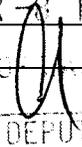


NO. 37918-0

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARKUS C. WILLIAMSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 07-1-05870-4

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
THOMAS ROBERT
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant fail to preserve the claim regarding the procedural issue of an insufficient factual basis when he failed to raise the issue at the trial level?
2. Did the court properly find a factual basis for defendant's plea when (1) the court explicitly said it found there was a factual basis, (2) the declaration of probable cause and amended information were a part of the record, and (3) defendant indicated he reviewed the evidence, understood the charges, and entered the plea to take advantage of the State's offer?

B. STATEMENT OF THE CASE.

On November 20, 2007, Pierce County Prosecuting Attorney's Office charged Markus Williamson, hereinafter "defendant," with one count of malicious harassment, two counts felony harassment, two counts fourth degree assault, one count second degree criminal trespass, and one count resisting arrest. CP 1-4. On April 18, 2008, the Pierce County Prosecuting Attorney's Office filed an amended information dropping the second degree criminal trespass charge, adding a charge of one count first degree burglary, and two counts intimidating a public servant. CP 18-21.

On May 8, 2008, defendant entered an *Alford*¹ plea to one count felony harassment, and two counts assault in the fourth degree, pursuant to a second amended information. CP 27-41; CP 28-36; CP 25-26.

Defendant made the following declaration in the Statement on Plea of Guilty for the felony harassment charge:

I believe I am innocent of the charges, but after discussing the evidence with my attorney I realize the likelihood of conviction is substantial and I want to take advantage of the prosecutor's offer because at the time of the incident I was off of my prescription medication, intoxicated, grieving for both my mother and sister who had recently died and I do not recall much of what occurred.

CP 37-41.

The Declaration for Determination of Probable Cause stated:

On November 19, 2007, at approximately 1852 hours, Lakewood P.D. officers D. Tenney and E. Bell were dispatched to a disturbance at Gibbon and Sons Towing at 15408 Union Avenue S.W. in Lakewood. When they arrived they observed the defendant, MARKUS CHARLES WILLIAMSON, being held down by three men, including Gibbon & Sons employees B. Spencer and T. Darnell.

Officer Tenney ordered Williamson to give him his hands. Williamson did not comply and stated, "Fuck off." Officer Tenney stated he was a police officer and to do as instructed. WILLIAMSON still failed to comply. Officers Tenney and Bell then each grabbed an arm and forcibly placed WILLIAMSON in handcuffs. WILLIAMSON was ordered to stand up, but again he refused and had to be brought forcibly to his feet.

Spencer explained to the officers that WILLIAMSON had entered onto the business property, had become belligerent and had refused to leave. Mr. Spencer is African-

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

American; WILLIAMSON is Caucasian. When the Officers then advised WILLIAMSON he was under arrest, WILLIAMSON screamed at Mr. Spencer, "You black nigger, I'm going to kill you!" WILLIAMSON was told to stop making racial comments, but he replied, "Fuck you, I'll kill all niggers."

WILLIAMSON was taken to a patrol car, where he began to kick, spit, and yell. He was placed in restraints, including a spit mask.

Mr. Darnell and Mr. Spencer explained as follows: WILLIAMSON had come onto the property from a Pierce Transit bus and begin yelling at Mr. Darnell regarding towing his vehicle. Mr. Darnell asked WILLIAMSON to leave the property. WILLIAMSON refused. Mr. Darnell requested assistance from Mr. Spencer. WILLIAMSON then threw a punch at Mr. Darnell, connecting a glancing blow off Mr. Darnell's chin. When Mr. Spencer attempted to separate the two, WILLIAMSON punched Mr. Spencer in the face. Mr. Spencer and Mr. Darnell then took WILLIAMSON to the ground and waited for the police to arrive.

When the officers returned to the patrol vehicle to transport WILLIAMSON to the jail, WILLIAMSON threatened to kill both Officer Tenney and Officer Bell. He made repeated threats to kill the officers, and also continued with his racial slurs.

CP 5-6.

On May 29, 2008, the court sentenced defendant to the low end standard sentence of 22 months confinement on count II, felony harassment, and three hundred and sixty-five days suspended with twelve

months probation for the fourth degree assault convictions. CP 44-45; CP 56-60; 4 RP 16².

