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COA NO. 37043-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SREGZINSKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable M. Scott Wolfram, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. SREGZINSKI DID NOT ENTER A KNOWING, VOLUNTARY AND INTELLIGENT PLEA, REQUIRING REMAND TO PERMIT WITHDRAWAL OF THE PLEA IN ITS ENTIRETY.

The State complains there is no record by which the Court of Appeals can "verify" Sregzinski's claim that he lacked an understanding of the law in relation to the facts. Brief of Respondent (BR) at 9. The State has the law backwards.

"Due process principles are offended by the entry of a guilty plea without an affirmative showing in the record that the plea was made intelligently and voluntarily." State v. S.M., 100 Wn. App. 401, 413, 996 P.2d 1111 (2000) (citing State v. Holley, 75 Wn. App. 191, 196, 876 P.2d 973 (1994) (citing State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980) (citing Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969))). To be entitled to relief, the defendant does not need to make an affirmative showing in the record that his plea was less than intelligent and voluntary. To avoid reversal, the record must affirmatively show the plea was intelligent and voluntary. The State contends S.M. is factually different. BR at 7. It is. But the established legal principles set

forth in that case related to understanding the facts in relation to the law and the factual basis for a plea remain applicable.

The State contends Sregzinski cannot raise a challenge to his plea for the first time on appeal. BR at 9. The State is mistaken.

The factual basis of a plea is constitutionally significant where it relates to the defendant's understanding of the plea, including understanding of the facts in relation to the law. In re Pers. Restraint of Hews, 108 Wn.2d 579, 591-92, 714 P.2d 983 (1987); In re Pers. Restraint of Clements, 125 Wn. App. 634, 645, 106 P.3d 244, review denied, 154 Wn.2d 1020, 120 P.3d 548 (2005). In this regard, an insufficient factual basis for a plea is a violation of constitutional dimension and offends due process. In re Pers. Restraint of Bratz, 101 Wn. App. 662, 672, 5 P.3d.759 (2000); State v. R.L.D., 132 Wn. App. 699, 705, 133 P.3d 505 (2006). In light of this constitutional dimension, courts have permitted challenges to the factual basis of a plea for the first time on appeal under RAP 2.5(a)(3). See State v. Moser, 1 Wn. App.2d 1029, 2017 WL 5608937, at *5 (2017) (unpublished); State v. Marcum, 192 Wn. App. 1037, 2016 WL 562758, at *2-3 (2016)

(unpublished); State v. Davis, 185 Wn. App. 1059, 2015 WL 728253, at *1 (2015) (unpublished).¹

The State argues the probable cause affidavit establishes the factual basis for the plea. BR at 11-12. There are two problems with that argument.

First, the plea statement does not contain any language permitting the trial court to rely on the facts set forth in the certificate of probable cause in accepting the plea. CP 18-28. The plea colloquy likewise does not reflect an agreement to consider the certificate. 1RP 3-10. Documents like the probable cause certificate can furnish the factual basis for a plea only if the defendant agrees the court may rely on it in accepting the plea. State v. Codiga, 162 Wn.2d 912, 917, 924, 175 P.3d 1082 (2008) (trial court could review the police reports and statement of probable cause for the factual basis for the plea because Codiga agreed to such in the plea form); State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991) (certificates of probable cause could be relied on as reliable source of information where Saas stipulated that the

¹ GR 14.1(a) permits citations to unpublished decisions filed on or after April 1, 2013. Unpublished decisions have no precedential value, are not binding on any court, and may be accorded such persuasive value as the court deems appropriate. GR 14.1(a).

court could consider each of the State's three certifications for determination of probable cause in determining whether to accept the guilty plea). In the absence of Sregzinski's agreement, the probable cause certificate cannot furnish the factual basis for the plea.

The second problem with the State's argument is that, even if the certificate can be considered to be reliable evidence to be considered by the trial court in determining a factual basis for the plea, the certificate does not establish that Sregzinski assaulted Hickman with a deadly weapon.

