

NO. 65396-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

GERMAN DURAN MADRIGAL,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGES JOHANNA BENDER,  
BARBARA HARRIS AND MICHAEL HEAVEY

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**BRIEF OF RESPONDENT**

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**A. SUMMARY OF ARGUMENT AND ISSUES PRESENTED**

In 2007, the defendant committed a number of felony and misdemeanor offenses. He was charged with multiple crimes under three different superior court cause numbers. With counsel, the defendant negotiated a plea deal that included reduced charges, a favorable sentence recommendation, and an agreement not to file additional charges for crimes the defendant had committed. Now, over three years since being sentenced, to avoid certain immigration consequences, the defendant seeks to get his plea rescinded based on the following issues--none of which was raised below:

1. The defendant agreed to have his pleas accepted by pro tem judges. The defendant now asserts that there is absolutely no constitutional or statutory authority in the State of Washington that allows a pro tem judge to engage in a single act in court other than to hear an actual trial. Should this Court reject such a narrow interpretation of Washington Constitution and applicable statutes?

2. The defendant asserts a CrR 4.2(d) violation, that the court should not have accepted his pleas because his own statement of the facts provided an insufficient factual basis for the judge to accept the pleas. Should this Court reject this argument

because (1) the Court--contrary to the defendant's claim--can consider the Certification for Determination of Probable Cause, (2) the defendant's statements do provide a sufficient factual basis for his pleas, and (3) the defendant fails to show any prejudice?

3. The defendant claims the Information charging him with Unlawful Possession of a Firearm was inadequate. Should this Court reject this claim because the defendant's assertion is based on a defense to the charge, not an element of the crime, and he can show no prejudice?

4. Charged with felony possession of cocaine, the defendant pled guilty to a reduced charge of attempted possession of cocaine--a gross misdemeanor. Should this Court reject the defendant's claim that he was not properly informed of the maximum possible punishment for the offense?

**B. STATEMENT OF THE CASE**

**THE FACTS--THE DEFENDANT'S CRIME SPREE.**

Under cause number 07-1-11346-7, the defendant was charged with Domestic Violence--Felony Violation of a Court Order for assaulting Mary Duran in violation of a previously issued protection order. CP 31-34. On December 28, 2007, the defendant

entered a plea of guilty to a negotiated reduced charge of Misdemeanor Violation of a Court Order. CP 12, 39-46. The defendant's plea was accepted by the Honorable Pro Tempore Judge Barbara Harris. CP 35. On January 11, 2008, the defendant received a suspended sentence with a jail term of credit for time already served. CP 48-50.

Under cause number 07-1-10580-4, the defendant was charged in Count I with Domestic Violence--Violation of a Court Order for violating the provisions of a previously issued protection order issued for the protection of Mary Duran and in Count II with Violation of the Uniform Controlled Substances Act, Possession of Cocaine. CP 1-6. On November 15, 2007, the defendant entered a plea of guilty to a negotiated reduced charge of Misdemeanor Violation of a Court Order and Misdemeanor Attempted Violation of the Uniform Controlled Substances Act. CP 8-20. The defendant's plea was accepted by the Honorable Pro Tempore Judge Johanna Bender. CP 18. On January 11, 2008, the defendant received a suspended sentence with a jail term of credit for time already served--concurrent with the sentence listed above. CP 22-24.

Under cause number 07-1-00945-7, the defendant was charged in Count I with Unlawful Possession of a Firearm in the

Second Degree for having been previously convicted of Felony Telephone Harassment and being in knowing possession of a fully loaded 20 gauge shotgun, and in Count II with Domestic Violence-- Assault in the Fourth Degree for assaulting Mary Duran. CP 57-62. On November 15, 2007, the defendant entered a plea of guilty as charged as part of the negotiated pleas in the above cases. CP 64-97. The defendant's plea was accepted by the Honorable Pro Tempore Judge Johanna Bender. CP 63. On January 11, 2008, the defendant received a suspended sentence with a jail term of credit for time already served on the misdemeanor--Count II; and a term of three months with credit for time served on the felony-- Count I. CP 99-108. The sentence was concurrent with the sentences listed above. Id.

Now, three years later, to avoid immigration consequences, the defendant seeks to withdraw all his pleas and be placed back in the position of facing trial on three felony charges, two misdemeanor charges, and an unknown number of other charges the State agreed not to file against the defendant. CP 10, 94; see also Defendant's Motion to Extend Time to File Notices of Appeal. Prior to this appeal, the defendant never raised any objection to his plea or asserted his pleas were infirm in any way.