On June 24, 2008, defendant filed a timely notice of appeal. CP 68-71.

C. ARGUMENT.

1. DEFENDANT FAILED TO PRESERVE ANY CLAIM REGARDING AN INSUFFICIENT FACTUAL BASIS UNDER CrR 4.2(d) IN TRIAL COURT.

The requirement of a factual basis for a plea is found in CrR 4.2(d), which reads:

Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The rule requiring the trial court taking a guilty plea to find a factual basis for the plea is intended simply to enable the trial court to verify the accused's understanding of the charges. *In re Hilyard*, 39 Wn. App. 723, 726 7, 695 P.2d 596 (1985). Even though CrR 4.2(d) requires that the judge taking a plea must be "satisfied there is a factual basis for

² The verbatim report of proceedings is referred to as follows: Arraignment, November 20, 2007= "1 RP", Rearrangement on charges, April 18, 2008= "2 RP", Plea Hearing, May 8, 2008= "3 RP", Sentencing, May 29, 2008= "4 RP".

the plea”, and that those underpinning facts must be developed on the record of the plea hearing, the federal and state constitutions do not impose this requirement. *In re Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987) (“[The] factual basis is not an independent constitutional requirement and is constitutionally significant only in so far as it relates to the defendant's understanding of his or her plea.”). “CrR 4.2 is not the embodiment of a constitutionally valid plea; strict adherence to the rule is “not a constitutionally mandated procedure.” *Hilyard*, 39 Wn. App. at 727 (citing *In re Vensel*, 88 Wn.2d 552, 554, 564 P.2d 326 (1977)). Only manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

Here, defendant does not argue that he did not understand the plea, or that the lack of factual basis prevented him from understanding how his conduct constituted felony harassment. The record indicates defendant’s plea was knowingly, voluntarily, and intelligently made. In his statement on plea of guilty, defendant stated, “I believe I am innocent of the charges, but after *discussing the evidence with my attorney realize the likelihood of conviction is substantial* and I want to take advantage of the prosecutor’s offer.” (emphasis added) CP 35. During the plea hearing, defendant stated that he understood the plea, he understood the charges against him, and he understood the possible sentence options. 3 RP 5-7. His statement on the plea of guilty demonstrates that he understood the facts alleged and evidence against him. CP 35. Therefore, the factual basis for his plea is

not constitutionally significant and defendant cannot challenge the factual basis for the first time on appeal.

In order to preserve his issue for review, defendant was required to raise an objection to the factual basis requirement of CrR 4.2(d) in the trial court. RAP 2.5(a). An appeal is not a proper substitute for a motion to withdraw a guilty plea. *Robinson v. State*, 373 So. 2d 898, 902 (Fla. 1979); *see also United States v. Akinsola*, 105 F.3d 331, 333 (7th Cir. 1997). Allowing defendant to withdraw his plea regarding an alleged procedural violation would eliminate the need for a defendant to move to withdraw his plea at the trial level. *See State v. Arnold*, 81 Wn. App. 379, 383-84, 914 P.2d 762 (1996) (noting trial judges have inherent authority to settle the record when questions arise as to what was in the record before them at the time of the hearing as they are in the best position to resolve such claims).

In the instant case, defendant failed to challenge the lack of a factual basis below. If the defendant objected to the adequacy of the record to support the court's factual finding, he had a remedy in the trial court. He could have brought it to the court's attention at the time of the plea. In *Arnold*, after the defendant entered a plea of guilty, but prior to sentencing, Arnold moved to withdraw his plea prior to sentencing for lack of a factual basis. *Arnold*, 81 Wn. App. at 381. Arnold claimed, and the State conceded, that the certificate of probable cause was not in the record at the time of the plea hearing. *Id.* at 383. After Arnold brought

this to the attention of the court, the judge stated that he had in fact considered the certificate of probable cause although he had not articulated that in the record. *Arnold*, 81 Wn. App. at 384. The appellate court affirmed that a factual basis was established, relying on the fact that the court retroactively affirmed it had relied on the certificate of probable cause. *Id.* Here, defendant could have brought the factual basis issue to the court's attention at the time of the plea; defendant could have moved to withdraw his plea under CrR 4.2(f) before sentencing, or CrR 7.8 after the judgment was entered. Defendant failed to do any of these things at the trial court level.

