

> Having a mental health illness does not mean you're not competent. Those are two separate things. . . . It simply means you are dealing with a mental illness. That is a different issue.

Report of Proceedings (Jan. 30, 2018) at 87. We agree. To demonstrate that he was incompetent to stand trial, Mr. Wolf was required to demonstrate that he lacked the capacity to understand the nature of the proceedings against him and was unable to assist in his own defense. *See* RCW 10.77.010(15) (defining "Incompetency").

incompetent at the time of his stipulated facts trial, his remedy is to file a personal restraint petition supported by that evidence. *See State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159 (1991).

We affirm Mr. Wolf's convictions. We remand to the trial court with instructions to strike the criminal filing and DNA collection fees imposed by his judgment and sentence as well as the provisions requiring him to pay the costs of community custody and accruing interest.[8]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.

[8] Mr. Wolf's opening brief includes an assignment of error to cumulative error that we need not address, having found no error.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 36089-0-III
	)	
GAVIN WOLF,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MAY, 2020, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	GAVIN WOLF 322794 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362-1065	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF MAY, 2020.

X_____

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WASHINGTON APPELLATE PROJECT

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