FILED
Court of Appeals
Division III
State of Washington
5/29/2020 1:41 PM

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining to Assignments of Error 2

B. STATEMENT OF THE CASE 3

C. ARGUMENT 6

1. SREGZINSKI DID NOT ENTER A KNOWING, VOLUNTARY AND INTELLIGENT PLEA, REQUIRING REMAND TO PERMIT WITHDRAWAL OF THE PLEA IN ITS ENTIRETY. 6

2. BECAUSE ALCOHOL DID NOT CONTRIBUTE TO THE OFFENSE, THE CONDITION REQUIRING "ALCOHOL/DRUG" TREATMENT MUST BE LIMITED TO TREATMENT FOR DRUGS. 16

3. IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS IS A CLERICAL ERROR OR THE COURT OTHERWISE ERRED IN IMPOSING THEM. 19

a. The costs are clerical errors because the record shows the court did not intend to impose them. 19

b. Alternatively, the challenged costs must be stricken because the court did not adequately inquire into Sregzinski's ability to pay. 23

4. THE COURT LACKED AUTHORITY TO IMPOSE INTEREST ON NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS..... 25

TABLE OF CONTENTS

Page

5. THE COURT LACKED AUTHORITY TO ENTER A CIVIL ANTI-HARASSMENT PROTECTION ORDER AS PART OF A CRIMINAL SENTENCING PROCEEDING. 26

D. CONCLUSION 32

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Marriage of Lutz
74 Wn. App. 356 873 P.2d 566 (1994) 10

In re Pers. Restraint of Bratz
101 Wn. App. 662, 5 P.3d.759 (2000) 7, 10

In re Pers. Restraint of Clements
125 Wn. App. 634, 106 P.3d 244,
review denied, 154 Wn.2d 1020, 120 P.3d 548 (2005)..... 10

In re Pers. Restraint of Hews
108 Wn.2d 579, 714 P.2d 983 (1987)..... 10

In re Pers. Restraint of Isadore
151 Wn.2d 294, 88 P.3d 390 (2004) 7

In re Pers. Restraint of Keene
95 Wn.2d 203, 622 P.2d 360 (1980) 9, 11

State v. A.N.J.
168 Wn.2d 91, 225 P.3d 956 (2010)..... 9

State v. Armendariz
160 Wn.2d 106, 156 P.3d 201 (2007)..... 27, 31

State v. Arnold
81 Wn. App. 379, 914 P.2d 762
review denied, 130 Wn.2d 1003, 925 P.2d 989 (1996)..... 12

State v. Barnett
139 Wn.2d 462, 987 P.2d 626 (1999)..... 32

State v. Berry
129 Wn. App. 59, 117 P.3d 1162 (2005)
review denied, 158 Wn.2d 1006, 143 P.3d 829 (2006)..... 9

TABLE OF AUTHORITIES

Page

WASHINGTON CASES (CONT'D)

State v. Branch
129 Wn.2d 635, 919 P.2d 1228 (1996) 10

State v. Catling
193 Wn.2d 252, 438 P.3d 1174 (2019) 25

State v. Clark
191 Wn. App. 369, 362 P.3d 309 (2015)..... 20

State v. Codiga
162 Wn.2d 912, 175 P.2d 1082 (2008). 8

State v. Dillon
12 Wn. App. 2d 133, 456 P.3d 1199 (2020)..... 21, 22, 23

State v. Gonzalez-Gonzalez
193 Wn. App. 683, 370 P.3d 989 (2016)..... 20

State v. Granath
190 Wn.2d 548, 415 P.3d 1179 (2018) 31

State v. Houck
9 Wn. App. 2d 636, 446 P.3d 646 (2019)
review denied, 194 Wn.2d 1024, 456 P.3d 397 (2020) 26

State v. Johnson
180 Wn. App. 318, 327 P.3d 704 (2014)..... 16

State v. Jones
118 Wn. App. 199, 76 P.3d 258 (2003) 17, 18

State v. Julian,
102 Wn. App. 296, 9 P.3d 851 (2000),
review denied, 143 Wn.2d 1003, 20 P.3d 944 (2001) 32

TABLE OF AUTHORITIES

Page

WASHINGTON CASES (CONT'D)

State v. Keend
140 Wn. App. 858, 166 P.3d 1268 (2007)
review denied, 163 Wn.2d 1041, 187 P.3d 270 (2008) 12

State v. Kinzle
181 Wn. App. 774, 326 P.3d 870 (2014)
review denied, 181 Wn.2d 1019, 337 P.3d 325 (2014) 18, 19

State v. Lundstrom
6 Wn. App. 2d 388, 429 P.3d 1116 (2018)
review denied, 193 Wn.2d 1007, 443 P.3d 800 (2019) 21