**C. ARGUMENT**

**1. PRO TEM JUDGES IN WASHINGTON HAVE THE CONSTITUTIONAL AND STATUTORY AUTHORITY TO ACCEPT PLEAS.**

The defendant contends that all of his pleas of guilty, taken by pro tem judges, are invalid. He asserts that there is absolutely no constitutional or statutory authority in the State of Washington allowing for a pro tem judge to take any legal action other than the hearing of an actual trial. He raises this claim for the first time on appeal.<sup>1</sup> The defendant's claim must be rejected. No court has ever interpreted the constitution or parallel statutes in such a narrow manner and a manner that would result in such a strained and absurd result. See Nelson v. Seattle Traction Co., 25 Wash. 602, 603-04, 66 P. 61 (1901) (the language "tried by a judge pro tempore" does not limit the power of a pro tem judge to just hearing and conducting a "trial"); Mitchell v. Kitsap County, 59 Wn. App.

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<sup>1</sup> To the extent the defendant's argument is based on statutory authority (or any other non-constitutionally based authority), the defendant has waived the issue by failing to object below or by inviting the error by specifically agreeing to have a pro tem judge accept his pleas. The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996); State v. Korum, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). A failure to object precludes appellate review except for a manifest error affecting a constitutional right. RAP 2.5; State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988).

177, 185, 797 P.2d 516 (1990) (rejecting such a narrow interpretation of the term "tried").

In pertinent part, article 4, section 7 of the Washington Constitution provides as follows:

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. ***A case in the superior court may be tried by a judge pro tempore*** either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule.

Art. 4, § 7 (emphasis added).<sup>2</sup>

This provision of the constitution was adopted in 1889, with two later amendments not relevant to the issue raised on appeal. See Amendment 80 (Laws 1987, S.J.R. No. 8207, approved Nov. 3, 1987); Amendment 94 (Laws 2001, S.J.R. No. 8208, approved

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<sup>2</sup> The defendant's statutory argument is based on nearly identical language contained in RCW 2.08.180, the statute governing the appointment of pro tem judges. In pertinent part the statute provides:

***A case in the superior court of any county may be tried by a judge pro tempore***...Any action in the trial of such a cause shall have the same effect as if it was made by a judge of such court.

RCW 2.08.180 (emphasis added); see *State v. Sain*, 34 Wn. App. 553, 555, 663 P.2d 493 (1983) (the pertinent language of article 4, section 7 and RCW 2.08.180 is nearly identical).

November 6, 2001). The defendant asks this Court to interpret the highlighted language in an extremely narrow manner, a construction that would make void every court action by a pro tem judge in the State of Washington since 1889 other than the hearing and conducting of an actual trial. Every plea, sentencing, arraignment, ruling on a motion, or continuance in a criminal case by a pro tem would be void for lack of jurisdiction under the defendant's argument. Every divorce decree, every annulment, every child custody order, every protection order issued, every RALJ appeal decided, and every ruling in a civil case outside of trial would be of no validity. There is no authority supporting such a narrow interpretation of the constitution and statute.

The constitution must be interpreted in the light of the law as it existed at the time it was adopted. State v. LaBelle, 18 Wn. App. 380, 388, 568 P.2d 808 (1977). The constitution will not be interpreted so as to force an absurd conclusion. State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 104, 273 P.2d 464 (1954). Interpretation of the constitution should be no different than interpreting a statute, the paramount duty should be to give effect to

the intent of the drafters,<sup>3</sup> the court should avoid a literal reading if it would result in unlikely, absurd, or strained consequences,<sup>4</sup> and "[t]he spirit or purpose of an enactment should prevail over the express but inept wording."<sup>5</sup>

An example of an attempt to manipulate constitutional language in an absurd manner occurred in State v. Monfort, 93 Wash. 4, 5-6, 159 P. 889 (1916). Monfort involved the construction of article 4, section 17 of the constitution, which reads:

No person shall be eligible to the office of judge of the Supreme Court or judge of a superior court unless he shall have been admitted to practice in the courts of record of this state or of the territory of Washington.

