

No. 45795-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Bobby Zimmerle,**

Appellant.

---

Cowlitz County Superior Court Cause No. 13-1-00417-5

The Honorable Judge Marilyn Haan

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The court abused its discretion by denying Mr. Zimmerle's motion to withdraw his guilty plea.
2. The court violated Mr. Zimmerle's Sixth and Fourteenth Amendment right to represent himself.
3. The court violated Mr. Zimmerle's Wash. Const. art. I, § 22 right to appear and defend in person.
4. The court violated Mr. Zimmerle's Fourteenth Amendment and art. I, § 22 rights to access to the courts.
5. The court abused its discretion by refusing to permit Mr. Zimmerle to proceed *pro se*.
6. The court abused its discretion by refusing to give Mr. Zimmerle the form he needed to plead guilty *pro se*.

**ISSUE 1:** A court must accept a knowing and voluntary waiver of the right to counsel. Here, the trial court refused to permit Mr. Zimmerle to represent himself. Did the court violate Mr. Zimmerle's right to self-representation under the Sixth and Fourteenth Amendments and art. I, § 22?

**ISSUE 2:** A court must provide access to materials reasonably necessary to allow an accused person to proceed *pro se*. Here, the court unreasonably denied Mr. Zimmerle access to the form he would have needed to plead guilty *pro se*. Did the court violate Mr. Zimmerle's right to access to the courts under the Sixth and Fourteenth Amendments and art. I, § 22?

7. Mr. Zimmerle's guilty plea violated his Fourteenth Amendment right to due process.
8. Mr. Zimmerle's guilty plea was not knowing, intelligent, and voluntary.
9. The factual basis for Mr. Zimmerle's plea to third degree assault was insufficient because it did not establish that the transit employee was performing his/her official duties.

10. The factual basis for Mr. Zimmerle's plea to misdemeanor harassment was insufficient because it did not establish that his words or actions placed the alleged victim in reasonable fear that the threat would be carried out.

**ISSUE 3:** A guilty plea is not knowing, intelligent, and voluntary if the record does not set forth an adequate factual basis for a finding of guilt. Here, the factual basis for Mr. Zimmerle's guilty pleas omitted an element of each charge. Does the lack of an adequate factual basis render Mr. Zimmerle's guilty pleas involuntary under the Fourteenth Amendment?

11. The trial court erred by imposing attorney's fees.
12. The trial court's imposition of attorney's fees violated Mr. Zimmerle's Sixth and Fourteenth Amendment right to counsel.
13. The trial court erred by adopting Finding of Fact No. 2.5 (Judgment and Sentence).

**ISSUE 4:** A trial court may only impose attorney fees after finding that the offender has the present or likely future ability to pay. Here, the court imposed \$825 in attorney fees after forcing Mr. Zimmerle to accept an attorney (despite his desire to proceed *pro se*) and without conducting any inquiry into whether he could afford to pay. Did the trial court violate Mr. Zimmerle's Sixth and Fourteenth Amendment right to counsel?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Police arrested Bobby Zimmerle after an intoxicated altercation with several bus drivers. RP 1. Prior to this, Mr. Zimmerle had represented himself at a jury trial and won an acquittal. RP 20. At his first appearance on this case, he told the judge that he did not want an attorney appointed. RP 2. He said that he wanted to represent himself and to plead guilty immediately. RP 2-3.

The court told Mr. Zimmerle that he could not plead guilty because he did not have a lawyer to help him fill out the form. RP 2, 4-5. Mr. Zimmerle said that if he had the form, he would fill it out himself. RP 6-7. The court agreed to send a copy of the form to Mr. Zimmerle in jail. RP 6. The court set the matter over until the following day. RP 9.

The next day, Mr. Zimmerle appeared before a different judge. RP 10. Mr. Zimmerle had not received the form he needed to plead guilty *pro se*. RP 12, 15. He asked the new judge several times for a copy of the form. RP 12-13, 17, 23. Mr. Zimmerle again told the court that he did not want an attorney appointed. RP 11. He explained that he did not want to have to pay attorney's fees. RP 14. He said that he understood that the maximum penalty for his charges was five years in prison. RP 17.

The court told Mr. Zimmerle that he was going to be “sitting in jail a lot longer” if he did not have an appointed attorney. RP 13. This was because the case would be resolved more quickly with an attorney. RP 22.

