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Court of Appeals
Division III
State of Washington

32783-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES R. SOKOLIK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry D. Steinmetz
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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APPELLANT'S ASSIGNMENT OF ERROR

1. The court erred by accepting Mr. Sokolik's guilty plea.

ISSUES PRESENTED

1. Whether a defendant alleging for the first time on appeal that his pleas of guilty were not voluntary must demonstrate the existence of manifest error affecting a constitutional right pursuant to RAP 2.5(a)(3), and if so, whether the defendant in this case has demonstrated manifest error regarding the taking and entry of his guilty pleas?
2. Should this court consider a claim by the defendant if he fails to assign error, cite any authority or any reference to the record regarding an accusation that the Department of Corrections ordered him to participate in some form of treatment even though it was not ordered by the trial court?

STATEMENT OF THE CASE

Defendant, Charles Sokolik, was charged by amended information on August 15, 2014, with one count of third degree assault (by means of a weapon) and one count of felony harassment. CP 17.

The probable cause affidavit filed in this matter and relied on by the Superior Court when accepting the defendant's pleas states the victim was in his backyard speaking with his niece when he was confronted by

the defendant. CP 2. Without reason, the defendant slapped him and then pointed a black handgun at him causing the victim to be in fear. As the victim walked toward his house, the defendant followed him, continuing to point the pistol at him. The incident was witnessed by a neighbor. Thereafter, the defendant was charged by information with second degree assault. The charge contained a firearm allegation.

On August 1, 2014, the defendant, his attorney Jeffrey Compton, and the deputy prosecutor appeared in the Spokane County Superior Court before the Honorable Salvatore Cozza for a guilty plea. SRP 3¹ The court began to review the guilty plea statement with the defendant. SRP 4.

THE COURT: And you've gone through the 11th grade and you have your GED?

THE DEFENDANT: Mm-hmm.

THE COURT: Have you been able to go over these guilty plea Statements and discuss them with Mr. Compton?

THE DEFENDANT: Yes.

THE COURT: Any questions about your rights?

THE DEFENDANT: There was lots of questions because, I mean, I asked him lots of things.

THE COURT: About the rights listed on the document.

¹ The references to "SRP" refer to the first guilty plea hearing dated August 1, 2014 (Judge Cozza) and "RP" refers to the second guilty plea hearing August 15, 2014 (Judge Tompkins).

THE DEFENDANT: Oh, I asked him and he tried to explain it to me.

THE COURT: Do you have any questions that you don't understand about your rights under the constitution and the laws of the State of Washington?

THE DEFENDANT: Well, yeah, I mean, I question it quite a bit because of the fact that I—

THE COURT: All right. Why don't you have a long discussion with Mr. Compton. Let's do this another day if Mr. Sokolik has questions here. He doesn't understand what's going on.

THE DEFENDANT: I understand what's going on.

THE COURT: That's why I asked the question, do you have questions or not? You said you had questions.

THE DEFENDANT: I'm just trying to explain what was going on. I'm sorry.

THE COURT: Okay. I'll ask it again. Do you have any questions about your rights on the guilty plea statement?

THE DEFENDANT: No.

SRP 4-5.

The court continued reviewing the guilty plea statement with the defendant. SRP 5–8. When the court questioned the defendant if he understood each of the provisions of the guilty plea statement, the defendant answered “yes” or “mm-hmm.” SRP 5–8. The court then stopped the proceedings stating: “He is either being deliberately obtuse or --.” SRP 8. After a short discussion with counsel regarding a request

for postponement by counsel, *the defendant asked for one more chance.*

SRP 9. The court then remarked to the defendant:

He's just giving me this straight attitude. Just a minute, you're giving me this attitude that I don't want to be here, I'm being a wise guy. You're pretending to be a little bit obtuse about these questions. That's it. I'm granting the good cause continuance.

SRP 9-10.²

On August 15, 2014, the parties appeared before the Honorable Linda Tompkins for entry of a guilty plea and sentencing to the charges contained within the amended information. At the time of the guilty plea hearing, Judge Tompkins entered into a colloquy with the defendant:

THE COURT: Any problems reading or writing?

THE DEFENDANT: Yeah, I have ADD.

THE COURT: Were you able to thoroughly go over these documents line by line with Mr. Compton?

THE DEFENDANT: Yes.

THE COURT: Were you able to ask any questions that you needed to?

THE DEFENDANT: Yes.