The defendant does not argue that he did not understand the plea. Rather, he argues that the record regarding the factual basis was insufficient. The record clearly demonstrates that the defendant understood the plea and that he entered it knowingly and voluntarily. Because the defendant does not allege that he did not understand his guilty plea, the factual basis of the plea is not constitutionally significant, and the defendant has not alleged that a manifest error affecting a constitutional right occurred. *Hews*, 108 Wn.2d at 591-92. Therefore, the Court should decline to review the validity of the defendant's guilty plea.

2. THE TRIAL COURT PROPERLY FOUND A FACTUAL BASIS AT THE PLEA HEARING WHEN (1) THE COURT EXPLICITLY STATED IT FOUND A FACTUAL BASIS, (2) THE RECORD CONTAINED A DECLARATION OF PROBABLE CAUSE AND AN AMENDED INFORMATION, (3) AND DEFENDANT INDICATED HE UNDERSTOOD THE CHARGES.

If the court finds defendant's claim was properly preserved, this Court must decide if there was a factual basis for the plea. In establishing whether there is a factual basis, the court may consider a variety of resources, such as statements given to the police by witnesses to the crime, or the affidavit for probable cause. *Hilyard*, 39 Wn. App. at 725-726 (citing *State v. Osborne*, 35 Wn. App. 751, 669 P.2d 905 (1983)); *State v. Norval*, 35 Wn. App. 775, 669 P.2d 1264 (1983). "When a defendant pleads guilty, the factual basis for the offense is provided at least in part by the defendant's own admissions." *State v. D.T.M.*, 78 Wn. App. 216, 220, 896 P.2d 108 (1995). The court may consider information from reliable sources so long as that information is made a part of the record at the time of the plea. *State v. Arnold*, 81 Wn. App. 379, 382, 914 P.2d 762, review denied, 130 Wn.2d 1003, 925 P.2d 989 (1996). A factual basis will be deemed to exist if the evidence is sufficient for a jury to conclude that the defendant is guilty. *Arnold*, 81 Wn. App. at 382 (citing *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976)). "The

constitution does not require that a defendant admit to every element of the charged crime in order to enter a valid guilty plea, but necessitates merely that the defendant understand the critical elements of the crime and admit to conduct which satisfies those elements.” *Hews*, 108 Wn.2d at 596.

Here, the court explicitly stated there was a factual basis for the plea. 3 RP 9. However, the court did not indicate what documents or testimony it relied upon to find the factual basis. While the defendant acknowledged that he understood he was charged with felony harassment, and that he had discussed and reviewed the evidence with his attorney, the certificate of probable cause was not specifically referred to in the record at the time of the plea hearing. 3 RP 5.

When a statement of probable cause is not made a part of the oral record at the plea hearing, courts will look to whether the certificate of probable cause was filed prior to the plea hearing in determining whether the certificate was a part of the record. For example, in *Osborne*, the prosecutor’s affidavit provided a sufficient factual basis for the guilty pleas, yet the record of the plea proceedings made no specific reference to the prosecutor’s affidavit. *State v. Osborne*, 102 Wn.2d 87, 96, 684 P.2d 683 (1984). The prosecutor’s affidavit was filed more than two months before the plea hearing. *Id.* Because the prosecutor’s affidavit was filed before the plea hearing, and because both petitioners acknowledged they had reviewed witness statements and the autopsy report that was

summarized in the prosecutor's affidavit, the court held the prosecutor's affidavit had been "incorporated" into the plea proceedings. *Id.* Thus, the court held there was a sufficient factual basis under CrR 4.2.