State v. Lundy
176 Wn. App. 96, 308 P.3d 755 (2013) 23

State v. Motter
139 Wn. App. 797, 162 P.3d 1190 (2007),
overruled on other grounds by
State v. Sanchez Valencia,
169 Wn.2d 782, 239 P.3d 1059 (2010). 17

State v. Munoz-Rivera
190 Wn. App. 870, 361 P.3d 182 (2015)..... 18, 19

State v. Navarro
188 Wn. App. 550, 354 P.3d 22 (2015)
review denied, 184 Wn.2d 1031, 364 P.3d 119 (2016) 27, 31

State v. Paulson
131 Wn. App. 579, 128 P.3d 133 (2006)..... 32

State v. R.L.D.
132 Wn. App. 699, 133 P.3d 505 (2006)..... 8, 10, 14

State v. Ramirez
191 Wn.2d 732, 426 P.3d 714 (2018) 24, 25

TABLE OF AUTHORITIES

Page

WASHINGTON CASES (CONT'D)

State v. Saas
118 Wn.2d 37, 820 P.2d 505 (1991) 11, 12

State v. Skenandore
99 Wn. App. 494, 994 P.2d 291 (2000) 12

State v. S.M.
100 Wn. App. 401, 996 P.2d 1111 (2000)..... 6, 11, 15

State v. Sullivan
3 Wn. App. 2d 376, 415 P.3d 1261 (2018)..... 22

State v. Turley
149 Wn.2d 395, 69 P.3d 338 (2003). 15

State v. Walsh
143 Wn.2d 1, 17 P.3d 591, 593 (2001). 9, 15

State v. Warnock
174 Wn. App. 608, 299 P.3d 1173 (2013)..... 17, 18, 19

FEDERAL CASES

Boykin v. Alabama
395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)..... 7

McCarthy v. United States
394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)..... 7, 11

RULES, STATUES AND OTHER AUTHORITIES

13 Royce A. Ferguson, Jr., Washington Practice:
Criminal Practice and Procedure § 3713 (3rd ed. 2004)..... 9

CrR 4.2 ..... 8, 10

Former RCW 9.94A.505 31

TABLE OF AUTHORITIES

Page

RULES, STATUES AND OTHER AUTHORITIES

Laws of 2018, ch. 269 § 1 25

RCW 7.68.035 23

RCW 7.90.150 29

RCW 7.92.160 29

RCW 9.94A.030 ..... 23, 29

RCW 9.94A.505 ..... 26, 30, 31

RCW 9.94A.703 ..... 17, 21

RCW 9.94B.040 31

RCW 9A.28 29

RCW 9A.32.060 3

RCW 9A.36.021 ..... 3, 6, 12

RCW 9A.44.096 29

RCW 9A.46.020 15

RCW 9A.46.060 29

RCW 9A.46.110 29

RCW 10.01.160 ..... 23, 24

RCW 10.101.010 ..... 23, 24

RCW 10.14 ..... 27, 30

TABLE OF AUTHORITIES

Page

RULES, STATUES AND OTHER AUTHORITIES (CONT'D)

RCW 10.14.020 ..... 27, 30

RCW 10.14.040 ..... 27, 28

RCW 10.14.070 ..... 28, 30

RCW 10.14.080 ..... 27, 28, 30

RCW 10.14.170 ..... 28, 30, 31

RCW 10.82.090 ..... 25, 26

RCW 10.99.050 ..... 29, 31

RCW 26.50 29

RCW 36.18.190 20

U.S. Const. Amend. XIV 7

Wash. Const. art. I, § 3 7

A. ASSIGNMENTS OF ERROR

1. The court erred in accepting a guilty plea that was not knowing, voluntary and intelligent, as appellant did not understand the facts in relation to the law, in violation of due process.

2. As part of the statement of defendant on plea of guilty, the court erred in entering this finding: "I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and consequences of the plea. There is a factual basis for the plea." CP 28.

3. The court erred in ordering this condition of community custody: "The defendant shall participate in crime related treatment or counseling services as follows: (x) inpatient or outpatient alcohol/drug program at his expense, at the discretion of his probation/community corrections officer." CP 81.

4. The court erred in imposing collection costs in the judgment and sentence. CP 79.

5. The court erred in imposing the cost of supervision in the judgment and sentence. CP 80, 88.

6. The interest provision in the judgment and sentence is unauthorized by statute. CP 79.

7. The court erred in entering a civil anti-harassment protection order as part of the judgment and sentence. CP 84-86.

Issues Pertaining to Assignments of Error

1. To satisfy due process, a guilty plea must be knowing, voluntary, and intelligent. Must appellant be allowed to withdraw his plea because he did not have an understanding of the facts in relation to the law on the second degree assault count, as there is no factual basis for the allegation that he assaulted another with a deadly weapon?

2. Whether the community custody condition requiring participation in an "alcohol/drug program" must be narrowed to encompass only evaluation and treatment for drugs because there is no substantial evidence that alcohol contributed to the offense?

