64815-2

64815-2

NO. 64815-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER LEE NEAL, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Rule of Appellate Procedure 5.2(a) requires that a Notice of Appeal be filed within 30 days of entry of the judgment being appealed. Neal filed his Notice of Appeal 31 days after entry of the Judgment and Sentence. Should this appeal be dismissed as untimely?

2. A defendant's plea is knowing, intelligent, and voluntary if the defendant understands the elements of the offense, the direct consequences of his plea, and the rights he is giving up by pleading guilty. Neal received notice of the crime of Bail Jumping, and acknowledged reviewing it with his lawyer. He then pled guilty "as charged," but failed to specifically admit that he received notice of the hearing at which he failed to appear. The notice, which Neal signed, is in the record. Was Neal's plea invalid?

3. By pleading guilty, Neal waived his right to appeal a determination of guilt. Further, the error he alleges is not of constitutional dimension, and was not raised below as required by Rule of Appellate Procedure 2.5(a)(3). Criminal Rules 4.2 and 7.8 instead provide the appropriate procedures for an attack on a guilty plea. Should Neal's appeal be rejected?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On August 16, 2007, Appellant Sylvester Neal, Jr., was charged by Information with one count of Identity Theft in the First Degree—Domestic Violence and three counts of Forgery—Domestic Violence. CP 1-5. After failing to appear for his originally scheduled arraignment on August 29, 2007, CP __ [sub no. 4], Neal was arraigned on the charges on January 22, 2008, and released from custody on his personal recognizance. CP __ [sub nos. 7, 8].

The case dragged on. Neal failed to appear for required court hearings at least four times, on March 20, 2007, August 1, 2008, November 7, 2008, and March 13, 2009, and a bench warrant was issued in each instance. CP __ [sub nos. 17, 34, 54, 78].

Finally, on December 15, 2009, Neal pled guilty to Unlawful Possession of Payment Instruments—Domestic Violence and Bail Jumping charged in a Second Amended Information. CP 10-30. He was sentenced to credit for time served and released from

custody two days later. CP 31-36, 12-17-09 RT.[1] Judgment was entered on December 21, 2009. CP 31: A Notice of Appeal was filed 31 days later on January 21, 2010. CP 37.

2. SUBSTANTIVE FACTS

In early 2007, the appellant's father, Sylvester Neal, Sr., reported to the police that his Discover Card account was being used without his authorization. CP 3. Specifically, the address on the card had been changed from his own address in Auburn to an address on Denny Way in Seattle. CP 3. Further, someone had written three checks on Neal Sr.'s Discover Card account, to U.S. Bank, Fry's Electronics, and Office Depot, and another three checks on his Bank of America credit card account to Howard Murphy (two checks) and QFC. CP 3-4. Neal Sr. suspected his son, Appellant Neal.

The U.S. Bank account that one check had been deposited into had been opened by Neal, and Neal could be seen in surveillance photographs accessing this account at a U.S. Bank branch. CP 4. The signatures on the various checks matched

[1] The transcripts, whether denominated Reporter's Transcript, Verbatim Report of Proceedings, or some other title, will be referred to herein first by the date of the transcript, then RT, then the particular page, if appropriate.

Neal's signature, not Neal Sr.'s. CP 3. Further, the address that Neal repeatedly provided to the court during proceedings on this case matched the address to which the Discover Card account information had been changed. CP __ [sub no. 7]. The total losses due to Neal's fraud amounted to $6,757.81. CP 4.

During the pendency of the case, on June 27, 2008, Neal sought and was granted a continuance of the trial date in order for his new attorney to be prepared for trial. CP __ [sub no. 27]. The new trial date was scheduled for August 12, 2008, and the omnibus hearing was scheduled for August 1, 2008. CP __ [sub no. 27]. Neal signed the order continuing the trial date, acknowledging that he agreed to the continuance. At the omnibus hearing on August 1, 2008, however, Neal failed to appear, and a bench warrant issued for his arrest. CP __ [sub no. 34].