The State points to the part of the affidavit alleging (1) Sregzinski and "Witness B" were in the front room when Rodriguez came out of the bathroom; (2) Sregzinski confronted Rodriguez with a shotgun and told him to sit down; (3) Rodriguez refused, told Sregzinski that he was going to have to shoot him, and walked toward Sregzinski; and (4) Sregzinski shot Rodriguez at short range. BR at 11-12; CP 2. The affidavit further states "Witness B was near Sregzinski and [Rodriguez] but turned their head prior to the shotgun blast. Blood spatter from the forceful impact of the close

range gun shot went onto Witness B's clothing, hair, and face." CP 2.²

As pointed out in the opening brief, the certificate does not identify who "Witness B" is. Nothing in the certificate, the plea statement, or the plea colloquy identifies Hickman as "Witness B." The State claims "It was understood by all parties that Sara Morse Hickman was Witness B, and such was indicated at the sentencing hearing. RP 21." BR at 12. To be clear, neither Sregzinski nor his defense counsel agreed with the prosecutor's comments regarding Hickman at sentencing. The most that can be said is that there was no objection to them. Which doesn't matter anyway. Anything that was said at the sentencing hearing is irrelevant to whether there is a factual basis for the plea. The factual basis for the plea must be developed on the record at the time the plea is taken and may not be deferred until sentencing. In re Pers. Restraint of Keene, 95 Wn.2d 203, 210, 622 P.2d 360 (1980). The State cites to nothing else in the record showing Sregzinski understood that "Witness B" was Hickman.

² The State asserts in its brief that Witness B was "standing less than 6 inches away from the victim." BR at 11. The probable cause certificate does not contain this alleged fact. CP 1-4.

Even if the record on which the court could rely for the factual basis showed "Witness B" was Hickman, the certificate still does not factually establish that Sregzinski committed second degree assault with a deadly weapon against her.

"Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm." State v. Stevens, 158 Wn.2d 304, 311, 143 P.3d 817 (2006). "To prove assault by attempt to cause injury, the State must show specific intent to cause bodily injury but need not provide evidence of injury or fear in fact." State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577, 578 (1996) (citing State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). "Assault by attempt to cause fear and apprehension of injury requires specific intent to create reasonable fear and apprehension of bodily injury." Id. To sustain a second degree assault conviction based on putting another in apprehension of harm, the State must prove the victim was in fact put in fear. Id. at 504.

The State does not attempt to explain how the facts alleged in the certificate establish that Sregzinski, using a deadly weapon, had a specific intent to cause Hickman bodily harm or the specific intent to create an apprehension of harm in Hickman. The facts set forth in the certificate make plain that Sregzinski's use of the deadly weapon was entirely directed at Rodriguez. CP 2. Hickman was not physically injured. There was no fact set forth in the certificate showing Sregzinski pointed the gun at Hickman or intended to fire the gun at Hickman. Nor is there any evidence set forth in the certificate that Hickman was in fact placed in apprehension of bodily harm. Nowhere is it stated that she felt such apprehension. The trial court's determination that a factual basis exists for the plea requires sufficient evidence to sustain a jury finding of guilt. S.M., 100 Wn. App. at 414. On this record, there is insufficient evidence for a jury to find Sregzinski guilty of assaulting Hickman with a deadly weapon. His conduct does not actually fall within the charge.

His plea therefore cannot be considered voluntary. A guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). This means the defendant must be aware that the facts support guilt

on the charge. Keene, 95 Wn.2d at 209; State v. Berry, 129 Wn. App. 59, 65, 117 P.3d 1162 (2005). The lack of factual basis prevented Sregzinski from understanding how his conduct constituted second degree assault, rendering his plea involuntary.

2. BECAUSE ALCOHOL DID NOT CONTRIBUTE TO THE OFFENSE, THE CONDITION REQUIRING "ALCOHOL/DRUG" TREATMENT MUST BE LIMITED TO TREATMENT FOR DRUGS.

The State does not claim alcohol contributed to the offense. Even so, it asserts the court had authority to require treatment for alcohol as well as drugs as a condition of the sentence under RCW 9.94A.607(1), the chemical dependency statute. BR at 14. The court, though, did not order a chemical dependency evaluation under RCW 9.94A.607(1). Rather, it ordered "drug/alcohol" treatment under the authority of RCW 9.94A.703. CP 80 (citing RCW 9.94A.700-.720); 1RP 29-30 (expressing intent to impose "crime related treatment or counseling, alcohol, drug evaluation and treatment."). The distinction matters because the two statutes have different threshold requirements.

Under RCW 9.94A.607(1), "[a] rehabilitative program may include a directive that the offender obtain an evaluation as to the need for chemical dependency treatment related to the use of

alcohol or controlled substances, regardless of the particular substance that contributed to the commission of the offense." RCW 9.94A.607(1) requires a special finding that "the offender has any chemical dependency that has contributed to his or her offense." "If the court fails to make the required finding, it lacks statutory authority to impose the condition." State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013) (addressing former RCW 9.94A.607(1), which stated "Where the court finds that the offender has a chemical dependency that has contributed to his or her offense . . . "). The court did not find Sregzinski has any chemical dependency. The court did not purport to impose chemical dependency treatment under RCW 9.94A.607(1). No one at sentencing mentioned that provision and no one made reference to a chemical dependency.