3. Whether the court erred in ordering appellant to pay the cost of collecting legal financial obligations and the cost of supervision because (a) they are clerical errors or (b) the court failed to make an adequate inquiry into appellant's ability to pay them?

4. Whether all non-restitution interest on legal financial obligations must be stricken and the provision in the judgment and sentence directing accrual of interest amended to conform to the law?

5. Whether the court erred in entering a post-conviction civil anti-harassment protection order because there is no statutory authority for the court to impose such an order as part of a judgment and sentence?

B. STATEMENT OF THE CASE

Robert Sregzinski pleaded guilty to one count of first degree manslaughter committed against Gabriel Ledezma Rodriguez and one count of second degree assault committed against Sarah Morse Hickman. CP 18-30. The statement of defendant on plea of guilty, signed by Sregzinski, states:

> I Have Been Informed and Fully Understand That:
> . . .
>
> (b) I am charged with:
>
> COUNT 1 - MANSLAUGHTER 1ST DEGREE, RCW 9A.32.060(10(A), CLASS A FELONY
>
> The elements are: On April 22, 2016, Defendant did recklessly cause the death of Gabriel Ledezma Rodriguez, a human being. This took place in Walla Walla County, Washington.
>
> COUNT 2 - ASSAULT 2ND DEGREE, RCW 9A.36.021, CLASS B FELONY
>
> The elements are: On April 22, 2016, Defendant did assault Sarah M. Morse Hickman in a degree not amounting to 1st Degree. This took place in Walla Walla County, Washington. CP 18.

The written statement further provides "I plead guilty to count 1 and 2 in the amended Information. I have received a copy of that Information" and "I make this plea freely and voluntarily." CP 27.

Paragraph 11 states:

> The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement:
>
> On April 22, 2016, I did recklessly cause the death of Gabriel Ledezma Rodriguez, a human being. On April 22, 2016, I did assault Sarah Hickman in a degree not amounting to 1st degree. This took place in Walla Walla County, Washington.
> CP 27.

Paragraph 12, in boilerplate language, states:

> My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment, if applicable. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.
> CP 27.

Boxes were checked that "The defendant had previously read the entire statement above and that the defendant understood it in full" and "The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full." CP 28.

A plea colloquy took place. 1RP[1] 3-9. The judge went through the plea statement with Sregzinski. 1RP 3-9. The judge recited the elements of first degree manslaughter and second degree assault by reading from the plea statement, describing the elements of assault as "you did assault Sarah M. Morse Hickman in an amount not amounting to First Degree" on the same date and in the same location as the manslaughter. 1RP 3-4. The judge asked if Sregzinski understood "that these are the two counts and charges and elements of those charges that you are pleading guilty to today?" 1RP 4. Sregzinski answered "Yes, sir."

After going over other provisions in the plea statement, including the standard range and maximum penalty, the judge asked if Sregzinski had "gone through all this form with your lawyer?" 1RP 8. Sregzinski said he had. 1RP 8. Sregzinski's personal statement of what made him guilty, as set forth in the plea statement, was read into the record. 1RP 8. Sregzinski pleaded guilty to the two counts. 1RP 8-9. The judge then stated:

> Based on our colloquy here today I'll find the defendant's plea of guilty is made knowingly, voluntarily intelligently and voluntarily [sic]. I find Mr. Sregzinski understands the charges and what the

[1] The verbatim report of proceedings is cited as follows: 1RP – one volume consisting of 5/5/19 and 7/31/19; 2RP – 7/15/19.

> consequences are of pleading guilty. I'm familiar with this file, have been since the beginning, and find that there is a factual basis for the plea as set forth in the Certificate of Probable Cause. And therefore, I do find him guilty as charged as to these two counts.
> 1RP 9.

At the subsequent sentencing hearing, the court imposed a total of 280 months in confinement, to run consecutive to the sentence imposed in a previous Oregon case. CP 80; 1RP 29. Sregzinski appeals. CP 94.

C. ARGUMENT

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

"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). The record does not show Sregzinski, in pleading guilty, understood the law in relation to the facts. Regarding the assault charge, Sregzinski admitted in his plea statement that “I did assault Sarah Hickman in a degree not amounting to 1st degree." CP 27. However, the plea statement omitted the requirement in RCW 9A.36.021(1)(c) that, to be guilty of second degree assault, there must be an assault of another with a

deadly weapon. The trial court's colloquy with Sregzinski did not reference the deadly weapon requirement. There is no evidence in the record presented to the trial court at the time of the plea showing Sregzinski's conduct met this requirement. There was therefore insufficient evidence in the record to show a factual basis for Sregzinski's guilty plea to the assault charge. The remedy is remand to allow Sregzinski to withdraw his guilty plea.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. Boykin v. Alabama. 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3. "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it 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).