C. ARGUMENT

1. THIS APPEAL SHOULD BE DISMISSED AS UNTIMELY.

Rule of Appellate Procedure 5.2(a) provides that "a notice of appeal must be filed in the trial court within . . . 30 days after the entry of the decision of the trial court that the party filing the notice

wants reviewed." RAP 5.2(a).[2] A judgment is entered when it is delivered to the clerk for filing. RAP 5.2(c); CR 5(c), 58.

Neal was sentenced on December 17, 2009. CP 36, 12-17-09 RT. The Judgment and Sentence—the decision being appealed—was filed with the clerk on December 21, 2009, a Monday. CP 31. The last day of the 30-day period for filing a notice of appeal was January 20, 2010, a Wednesday. That date was not a Saturday, Sunday, or legal holiday that would extend the time period for filing to the next day. RAP 18.6; RCW 1.16.050. The Notice of Appeal was filed on January 21, 2010, 31 days after entry of the Judgment and Sentence. CP 37. It was not timely filed. This appeal should be dismissed.[3]

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[2] The rule provides that the notice of appeal must be filed within the longer of 30 days after entry of the decision or "the time provided in section (e)." RAP 5.2(a). Nothing in section (e) is relevant to this appeal.

[3] The Court may be inclined to assume that the late filing of the Notice of Appeal was an oversight, and relief should be granted due to ineffective assistance of counsel. Such a conclusion cannot be supported on this record. There is nothing in the record whatsoever that reflects that Neal directed his attorney to file an appeal, or did so in a timely fashion. Indeed, until the last week or two, even his appellate counsel had never spoken with Neal; frankly, it is unclear that this appeal is even authorized.

2. NEAL'S PLEA WAS KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE.

Neal contends that his plea was not voluntary, because the record does not contain an adequate factual basis for his plea of guilty to Bail Jumping. Therefore, he argues, his due process rights were violated, and his conviction must be vacated and the charge dismissed. Neal is incorrect on several grounds.

Due process requires that a defendant's plea of guilty must be knowing, intelligent, and voluntary. State v. Kennar, 135 Wn. App. 68, 72, 143 P.3d 326 (2006) (citing In re Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004)). These requirements are met if the defendant understands the elements of the offense, the direct consequences of the guilty plea, and that he is waiving his right to remain silent, confront his accusers, and have a trial by jury. State v. Holsworth, 93 Wn.2d 148, 153, 607 P.2d 845 (1980); In re Hilyard, 39 Wn. App. 723, 727, 695 P.2d 596 (1985).

Criminal Rule 4.2 provides procedures that a trial court should follow before accepting a defendant's plea of guilty. Although Rule 4.2 was designed to ensure that a defendant's constitutional rights are protected, the procedures outlined therein are not themselves constitutionally compelled. E.g., Kennar, 135

Wn. App. at 72-73; Hilyard, 39 Wn. App. at 726-27 ("CrR 4.2 is not the embodiment of a constitutionally valid plea; strict adherence to the rule is 'not a constitutionally mandated procedure.'" (quoting In re Vensel, 88 Wn.2d 552, 554, 564 P.2d 326 (1977)).

a. Neal Understood The Elements Of The Crime Charged.

Neal first implies that his due process rights were violated because he did not get notice of the elements of the crime of Bail Jumping. Neal's Opening Brief at 6 ("Neal . . . did not understand an essential element of the crime of bail jumping."). This is unsupported by the record.

Bail Jumping is defined in RCW 9A.76.170. The relevant elements of Bail Jumping are that the defendant: (1) was charged with a particular crime, (2) was released by court order or admitted to bail, (3) had knowledge of the requirement of a subsequent personal appearance, and (4) failed to appear as required. RCW 9A.76.170; compare State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000) (discussing previous version of RCW 9A.76.170). The Second Amended Information, to which Neal pled guilty, correctly contains each of the required elements. CP 30.

