

No. 49290-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TERRY RAY MOSER, JR.,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-03711-2
The Honorable Gretchen Leanderson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it accepted Terry Moser's guilty plea without adequately determining whether he understood the nature of the charges to which he was pleading.
2. The trial court erred when it accepted Terry Moser's guilty plea without determining whether there was an adequate factual basis to support the plea.
3. Any future request by the State for appellate costs should be denied.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the plea statement did not recite the elements the State must prove to convict Terry Moser of robbery and unlawful possession of a firearm, and where the court failed to determine if Moser understood the elements of the crimes, did the trial court err when it found that Moser understood the nature of the charges and when it accepted his plea to first degree robbery and unlawful possession of a firearm?
(Assignment of Error 1)
2. Where Terry Moser's statement of guilt did not admit facts that would establish all the elements of the charged crimes, and where the trial court failed to determine whether there

was a factual basis to support Moser's plea, did the trial court err when it accepted Moser's guilty plea to first degree robbery and first degree unlawful possession of a firearm? (Assignment of Error 2)

3. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs because Terry Moser does not have the ability to pay costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 3)

III. STATEMENT OF THE CASE

The State charged Terry Ray Moser, Jr. with three counts of first degree robbery (RCW 9A.56.190, .200), one count of first degree assault (RCW 9A.36.011) and one count of first degree unlawful possession of a firearm (RCW 9.41.040). (CP 1-3) The State alleged that Moser was armed with a firearm when he committed the assault and robbery offenses, and was therefore subject to firearm sentence enhancements (RCW 9.94A.530, .533). (CP 1-3)

According to the probable cause declaration filed with the Information, Moser entered a Pierce County Autozone store and

pointed a gun at an employee and several customers, and demanded they give him money. (CP 4-6) Moser fired the gun inside the store, and also fired the gun towards another employee outside the store when he fled the scene. (CP 4-6)

Moser agreed to plead guilty to an Amended Information charging three counts of first degree robbery, one count of first degree assault, and one count of first degree unlawful possession of a firearm. (CP 62-64, 65-74) The State removed three of the four firearm sentence enhancements. (CP 62-63) When asked in his Statement of Defendant on Plea of Guilty to list what he did to make him guilty of the crimes, Moser writes:

On September 9th, 2015, in Pierce County Washington, I robbed three people at gun point and shot at another with a firearm with intent to cause great bodily harm after having been previously convicted of a serious offense.

(CP 73)

The trial court accepted Moser's plea as intelligent and voluntary, but did not discuss the elements of the crimes or the factual basis to support his plea. (07/12/16 RP 61)¹ The court imposed a standard range sentence totaling 300 months of

¹ The transcripts will be referred to by the date of the proceeding.

confinement. (CP 85; 07/12/16 RP 66) Moser timely appealed.
(CP 97-99)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRED WHEN IT ACCEPTED MOSER'S GUILTY PLEA TO ROBBERY AND UNLAWFUL POSSESSION OF A FIREARM WITHOUT ADEQUATELY DETERMINING WHETHER HE UNDERSTOOD THE NATURE OF THE CHARGES TO WHICH HE WAS PLEADING AND WITHOUT DETERMINING WHETHER THERE WAS A FACTUAL BASIS TO SUPPORT THE PLEA.

Washington's court rules set forth the requirements for the acceptance of a guilty plea:

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 the 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.

CrR 4.2(d). A guilty plea is invalid if it is made without "an understanding of the nature of the charge." CrR 4.2(d). And a guilty plea is not truly voluntary "unless the defendant possesses an understanding of the law in relation to the facts." In re PRP of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)). "At a minimum, 'the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime.'" State v. Osborne, 102

Wn.2d 87, 93, 684 P.2d 683 (1984) (quoting Keene, 95 Wn.2d at 207).

Due process also requires that a guilty plea be knowing, intelligent and voluntary. In re PRP of Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). An inadequate factual basis may affect this understanding. In re PRP of Clements, 125 Wn. App. 634, 645, 106 P.3d 244 (2005). Thus, “[d]ue process requires that a defendant be apprised of the nature of the offense in order for a guilty plea to be accepted as knowing, intelligent, and voluntary. Real notice of the nature of the charge is ‘the first and most universally recognized requirement of due process.’” Osborne, 102 Wn.2d at 92-93 (quoting Henderson, 426 U.S. at 645).

In this case, the record does not establish that Moser understood the nature of the crimes or the facts the State would have to prove for a jury to find him guilty. Moser pleaded guilty to three counts of robbery. (CP 62-63, 65-74) Under RCW 9A.56.190:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the

use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking[.]