² When determining whether to accept a guilty plea, the trial court has discretion to accept or reject an offer to plead guilty once the defendant enters a not guilty plea that complies with CrR 4.2. *State v. Hubbard*, 106 Wn. App. 149, 153, 22 P.3d 296 (2001), *rev. denied*, 145 Wn.2d 1004 (2001).

THE COURT: And get the answers that you needed to?

THE DEFENDANT: Yes.

THE COURT: Do you understand the documents that we have in front of us today?

THE DEFENDANT: Yes.

RP 1001-02.

THE COURT: You have some important constitutional rights, sir. Right to counsel, right to have counsel present during all questions, right to a speedy public trial, right to hear and question witnesses, the right to testify, the right to remain silent, the right to be presumed innocent until such time as the state proves beyond a reasonable doubt any charges against you, and if you were found guilty after the trial, you'd also have the right to appeal. Do you understand those rights?

THE DEFENDANT: Yes.

THE COURT: On the other hand, if you plead guilty and if the Court accepts your plea, you will be found guilty. No trial, no appeal. The only issue remaining would be sentencing. Do you understand those consequences?

THE DEFENDANT: Yes.

THE COURT: Have you had enough time to thoroughly talk over these issues with Mr. Compton?

THE DEFENDANT: Yes.

THE COURT: Do you have any remaining questions of counsel or the Court?

THE DEFENDANT: No.

THE COURT: Are you ready to move forward with your pleas today?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Count I, third degree assault, what is your plea?

THE DEFENDANT: Guilty.

THE COURT: Count II, harassment, your plea?

THE DEFENDANT: Guilty.

THE COURT: Let the record reflect Mr. Sokolik has pled guilty to Count I, third degree assault; Count II, harassment, those being the only two counts in today's Amended Information. Are you offering this plea freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: Has anyone issued any threat of harm to you?

THE DEFENDANT: No.

THE COURT: Has anyone given you any promises?

THE DEFENDANT: No.

RP 1003-04.

The trial court then reviewed the sentencing consequences of pleading guilty with the defendant. RP 1004-05. The court continued with the colloquy.

THE COURT: The reason I'm asking you these questions is I need to make sure you're fully on board with what's going on today and you're aware of the recommendation and that is part of the understanding that you are coming into court with. It appears to track pretty closely what the Court has heard as the recommendation. I have before me a ten-page document titled Statement of Defendant on Plea of Guilty. Were you able to thoroughly go over this document and sign it with Mr. Compton?

THE DEFENDANT: I didn't sign it -- oh, I guess I did. Okay.

THE COURT: Do you understand the contents of the document?

THE DEFENDANT: Yes.

THE COURT: And you understand the Court will look to the document as being your own personal statement?

THE DEFENDANT: Right.

RP 1005-06.

The trial court continued the dialogue with the defendant regarding the potential loss of citizenship; firearms prohibition; loss of voting rights; potential suspension of government benefits; DNA collection and fee; other costs associated with pleading guilty; the potential sentencing range; range of community custody; and rehabilitative treatment if the court found chemical dependency contributed to the offense. RP 1006-1008. The defendant acknowledged each of these consequences. Thereafter, the

court questioned counsel about whether chemical dependency contributed to the offense.

THE COURT: If the Court finds chemical dependency contributed to the offense, there may be additional rehabilitative requirements imposed. Counsel, are either of you requesting chemical dependency finding?

DEFENSE ATTORNEY: No, Your Honor.

DEPUTY PROSECUTOR: No, Judge.

RP 1008.

The defendant then acknowledged his plea of guilty was an “Alford” plea – he was pleading guilty because if the facts contained in the police report were presented to a jury he could be convicted. RP 1008; CP 19. The defense attorney then acknowledged the court could rely on the probable cause affidavit and the police report as a factual basis for the plea. RP 1009. Thereafter, the court continued with the plea.

THE COURT: I have had a chance to review that document, Mr. Sokolik's written statement. I've listened carefully to his verbal statements. I'm satisfied his plea today has been given freely and voluntarily with an adequate understanding of the nature of the charge and consequences of the plea. There is an adequate factual basis for the plea. I find Mr. Sokolik guilty as charged in Count I, third degree assault, and Count II, harassment. Thank you, sir. You may be seated.

RP 1009.

After hearing statements by the lawyers and the defendant's allocution,³ the court sentenced the defendant as a "first offender" at the request of the parties. RP 1017; CP 24.