Moreover, Neal received and reviewed that Information. The Second Amended Information was filed on December 15, 2009, and defense counsel acknowledged receipt of a copy of that Information. 12-15-09 RT 1. In the Statement of Defendant on Plea of Guilty, which bears Neal's signature, Neal acknowledged reviewing the Second Amended Information with his lawyer. Further, during the plea colloquy itself, Neal specifically admitted looking at the Second Amended Information and understanding the elements of both crimes contained therein. 12-15-09 RT 2-3.

Thus, Neal received actual notice of the elements of the crime to which he pled guilty. The plea was voluntary.

b. The Record Contained An Adequate Factual Basis To Support A Guilty Plea To Bail Jumping.

Neal next argues that there was no factual basis in the record to support his plea to Bail Jumping. Specifically, he points to the portion of the Statement of Defendant on Plea of Guilty where he "state[d] briefly in [his] own words what [he] did that makes [him]

guilty of this . . . crime." CP 19. Concededly, in that short paragraph, Neal did not specifically admit to every fact that the State would have been required to prove if the case had gone to trial. Instead, he acknowledged, "On or about August 1, 2008, in King County Washington I had been released by order of the court after having been charged with a class C felony and I did fail to appear." CP 19. Neal correctly points out that this sentence does not contain an admission that Neal had received notice that he was required to appear for court on August 1, 2008. Nonetheless, this omission is inadequate to reverse his conviction.

First, Neal admitted that he was pleading guilty "as charged." CP 19. Where a defendant has knowledge of the contents of the Information, as here, "his plea of guilty may well be deemed a factual admission that he did what he is charged with doing so that a judgment of conviction may validly be entered against him." Henderson v. Morgan, 426 U.S. 637, 649 n.2, 96 S. Ct. 2253,

49 L. Ed. 2d 108 (1976).[4] In other words, his plea of guilty is a tacit admission that every element of the crime is true.

Second, in establishing a factual basis for a plea, the court can consider any reliable source, as long as it is a part of the record at the time of the plea. State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991). Here, the record contained the actual notice that Neal received advising him of his court date on August 1, 2008: the Order Continuing Trial, signed by the court and filed June 27, 2008, which bears Neal's signature. CP ___ [sub no. 27]. While there is no evidence that the court in accepting the plea in fact reviewed that document before finding that there was a factual basis for the plea, the document was created by the court itself (albeit a different judge) and was in the court file at the time of the plea. CP __ [sub no. 27].

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[4] Neal relies on Henderson to suggest that due process requires both that the defendant understand the elements of the crime and that the record contain a factual basis for every element of the crime. Neal's Opening Brief at 4, 8. But in Henderson, the defendant pled guilty to a crime that was a lesser included offense than the crime charged, and was not advised in writing or otherwise of the elements of the lesser offense. 426 U.S. at 645-46. Nor did he admit to having the requisite intent. 426 U.S. at 642-43. With neither notice nor an admission, the Henderson Court concluded that the defendant's guilty plea was not voluntary. 426 U.S. 644-45. Henderson does not stand for the proposition that notice and an admission are both required, but rather that the absence of both is fatal. Here, as discussed in section C.2.a supra, there is no question that Neal had notice of all of the elements of the crime of Bail Jumping.

The complete record of the case and Neal's admission that he was pleading guilty as charged, after having reviewed the elements of the charge with his lawyer, provided an adequate factual basis to support the plea. Neal's argument to the contrary should be rejected.

3. AN APPEAL IS NOT THE APPROPRIATE FORUM FOR NEAL'S CLAIM.

Irrespective of the merits of Neal's argument, his claim is not cognizable on appeal. In pleading guilty, Neal waived his right to appeal. Moreover, the error he complains of—if any exists—is not of constitutional dimension, so it cannot be raised for the first time on appeal. Rather, he must make a motion in the trial court to withdraw his plea.