To this end, the trial court must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information." In re Pers. Restraint of Bratz, 101 Wn. App. 662, 672, 5 P.3d.759 (2000) (quoting McCarthy, 394 U.S. at 467). "Without an accurate understanding of the relation of the

facts to the law, a defendant is unable to evaluate the strength of the State's case and thus make a knowing and intelligent guilty plea." State v. R.L.D., 132 Wn. App. 699, 705-06, 133 P.3d 505 (2006).

Reliable evidence in the record at the time of the plea does not establish that Sregzinski's conduct toward Hickman constituted assault with a deadly weapon. His plea to the second degree assault charge was therefore involuntary.

A trial court "shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). An involuntary plea constitutes a manifest injustice. State v. Codiga, 162 Wn.2d 912, 923, 175 P.2d 1082 (2008).

The criminal rules reflect the due process principle that a guilty plea must be knowing, voluntary and intelligent by dictating that a court must 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." Id. at 922 (quoting CrR 4.2(d)). "In addition, the court must be satisfied 'that there is a factual basis for the plea.'" Id. (quoting CrR 4.2(d)). The lack of a factual basis impacts a

defendant's understanding of the facts in relation to the law. State v. A.N.J., 168 Wn.2d 91, 118-19, 225 P.3d 956 (2010). The trial court violates due process in accepting a guilty plea under such circumstances. Id.

For a plea to be voluntary and knowledgeable, not only must a defendant be apprised of the nature of the charges, he must also be aware the facts support his guilt under those charges. In re Pers. Restraint of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980). "[T]he purpose behind the factual basis requirement is to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge, but without realizing that his conduct does not actually fall within the charge." State v. Berry, 129 Wn. App. 59, 65, 117 P.3d 1162 (2005) (quoting 13 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 3713, 91-92 (3rd ed. 2004)), review denied, 158 Wn.2d 1006, 143 P.3d 829 (2006).

Sregzinski did not seek to withdraw his plea at the trial level, but a challenge to the voluntariness of a plea agreement may be raised for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 6-8, 17 P.3d 591, 593 (2001). Further, the trial court made an express finding that the plea had a factual basis, thereby subjecting

the finding to challenge on appeal. CP 28; 1RP 9; see In re Marriage of Lutz, 74 Wn. App. 356, 370, 873 P.2d 566 (1994) ("To withstand a challenge on appeal, a finding of fact must be supported by substantial evidence.").

Although the failure to adhere to the procedural requirements of CrR 4.2 does not by itself result in a constitutional violation, State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996), 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). Stated another way, "[e]stablishment of a sufficient factual basis of guilt is not an independent constitutional requirement, but an inadequate factual basis may affect the constitutional voluntariness of the plea because some information about the facts is necessary to the defendant's assessment of the law in relation to the facts." 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. Bratz, 101 Wn. App. at 672; R.L.D., 132 Wn. App. at 705.

Again, it must be shown '"that the conduct which the defendant admits constitutes the offense charged in the indictment or information."' S.M., 100 Wn. App. at 413 (quoting Keene, 95 Wn.2d at 209) (quoting McCarthy, 394 U.S. at 467). The lack of factual basis prevented Sregzinski from understanding how his conduct constituted second degree assault.

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. In making this determination, the court may consider any reliable source of information, as long as the information is part of the record at the time of the plea. State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991).

The written plea statement provides that Sregzinski was informed and fully understood that the elements of count 2 to which he pleaded guilty are "On April 22, 2016, Defendant did assault Sarah M. Morse Hickman in a degree not amounting to 1st Degree. This took place in Walla Walla County, Washington." CP 18. Sregzinski's description of "what I did in my own words that makes me guilty of this crime" uses the same language. CP 27.

The only element set forth in either instance is the jurisdictional element. That the act did not amount to first degree

assault is not an element of second degree assault. State v. Keend, 140 Wn. App. 858, 862, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041, 187 P.3d 270 (2008). Assault with a deadly weapon is an element of the crime of second degree assault. RCW 9A.36.021(1)(c); State v. Skenandore, 99 Wn. App. 494, 499, 994 P.2d 291 (2000). That is the means of committing the crime at issue, since the State charged Sregzinski by amended information with assaulting Hickman with a deadly weapon, to wit: a shotgun. CP 16. The plea statement, though, nowhere sets forth a fact showing Sregzinski assaulted Hickman with a deadly weapon.

"[T]he prosecutor's factual statement contained in the certificate of probable cause may provide the factual basis for a plea of guilty, as long as the statement was before the court at the time of the plea, and was made a part of the record at that time." State v. Arnold, 81 Wn. App. 379, 383, 914 P.2d 762, review denied, 130 Wn.2d 1003, 925 P.2d 989 (1996). Such a statement may be relied on to show the factual basis for a plea if agreed to by the defendant. Saas, 118 Wn.2d at 43-44. The plea statement in Sregzinski's case 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. The plea colloquy does not reflect an agreement to consider the certificate.