Monfort argued that a strict construction of the language of article 4, section 17 meant that an attorney who had been disbarred or suspended could still be a judge because they had at one time "been admitted to practice in the courts of record" of the state. The Supreme Court rejected this argument stating that "the rule is that the reason and intention of the lawgiver will control the strict letter

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<sup>3</sup> See WPPSS v. General Elec. Co., 113 Wn.2d 288, 292, 778 P.2d 1047 (1989).

<sup>4</sup> See State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

<sup>5</sup> See State v. Day, 96 Wn.2d 646, 648, 638 P.2d 546 (1981).

of the law when the latter would lead to palpable injustice, contradiction, and absurdity." Monfort, 93 Wash at 5.<sup>6</sup>

There is no language in the constitution that clearly or unmistakably limits the power of a pro tem judge as the defendant claims. While the defendant focuses on the word "trial," that word does not appear in article 4, section 7. Rather, the phrase in question refers to the trying of a "case," with no limiting language attached thereto. A "case" includes any action from beginning to end and is not limited to a trial. This certainly appears to be the interpretation of the courts for the past 100 plus years. See e.g., Nelson, supra (pro tem judge has power to hear motions for new trial, enter judgments and other questions of law and fact); Mitchell,

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<sup>6</sup> The court also cited to Heydenfeldt v. Daney, etc., Min. Co., 93 U.S. 634, 638, 23 L. Ed. 995 (1876), a case that included the following Supreme Court summary of the rule of construction:

[I]n construing it, we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. 'It is better always,' says Judge Sharswood, 'to adhere to a plain common-sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction.' Gyger's Estate, 65 Penn. St. 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment. With these rules as our guide, it is not difficult, we think, to give a true construction to the law under consideration.

supra (pro tems allowed to hear and decide summary judgment motions); National Bank of Washington, Coffman-Dobson Branch v. McCrillis, 15 Wn.2d 345, 356, 130 P.2d 901 (1942) (a pro tem judge has the power to issue a default judgment); Fisher v. Puget Sound Brick, Tile & Terra Cotta Co., 34 Wash. 578, 580-81, 76 P. 107 (1904) (pro tem had power to hear motions and enter orders); State v. Belgarde, 62 Wn. App. 684, 692, 815 P.2d 812 (1991) (the defendant was "tried" in 1988, but for purposes of article 4, section 7, the "case" began in 1984), affirmed, State v. Belgarde, 119 Wn.2d 711, 720-21, 837 P.2d 599 (1992) (there is no constitutional right to a trial presided over by an elected superior court judge).

**2. PURSUANT TO CrR 4.2(d) A TRIAL COURT MUST BE SATISFIED THAT THERE IS A FACTUAL BASIS FOR A PLEA.**

**a. This Issue Has Been Waived.**

The defendant asserts for the first time on appeal that there was an insufficient factual basis for the judges to have accepted his pleas of guilty, essentially a CrR 4.2(d) violation. However, a defendant may not raise an issue on appeal without first having raised the issue with the trial court unless the issue involves a

manifest error affecting a constitutional right. Here, because a sufficient factual basis for a plea is not constitutionally mandated and the defendant never raised this issue below, he is barred from raising this issue for the first time on appeal.

As a general rule, issues cannot be raised for the first time on appeal. RAP 2.5(a); State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). A limited exception exists where the issue raised involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Lynn, 67 Wn. App. 339, 343, 835 P.2d 251 (1992). An alleged failure of a plea judge to adequately determine whether there was a factual basis for a plea is not by itself an issue of constitutional magnitude.

CrR 4.2(d) places a requirement upon the plea judge to "not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." CrR 4.2(d) was promulgated to aid the trial judge in determining whether a plea of guilty is voluntary and to create a record of the factors inherent in a voluntary plea, thus decreasing the number of occasions on which a plea must be set aside to correct the "manifest injustice" of an involuntary plea. In re Hilyard, 39 Wn. App. 723, 726-27, 695 P.2d 596 (1985). However, "the 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 Hews, 108 Wn.2d 579, 591-92, 741 P.2d 983 (1987). "Strict adherence to the rule is not a constitutionally mandated procedure," and the "duty imposed by court rule that the judge must be satisfied of the plea's factual basis should not be confused with the constitutional requirement that the accused have an understanding of the nature of the charge." Hilyard, 39 Wn. App. at 727 (citing In re Vensel, 88 Wn.2d 552, 554, 565 P.2d 326 (1977)).<sup>7</sup>