Instead, the court ordered drug/alcohol treatment as a "crime-related" condition of community custody under RCW 9.94A.703. CP 80; 1RP 29-30. Under that statute, the court is authorized to require an offender to "[p]articipate in crime-related treatment or counseling services" and in "rehabilitative programs or otherwise perform affirmative conduct reasonably related to the

circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703 (3)(c), (d).

When treatment is ordered under RCW 9.94A.703, it must be limited to the kind of substance that contributed to the offense. If only drugs contributed to the offense, then treatment must be limited to drugs; it cannot include treatment for alcohol. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003) (trial court improperly imposed a condition requiring alcohol counseling when there was evidence that methamphetamines, but not alcohol, contributed to the offense). Conversely, if only alcohol contributed to the offense, then treatment must be limited to alcohol; it cannot include treatment for drugs. State v. Munoz-Rivera, 190 Wn. App. 870, 893, 361 P.3d 182 (2015) (condition requiring substance abuse evaluation and treatment needed to be restricted to alcohol because there was no evidence substances other than alcohol contributed to crimes). Because there is no evidence that alcohol contributed to Sregzinski's offenses, treatment must be restricted to controlled substances.

Arguing to the contrary, the State relies on an unpublished decision, State v. Luna, 11 Wn. App. 2d 1010, 2019 WL 5699121

(2019). That decision has no persuasive value in relation to Sregzinski's case.

In Luna, the trial court actually imposed a "chemical dependency" evaluation under the authority of RCW 9.94A.607. Luna, 2019 WL 5699121, at *2. The defendant in Luna argued the court erred in imposing the chemical dependency evaluation because it did not make an express finding that chemical dependency contributed to his offense. Id. Division One disagreed because the record supported a finding that alcohol contributed to Luna's offense. Id. The Luna court also pointed out the chemical dependency statute at RCW 9.94A.607(1) had been amended to authorize evaluation for "any" chemical dependency "regardless of the particular substance that contributed to the commission of the offense," so Warnock and State v. Kinzle, 181 Wn. App. 774, 786, 326 P.3d 870 (2014), review denied, 181 Wn.2d 1019, 337 P.3d 325 (2014) did not control the outcome in that case. Luna, 2019 WL 5699121, at *3.

Sregzinski's case is distinguishable. Unlike in Luna, the trial court in Sregzinski's case did not impose a chemical dependency evaluation. For this reason, a different legal standard is in play.

In retrospect, Sregzinski's citation to Warnock and Kinzle in the opening brief unnecessarily muddied the analytical waters here. Warnock and Kinzle, like Luna, are chemical dependency cases. Sregzinski's isn't. The on-point precedent is Jones and Munoz-Rivera, which addressed treatment imposed under what is now codified at RCW 9.94A.703(3). Jones, 118 Wn. App. at 207-08; Munoz-Rivera, 190 Wn. App. at 893. When treatment is imposed under RCW 9.94A.703(3), it must be restricted to the kind of substance — drugs or alcohol — that contributed to the offense. Id. The amendment to the chemical dependency statute does not change the legal standard embodied in that separate statute.

Luna, aside from being distinguishable on this ground, is infirm insofar as it ratified an appellate court to find facts that the trial court never found. In that case, there was no trial court finding that a chemical dependency contributed to the offense. Luna, 2019 WL 5699121, at *2. But relying on State v. Powell, 139 Wn. App. 808, 820, 162 P.3d 1180 (2007), rev'd on other grounds, 166 Wn.2d 73, 206 P.3d 321 (2009)), Luna upheld the condition on appeal because the record supported such a finding. Luna, 2019 WL 5699121, at *2.

The relevant portion of Powell is dicta because the court had already decided to reverse conviction on a separate issue when it addressed the viability of the community custody condition. Powell, 139 Wn. App. at 818; see State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (where court of appeals reversed on separate issue, its discussion of another issue likely to arise on remand was dicta). Dicta have no precedential value. Bauer v. State Employment Sec. Dep't, 126 Wn. App. 468, 475 n.3, 108 P.3d 1240 (2005).

The dicta in Powell also conflicts with Jones, which held the trial court's failure to make a statutorily required finding before ordering mental health treatment and counseling was reversible error even though the record contained evidence supporting such a finding. Jones, 118 Wn. App. at 209-10. The holding in Jones comports with the established principle that "[a]ppellate courts are not fact-finders." State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003). The function of the appellate court is to review the action of the trial courts, not to act as one. Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009), review denied, 168 Wn.2d 1041 (2010). The court in Powell violated this principle when it independently reviewed the record

and, in effect, made a finding the trial court never made. See State v. Larsen-Snyder, 175 Wn. App. 1005, 2013 WL 2325860, at *1 (filed May 28, 2013) (unpublished) ("the relevant portion of Powell is dicta. Moreover, Powell's dicta conflicts with Division Two's decision in State v. Jones, 118 Wn. App. 199, 209-10, 76 P.3d 258 (2003) (failure to make statutorily required finding before ordering mental health treatment and counseling was reversible error even though record contained substantial evidence supporting such a finding)." Luna erred in following suit.