Even assuming the certificate can be considered to be reliable evidence, it does not establish that Sregzinski assaulted Hickman with a deadly weapon. The certificate does not identify Hickman by name. CP 1-4. Rather, the certificate uses letters in place of witness names: witnesses A, B, C, D, E and F. CP 1-4. It is impossible to ascertain from the certificate which letter corresponds to Hickman. At one point, the certificate states: "During the car ride to Rose Lane Apartments, both Witness A and Witness B were fearful that they were going to be killed by Sregzinski." CP 2. Even assuming Hickman is Witness A or B, this passage does not show Sregzinski assaulted her with a deadly weapon. The certificate does not set forth any fact showing any witness was assaulted with a deadly weapon.

The plea statement acknowledges that Sregzinski pleaded guilty to count 2 in the amended information and had received a copy of it. CP 27. The second amended information alleges for count 2 that Sregzinski "on or about April 22, 2016, did assault Sarah M. Morse Hickman, a human being, with a deadly weapon, to-wit: a shotgun." CP 16. However, referencing the elements of

charged crimes at most only shows Sregzinski was aware of those elements. That is different than stating a factual basis for those elements. "A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements." R.L.D., 132 Wn. App. at 705.

The court conducted a plea colloquy. 1RP 3-9. But the colloquy does not address how Sregzinski's alleged conduct satisfied the deadly weapon element of the second assault crime. Instead, the court walked Sregzinski through the plea statement, which itself does not set forth any fact showing Sregzinski's conduct constituted assault with a deadly weapon.

At the sentencing hearing, the prosecutor stated that Sregzinski drove Hickman and Jeff Dunbar out into the country and "started speculating about where would be a good place to hide their bodies if they talked about this crime." 1RP 19. The prosecutor said Sregzinski threatened Hickman in this manner. 1RP 21-22. Anything the prosecutor said at the sentencing hearing is irrelevant to whether the plea is valid. Evidence establishing a factual basis for the plea "must be developed on the record at the

time the plea is taken; it may not be deferred until sentencing." S.M., 100 Wn. App. at 414.[2]

The facts before the court insufficiently demonstrate the requisite assault with a deadly weapon to support a second degree assault conviction. Although the court expressly found a factual basis for Sregzinski's plea, the record shows no facts were developed for the court to find a factual basis for the second degree assault count. The court therefore erred in finding a factual basis for the plea in relation to the second degree assault count. CP 28; 1RP 9.

Because Sregzinski's plea to second degree assault was involuntary, he should be allowed to withdraw the entirety of his plea agreement. Where a plea agreement is invalid, as in this case, the defendant may generally choose to withdraw the plea. Walsh, 143 Wn.2d at 8-9. Sregzinski is entitled to withdraw his plea as to both the assault and the manslaughter counts because the plea is indivisible. A plea agreement is indivisible when the defendant pleads guilty to multiple charges in a single proceeding and the pleas are described in the same agreement. State v. Turley, 149

[2] The prosecutor's description does not show second degree assault with a deadly weapon anyway. At most, it is felony harassment based on threat to kill. RCW 9A.46.020(2)(b)(ii).

Wn.2d 395, 400, 402, 69 P.3d 338 (2003). Such is the case here. The assault and manslaughter counts are described in the same documents and Sregzinski pleaded guilty to them as part of the same proceeding. CP 18-30; 1RP 3-9. Because the invalid plea is indivisible, this Court should remand to allow Sregzinski to withdraw his plea to both counts.

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

As a condition of community custody, the court ordered Sregzinski to "participate in crime related treatment or counseling services as follows: (x) inpatient or outpatient alcohol/drug program at his expense, at the discretion of his probation/community corrections officer." CP 81.

This condition is unauthorized to the extent it requires treatment for alcohol. Treatment should be limited to drugs, i.e., controlled substances.

Whether the court had statutory authority to impose a sentencing condition is reviewed de novo. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). The trial court's decision is reviewed for abuse of discretion only if it had statutory

authorization. Id. at 326. Defense counsel did not object to this condition below, but an unlawful sentence may be challenged for the first time on appeal. State v. Warnock, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013).

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). But court-ordered substance abuse evaluation and treatment must address an issue that contributed to the offense. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). Alcohol and drugs are not interchangeable terms in this context. Warnock, 174 Wn. App. at 613-14 (recognizing a difference between controlled substances and alcohol); State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (distinguishing between "substance abuse" and "alcohol" treatment as a condition of community custody), overruled on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

The record shows drugs were connected to the crime but not alcohol. According to the pre-investigation report, Sregzinski stopped going to church and "began spending time with his father-in-law and brother-in-law, who were drug users, and this led to his current crimes." CP 39. Sregzinski was upset with the shooting victim as a result of a drug debt. CP 32. At sentencing, defense counsel said Sregzinski had "fallen back into serious drug use" at the time of his offense. 1RP 25. It is lawful for the court to order drug treatment as a condition of the sentence because the record shows drug use contributed to the offense.