First, Neal waived his right to appeal a guilty finding. In the Statement of Defendant on Plea of Guilty, Neal specifically relinquished "the right to appeal a determination of guilt after a trial," among other rights. CP 11. He was also questioned about that waiver during the plea colloquy, and he acknowledged understanding and then waived that right. 12-15-09 RT 3-4. A waiver is an intentional relinquishment of a known right. E.g.,

State v. Sweet, 90 Wn.2d 282, 286-87, 581 P.2d 579 (1978) (citing Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). There can be no argument—and Neal has made none—that Neal validly waived his right to appeal a determination of guilt. Indeed, by asking the court to accept his plea of guilty as charged, Neal invited any error that the court may have made in adjudicating him guilty. E.g., State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (holding that "even if error was committed, of whatever kind," a defendant cannot claim on appeal that it is reversible error if it was made at the defendant's invitation).

Second, errors not first raised in the trial court are generally not reviewable on appeal, absent a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995) (citations omitted). An error is "manifest" if it is "truly of constitutional magnitude" and the defendant was actually prejudiced thereby. McFarland, 127 Wn.2d at 333 (citations omitted). As discussed in section C.2 supra, a court's failure to establish an adequate factual basis to support a plea is a violation of Criminal Rule 4.2, not a violation of any constitutional right. In re Hews, 108 Wn.2d 579, 591-92, 741 P.2d 983 (1987) ("[T]he establishment of a factual basis is not an

independent constitutional requirement, and is constitutionally significant only insofar as it relates to the defendant's understanding of his or her plea.").

The purpose of establishing a factual basis for a defendant's plea is to ensure that the defendant understands the relation between the defendant's acts and the crime charged. In re Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (citing McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)). A court's failure to comply with Criminal Rule 4.2 and make a record of the factual basis for the plea could, in some circumstances, prevent the court from recognizing that the defendant does not so understand. Accepting a plea of guilty when a defendant lacks such understanding would indeed be a violation of due process.

Here, however, Neal's claim that he did not understand the relation between his conduct and the elements of the crime—in other words, that he did not know he was required to appear—is, at best, speculative. As discussed above, the record demonstrates that Neal in fact had notice of the hearing for which he failed to appear. CP ___ [sub no. 27]. Certainly, any constitutional error is

not "manifest." This claim should not be entertained on appeal when not raised below.

This is not to say that Neal has no remedy if in fact he did not understand the relation between his conduct and the crime charged. On the contrary, the criminal rules themselves specify the correct procedure: a motion to withdraw his plea. A defendant may withdraw his plea at any time prior to sentencing whenever it appears that withdrawal is necessary to correct a manifest injustice. CrR 4.2(f). Where the motion is made after sentencing, the motion is governed by Criminal Rule 7.8. That rule provides that a party may be relieved from a final order, such as a judgment and sentence, upon a showing of, among other things, mistake, irregularity in obtaining an order, newly discovered evidence, or any other reason justifying relief. CrR 7.8(b).

Indeed, nearly all of the cases regarding the effect of an inadequate record of the factual basis on the validity of a plea, including most of those cited by Neal, came to the Court of Appeals through an appeal of a denial of a motion to withdraw a guilty plea made pursuant to Criminal Rule 4.2 or 7.8. State v. Taft, 49 Wn.2d 98, 99, 297 P.2d 1116 (1956); State v. Taylor, 83 Wn.2d 594, 594-95, 521 P.2d 699; see also Saas, 118 Wn.2d at 39; Keene, 95

Wn.2d at 205.[5] That is the procedure that should have been followed here. The parties could each have presented evidence relating to Neal's understanding of the relation between the charge and his conduct. Further, the trial court could have advised Neal that withdrawal of his guilty plea on one count alone is not an option; in an integrated plea agreement like Neal's, where he pled guilty to multiple counts at the same time in the same plea agreement, his options are withdrawal of his entire plea or specific performance. State v. Bisson, 156 Wn.2d 507, 519-20, 130 P.3d 820 (2006).