IV. ARGUMENT

THE DEFENDANT'S CONCLUSORY AND UNSUPPORTED CONTENTION THAT HIS PLEAS OF GUILTY WERE NOT VOLUNTARY DOES NOT ESTABLISH MANIFEST ERROR. HIS VERIFICATION - BY HIS COLLOQUY WITH THE COURT AND HIS WRITTEN, SIGNED PLEA STATEMENT - ESTABLISHES THE VOLUNTARINESS OF HIS PLEAS OF GUILTY.

On appeal, the defendant argues his guilty pleas to the charged offenses were involuntary.⁴ He attempts to buttress his argument mentioning the defendant's demeanor toward the trial court at the first guilty plea hearing and remarks made by the lawyers at that hearing that it might be difficult. He fails to show that he can raise this claim for the first time on appeal under RAP 2.5(a)(3).

Standard of Review.

Although the defendant does not reflect the standard of review in his argument, a defendant attempting to withdraw his guilty plea for the first time on appeal has the burden to demonstrate a manifest

³ The defendant did remark during his allocution at sentencing: "I'm afraid to test anybody's patience." RP 1001.

⁴ The defendant did not seek redress in the trial court under CrR 7.8.

constitutional error. RAP 2.5(a)(3);⁵ *State v. Walsh*, 143 Wn.2d 1, 6–7, 17 P.3d 591 (2001). “Manifest” in RAP 2.5(a)(3) means that a showing of actual prejudice is made - meaning it is so obvious on the record that it warrants review. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995).

In analyzing an asserted constitutional claim, this court does not assume the alleged error is of constitutional magnitude and “the constitutional error exception [under RAP 2.5(a)(3)] is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988).

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to

⁵ RAP 2.5(a)(3), in part, states: “The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.”

determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

O'Hara, 167 Wn.2d at 99-100 (internal citations omitted).

A claim of involuntariness of a guilty plea⁶ is traditionally the type of constitutional error that a defendant can raise for the first time on appeal. *See, Walsh*, 143 Wn.2d at 6. Once a plea is entered, the defendant bears the burden to show an involuntary plea. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984); *see also, State v. McDermond*, 112 Wn. App. 239, 243, 47 P.3d 600 (2002).⁷ Given the procedural safeguards inherent in plea proceedings, the defendant's burden of proof requires more evidence than “a mere allegation by the defendant.” *Osborne*, 102 Wn.2d at 97.

⁶ “A guilty plea waives or renders irrelevant all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea or to the government's legal power to prosecute regardless of factual guilt.” *In re Bybee*, 142 Wn. App. 260, 268, 175 P.3d 589 (2007).

⁷ A guilty plea is not voluntary if the defendant was misinformed about the direct sentencing consequences of pleading guilty. *State v. A.N.J.*, 168 Wn.2d 91, 113–14, 225 P.3d 956 (2010). Here, the defendant does not assert any violation wherein he was not advised by the court of the direct sentencing consequences which affected his decision to plead guilty.

In *Osborne*, one of the defendants moved to withdraw his guilty plea, stating his plea was involuntary because his wife threatened to commit suicide if he went to trial. *Osborne*, 102 Wn.2d at 92, 96–97. The Supreme Court determined that because the defendant had “specifically stated, several times during the plea proceedings, that his guilty plea was voluntary and free of coercion,” these statements on the record constituted “highly persuasive evidence of voluntariness” that required more than just a “mere allegation of the defendant” to be overcome. *Osborne*, 102 Wn.2d at 97. *See also*, *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974); *In re Pers. Restraint of Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993).

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *State v. Robinson* 172 Wn.2d 783, 790, 263 P.3d 1233 (2011). A court determines whether these criteria are satisfied based on the totality of the circumstances. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). A guilty plea is involuntary whenever it is based on misinformation of sentencing consequences. *In re Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). A defendant need not be informed of all possible consequences of his plea, but he or she must be informed of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

CrR 4.2 provides procedural safeguards to ensure the defendant's constitutional rights are protected. *Branch*, 129 Wn.2d at 642. Under CrR 4.2(d), the trial court cannot accept a defendant's guilty plea without first determining that the defendant has entered into the plea voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. Additionally, the court must be satisfied that there is a factual basis for the plea. CrR 4.2(d). If the plea is part of an agreement with the State, “[t]he nature of the agreement and the reasons for the agreement shall be made a part of the record...” CrR 4.2(e). A written statement on a plea of guilty must also be filed. CrR 4.2(g).

1. Written plea agreement.

When a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary.” *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998).

