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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	NO. 32963-1-III
Plaintiff/Respondent,)	
)	
vs.)	
)	
HENRY CAMPOS GONZALEZ,)	
Defendant/Appellant.)	

RESPONDENT'S BRIEF

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INTRODUCTION

Respondent, State of Washington, asks this court to dismiss the appeal of the trial court's decision to deny defendant's post-judgment motion to withdraw his guilty plea.

QUESTION PRESENTED

Whether an issue not raised in a post-judgment motion to vacate at the trial court level may be raised for the first time during the appeal of the motion to vacate?

Brief answer: No. Review of a trial court's decision regarding a CrR 7.8 motion is limited to issues raised in the hearing. *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002).

SUMMARY

After pleading guilty by way of *Alford*¹ plea to a felony drug possession charge, defendant sought to withdraw his guilty plea precisely one year later on the basis that he was not properly advised as to the immigration consequences of his plea. The trial court, after a hearing and briefing, denied the motion, finding that trial counsel had advised defendant he would be deported and that defendant knew the same prior to pleading guilty. Defendant appealed the denial of the motion, but abandoned the issue argued at the motion hearing and for the first time instead argues a completely different issue in this appeal.

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

STATEMENT OF THE CASE

The statement of the case presented by defendant in his appellate brief is adopted herein. The Judgment and Sentence for the conviction was entered on July 22, 2013. CP 15-25. The defendant did not appeal the judgment and sentence, and the 30-day appeal period expired.

The record developed at the CrR 7.8 hearing revealed an email on July 18th where the prosecutor informed defense counsel that the suspected cocaine would be sent to the crime lab and the results would be obtained prior to August 8th. RP (10/01/14) 26. Further, defense counsel specifically discussed with defendant that the drugs had not yet been tested, but defendant wanted to go forward with the plea anyway. RP (10/01/14) 50-51.

The Motion to Vacate Guilty Plea was filed on July 22, 2014. CP 26-34. The Findings of Fact and Conclusions and Decision on Motion to Vacate Guilty Plea was entered by the court on November 19, 2014. CP 67-69. The Notice of Direct Appeal Pro Se was filed on December 10, 2014. CP 70.

ARGUMENT

1. Issue not preserved for appeal.

Under CrR 7.8(b), after entry of judgment, a defendant may move to for relief from the judgment for mistakes, newly discovered evidence, fraud, the judgment is void, or “any other reason justifying relief from the operation of the judgment.” See *In Re Stockwell*, 179 Wn.2d 588, 601, 316 P.3d 1007 (2014). CrR 7.8 requires such motions to be “made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140.”

A motion to withdraw a guilty plea under CrR 7.8 is a collateral attack. RCW 10.73.090(2); *In re Becker*, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). To succeed, a collateral attack of a criminal conviction cannot simply reiterate issues finally resolved at trial. See *Becker*, 143 Wn.2d at 496 (personal restraint petition). Rather, collateral attacks must ‘raise new points of fact and law that were not or could not have been raised in the principal action.’ *Becker*, 143 Wn.2d at 496. ‘Bare allegations unsupported by citation of authority, references to the record, or persuasive reasoning cannot sustain’ the burden of proof required to prevail in a collateral attack. *State v. Brune*, 45 Wn.App. 354, 363, 725

P.2d 454 (1986) (citing *In re Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982)).

RCW 10.73.090 precludes the filing of motion for collateral attack, which includes a post-conviction motion to vacate, “more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.”

An appeal of a CrR 7.8 ruling is limited to the issues raised in the motion, and is reviewed only for abuse of discretion. *State v. Gaut*, 111 Wn. App. 875, 46 P.3d 832 (2002).

Defendant does not allege any abuse of discretion by the trial court in denying his CrR 7.8 motion based on the immigration issues.

On review of an order denying a motion to vacate, only “the propriety of the denial not the impropriety of the underlying judgment” is before the reviewing court. *Bjurstrom v. Campbell*, 27 Wash. App. 449, 450–51, 618 P.2d 533 (1980) (emphasis added). Said another way, an unappealed final judgment cannot be restored to an appellate track by means of moving to vacate and appealing the denial of the motion.

State v. Gaut, 111 Wn. App. at 881.

Although defendant states in his brief that “[t]he trial court erred when it denied the appellant’s motion to withdraw his guilty plea”, defendant does not allege that the trial court’s decision at the CrR 7.8

hearing was based on the *Alford* issue raised for the first time in this appeal. The trial court could not err on an issue not before it.