Because there is no evidence that alcohol contributed to Sregzinski's offenses, treatment must be restricted to controlled substances. 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 where there was no evidence substances other than alcohol contributed to crimes); Warnock, 174 Wn. App. at 614 (same); State v. Kinzle, 181 Wn. App. 774, 786, 326 P.3d 870 (2014), review denied, 181 Wn.2d 1019, 337 P.3d 325 (2014) (same); Jones, 118 Wn. App. at 207-08 (trial court improperly imposed a condition requiring alcohol

counseling when there was evidence that methamphetamines, but not alcohol, contributed to the offense).

The remedy is to remand with directions to amend the judgment and sentence to strike the reference to an "alcohol/drug" program and impose only treatment for drugs, i.e., controlled substances. Warnock, 174 Wn. App. at 614; Munoz-Rivera, 190 Wn. App. at 894; Kinzle, 181 Wn. App. at 786.

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

The court imposed a supervision cost and the cost of legal financial obligation (LFO) collection, both of which are discretionary. The imposition of these costs represents a clerical error in need of correction, as the court at sentencing expressed its intention to impose only mandatory obligations. Alternatively, these discretionary LFOs must be stricken because the court failed to adequately inquire into Sregzinski's ability to pay them.

a. The costs are clerical errors because the record shows the court did not intend to impose them.

At sentencing, the court asked whether Sregzinski had been "tested for DNA previously." 2RP 26. Defense counsel said he had,

and the court assumed it was so. 2RP 26. Defense counsel then alluded to the striking of court costs. 2RP 26. The court confirmed with defense counsel that Sregzinski continued to be indigent. 2RP 26. The court then stated "So I'm imposing the crime victim assessment, which is mandatory, of $500, and restitution to the crime victim's compensation program, and to Sarah Morse Hickman is reserved." 2RP 26-27.

A portion of the judgment and sentence nonetheless provides: "The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190." CP 79.

RCW 36.18.190 states "The superior court *may*, at sentencing or at any time within ten years, assess as court costs the moneys paid for remuneration for services or charges paid to collection agencies or for collection services." (emphasis added). Collection costs are discretionary. State v. Clark, 191 Wn. App. 369, 374, 362 P.3d 309 (2015); see also State v. Gonzalez-Gonzalez, 193 Wn. App. 683, 691, 370 P.3d 989 (2016) (use of the word "may" in LFO statute shows the court has discretion).

Another boilerplate condition in the judgment and sentence provides: "The defendant shall pay supervision fees as determined by the Department of Corrections." CP 80. The condition is

repeated in an appendix: "Pay supervision fees as determined by the Department of Corrections." CP 88.

RCW 9.94A.703(2)(d) states "*Unless waived by the court*, . . . the court shall order an offender to: . . . (d) Pay supervision fees as determined by the Department." (emphasis added). Given the language authorizing the court to waive the cost, the cost of community custody is discretionary. 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).

In State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020), the Court of Appeals struck the supervision fee because the record demonstrated that the trial court intended to impose only mandatory LFOs. In that case, the trial court indicated at sentencing that it would impose mandatory LFOs. The court did not mention supervision fees and the LFO section of the judgment and sentence did not include any reference to the supervision fee. Under the section in the judgment and sentence on community custody conditions, the requirement to "pay supervision fees as determined by DOC" was buried in a lengthy paragraph on community custody. "From this record, it appears that the trial court intended to waive all discretionary LFOs, but inadvertently imposed

supervision fees because of its location in the judgment and sentence." Id. The Court of Appeals therefore remanded to strike the supervision fee. Id. at 137, 152.

The record in Sregzinski's case is comparable. It is apparent that the court intended to impose only mandatory LFOs because the prosecution made no request for the supervision cost or collection cost at the sentencing hearing, defense counsel alluded to the striking of costs, the court found Sregzinski indigent, and the court only imposed mandatory legal financial obligations consisting of the victim penalty assessment and restitution in pronouncing sentence. 2RP 26-27. The requirement to pay supervision fees was buried in a boilerplate paragraph listing community custody conditions and again in an attached appendix. CP 80, 88. The checked box for collection costs was pre-printed and included in a boilerplate section of the judgment and sentence. CP 79. The discretionary fees listed in the LFO section were all crossed out by hand. CP 78.

As in Dillon, the record shows the trial court did not intend to impose the discretionary supervision fee. "The remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for correction." State v. Sullivan, 3 Wn. App. 2d 376,

381, 415 P.3d 1261 (2018). The remedy, then, is remand to strike the unintended fees. Dillon, 12 Wn. App. 2d at 137, 152.

b. Alternatively, the challenged costs must be stricken because the court did not adequately inquire into Sregzinski's ability to pay.