The judge said that he would not give Mr. Zimmerle a copy of the plea form he needed. RP 17-18. The court set Mr. Zimmerle’s arraignment over for two weeks. RP 16. Mr. Zimmerle reiterated that he did not want a lawyer. RP 22. He asked if he would be able to plead guilty *pro se* at arraignment. RP 23. The court responded that he probably would not:

MR. ZIMMERLE: And then can I plead guilty [at the next hearing]?

COURT: I don’t know. Probably not because you won’t have the paperwork.

MR. ZIMMERLE: Well, give me the paperwork.

COURT: The state will send up a plea form if they wish to, but it’s not their responsibility to.

Finally, Mr. Zimmerle submitted to having an attorney appointed.

RP 23.

At the next hearing, Mr. Zimmerle was represented by counsel and pled guilty to third degree assault and misdemeanor harassment. CP 5-14.

His plea statement read:

On 3/23/2013, I made a threat against a person, and also assaulted a public transit employee, in Cowlitz, County, WA.

CP 12. At the plea hearing, the court clarified that the threat had been one to cause bodily harm. RP 28. Neither the court nor the prosecuting attorney supplemented the factual basis for the plea in any other way. RP 24-30.

The court accepted the plea and sentenced Mr. Zimmerle to forty-three months confinement. CP 21. It ordered him to pay \$825 in attorney's fees. CP 19.

A few months later, Mr. Zimmerle moved *pro se* to withdraw his guilty plea. CP 30. He argued that his attorney did not adequately represent him and that he was not guilty of the charges. CP 31-32; RP 45-47. The court denied his motion. CP 33. This timely appeal follows. CP 34-36.

## **ARGUMENT**

### **I. THE COURT VIOLATED MR. ZIMMERLE'S RIGHT TO SELF-REPRESENTATION AND HIS RIGHT TO DUE PROCESS BY DENYING HIS MOTION TO WITHDRAW HIS GUILTY PLEA.**

#### **A. Standard of Review.**

Denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. A.N.J.*, 168 Wn.2d 91, 106, 225 P.3d 956 (2010). A court necessarily abuses its discretion by denying an accused person

his/her constitutional rights. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

Constitutional issues are reviewed *de novo*. *Id.*

B. The guilty plea violated Mr. Zimmerle’s constitutional right to self-representation and to access to the courts.

The state and federal constitutions guarantee the right to represent oneself. U.S. Const. Amends. VI, XIV; art. I, § 22; *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). Both constitutions also guarantee the right to access the courts. *State v. Silva*, 107 Wn. App. 605, 622, 27 P.3d 663 (2001).

The unjustified denial of the right to proceed *pro se* requires reversal. *Madsen*, 168 Wn.2d at 503. The right to self-representation “is either respected or denied; its deprivation cannot be harmless.” *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

A trial court cannot deny an accused person the right to self-representation on the ground that it would be detrimental, or because the defendant lacks technical legal knowledge. *Faretta*, 422 U.S. at 834, 836; *Madsen*, 168 Wn.2d at 505. A court may not “sacrifice constitutional rights on the altar of efficiency.” *Madsen*, 168 Wn.2d at 509.

When an accused person requests to represent himself, the court must first assess whether the motion is timely and unequivocal. *Madsen*, 168 Wn.2d at 504. If those requirements are met, the court must next assess whether the waiver of an attorney is knowing, voluntary, and intelligent. *Id.* The court accomplishes this through a colloquy with the accused. *Id.* The court may not “stack the deck against a defendant” by failing to conduct a proper colloquy. *Id.* at 506. If the trial court does not ask appropriate questions and the record does not show involuntariness, the appellate court must conclude that waiver was knowing and voluntary. *Id.*

A trial court violates the accused’s right to self-representation by deferring ruling on a motion to proceed *pro se* when the motion should have been granted. *Madsen*, 168 Wn.2d at 506.

The court must provide a *pro se* defendant with the materials reasonably necessary to self-representation. *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987) (*citing Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977)). Failure to provide such access violates the right to self representation:

The right of self-representation guaranteed in our state constitution is a substantive right, not a mere formality. Just as the right to appointed counsel is not satisfied unless the representation is meaningful, the right to represent oneself cannot be satisfied unless

it is made meaningful by providing the accused the resources necessary to prepare an adequate pro se defense.

*Silva*, 107 Wn. App. at 620.