Here, the defendant and his counsel had the opportunity at the time of the plea to correct what he now claims was a failure of the plea judge to sufficiently determine whether there was a factual basis for his plea. The defendant also had the opportunity prior to sentencing and after sentencing to make a motion to withdraw his plea. See CrR 4.2(f); CrR 7.8. The defendant may not now claim his pleas are invalid when he is armed with nothing more than an

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<sup>7</sup> See also In re Barr, 102 Wn.2d 265, 269, 684 P.2d 712 (1984) (CrR 4.2(d) is a procedural requirement and failure to comply with the rule does not establish that a plea is constitutionally infirm); McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969) (the procedures embodied in Rule 11--the federal version of CrR 4.2(d)--are not constitutionally mandated); In re Keene, 95 Wn.2d 203, 622 P.2d 360 (1980) (the requirements of CrR 4.2(d) are not constitutionally required).

alleged violation of CrR 4.2(d) raised for the first time on appeal. See State v. Ridgley, 28 Wn. App. 351, 623 P.2d 717 (armed with nothing but the bare assertion that there was a violation of CrR 4.2, the appellate court declines to consider the issue), rev. denied, 95 Wn.2d 1020 (1981); also State v. Zumwalt, 79 Wn. App. 124, 129, 901 P.2d 319 (1995) (factual basis issue appealable only because the issue was raised at the trial court level), overruled on other grounds by, State v. Bisson, 156 Wn.2d 507, 130 P.3d 820 (2006).

The defendant's argument to the contrary is unavailing. The defendant cites to Keene, supra, and says that "[a] guilty plea does not preclude an appeal as to the circumstances under which the plea was made." Def. br. at 19. While true, this, however, misses the point. It is not the plea itself that bars review, but the defendant's failure to object and allow the trial court to correct the alleged factual mistake that bars review.

By pleading guilty, a defendant waives many claims-- including the admission to acts well pled, all defenses, and the right to trial--while retaining the ability to challenge jurisdiction, the sufficiency of the information and the circumstances under which the plea was made. State v. Sawyer, 62 Wn.2d 1, 2-3, 380 P.2d 726 (1963). But a defendant still must comply with the procedural

requirements of the law in making a challenge and the Court in Keene specifically stated that this type of error--a CrR 4.2(d) challenge--is an error not of constitutional magnitude. Keene, 95 Wn.2d at 205. Thus, an objection below is required.

The defendant also cites to State v. Easterlin, 159 Wn.2d 203, 149 P.3d 366 (2006) and In re Hews, supra, and claims that in those cases a factual basis review was heard by the reviewing court. However, in neither case was the issue of waiver raised by the State, and in neither case is it known whether the issue was raised in the trial court. Further, Hews involves a constitutional challenge to the plea, whether the defendant's plea was actually made knowingly, intelligently and voluntarily. Such a claim goes directly to what the defendant knew, whereas a factual basis claim concerns what the trial court did. See Hews, 108 Wn.2d at 592-93 (the constitution does not require a factual basis for a guilty plea, with the failure to establish a factual basis being relevant only to the extent it "may suggest" a defendant did not possess an adequate understanding of the law in relation to the facts). But this is not the claim the defendant makes here. In short, the defendant's failure to raise this non-constitutional issue below constitutes waiver of the issue on appeal.

**b. A Factual Basis To Accept A Plea Is Based On Matters In The Record.**

CrR 4.2(d) requires that the trial judge be satisfied that there is a factual basis for the plea being taken.<sup>8</sup> In determining whether a factual basis exists for a plea, the trial court need not be convinced beyond a reasonable doubt that the defendant is in fact guilty. State v. Sass, 118 Wn.2d 37, 43, 820 P.2d 505 (1991). Rather, a factual basis exists if the trial court is satisfied that there is sufficient evidence for a jury to conclude that the defendant is guilty. Sass, 118 Wn.2d at 43. The rule is intended simply to enable the judge to verify that the accused understands the charge and to make a record thereof. Hilyard, 39 Wn. App. at 727. The factual basis requirement is not dependent on the defendant's admissions alone, rather, it may be established from any reliable source so long as the material relied upon by the trial court is made a part of the record. Keene, 95 Wn.2d at 210 n.2; State v. Osborne, 102 Wn.2d 87, 95-96, 684 P.2d 683 (1984); State v.