Even if these costs are not subject to being stricken because they represent clerical errors, they are still improper in the absence of an adequate inquiry into ability to pay. The collection cost and supervision cost are LFOs by statutory definition.[3] Discretionary LFOs can be waived. "Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations, such as court costs and fees, as a sentencing condition, it must consider the defendant's present or likely future ability to pay." State v. Lundy, 176 Wn. App. 96, 103, 308 P.3d 755 (2013).

RCW 10.01.160(3) provides: "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). In

[3] See RCW 9.94A.030(31) (defining "legal financial obligation" as "a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and *any other financial obligation that is assessed to the offender as a result of a felony conviction*.").

determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3)(a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."

Although the record does not establish Sregzinski is indigent as defined in RCW 10.101.010(3)(a)-(c), the court must still "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). Trial courts must "conduct an individualized inquiry into the financial circumstances of each offender before levying *any discretionary LFOs*." State v. Ramirez, 191 Wn.2d 732, 739, 426 P.3d 714 (2018).

Employment history, income, assets and other financial resources, monthly living expenses, and other debts are relevant to determining a defendant's ability to pay discretionary LFOs. Id. at 744. "[T]he record must reflect that the trial court inquired into all five of these categories before deciding to impose discretionary costs." Id. The record does not reflect the requisite inquiry here. In explaining the basis for the standard range sentence, the court remarked Sregzinski "had a good earning capacity." 2RP 28. But

the court did not inquire into income, assets and other financial resources, monthly living expenses, and other debts. The lack of inquiry can be explained by the court's intention not to impose discretionary LFOs. But if there is such intention, the court failed to conduct the full inquiry mandated by Ramirez.

4. THE COURT LACKED AUTHORITY TO IMPOSE INTEREST ON NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS

The judgment and sentence states: "Per RCW 10.82.090, Financial Obligations imposed shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments." CP 79. This mandate does not comply with current law.

The current version of RCW 10.82.090(1), effective June 7, 2018, provides in relevant part that "restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations."

This statute was amended as part of HB 1783's overhaul of the LFO system. State v. Catling, 193 Wn.2d 252, 259 n.5, 438 P.3d 1174 (2019); Laws of 2018, ch. 269 § 1. The judgment and

sentence must be modified to reflect that no interest shall accrue on non-restitution legal financial obligations in accordance with RCW 10.82.090(1). Catling, 193 Wn.2d at 259 n.5. Imposition of unauthorized interest must be stricken. State v. Houck, 9 Wn. App. 2d 636, 651, 446 P.3d 646 (2019), review denied, 194 Wn.2d 1024, 456 P.3d 397 (2020).

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

As a condition of the sentence, the court ordered Sregzinski to have no contact with Hickman and four others for life. CP 82. That sentencing condition is not challenged on appeal because the court has authority to order no contact as a condition of the sentence for the statutory maximum under RCW 9.94A.505(9).

But the court also entered a separate civil anti-harassment no-contact order prohibiting Sregzinski from contacting those five people as part of the judgment and sentence. CP 84-86. The court did not explain any statutory basis for doing so. 1RP 30. There is no such authority. The civil anti-harassment no-contact order must be vacated.

Statutory interpretation is a question of law reviewed de novo. State v. Navarro, 188 Wn. App. 550, 553, 354 P.3d 22 (2015), review denied, 184 Wn.2d 1031, 364 P.3d 119 (2016). In interpreting a statute, courts look first to its plain language. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the plain language of the statute is unambiguous, then the court's inquiry is at an end. Id.

Chapter 10.14 RCW governs civil anti-harassment protection orders. No provision permits the court to issue such an order on its own action as part of a criminal sentencing proceeding.

Under that chapter, "[t]here shall exist an action known as a petition for an order for protection in cases of unlawful harassment." RCW 10.14.040. An anti-harassment order action is begun by filing a petition for relief that alleges the existence of unlawful harassment and an affidavit made under oath stating the specific facts and circumstances from which relief is sought. RCW 10.14.040(1). In seeking a temporary no-contact order, the petitioner must show "reasonable proof of unlawful harassment." RCW 10.14.080(1). "'Unlawful harassment' means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such

person, and which serves no legitimate or lawful purpose." RCW 10.14.020(2).

A "full hearing" is required to be set to determine whether the order should become effective for a longer period. RCW 10.14.080(2); RCW 10.14.070. Notice to the respondent is required prior to such hearing. RCW 10.14.080(2). "At the hearing, if the court finds by a preponderance of the evidence that unlawful harassment exists, a civil antiharassment protection order shall issue prohibiting such unlawful harassment." RCW 10.14.080(3). "Any respondent age eighteen years or over who willfully disobeys any civil antiharassment protection order issued pursuant to this chapter shall be guilty of a gross misdemeanor." RCW 10.14.170.