Here, the court violated Mr. Zimmerle's constitutional right to self-representation by refusing to allow him to proceed *pro se*. First, the court impermissibly "stacked the deck" against Mr. Zimmerle by failing to conduct any inquiry into whether his waiver of counsel was knowing, intelligent, and voluntary. *Madsen*, 168 Wn.2d at 505. Once the court determined that Mr. Zimmerle's request was timely and unequivocal, the judge should have conducted a colloquy, ensuring that Mr. Zimmerle understood the nature of the charges and the maximum penalty. *Id.* at 504. Instead, the court failed to rule on Mr. Zimmerle's motion and pressured him to change his mind. This failure to rule should be treated as a denial of the motion. *Id.* at 506.

Because the trial court did not conduct a meaningful colloquy, the appellate court must presume a knowing, intelligent and voluntary decision to proceed *pro se*. *Id.* The court abused its discretion by failing to grant Mr. Zimmerle's request. *Id.*

Second, the court violated Mr. Zimmerle's right to self-representation by refusing to provide him with the materials he needed to proceed *pro se*. *Bebb*, 108 Wn.2d at 524. The court informed Mr.

Zimmerle that he could not plead guilty *pro se* because he did not have a copy of the plea form. RP 12, 15. When Mr. Zimmerle asked repeatedly for a copy of the form, the court did not give him one. RP 12-13, 17-18, 23. The court's failure to provide a plea form violated Mr. Zimmerle's rights to self-representation and to access to the courts by making it impossible for him to actually proceed without an attorney. *Silva*, 107 Wn. App. at 620.

The trial court violated Mr. Zimmerle's constitutional rights to self-representation and to meaningful access to the courts. *Madsen*, 168 Wn.2d at 505-06; *Silva*, 107 Wn. App. at 620. Because of this, Mr. Zimmerle's guilty plea was invalid. *A.N.J.*, 168 Wn.2d at 120.

The court entered Mr. Zimmerle's guilty plea in violation of his constitutional right to self-representation. *A.N.J.*, 168 Wn.2d at 120; *Iniguez*, 167 Wn.2d at 280. Mr. Zimmerle must be allowed to withdraw his guilty plea. *Id.*

C. The record does not set forth a sufficient factual basis for either of Mr. Zimmerle's guilty pleas.

Due process requires an affirmative showing that an accused person's guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969); *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004). Absent

such an affirmative showing, the accused must be permitted to withdraw the guilty plea. *A.N.J.*, 168 Wn.2d at 119-20.

A guilty plea is not voluntary if it is not supported by sufficient factual basis. *State v. S.M.*, 100 Wn. App. 401, 414, 996 P.2d 1111 (2000). The factual basis must be developed on the record at the time the plea is taken. *S.M.*, 100 Wn. App. at 415. The factual basis for a plea is insufficient if it fails to satisfy all the elements of the offense. *State v. R.L.D.*, 132 Wn. App. 699, 706, 133 P.3d 505 (2006). Failure to sufficiently develop facts on the record at the time of the plea requires vacation of the conviction and dismissal of the charge with prejudice. *Id.*

When the court relies on the accused's written statement on plea of guilty as the factual basis for the plea, it must "insure the facts admitted amount to the violation charged." *S.M.*, 100 Wn. App. at 414 (*quoting In re Taylor*, 31 Wn. App. 254, 259, 640 P.2d 737 (1982)).

1. The record does not establish an adequate factual basis for Mr. Zimmerle's guilty plea to assault.

A conviction for third degree assault of a transit employee requires the state to prove that the accused:

Assault[ed] a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, *while that person is performing his or her official duties at the time of the assault.*

RCW 9A.36.031(1)(b) (emphasis added).

Here, the court relied on Mr. Zimmerle's written plea statement. The plea statement recites only that he "assaulted a public transit employee in Cowlitz County, WA." CP 12. It does not mention whether the transit worker was performing official duties at the time of the assault. CP 12. The court did nothing to remedy this infirmity during the plea hearing. RP 24-30. The factual basis for the plea is insufficient because it is silent as to an element of the offense. *R.L.D.*, 132 Wn. App. at 706.

Mr. Zimmerle's guilty plea to third degree assault violates due process. It is not supported by a factual basis establishing each of the elements of the offense. *Id.* at 706. Mr. Zimmerle's plea must be vacated and the charge dismissed with prejudice. *Id.* at 707.

2. The record does not establish an adequate factual basis for Mr. Zimmerle's guilty plea to harassment.

To support a conviction for misdemeanor harassment, the state must prove that the accused knowingly threatened to cause bodily harm to a person and "by words or conduct place[d] the person threatened in reasonable fear that the threat would be carried out." RCW 9A.46.020(1)(b).