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<sup>8</sup> The rule states that:

The court shall not accept a plea of guilty without first determining that it is made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Arnold, 81 Wn. App. 379, 382, 914 P.2d 762, rev. denied,  
130 Wn.2d 1003 (1996).

Here, before the court and part of the record of each plea were the following documents (among others) (1) the Statement of Defendant on Plea of Guilty that included a brief factual statement by the defendant, (2) the Information or Amended Information that included the elements of the crime and facts supporting the elements of each crime, (3) the Certification for Determination of Probable Cause that included a summary of the evidence supporting each charge, (4) a prosecutor's Case Summary and Bail Request that contained additional facts supporting each charge, and (5) the Plea Agreements. CP 8-20, 39-46, 64-97. In each case, the defendant signed both the Statement of Defendant of Plea of Guilty and the Plea Agreement. Id.

The defendant contends that because neither plea judge specifically articulated that they read the above documents, this Court must turn a blind eye to these documents that were provided to the court in determining whether there was a factual basis for his pleas. Instead, the defendant claims this court is limited to reviewing his written admissions contained in each statement on plea of guilty. There is no support for this claim.

A "reliable source which may provide a factual basis for a guilty plea is the prosecutor's factual statement." Osborne, 120 Wn.2d at 95. In order for this statement to form a factual basis for the plea, the statement "must: (1) be before the court at the time of the plea, and (2) be made part of the record at that time." Osborne, at 96. These two requirements are meant to avoid the "evil" of "the taking of new evidence after the plea is entered in order to justify a plea that the trial judge should never have accepted in the first place because it lacked a factual basis." Arnold, 81 Wn. App. at 383.

Here, the defendant concedes that the above documents were before the trial court and were part of the record. The fact that neither judge said the magic words, "I have reviewed these documents" does not mean this Court cannot consider them. The "evil" of taking new evidence after the fact is not present here. The defendant's assertion that this Court cannot consider the documents what were before the trial court is not well taken.

**c. Unlawful Possession Of A Firearm.**

The defendant claims that his single written admission in each of his plea statements did not provide a factual basis for the

trial court to have accepted his pleas. As discussed above, restricting the review to only his admission in each statement is incorrect. However, in the event this Court finds that this Court's consideration is so limited, each charge and allegation will be addressed below based solely on the defendant's written statement.

The elements of the crime of unlawful possession of a firearm in the second degree, as charged here, are as follows:

- (1) That on or about January 31, 2007, the defendant knowingly owned, possessed or had in his control a firearm;
- (2) That the defendant had previously been convicted of Telephone Harassment, a felony, and
- (3) That the possession or control of the firearm occurred in the State of Washington.

CP 57; WPIC 133.02.02; RCW 9.41.040(2)(a)(i). These are the only elements of the crime.

The defendant's plea statement reads as follows:

The judge has asked me to state briefly in my own words what I did that makes me guilty of this crime. This is my statement:

In King County WA, on 1/31/07 I had possession of a firearm in the second degree. I had previously been

convicted of a felony in WA and my right to possess a firearm had been revoked.

CP 85.

The defendant cites to State v. Minor, 162 Wn.2d 796, 174 P.3d 1162 (2008) and asserts that there is another element of the offense, an element of notice--that the State must prove a defendant was given prior notice that he was ineligible to possess a firearm. This is incorrect. Minor does not stand for this proposition. As the Court in Minor stated, ignorance of the law is not a defense and knowledge of the illegality of firearm possession "is not an element of the crime." Minor, 162 Wn.2d at 802. What the Court in Minor held was that where a defendant is "affirmatively misled" by the State about whether he can legally possess a firearm, the defendant may have a defense to a charge of unlawful possession of a firearm. Id. at 803-04. The Court added no new element to the crime.

The defendant also contends that nowhere in his plea statement does it state that his right to possess a firearm had not been restored. This too is not an element of the crime, it is a defense to the crime of unlawful possession. The defendant's plea statement shows that he had been convicted of a felony offense

and that his right to possess a firearm had been revoked. Upon the defendant's admission that he possessed a firearm, the judge could reasonably find that a jury could convict the defendant on these facts.

