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Court of Appeals
Division I
State of Washington

NO. 74211-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HERON LINDSAY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

MOTION OF APPOINTED COUNSEL TO WITHDRAW AND
BRIEF IN SUPPORT THEREOF

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A. IDENTITY OF MOVING PARTY

Washington Appellate Project and Travis Stearns, appointed counsel for appellant, Heron Lindsay, requests the relief requested in part B of this motion.

B. STATEMENT OF RELIEF SOUGHT

Appointed counsel on appeal requests permission to withdraw as attorney of record in accordance with RAP 18.3(a)(2), *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and *State v. Hairston*, 133 Wn.2d 534, 946 P.2d 397 (1997).

C. FACTS RELEVANT TO MOTION

The Washington Appellate Project was appointed to represent Mr. Lindsay on appeal from his conviction following a plea of guilty to assault in the third degree and his sentence within the standard range. In reviewing appellant's case for issues to raise on appeal, counsel has done the following:

1. Reviewed the verbatim report of proceedings from September 30, 2015, involving the guilty plea, and the sentencing proceeding on October 16, 2015;
2. Reviewed the superior court file;

3. Solicited from appellant any issues he believed warranted appellate review;
4. Solicited from trial counsel any issues he believed warranted appellate review;
5. Conferred with other attorneys concerning possible legal and factual bases for appellate review.

Counsel has now “master[ed] the trial record, thoroughly research[ed] the law, and exercise[d] judgment in identifying the arguments that may be advanced on appeal.” *McCoy v. Court of Appeals, Dist. 1*, 486 U.S. 429, 438, 100 L.Ed.2d 440, 108 S.Ct. 1895 (1988).

D. GROUND FOR RELIEF

Based on the foregoing evaluation of the record, counsel has concluded there is no basis in law or fact upon which a claim for relief could be granted. Counsel now requests this Court independently review the record in order to determine whether there is any further basis for appellate review. *Hairston*, 133 Wn.2d at 538. In the event the

Court concurs, the undersigned seeks to withdraw as appointed counsel on appeal without prejudice to the appellant's right to proceed *pro se*.¹

E. STATEMENT OF THE CASE

Mr. Lindsay was originally charged with one count of assault in the second degree. CP 1. The State also alleged this was a crime involving domestic violence, as it was a crime against a family or household member. CP 1.

1. Mr. Lindsay pled guilty to the reduced charge of assault in the third degree.

Mr. Lindsay pled guilty to the reduced charge of assault in the third degree, domestic violence. CP 7. In exchange for his plea to the reduced charge, the State agreed the parties would jointly recommend the First Time Offender Waiver, with credit for time served, community custody for 12 months, and completion of a cognitive behavioral program known as Moral Reconciliation Therapy. 10/16/15 RP 15.² The State also requested the court impose mandatory legal financial obligations. 10/16/15 RP 15.

¹ Upon request, counsel will provide appellant with all documents at counsel's disposal which appellant could use in preparing his statement of additional grounds.

² References to the record will be noted by date and page number, E.g, 5/5/15 RP 7.

Mr. Lindsay signed the guilty plea statement on September 30, 2015. CP 21. The parties used the standard guilty plea form. CP 8. This form has a check box to indicate how the information on the form was communicated to Mr. Lindsay. CP 21. The check box next to the statement which read that the guilty plea statement was read to him by his attorney was checked CP 21. The form indicates that an interpreter was not used to translate the document into another language. CP 21.

The guilty plea statement contained language which made out the crimes charged. CP 20. This paragraph was typed into the form, with two phrases added in handwriting. CP 20. It read:

On May 26, 2015, in King County, Washington, I, under circumstances not amounting to assault in the first or second degree, with criminal negligence, caused bodily harm to Mildred Chesney accompanied by substantial pain that extended for a period sufficient to cause considerable suffering [when I struck her head with a large object]. At the time, Ms. Chesney and I were married, and I should have known that she was particularly vulnerable [which was a substantial factor in the commission of the offense].³

CP 20. Mr. Lindsay stated in open court this statement had been written for him. 9/30/15 RP 10. He also accepted it as his own. 9/30/15 RP 10.