Here, the court relied primarily on Mr. Zimmerle's written plea form. The plea form indicates only that he "made a threat against a

person.” CP 12. During the plea hearing, the court clarified that the threat had been one to cause bodily harm. RP 28. But the court did nothing to establish that the alleged victim had been placed in reasonable fear that the threat would be carried out. RP 24-30. The factual basis for Mr. Zimmerle’s guilty plea is insufficient because it omits an element of the offense. *R.L.D.*, 132 Wn. App. at 706.

Mr. Zimmerle’s guilty plea to harassment was not voluntary because it was not supported by a factual basis meeting each of the elements of the offense. *Id.* at 706. Mr. Zimmerle’s plea must be vacated and the charge dismissed with prejudice. *Id.* at 707.

**II. THE COURT VIOLATED MR. ZIMMERLE’S RIGHT TO COUNSEL BY ORDERING HIM TO PAY THE COST OF HIS COURT-APPOINTED ATTORNEY WITHOUT FIRST DETERMINING THAT HE HAD THE PRESENT OR FUTURE ABILITY TO PAY.**

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused’s exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller*, the court must assess the accused person’s current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

The court *shall not order* a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.<sup>1</sup> *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay

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<sup>1</sup> In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

them.” *Id.* The court noted that, under the Oregon scheme, “no requirement to repay may be imposed if it appears *at the time of sentencing* that ‘there is no likelihood that a defendant's indigency will end.’” *Id.* (emphasis added). Accordingly, the court found that “the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship.” *Id.*

Oregon’s recoupment statute did not impermissibly chill the exercise of the right to counsel because “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay”. *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to require a finding of ability to pay before ordering an offender to reimburse for the cost of counsel. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) (“A cost judgment may not be constitutionally imposed on a

defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) (“The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn. Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions”); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) (“In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute”).

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney’s fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Here, Mr. Zimmerle informed the court that he did not want an attorney because he did not want to have to pay for one. RP 13-14. Ultimately, he submitted to the court's pressure, and allowed the court to appoint counsel. This only happened after the court told him he would be in custody for much longer without one and refused to give him a plea form to fill out himself.<sup>2</sup> RP 14-23.

At sentencing, neither of the parties provided the court with information about Mr. Zimmerle's present or likely future ability to pay. RP 32-40. Although the court made a finding that Mr. Zimmerle "has the ability or likely future ability to pay," this finding is not supported by anything in the record. CP 18. Indeed, the court found Mr. Zimmerle indigent at beginning and at the end of the proceedings. CP 37-39. Mr. Zimmerle's felony conviction and lengthy incarceration will also negatively impact his prospects for employment.

The lower court ordered Mr. Zimmerle to pay \$825 in fees for his court-appointed attorney without conducting any inquiry into his present or future ability to pay. This violated his right to counsel. Under *Fuller*, the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so.

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<sup>2</sup> As argued above, the court's actions violated Mr. Zimmerle's Sixth Amendment right to represent himself.

*Fuller*, 417 U.S. at 53. The order requiring Mr. Zimmerle to pay \$825 in attorney fees must be vacated. *Id*

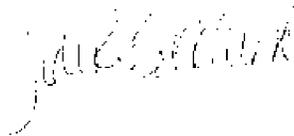
### **CONCLUSION**

The court violated Mr. Zimmerle's constitutional right to self-representation by refusing to rule on his motion to proceed *pro se* and by depriving him of the materials he would have needed to represent himself. The factual basis for Mr. Zimmerle's guilty plea omits an element of each of the charges. Mr. Zimmerle must be permitted to withdraw his guilty plea.

In the alternative, the court violated Mr. Zimmerle's right to counsel by ordering him to pay attorney's fees in a manner that impermissibly chills the exercise of that right. The order requiring Mr. Zimmerle to pay the cost of his court-appointed attorney must be vacated.

Respectfully submitted on July 15, 2014,

**BACKLUND AND MISTRY**



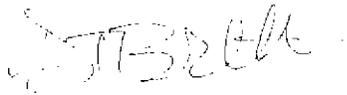
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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Bobby Zimmerle, DOC #257213  
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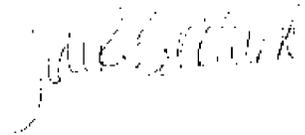
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney  
baurs@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 15, 2014.



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Jodi R. Backlund, WSBA No. 22917  
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**BACKLUND & MISTRY**

**July 15, 2014 - 10:50 AM**

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