Finally, the defendant asserts that because the actual term "knowingly" was not included in his plea statement his plea must be reversed. It is true, to convict a defendant of unlawful possession of a firearm, the State must prove that a defendant knowingly possessed, owned or had under his control a firearm.<sup>9</sup> State v. Hartzell, 156 Wn. App. 918, 237 P.3d 928 (2010). However, as caselaw analyzing the sufficiency of charging documents makes clear, the actual term "knowingly" is not required, so long as it can be inferred from the language used. See e.g., State v. Cuble, 109 Wn. App. 362, 35 P.3d 404 (2001) (terms "unlawfully" or "feloniously" convey an act committed with knowledge); State v. Krajieski, 104 Wn. App. 377, 385, 16 P.3d 69 (2001) (any words that convey that a defendant had knowledge are sufficient), rev. denied, 144 Wn.2d 1002 (2001).

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<sup>9</sup> Knowledge of possession must be contrasted from knowledge the possession is illegal--knowledge of the illegality of firearm possession is not an element of the crime. See State v. Breitung, 155 Wn. App. 606, 230 P.3d 614 (2010).

The defendant admitted that he possessed a firearm and that his possession violated the statute. The only way his admitted possession violated the statute as he admits, is if he knowingly possessed the firearm. While inartful, the trial judge here could find from the defendant's statement that he knowingly possessed a firearm in violation of the statute.

**d. Attempted Possession Of Cocaine.**

The defendant was arrested in actual possession of cocaine--approximately a gram of cocaine was found in his pants pocket. CP 14-15. As such, he was charged with the felony offense of possession of cocaine. CP 1-6. As part of a package deal to reduced charges and favorable sentencing considerations, the defendant pled guilty to a legal fiction, attempted possession of cocaine. See In re Barr, 102 Wn.2d at 269 (pleading guilty to a reduced charge that the defendant did not commit as a legal fiction is perfectly permissible). The defendant now asserts, however, that his admission to facts supporting this fictitious charge did not support the taking of his plea.

The elements of the crime of possession of cocaine, as originally charged here, are as follows:

(1) That on or about September 3, 2007, the defendant possessed cocaine, and

(2) That the act occurred in the State of Washington.

CP 1-2; WPIC 50.02; RCW 69.50.4013. These are the only elements of the crime of possession of cocaine.

"Attempt" is statutorily defined as follows:

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020(1).

The defendant's plea statement read as follows:

The court has asked me to state briefly in my own words what I did that resulted in my being charged with the crime(s) with which I have been charged. This is my statement:

... II. In King County WA, on September 3, 2009, I unlawfully attempted to possess cocaine a controlled substance.

CP 10.

The defendant points out that possession of a controlled substance is a strict liability crime. State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004). On the other hand, an attempted crime, the defendant adds, includes a mens rea element. State v. Roby,

67 Wn. App. 741, 746, 840 P.2d 218 (1992). He claims this is missing from his plea statement.

However, by definition, for a person to attempt to commit a crime, they must necessarily have the intent to commit the attempted offense. State v. Davidson, 20 Wn. App. 893, 898, 584 P.2d 401 (1978), rev. denied, 91 Wn.2d 1011 (1979); see also State v. Chhom, 128 Wn.2d 739, 742-43, 911 P.2d 1104 (1996) (for attempted rape, the perpetrator must have the specific intent to have sexual intercourse). As an example, it would make no logical sense to say that a person attempted to commit a murder but that the person did not intend to commit a murder. Here, the defendant admitted that he attempted to possess cocaine. While this statement does not provide specifics, the statement shows that the defendant acted with the intent to achieve the result of possessing cocaine. This statement of the defendant, admitting that he attempted to possess cocaine, was enough for the judge to determine there was a factual basis for the charge.

**e. Violation Of A No-Contact Order.**

The defendant pled guilty to two counts of Domestic Violence Misdemeanor Violation of a Court Order--one count under

07-1-11346-7 and one count under 07-1-10580-4. The elements of a crime are as follows:

- (1) That on or about the date of violation there existed a court order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a restraint provision of the order, and
- (4) That the act occurred in the State of Washington.

RCW 26.50.110(1).

Under cause number 07-1-11346-7 the defendant provided the following factual statement:

The court has asked me to state briefly in my own words what I did that resulted in my being charged with the crime(s) with which I have been charged. This is my statement:

In King County on 8/18/07 I had contact with Mary Duran in violation of a court order. I willfully violated this order with knowledge of said order.

CP 41.