³ The handwritten phrases are marked by brackets in the statement.

The Statement on Plea of Guilty contained paragraphs which advised Mr. Lindsay he was waiving the right to (1) a speedy and public jury trial; (2) remain silent before and during trial; (3) testify on his behalf and to confront witnesses; (4) call witnesses to testify for him; (5) be presumed innocent and the require the State to prove the charge beyond a reasonable doubt; and (6) appeal a determination of guilt. CP8-21-22.

Mr. Lindsay affirmed his understanding of the rights he was giving up. 9/30/15 RP 5-6. He stated he understood what the State's recommendation would be in exchange for his guilty plea. 9/30/15 RP 7-8. Mr. Lindsay also acknowledged he understood the sentencing judge did not have to follow either party's recommendations. 9/30/15 RP 8. The court found Mr. Lindsay made a knowing, intelligent and voluntary waiver of his rights, and that he was competent to do so. 9/30/15 RP 11.

There is some evidence Mr. Lindsay did not fully understand what was happening when he pled guilty. Mr. Lindsay hesitated several times before answering the court's questions. See, 9/30/15 RP 3, 4. He had questions restated. See, 9/30/15 RP 3, 7. Mr. Lindsay also did not respond to the court's questions. 9/30/15 RP 5. Finally, the court had to

take a break to allow Mr. Lindsay to speak with his attorney while hearing Mr. Lindsay's guilty plea. 9/30/15 RP 5.

2. The court imposed the agreed recommendation at sentencing.

When Mr. Lindsay returned for sentencing, the court imposed the sentence recommended by the parties. 10/16/15 RP 22-23. Mr. Lindsay signed the judgment and sentence. CP 46.

The court found the First Time Felony Waiver applied. 10/16/15 RP 22. The court then sentenced Mr. Lindsay to credit for time served, twelve months of community custody with the condition he engage in cognitive behavior therapy. 10/16/15 RP 22-23. The court also imposed a no-contact order with Ms. Chesney until further order of the court. 10/16/15 RP 23. Only mandatory legal financial obligations were imposed. 10/16/15 RP 23.

3. Mr. Lindsay's notice of appeal alleged he did not speak or understand sufficient English to have pled guilty.

Mr. Lindsay brought his appeal on November 2, 2015. CP 49. Mr. Lindsay alleged in his notice of appeal that his constitutional rights under the sixth and fourteenth amendments of the United States constitution and the Federal Civil Rights Act of 1964, Title VI. CP 50 were violated. In his notice of appeal, Mr. Lindsay alleged he pled

guilty to a charge he did not understand in a language he did not understand. CP 52.

Mr. Lindsay alleged he never had a fair chance because of his limited understanding and reading capability of English. CP 50. He was never provided with an interpreter, and because of his limited understanding of the judicial system, he did not know to ask for one. CP 50.

Mr. Lindsay also alleged his attorney did not explain the guilty plea statement to him. CP 50. He alleged he told his attorney he needed an interpreter, his attorney agreed he would provide him with one, but that one could not be found. CP 50. Mr. Lindsay alleged he either had to move forward with the guilty plea hearing or go to trial, where he was told he could face up to ten years. CP 50.

Prior to filing this brief, a motion was made to stay proceedings and order a reference hearing to determine whether Mr. Lindsay could speak and understand English sufficiently to have pled guilty without the assistance of an interpreter. App. A. The motion was denied by Commissioner Kanazawa. App. B.

F. POTENTIAL ISSUES ON APPEAL

RAP 18.3 (a)(2) provides for the withdrawal of counsel on appeal where the attorney can find no basis for a good faith argument on review. In accordance with the due process requirements of *Anders*; *State v. Theobald*, 78 Wn.2d 184, 185, 470 P.2d 188 (1970); and *State v. Pollard*, 66 Wn.App. 779, 787-90, 825 P.2d 336, 834 P.2d 51, *review denied*, 120 Wn.2d 1015 (1992); counsel submits the following brief in satisfaction of these requirements.