Thus, the State would have to produce sufficient evidence for a jury to conclude that Moser threatened to use force and that the threat of force was used to obtain or retain possession of the property. But there is nothing in the record to show that Moser understood this requirement. Moser simply states that he “robbed three people at gun point[.]” (CP 73)

Moser also pleaded guilty to one count of unlawful possession of a firearm, which requires proof that he possessed or controlled a firearm “after having previously been convicted ... of any serious offense as defined in this chapter.” RCW 9.41.040. But there is nothing in the record to show that Moser understood what a “serious offense” is.

At the plea hearing, the trial court did not inquire into whether Moser understood these essential elements. The only discussion about the elements or factual basis for the crimes occurred when the trial court read Moser’s statement of guilt set forth above, and asked if that was Moser’s statement. (07/12/16

RP 58) Moser answered with a simple “Yes.” (07/12/16 RP 58-59)

Neither the defense attorney, nor the prosecutor nor the judge recited any additional facts or explained the requirements or meaning of the essential elements of robbery and unlawful possession of a firearm. And the trial court never made a finding that a factual basis existed to establish these elements.

Simply reciting Moser’s bare-bones factual statement, and Moser’s one word response acknowledging the statement, does not show that Moser truly understood the nature of the allegations, and the elements the State was required to establish before he could be convicted of the charged offenses. See State v. S.M., 100 Wn. App. 401, 415, 996 P.2d 1111 (2000) (the defendant’s “simple ‘yes’ response to the court’s oral question about the meaning of sexual intercourse” is not adequate).

Accordingly, “the record does not affirmatively show” that Moser “understood the law in relation to the facts or entered the plea intelligently and voluntarily,” and the trial court erred when it accepted Moser’s guilty plea. S.M., 100 Wn. App. at 415. And the State cannot meet its burden on appeal of proving the plea’s validity. See State v. Knotek, 136 Wn. App. 412, 423, 149 P.3d 676 (2006).

An involuntary guilty plea produces a manifest injustice and due process requires that the defendant be permitted to withdraw the plea. In re PRP of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). When a defendant pleads guilty pursuant to a plea agreement, the agreement is indivisible if the charges were made at the same time, described in one document, and accepted in a single proceeding. State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). When a defendant shows manifest injustice as to one charge in an indivisible plea agreement, he may move to withdraw the entire agreement. Turley, 149 Wn.2d at 400. Here, the plea agreement is indivisible because the charges were made at the same time, described in one document, and accepted in a single proceeding. (CP 1-3, 62-64; 07/12/16 RP 51-61) The State resolved the case through a guilty plea and Moser benefited by the dismissal of three firearm sentence enhancements. Thus, Moser must be allowed to withdraw his guilty plea to all of the charges.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.²

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of

² In State v. Sinclair, Division 1 concluded that an appellant should object to the imposition of appellate costs in the opening brief. 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). More recently, in State v. Grant, this Court disagreed with Sinclair and held that an appellant should object to the imposition of costs through a motion to modify a commissioner’s ruling ordering costs. 2016 WL 6649269 at *2 (2016). But Moser has included an objection to costs in this brief in the event that a higher court adopts the Sinclair reasoning at a future time, and because this Court also noted in Grant that “a defendant may continue to properly raise the issue of appellate costs in briefing or a motion for reconsideration consistently with Sinclair.” 2016 WL 6649269 at *2.

whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Moser’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Moser owns no property or assets, has no savings, and has no job and no income. (CP 101-03) Moser will be incarcerated for the next 25 years, and already owes \$50,000 in previously ordered LFOs. (CP 85, 102) And the trial court declined to order any discretionary LFOs at sentencing in this case. (CP 83) Thus, there was no evidence below, and no evidence on appeal, that Moser has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Moser is indigent and entitled to appellate review at public expense. (CP 106-07) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of

continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). See also State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) (noting that "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

Similarly, there has been no evidence presented to this

Court, and no finding by the trial court, that Moser's financial situation has improved or is likely to improve. Moser is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

V. CONCLUSION

The trial court failed to comply with CrR 4.2 or with due process standards because it did not ensure that Moser understood the full nature of the charge of first degree robbery and unlawful possession of a firearm, or the facts necessary to prove these charges. And the trial court failed to ensure that there was an adequate factual basis to support the plea. Moser's convictions should therefore be vacated and his case remanded to the trial court for a new plea hearing. This court should also decline any future request to impose appellate costs.

DATED: January 20, 2017



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Attorney for Terry Ray Moser, Jr.

CERTIFICATE OF MAILING

I certify that on 01/20/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Terry R. Moser Jr., DOC# 779689, Monroe Correctional Complex-SOU, PO Box 514, Monroe, WA 98272.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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