Under cause number 07-1-10580-4 the defendant provided the following factual statement:

The court has asked me to state briefly in my own words what I did that resulted in my being charged with the crime(s) with which I have been charged. This is my statement:

I. In King County WA on September 3, 2007, I had contact with Mary Duran the named individual in a no contact order issued pursuant to RCW 10.99. I willfully and knowingly violated the order.

CP 10.

The defendant claims there was no factual basis to accept these pleas because, among other things, at least one of them did not state what RCW the prior order was issued under. However, the legal validity of a domestic violence no-contact court order is not an element of the offense. See State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005) (overruling prior Court of Appeals decisions that had held to the contrary). Rather than presenting a question of fact for the jury, the Court concluded that the question of validity is one to be determined by the trial court as a matter of law. Id. Further, implicit in the charge of domestic violence violation of a court order is the fact that the order is a domestic violence issued order--otherwise no offense can be charged under the statute.

The defendant also claims that the statements did not refer to whether the defendant was the respondent or petitioner in the order, whether the order had expired or not, or which restraint provision he had violated. These are facts that are implicit in

admitting to violating the order. If the defendant were the petitioner in the prior order or the order had expired, he could not have violated a restraint provision of the order. The very fact that the defendant is admitting to having willfully and knowingly violated the order implicitly admits to the existence and validity of the order and that he was subject to a restraint provision of the order--which restraint provision being irrelevant.

**f. No Showing Of Prejudice.**

The defendant comes forth with nothing more than an assertion that there was a technical violation of CrR 4.2, that the facts in his plea statements were insufficient to satisfy the requirements of CrR 4.2(d). But a court will not set aside a plea simply because there may have been a violation of CrR 4.2(d); a defendant still must prove prejudice. Ridgley, 28 Wn. App. at 358-59. The defendant has shown none here. He entered into these pleas fully represented by counsel. He acknowledged and signed that he went over the pleas with counsel and had the pleas read to him. The plea agreements were negotiated pleas that conveyed a substantial benefit to the defendant--and he makes no

contention that he did not receive the benefit of his bargain. As the court in Ridgley stated:

When a defendant is represented by counsel and enters a plea of guilty pursuant to a plea agreement it is appropriate to inform him of the nature of the charge by naming the offense. Under these circumstances the record reflects substantial compliance with [the rule]... We will not set aside a judgment entered on such a plea of guilty absent an allegation and proof of prejudice.

Ridgley, at 358-59 (citing People v. Robinson, 63 Ill.2d 141, 345 N.E.2d 465, 467 (1976)); see also In re Hews, 108 Wn.2d at 592-93 (citing In re Barr, supra) (although the defendant's understanding of law and facts was technically deficient, his plea was not affected). There is a strong public interest in enforcement of plea agreements that are voluntarily and intelligently made. State v. Walsh, 143 Wn.2d 1, 6, 17, P.3d 591 (2001). A court will allow withdrawal of a guilty plea only to correct a manifest injustice. Id. No such injustice is shown here.

**3. THE INFORMATION SUFFICIENTLY INFORMED THE DEFENDANT OF THE CHARGE AGAINST HIM--UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE.**

The defendant contends that the Information charging him with Unlawful Possession of a Firearm in the Second Degree was

constitutionally defective in that it did not contain all the essential elements of the crime. This claim has no merit. The Information contained all the essential elements of the statute.

The essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This is known as the essential elements rule. Kjorsvik, 117 Wn.2d at 98.

“Elements” are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime. State v. Recuenco, 163 Wn.2d 428, 434-35, 180 P.3d 1276 (2008). An element is “essential” if its “specification is necessary to establish the very illegality of the behavior.” State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007) (internal citations omitted).

When the sufficiency of an Information is first challenged on appeal, as it is here, the court applies a two-pronged test: (1) do the necessary elements appear in any form, or by fair construction can they be found, in the Information, and if so (2) can the defendant show he or she was actually prejudiced by the inartful language. Kjorsvik, 117 Wn.2d at 105-06.

The Unlawful Possession of a Firearm statute provides in pertinent part:

(2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040).

RCW 9.41.040(2)(a)(i). Beyond these statutory elements, the State must also prove that the possession was knowing. See Cuble, supra.