“New assignments of error to the circumstances of the plea and the judgment are not reviewable on appeal from an order denying a motion to vacate.” *State v. Gaut*, 111 Wn. App. at 882.

2. Collateral attack is not timely.

As this new issue was not raised at the time of the CrR 7.8 hearing, and is being raised for the first time in his brief dated May 25, 2015, defendant has clearly exceeded the one year time restraint imposed by 10.73.090 for this late developing collateral attack shrouded in the form of an appeal.

3. No constitutional error alleged.

Under CrR 4.2(f) and CrR 7.8(b), a defendant must be allowed to withdraw a guilty plea ‘whenever it appears that the withdrawal is necessary to correct a manifest injustice.’ ‘A ‘manifest injustice’ is one that is ‘obvious, directly observable, overt, not obscure.’ ‘ *State v. Norval*, 35 Wn.App. 775, 783, 669 P.2d 1264 (1983) (quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). An involuntary plea constitutes a manifest injustice. *State v. Hurt*, 107 Wn.App. 816, 829, 27 P.3d 1276 (2001).

The question is whether the defendant understood the plea proceedings and made a knowing, voluntary, and intelligent plea. *State v. Hubbard*, 106 Wn. App. 149, 155, 22 P.3d 296 (2001); *In re Montoya*, 109 Wn.2d 270, 280, 744 P.2d 340 (1987).

Here, there is no showing that the plea was not voluntary. Defendant signed a written statement on plea of guilty indicating that the plea was made freely and voluntarily. This statement alone ‘provides prima facie verification of the plea’s voluntariness.’ *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982) (citing *In re Keene*, 95 Wn.2d 203, 206–07, 622 P.2d 360 (1980)). The record indicates that defendant was advised of the nature of the charge against him and the rights he waived by pleading guilty. The record further reflects that defendant understood that deportation was a consequence of his plea.

Defendant argues that he should be allowed to withdraw his plea because the trial court accepted the plea without first establishing a factual basis as required by CrR 4.2(d). This argument, however, is grounded on the procedural requirements of our court rules, not constitutional principles. Defendant seeks to withdraw his guilty plea even though the foregoing claim is being raised for the first time on appeal. While it is true that entry of a guilty plea does not automatically prevent an offender from later challenging the circumstances under

which the plea was entered (*State v. Walsh*, 143 Wn.2d 1, 6, 17 P.3d 591 (2001); *State v. Gaut*, 111 Wn.App. at 880), the nature and breadth of the inquiry on appeal necessarily depends upon whether the issue was raised below. See *State v. Zumwalt*, 79 Wn.App. 124, 901 P.2d 319 (1995).

Even though CrR 4.2(d) requires that the judge taking a plea must be ‘satisfied there is a factual basis for the plea’ and that those underpinning facts must be developed on the record of the plea hearing, the federal and state constitutions do not. *State v. Osborne*, 102 Wn.2d 87, 95, 684 P.2d 683 (1984) (‘The factual basis required by CrR 4.2(d) must be developed on the record at the time the plea is taken.’); *Zumwalt*, 79 Wn.App. at 130, 901 P.2d 319. *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 591–92, 741 P.2d 983 (1987) (holding ‘establishment of a factual basis is not an independent constitutional requirement, and is constitutionally significant only insofar as it relates to the defendant's understanding of his or her plea’); *In re Pers. Restraint of Barr*, 102 Wash.2d 265, 269 n. 2, 684 P.2d 712 (1984) (holding a violation of the factual basis requirement of CrR 4.2(d) does not necessarily establish that a particular plea was constitutionally infirm); *In re Hilyard*, 39 Wash.App. 723, 727, 695 P.2d 596 (1985) (‘CrR 4.2 is not the embodiment of a constitutionally valid plea; strict adherence to the rule is ‘not a constitutionally mandated procedure.’ ’); 5 Wayne R.

Lafave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* sec. 21.4(f), at 183 (2d ed.1999) ('as a general matter the determination of a factual basis for the plea is not constitutionally required'); see also *Keene*, 95 Wn.2d at 206, 622 P.2d 360 (recognizing distinction between minimum constitutional requirements and those imposed by CrR 4.2(d)); but see *In re Pers. Restraint of Taylor*, 31 Wn.App. 254, 256, 640 P.2d 737 (1982) ('The necessity for the record to contain a factual basis for a guilty plea is as much a constitutional requirement as it is mandated by the applicable guilty plea rule.').