As expressed by the court in *State v. Perez*, 33 Wn. App. 258, 261–62, 654 P.2d 708 (1982):

When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. When the judge goes on to inquire orally of the defendant and satisfies himself [or herself] on the record of the existence of

various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.

State v. Perez, 33 Wn. App. at 261–62 (citations omitted).

2. Colloquy between the defendant and the court.

With regard to the colloquy during a plea hearing, in *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), the defendant had stated, as part of a series of form questions from the court during a plea in state court, that he understood that he could receive up to a life sentence, but claimed on collateral appeal that his plea was not voluntary because his attorney had promised a more lenient sentence, notwithstanding the defendant's representations, in entering his guilty plea, that he understood the range of sentences that might be imposed and that no other promises had been made. *Id.* at 65–66, 68–69, 70–71, 83.

Although the Supreme Court remanded the case for an evidentiary hearing regarding a claim of misconduct regarding his lawyer's representation to him outside of court about the sentencing, it found:

For the representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary

dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Here, there is nothing in the appellant's claim or in the record which constitutes manifest error – that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that a judge taking the plea could have failed to recognize a constitutional violation.

The defendant fails to show any error, let alone manifest error, that is observable or apparent in this case. The defendant made several specific assertions during his plea hearing that his plea of was voluntary and free of coercion. Like the defendant in *Osborne*, the defendant presents nothing to overcome “‘highly persuasive’ evidence of voluntariness” other than his allegation that his demeanor toward the court during the first hearing establishes an involuntary plea.

The defendant's acknowledgment during his plea hearing that the plea was voluntary and his acknowledgment of the same in his written plea agreement is wholly inconsistent with his claim on appeal. He cites to nothing in the record to support his bare allegation that his plea was not voluntary when entered in Judge Tompkins's court.

The fact that the defendant may have appeared dismissive toward Judge Cozza during an earlier hearing establishes nothing other than his possible disrespect for the court.⁸ Moreover, it says nothing about whether he entered into the plea voluntarily two weeks later in front of Judge Tompkins. The defendant's claims are exactly the type of "conclusory allegations ... subject to summary dismissal" discussed by the Supreme Court.⁹ The defendant cannot establish manifest error from the record.

Boiled down, the fact that the defendant now appears to have "buyer's remorse" for entering his plea does nothing to create a manifest constitutional error - to include involuntariness of his plea - where one does not exist. A defendant's decision to plead "guilty generally involves a conscious decision to accept both the benefits and burdens of a bargain [and][t]hat decision [should] not be lightly undone by buyer's remorse on the part of one who has reaped advantage from the purchase." *United States v. Fugit* 703 F.3d 248, 260 (4th Cir. 2012).

⁸ As reflected above, the defendant did ask to continue the plea hearing after Judge Cozza considered continuing the matter.

⁹ Bare allegations, alone, are insufficient to establish a basis for withdrawing a guilty plea. *See, State v. Osborne*, 102 Wn.2d at 97.

Having reviewed and signed the written plea statement and attended a formal plea hearing, it is clear from the record that the defendant was fully aware of the consequences of pleading guilty and that his plea of guilty was voluntary. Consequently, the record does not indicate any error affecting the defendant's constitutional rights.

As a result, the trial court did not err when it accepted his guilty plea. Contrary to the defendant's conclusory and unsupported allegations, there is not a showing his plea of guilty to the charged offenses was constitutionally invalid. His argument has no merit.

Department of Corrections treatment.

The defendant finally makes an inexact and unsupported claim that the Department of Corrections ordered him to participate in some form of treatment even though it was not ordered by the trial court. He neither cites nor provides any factual support or legal authority for his argument nor does he assign any error to this claim.

It is the burden of the party presenting an issue for review on appeal to provide a record sufficient to establish the alleged error. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); RAP 9.2(b). And the party should seek to supplement the record when necessary. RAP 9.9, 9.10.

Moreover, “[i]t is well settled that a party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.” *Escude v. King County. Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n. 4, 69 P.3d 895 (2003).

This court should not consider the defendant’s claim that DOC ordered him into treatment without court authorization.

V. CONCLUSION

For the reasons stated above, this court find the defendant has failed to establish grounds entitling him to withdraw his pleas of guilty. His convictions and sentence should be affirmed by the court.

Dated this 11th day of August, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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CHARLES R. SOKOLIK,

Appellant,

NO. 32783-3-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 11, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kenneth Kato
khkato@comcast.net

8/11/2015
(Date)

Spokane, WA
(Place)

Crystal McNees
(Signature)