Here, the defendant was charged in the Information as follows:

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse GERMAN MADRIGAL DURAN of the crime of Unlawful Possession of a Firearm in the Second Degree, committed as follows:

That the defendant GERMAN MADRIGAL DURAN in King County, Washington, on or about January 31, 2007, previously having been convicted in King County Superior , Washington of Telephone Harassment, a felony, knowingly did own, have in his possession, or have in his control, a shotgun, a firearm as defined in RCW 9.41.010;

Contrary to RCW 9.41.040(2)(a)(i), and against the peace and dignity of the State of Washington.

CP 57.

While not necessary, preferably compliance with the essential elements rule should take the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding. State v. Cosner, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975). That is exactly what was done here.

The Information accurately cited to the applicable statute. Entirely consistent with the WPIC "to convict" instruction listing the elements of the crime, and entirely consistent with the statutory language and caselaw added element of knowledge, the charging document included all the essential elements of the crime, knowing possession of a firearm after having been convicted of a felony offense. See WPIC 113.02.01.

The defendant's only argument to the contrary is the claim that some felons can get their right to possess a firearm reinstated

and that the Information did not state that he had failed to do so. It is certainly true that under the statute some felons can get their right to possess a firearm reinstated, and this would be a valid defense to the charge, but it is not an element of the crime. It does not establish the illegality of the crime. The Information here would put a defendant on notice that they are ineligible to possess a firearm because of a prior felony conviction and that on the date in question they knowingly possessed a firearm. By any "fair construction" the Information is sufficient.<sup>10</sup>

**4. THE DEFENDANT WAS PROPERLY INFORMED OF THE MAXIMUM PENALTY FOR THE CRIME HE PLED--ATTEMPTED POSSESSION OF COCAINE.**

The defendant contends he was erroneously informed that the maximum penalty for the crime he pled guilty--attempted possession of cocaine--was one year and a \$5000 fine, when in reality, according to him, the maximum penalty is five years and a \$10,000 fine. The defendant is mistaken. The crime the defendant pled was a gross misdemeanor with a statutory maximum of one year and a \$5000 fine. He did not plead guilty to a felony offense.

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<sup>10</sup> In addition, the defendant does not even attempt to argue that he was prejudiced in any fashion.

Possession of cocaine is a Class C felony with a maximum punishment of five years in prison and a \$10,000 fine. RCW 69.50.4013; RCW 9A.20.020(1)(c). Two "attempt" statutes exist under the law, a general attempt statute, codified at 9A.28.020, and an attempt statute related to drug offenses, codified at RCW 69.50.407. A conviction for an attempted Class C felony under RCW 9A.28.020 is a gross misdemeanor with a maximum penalty of one year and a \$5000 fine. See RCW 9A.28.020(d). A conviction for an attempted Class C felony under RCW 69.50.407 is an unranked felony with a standard range of zero to 12 months and a maximum possible punishment of five years and a \$10,000 fine. RCW 69.50.407; RCW 9.94A.505(b); State v. Moten, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999).

There is no constitutional requirement that the State charge a specific over a general statute. Earlier cases finding that the issue was of constitutional magnitude have since been overruled. See United States v. Batchelder, 442 U.S. 114, 125, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) (finding that a prosecutor choosing between concurrent statutes is no different than a prosecutor choosing to charge under similar but not concurrent statutes--this "does not give rise to a violation of the Equal Protection or Due Process Clause"); City of Kennewick, v. Fountain, 116

Wn.2d 189, 192-93, 802 P.2d 1371 (1991) (Washington Supreme Court recognizing overruling of equal protection concurrent statute arguments). As a result, the State can charge, and a defendant can plead, to charges under a general or a specific statute. See e.g., Moten, 95 Wn. App. at 929. Here, the defendant did just that, negotiating a plea to a non-felony crime, as clearly reflected in his plea of guilty to a non-felony offense. See CP 8, also CP 22 (listing conviction as under RCW 9A.28.020).

The defendant's argument is simply not supported by the record. There is nothing in the record showing that the defendant pled to--or intended to plead--to an attempt crime under RCW 69.50.407--a felony offense.

**D. CONCLUSION**

For the reasons cited above, this Court should reject the defendant's argument that his pleas of guilty are invalid.

DATED this 24 day of February, 2011.

Respectfully submitted,

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King County Prosecuting Attorney

By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Neil Fox, the attorney for the appellant, at 2003 Western Ave #330, Seattle, WA 98121, containing a copy of the Brief of Respondent, in STATE V. MADRIGAL, Cause No. 65396-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



\_\_\_\_\_  
Name  
Done in Seattle, Washington

02/24/11  
Date