As a general rule, issues cannot be raised for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995). There is, however, a limited exception where the issue being raised involves a 'manifest error affecting a constitutional right.' RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). In this setting, 'manifest' means that a showing of actual prejudice is made. *Walsh*, 143 Wn.2d at 18, 18 P.3d 523. Because defendant argues for the first time on appeal that the factual basis requirement of CrR 4.2(d) was violated, this non-constitutional issue has not been properly preserved for review.

The standards for withdrawal of a guilty plea are demanding. *State v. Paul*, 103 Wn. App. 487, 494, 12 P.3d 1036 (2000). The

defendant bears the burden of proving that a manifest injustice has occurred. *State v. Ross*, 129 Wn.2d 279, 283–84, 916 P.2d 405 (1996). To allow defendant to proceed with his CrR 4.2(d) claim now would in effect eliminate both the need for a defendant to move to withdraw his or her plea and the obligation to show a manifest injustice or actual prejudice as grounds for such a plea withdrawal. Given trial judges' inherent authority to settle the record when questions arise as to what was in the record before them at the time of a hearing, *State v. Arnold*, 81 Wn. App. 379, 383–84, 914 P.2d 762 (1996), they are in a unique position to resolve claims such as the one raised by defendant that no factual basis exists to support his guilty plea.

Nor has defendant established a clear violation of his constitutional rights. 'Due process guarantees in the federal and state constitutions require that a guilty plea be made intelligently and voluntarily.' *State v. S.M.*, 100 Wn.App. 401, 413, 996 P.2d 1111 (2000). While a judge who fails to establish the factual basis for a guilty plea on the record of the plea hearing may violate obligations imposed by CrR 4.2(d), there is no constitutional violation if the defendant actually possessed an understanding of the law in relation to the facts such that he or she could make an informed decision regarding whether or not to plead guilty. *Keene*, 95 Wn.2d at 209, 622 P.2d 360.

Defendant contends that his guilty plea to possession was not voluntary, as all pleas are constitutionally required to be, because the record does not establish a sufficient factual basis for the plea. Because there is a strong presumption that counsel's representation was effective, *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), we can generally presume that defendant's plea counsel advised defendant regarding whether his conduct fell within the possession charge. And, as previously noted, a signed plea form provides 'prima facie verification of the plea's voluntariness.' *Perez*, 33 Wn. App. at 261, 654 P.2d 708. While these presumptions may be rebutted, defendant bears the burden of showing that he did not have an adequate understanding of the material facts in relation to the possession charge.

But in the case at hand, defense counsel actually advised his client that the drugs had not yet been tested, yet defendant elected to proceed plead guilty and accept the state's offer.

Without a showing that defendant's rights were adversely affected by the alleged constitutional error, the claimed error is not 'manifest' under RAP 2.5(a)(3) and cannot be raised for the first time on appeal. See *McFarland*, 127 Wn.2d at 338, 899 P.2d 1251.

CONCLUSION

Defendant cannot convert an unappealed final judgment into an appeal of that judgment by moving to vacate under CrR 7.8 and then appealing the superior court's denial of that motion on an issue not raised in the CrR 7.8 hearing. The conviction should be upheld.

Respectfully submitted this 3rd day of June, 2015



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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,) NO. 32963-1-III
Plaintiff/Petitioner,)
)
vs.) AFFIDAVIT OF MAILING
)
HENRY CAMPOS GONZALEZ,)
Defendant/Respondent.)

STATE OF WASHINGTON)
: ss.
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath deposes and says: That on the 3rd day of June, 2015, affiant deposited in the United States Mail at Waterville, Washington, postage prepaid thereon, an envelope containing the original of this Affidavit and the original Respondent's Brief, addressed to:

Renee S. Townsley
Clerk/Administrator
Court of Appeals III
500 N. Cedar Street
Spokane, WA 99201

Affiant also deposited in the United States Mail at Waterville, Washington, on June 3, 2015, with postage prepaid thereon, copies of this Affidavit of Mailing and the Respondent's Brief, addressed to:

Jennifer M. Winkler
Eric J. Nielsen
1908 E Madison St
Seattle, WA 98122-2482

A handwritten signature in cursive script, appearing to read "John H. Sams", written over a horizontal line.

SUBSCRIBED AND SWORN to before me this 3rd day of June,
2015.

A handwritten signature in cursive script, appearing to read "J. Schlar", written over a horizontal line.

NOTARY PUBLIC in and for the State
of Washington, residing at East
Wenatchee; my commission expires
02/26/2019.