In reviewing the provisions governing a civil anti-harassment no-contact order, three features stand out. First, such an order is obtained when someone seeking protection from unlawful harassment files a petition. RCW 10.14.040(1); RCW 10.14.080(1). No provision allows the court, on its own action, to enter such an order absent a petition requesting such relief. In Sregzinski's case, not one of the five people named as protected parties in the anti-harassment no-contact order petitioned the court for such relief.

The governing statute does not permit the trial court to enter the order absent a petition.

When the legislature wants to authorize a court to issue a separate no-contact order following conviction in a criminal case, it spells that authority out in a statute. Thus, the court has authority to issue a domestic violence no-contact order following conviction for a domestic violence offense under the plain language of RCW 10.99.050(1).[4] The court has authority to issue a sexual assault protection order following conviction for a sex offense under RCW 7.90.150(6).[5] The court has authority to issue a no-contact order following conviction of a stalking offense under RCW 7.92.160(6)(a).[6] There is no comparable provision authorizing the

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[4] RCW 10.99.050(1) provides: "When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim."

[5] RCW 7.90.150(6)(a) provides: "When a defendant is found guilty of a sex offense as defined in RCW 9.94A.030, any violation of RCW 9A.44.096, or any violation of RCW 9.68A.090, or any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030, and a condition of the sentence restricts the defendant's ability to have contact with the victim, the condition shall be recorded as a sexual assault protection order."

[6] RCW 7.92.160(6)(a) provides: "When a defendant is found guilty of stalking as defined in RCW 9A.46.110 or any other stalking-

court to issue an anti-harassment no-contact order following conviction for a criminal offense under chapter 10.14 RCW.

Second, a temporary anti-harassment no-contact order cannot be converted into one of longer duration without notice to the respondent and a full hearing on the matter where "unlawful harassment" must be proven by a preponderance of the evidence. RCW 10.14.070; RCW 10.14.080(2), (3). Sregzinski was given no notice that such an order would be sought. There was no hearing at which unlawful harassment was proven by a preponderance of the evidence.[7] The statutory perquisites for issuing the order were not followed.

Third, willful violation of a civil anti-harassment protection is a criminal offense, a gross misdemeanor. RCW 10.14.170. This separates the order from one that may be issued as a condition of a criminal sentence under RCW 9.94A.505(9).

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related offense under RCW 9A.46.060 and a condition of the sentence restricts the defendant's ability to have contact with the victim, and the victim does not qualify for a domestic violence protection order under chapter 26.50 RCW, the condition shall be recorded as a stalking no-contact order."

[7] Nothing in the record shows a harassing "course of conduct" against any of the five people named as protected parties in the order. See RCW 10.14.020(1) ("'Course of conduct' means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.").

RCW 9.94A.505(9) states: "As a part of any sentence, the court may impose and enforce crime-related prohibitions." Under that provision, the trial court has authority to order no contact in the judgment and sentence as a crime-related prohibition for the statutory maximum of the offense. Armendariz, 160 Wn.2d at 121 (citing to former RCW 9.94A.505(8), since recodified as RCW 9.94A.505(9)). Violation of a no-contact condition of the sentence subjects the defendant to sanctions. RCW 9.94B.040(3) (addressing failure "to comply with any of the nonfinancial requirements or conditions of a sentence").

The no-contact order imposed as a condition of the sentence is separate from a post-conviction no-contact order, the latter being its own enforceable order subjecting the violator to criminal liability as a stand-alone offense. RCW 10.14.170; see State v. Granath, 190 Wn.2d 548, 555, 415 P.3d 1179 (2018) (distinguishing post-conviction domestic violence no-contact orders issued under RCW 10.99.050(1) from no-contact order entered as a crime-related prohibition); Navarro, 188 Wn. App. at 553-56 (analyzing post-conviction sex offense no-contact order separately from no-contact order issued as crime-related prohibition). The trial court expressly recognized the anti-harassment no-contact order was a "separate"

order. 1RP 30. The problem, as set forth in this brief, is that the court lacked statutory authority to issue that separate order as part of the judgment and sentence.

A court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). "A sentence imposed without statutory authority can be addressed for the first time on appeal, and this court has both the power and the duty to grant relief when necessary." State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003, 20 P.3d 944 (2001). The civil anti-harassment no-contact order entered as part of the judgment and sentence should therefore be vacated.

D. CONCLUSION

For the reasons stated, 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 29th day of May 2020

Respectfully Submitted,

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May 29, 2020 - 1:41 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	37043-7
Appellate Court Case Title:	State of Washington v. Robert Gage Sregzinski
Superior Court Case Number:	17-1-00389-9

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