1. Mr. Lindsay could argue the information was insufficient.

Both the federal and the Washington constitutions accord a person accused of a crime the right to be informed of the nature and cause of the accusation. U.S. Const. amend VI; Const. art. I, § 22. In addition, CrR 2.1(a)(1) provides, in part, that “the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”

A defective charging document may be challenged for the first time on appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The court will apply a two pronged test to determine the validity of the charging instrument, asking:

- (1) Do the necessary facts appear in any form, or by fair construction can they be found, in the charging

document; and, if so, (2) can the defendant show that he ... was nonetheless actually prejudiced by the inartful language which caused lack of notice?

Kjorsvik, 117 Wn.2d at 105–06.

Mr. Lindsay was charged under the First Amended Information with the crime of assault in the third degree-domestic violence. CP 7. The State also alleged Ms. Chesney was a particularly vulnerable victim. CP 7.

RCW 9A.36.031(1)(d) provides that a person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree, with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm. RCW 10.99.020 defines the terms “domestic violence” and “family or household members.” The State may seek a sentencing enhancement where it proves the victim of the crime was particularly vulnerable. RCW 9.94A.535(3)(b).

The first amended information provides that Mr. Lindsay, with criminal negligence, did cause bodily harm to Ms. Chesney by means of a weapon or other instrument likely to produce bodily harm, to wit, a

machete. CP 7. This crime was alleged to have occurred in King County Washington on May 26, 2015. CP 7.

The original information included a “Certification for Determination of Probable Cause”. CP 3-4. This document contains two pages of facts substantiating the investigation conducted by the King County Sheriff regarding the charges brought against Mr. Lindsay. CP 25-28.

Mr. Lindsay could argue the information fails to contain insufficient facts for him to defend himself against the charge brought.

2. Mr. Lindsay could argue there were insufficient facts to support his plea.

Before a guilty plea is accepted, the court must determine there is a factual basis for the plea. CrR 4.2(d); *see also In re Taylor*, 31 Wn.App. 254, 256, 640 P.2d 737 (1982); *In re Evans*, 31 Wn.App. 330, 332, 641 P.2d 722 (1982), *cert. denied* 459 U.S. 852, 103 S.Ct. 117, 74 L.Ed.2d 102 (1982). The rule protects a defendant who pleads with an understanding of the nature of the charge, but without realizing that his conduct does not actually fall within the charge. *State v. Zumwalt*, 79 Wn.App. 124, 126, 901 P.2d 319 (1995). A plea may be challenged where there is an insufficient record of the defendant’s conduct and state of mind, which is described in sufficient detail for a jury to have

concluded that he was guilty of the charge. *State v. Powell*, 29 Wn.App. 163, 166, 627 P.2d 1337 (1981), *appeal after remand* 34 Wn.App. 791, 664 P.2d 1 (1983).

Section eleven of the “Statement of a Defendant on Plea of Guilty” contains a typewritten paragraph which has two lines added to it in handwriting. With the handwritten sections added in brackets, the statement reads:

On May 26, 2015, in King County, Washington, I, under circumstances not amounting to assault in the first or second degree, with criminal negligence, caused bodily harm to Mildred Chesney accompanied by substantial pain that extended for a period sufficient to cause considerable suffering [when I struck her head with a large object]. At the time, Ms. Chesney and I were married, and I should have known that she was particularly vulnerable [which was a substantial factor in the commission of the offense].

CP 17. The court read this statement out loud in court and asked Mr. Lindsay whether he accepted the statement as his own. 9/30/15 RP 10. Mr. Lindsay said he did accept the statement and also said the statement was true. 9/30/15 RP 10.

Mr. Lindsay could argue there were insufficient facts contained within the statement to support his guilty plea.