On this point, this Court's decision in Warnock remains controlling law. The trial court lacks authority to impose a chemical dependency evaluation if the trial court fails to make the finding required by the plain language of the statute. Warnock, 174 Wn. App. at 612. The error in Luna and Powell should not be perpetuated. That said, it bears repeating that the trial court in Sregzinski's case did not purport to impose a chemical dependency evaluation under RCW 9.94A.607(1), so the chemical dependency cases do not govern the legal analysis anyway.

Finally, the State says the DOC has authority to impose a treatment requirement. BR at 15. RCW 9.94A.704(2)(a) authorizes the DOC to "assess the offender's risk of reoffense and may

establish and modify additional conditions of community custody based upon the risk to community safety." The DOC's authority is irrelevant to what is being challenged on appeal. Sregzinski does not speculatively challenge what the DOC may or may not do in the future. He challenges what the trial court has already done. He challenges a condition imposed by the court in the judgment and sentence, from which this appeal was taken.

3. IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS IS A CLERICAL ERROR OR THE COURT OTHERWISE ERRED IN IMPOSING THEM.

The State says the cost of community custody is "not imposed by the court, but rather by DOC." BR at 17. The courts see it differently. The court has discretionary authority to waive imposition of the cost of community custody. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), review denied, 193 Wn.2d 1007, 443 P.3d 800 (2019). And where, as here, the record shows the trial court intended to impose only mandatory legal financial obligations, the remedy is to strike the unintended discretionary obligations set forth in preprinted sections of the judgment and sentence. State v. Dillon, 12 Wn. App. 2d 133, 137,

152, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020).

4. THE COURT LACKED AUTHORITY TO ENTER A CIVIL ANTI-HARASSMENT PROTECTION ORDER AS PART OF A CRIMINAL SENTENCING PROCEEDING.

The State asserts the court has broad discretion to enter no contact orders. BR at 22. The key question, though, is whether the court had statutory authority to issue the order. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). There is no discretion to exercise when there is no statutory authority for the court to act because such action is void as a matter of law. State v. Johnson, 180 Wn. App. 318, 326-27, 327 P.3d 704 (2014); State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006).

The State attempts to show the court had authority by mashing together a no-contact order issued under RCW 9.94A.505 as a crime-related prohibition and an anti-harassment civil protection order issued under RCW 10.14.080. It blockquotes Armendariz on the authority of courts to issue no-contact orders under RCW 9.94A.505(9), which is irrelevant because Sregzinski does not challenge the no-contact condition entered as a crime-related prohibition in the judgment and sentence. He challenges

the anti-harassment civil protection order issued under RCW 10.14.080, which is a separate order issued under a separate statutory procedure with a separate consequence. Willful violation of a civil anti-harassment protection is a criminal offense, a gross misdemeanor. RCW 10.14.170. Violation of a no-contact condition of the sentence is not a criminal offense; it merely subjects the defendant to sanctions. RCW 9.94B.040(3).

The State cites no legal authority for the proposition that a court has statutory authority to issue a Chapter 10.14 RCW civil anti-harassment protection order on its own action as part of a criminal sentencing proceeding. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). As the State cites no authority for its argument, this Court should reject it for that reason alone. State v. Bluford, 195 Wn. App. 570, 590, 379 P.3d 163 (2016), aff'd in part, rev'd in part on other grounds, 188 Wn.2d 298, 393 P.3d 1219 (2017). Unable to cite to any relevant authority in support of its position, the State resorts to calling undersigned counsel's

argument "distasteful." BR at 22. That tells the Court all it needs to know about the hollowness of the State's argument.

B. CONCLUSION

For the reasons stated above and in the opening brief, Sregzinski requests remand to permit withdrawal of the guilty plea in its entirety. If this Court declines to allow withdrawal of the plea, then the case should be remanded to (1) strike the alcohol portion of the condition requiring treatment; (2) strike the unlawful interest provision in the judgment and sentence and any accrued interest on the LFOs; (3) strike the supervision and collection fees from the judgment and sentence; and (4) vacate the civil anti-harassment no-contact order.

DATED this 21st day of September 2020

Respectfully Submitted,

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