Similarly, in *Arnold*, while the certificate of probable cause established a factual basis for the charges, there was no oral reference to the certificate of probable cause at the plea hearing. *Arnold*, 81 Wash. App. 382-383. Moreover, the State conceded that the certificate of probable cause was not a part of the plea hearing. *Id.* However, the court found a factual basis was established because the certificate of probable cause was filed prior to the plea hearing and because the judge retroactively affirmed he had looked to the statement of probable cause. *Arnold*, 81 Wash. App. at 384. In finding there was a factual basis, the court also relied on the fact that no new evidence was taken after Arnold's plea hearing. *Id.* at 383. Specifically the court stated that "the evil meant to be avoided by the rule (CrR 4.2(d)) is the taking of new evidence after the plea is entered in order to justify a plea that the trial judge should have never accepted in the first place because it laced a factual basis." *Id.*

Here, as in *Osborne* and *Arnold*, it is clear the declaration of probable cause was filed prior to the plea hearing. The statement of probable cause was filed on November 20, 2007. CP 5-6. The plea hearing was held on May 8, 2008. 3 RP 1. Thus, the statement of probable cause was a part of the record at the time of the plea hearing. While a better practice would include making an oral record of the

probable cause establishing a factual basis, under *Arnold* and *Osborne* this is not a constitutionally mandated requirement. *Arnold*, 81 Wn. App. at 383; *Osborne*, 102 Wn.2d at 96. In addition, as in *Arnold*, no new evidence has been introduced since the plea hearing. The court had all the information in the record when it found the factual basis was satisfied at the plea hearing.

In addition to the statement of probable cause, other evidence was in the record at the time of the plea hearing establishing a factual basis. The second amended information defendant entered the *Alford* plea to specifically laid out the elements of the charges. Regarding the felony harassment, the information stated:

That Markus Charles Williamson, in the State of Washington, on or about the 19th day of November, 2007, did unlawfully, knowingly threaten D. Tenney and E. Bell to cause bodily injury, immediately or in the future, to that person or to any other person, and by words or conduct place the person threatened in reasonable fear that the threat would be carried out, and that further, the threat was a threat to kill the person.

CP 25-26.

Moreover, the statement on plea of guilty and defendant's own statements support that defendant understood the charges and entered the plea knowing and voluntarily. In the statement on plea of guilty, defendant stated he discussed the evidence with his attorney, he realized the likelihood of conviction was substantial, and he wanted to take advantage of the prosecutor's offer. CP 35. Defendant informed the court

he understood the charges in the plea. 3 RP 5. Defendant also informed the court he had reviewed the statement of plea of guilty with his attorney and he understood it. 3 RP 5. In addition, defendant signed the statement on the plea of guilty that lists the charges defendant was accused of. CP 36.

Appellant argues that reasonable fear on behalf of the officers was not established. This allegation is irrelevant. What matters in establishing a factual basis is that a jury could conclude that defendant was guilty of felony harassment. *Arnold*, 81 Wn. App. at 382. Because of defendant's repeated threats to kill and his defiant behavior, a jury could conclude defendant is guilty of felony harassment.

The harassment statute states that a person is guilty of harassment if, without lawful authority, the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to any other person, and the person places another in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a)(i)(b). The statement of probable cause demonstrates a factual basis for the required elements of the crime. The statement of probable cause indicates defendant repeatedly threatened to kill the officers. CP 5-6. The statement of probable cause also notes that when defendant was taken to the patrol car, "he began to kick, spit and yell." *Id.* Thus, there is sufficient evidence to establish a factual basis that defendant threatened the officers.

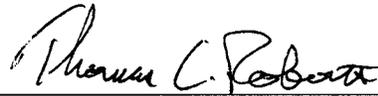
In conclusion, the factual basis requirement was satisfied by the statement of probable cause in the record at the time of the plea, the amended information, and defendant's own statements. The record supports this was a constitutionally sufficient plea. However, if the court determines that the factual basis was insufficient, the proper remedy is to reverse the trial court and remand to permit defendant to enter a new plea. *State v. Zumwalt*, 79 Wn. App. 124, 132, 901 P.2d 319 (1995) (overruled on other grounds); *In the Matter of the Personal Restraint of Evans*, 31 Wn. App. 330, 332, 641 P.2d 722 (1982).

D. CONCLUSION.

The defendant entered a constitutionally valid plea. For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction.

DATED: April 8, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



THOMAS ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Alexis Taylor
Legal Intern

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STATE OF WASHINGTON

BY [Signature]
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/8/08 Theresa Kar
Date Signature