3. Mr. Lindsay could argue his limited ability to speak and understand English prevented him from entering a guilty plea without an interpreter.

A person accused of a crime who lacks the ability to speak and understand English has both a statutory and constitutional right to an interpreter throughout the proceedings if he needed one. RCW 2.43.010, .030, .040(2); *State v. Gonzales–Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999); *State v. Woo Won Choi*, 55 Wn.App. 895, 901, 781 P.2d 505 (1989) (citing *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir.1973)); *United States ex rel. Negron v. New York*, 434 F.2d 386, 390 (2d Cir.1970). Trial courts have a duty to provide a non-English speaker with an interpreter where the court is aware of the English deficiency. *See* RCW 2.43.060(1)(b); *Woo Won Choi*, 55 Wn.App. at 901 (citing *Carrion*, 488 F.2d at 14). The appropriate remedy where there is evidence a defendant is unable to speak or understand English is to hold a reference hearing. *See, e.g., In re Khan*, 184 Wn.2d 679, 692, 363 P.3d 577 (2015).

In his notice of appeal, Mr. Lindsay makes clear allegations he did not speak or understand English sufficiently to plead guilty. CP 52. When Mr. Lindsay entered his guilty plea, he hesitated several times before answering the court's questions. *See*, 9/30/15 RP 3, 4. He also

had to have questions restated. See, 9/30/15 RP 3, 7. There were other times when Mr. Lindsay did not respond to the court's questions. 9/30/15 RP 5. Finally, the court had to take a break to allow Mr. Lindsay to speak with his attorney before the court could complete its colloquy. 9/30/15 RP 5.

In his notice of appeal, Mr. Lindsay alleged he did not understand English sufficiently to have pled guilty. Mr. Lindsay stated in his notice he had a limited understanding and reading capability of English. CP 50. He was never provided with an interpreter, and because of his limited understanding of the judicial system, he did not know to ask for one. CP 50.

Mr. Lindsay's motion to remand for a hearing to determine whether he spoke sufficient English to have entered a guilty plea without an interpreter was denied. App. B.

Mr. Lindsay could argue his plea was unlawful because he was denied his right to make a knowing and voluntary plea with the assistance of counsel.

4. Mr. Lindsay could argue his guilty plea was not knowingly, intelligently and voluntarily entered.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A plea is neither intelligently nor voluntarily made unless the defendant is aware of the "true nature of the charge against him." *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d (1976). To constitute a voluntary and intelligent waiver of the various constitutionally afforded trial rights, a guilty plea must establish the defendant was aware of "the nature of the constitutional protections he is waiving" and must establish the defendant "in fact understood the charge." *Henderson*, 426 U.S. at 645 n.13, citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 82 L.Ed 1461 (1938). A plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). The defendant must understand the "essential elements of the charge to which he pleads guilty." *Id.* at 467-68 n.20. If the defendant is not properly advised of the elements of the crime the plea is invalid on its face. *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 589, 741 P.2d 983 (1987).

Moreover, a guilty plea must be made with an understanding of its direct consequences. A guilty plea is involuntary if the defendant is not properly advised of a direct consequence of his plea. *State v. Turley*, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); *see also In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) (“A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.”)

Mr. Lindsay could argue his plea was not knowing, intelligent and voluntarily made.

5. Mr. Lindsay could argue his sentence was not proper.

The Sentencing Reform Act of 1981, chapter 9.94A RCW, “was designed to promote several significant interests, including protection of the public, the need for rehabilitation, and the need to make frugal use of state resources.” *State v. Pascal*, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987). “The presumptive sentence ranges established for each crime represent the legislative judgment as to how these interests shall best be accommodated.” *Id.* The SRA represents a significant limitation on judicial discretion and, as a determinate system, permits none of the sentencing flexibility available for misdemeanors. *Wahleithner v.*

Thompson, 134 Wn.App. 931, 941, 143 P.3d 321 (2006). An exceptional sentence above or below the standard range may be imposed for substantial and compelling reasons. RCW 9.94A.535; *State v. Jackson*, 150 Wn.2d 251, 273, 76 P.3d 217 (2003). Generally, “[a]n exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category.” *State v. Pennington*, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989).