Instead, Neal asks this court to ignore his waiver of right to appeal and to assume that the failure of his Statement of Defendant on Plea of Guilty to explicitly acknowledge that he had notice of the August 1, 2008, hearing—even though that fact was already established by the court record—meant that his plea was

[5] The single exception cited by Neal is a Division Two case, State v. R.L.D., 132 Wn. App. 699, 133 P.3d 505 (2006). This case appears anomalous, and contains no discussion of whether the defendant should instead have moved to withdraw his guilty plea. R.L.D. is also unusual in that its remedy for an involuntary plea was not to vacate the plea, but to dismiss the charge without prejudice. This is plainly incorrect. State v. Walsh, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001) (holding that the remedies for an involuntary plea are withdrawal of the plea or specific performance).

involuntary. This Court should not engage in such rank speculation. Instead, this Court should affirm Neal's conviction.

D. CONCLUSION

Neal's appeal is untimely. Moreover, Neal was apprised of all of the elements of the crime of Bail Jumping, and pled guilty "as charged." The record contained additional evidence that he was given notice of the hearing at which he failed to appear. There is no evidence that his plea was not voluntary. Finally, any failure of the trial court to make a record of the factual basis underlying the plea is not a manifest constitutional error that can be raised for the first time on appeal, especially where Neal waived his right to appeal a determination of guilt and asked the court to accept his guilty plea. Instead, the correct avenue for relief is a motion to withdraw his plea. Neal's Bail Jumping conviction should be affirmed, and this appeal dismissed.

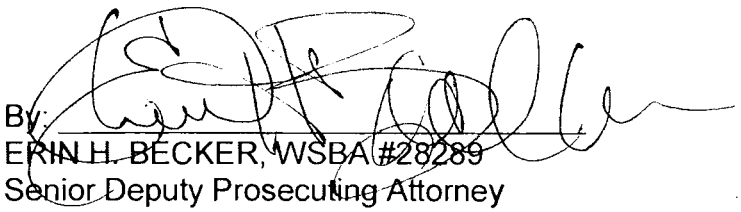
In the event that this Court concludes that constitutional error occurred, the correct remedy is not dismissal of the Bail Jumping charge without prejudice, as pressed by Neal, but remand for

withdrawal of his plea to both counts, and scheduling the matter for trial. Walsh, 143 Wn.2d at 8.

DATED this 31st day of January, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 07-1-10175-2 KNT
vs.	)	
SYLVESTER LEE NEAL, JR., Defendant,	)	SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS OR EXHIBITS TO BE SENT TO COURT OF APPEALS
	)	COA NO. 64815 - 2 - I

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4	Order Directing Issuance of Bench Warrant	8-29-07
7	Order Establishing Conditions of Release Pending Trial	1-22-08
8	Notice of Scheduling	1-22-08
17	Order Directing Issuance of Bench Warrant	3-28-08
34	Order Directing Issuance of Bench Warrant	8-1-08
54	Order Directing Issuance of Bench Warrant	11-7-08

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Sub No. or Exhibit No.	Description of Document/Exhibit	Date Filed or Admitted
78	Order Directing Issuance of Bench Warrant	3-13-09
27	Order Continuing Trial	6-27-08

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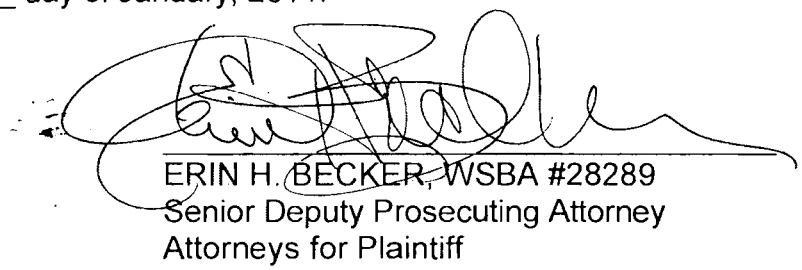

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Sandra Atkinson
Name

January 31, 2011
Date

Done in Seattle, Washington