No defendant is entitled to a particular sentence but every defendant is entitled to ask the court to consider sentencing alternatives and to have them actually considered. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (citing *State v. Garcia-Martinez*, 88 Wn.App 322, 330, 944 P.2d 1104 (1997)). A trial court abuses its discretion when it refuses categorically to consider alternative sentences. *Id.*; see also *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007).

RCW 9.94A.650 provides for reduced sentences for persons deemed to be first time felons. A sentence imposed on a first-time offender under RCW 9.94A.650 is deemed to be within the standard sentence range for the offense and is not appealable. *State v. Wright*,

183 Wn.App. 719, 733, 334 P.3d 22 (2014). A person sentenced under the First Time Felony Waiver can be ordered to engage in available outpatient treatment while on community custody. *State v. Acevedo*, 159 Wn.App. 221, 232, 248 P.3d 526 (2010).

The court imposed what the parties represented as an agreed sentence. 10/16/15 RP 22. Specifically, the court imposed a First Time Felony Waiver, giving Mr. Lindsay credit for time served and twelve months of community custody, with the condition he complete a cognitive behavior program. 10/16/15 RP 23. He was ordered to have no contact with Ms. Chesney until further order of the court. 10/16/15 RP 23.

Mr. Lindsay could argue the court imposed an unlawful sentence.

6. Mr. Lindsay could argue the court lacked authority to impose legal financial obligations.

In addition to any fine which may be imposed, the court must impose a penalty assessment of \$500.00 for each felony or gross misdemeanor conviction, and \$250.00 for any misdemeanor conviction. RCW 7.68.035(1)(a). A trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to

pay before the court imposes LFOs. *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

When a court requires an indigent defendant to reimburse the state for authorized costs, it must also expressly find the defendant has the financial ability to pay the costs imposed. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992). Imposing costs without finding the accused has the ability to pay violates equal protection by imposing extra punishment on a defendant due to his poverty. *Fuller*, 417 U.S. at 48 n.9 (“an order to repay can be entered only when a convicted person is financially able”).

In *State v. Bertrand*, 165 Wn.App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012), this Court held that the court errs by finding a convicted offender has the current or likely future ability to pay the legal financial obligations where nothing in the record supported that finding. *Blazina* recognizes that, in order to impose discretionary LFOs under RCW 10.01.160(3), the sentencing judge must consider the defendant’s individual financial circumstances and make an individualized inquiry into the defendant’s current and future ability to pay. *Blazina*, 182 Wn.2d at 837. The trial court must

“[take] into account the financial resources of the defendant and the nature of the burden” imposed by the legal financial obligations.

Bertrand, 165 Wn.App at 404 (quoting *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

Under RAP 2.5(a), this Court has discretionary authority to consider whether the trial court erred by finding a person had a current or likely future ability to pay his legal financial obligations. *Blazina*, 182 Wn.2d at 832. At sentencing, the court found Mr. Lindsay’s qualification for public defender services suggested the court should waive all discretionary fees and fines. In the plea agreement, Mr. Lindsay agreed to pay court costs. 10/16/15 RP 23. The court imposed the victim penalty fee and the DNA collections fee, waiving all discretionary fines and fees and interest. CP 56.

Mr. Lindsay could argue on appeal legal financial obligations were wrongfully imposed.

G. CONCLUSION.

Counsel requests this Court grant him permission to withdraw as attorney of record.

DATED this 5th day of August, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74211-6-I
v.)	
)	
HERON LINDSAY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **MOTION TO WITHDRAW AND BRIEF IN SUPPORT THEREOF** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] HERON LINDSAY	(X)	U.S. MAIL
COMPASS CENTER	()	HAND DELIVERY
77 S WASHINGTON	()	_____
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF AUGUST, 2016.



X _____

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