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King County Prosecutor  
Appellate Unit

NO. 66173-6-1

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

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STATE OF WASHINGTON,

Respondent,

v.

SERGEY BASOV,

Appellant.

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

The Honorable Palmer Robinson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in finding a factual basis supported appellant's guilty plea.

2. Appellant's guilty plea was not knowing, intelligent or voluntary.

Issues Pertaining to Assignments of Error

Appellant was charged with harassment under the threaten "to cause bodily injury" alternative means of committing that offense, but his plea statement only supports a factual basis under the threaten "to cause physical damage to the property" of another alternative means. There is nothing on the record to show appellant understood the elements of the charged offense in relation to the facts or that his admitted conduct was insufficient to satisfy the elements of the charged offense.

1. Was there an inadequate factual basis for appellant's plea?

2. Was appellant's plea voluntary, intelligent and knowing?

B. STATEMENT OF THE CASE

On November 12, 2009, Sergey Basov was charged with felony harassment in King County Superior Court. CP 1-5. The information charged Basov with "Felony Harassment, committed as follows: That the defendant Sergey Y. Basov...knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Melanie

Golden, by threatening to kill Melanie Golden, and the words or conduct did place said person in reasonable fear the threat would be carried out; Contrary to RCW 9A.46.020(1)(2) and against the peace and dignity of the State of Washington.” Id.

On April 29, 2010 the State’s motion to amend the charge to misdemeanor harassment was granted and that same day Basov, with the services of a Russian language interpreter, pleaded guilty to the amended charge. RP 1-10 (4/29/2010). The amended information is identical to the original information except the word “felony” and the clause “by threatening to kill Melanie Golden” are crossed out. CP 20.

In the Statement of Defendant on Plea of Guilty, Basov’s written plea statement is as follows: “In King County, WA on November 8, 2009, I knowingly and unlawfully threatened to damage the property of Melanie Golden and put her in reasonable fear that the threat would be carried out by threatening to break her plates.” CP 12. In the colloquy between Basov and the court during the plea hearing the court informed Basov of the constitutional rights he was waiving by pleading guilty and the maximum penalty. RP 5-7 (4/29/2010). Basov affirmed he understood the rights he was giving up by pleading guilty. RP 5 (4/29/2010). Basov also affirmed that his written statement in the plea form was accurate. RP 8 (4/29/2010). The court found Basov’s plea knowing and intelligent and

voluntary and that there was a factual basis for the plea based solely on the colloquy and Basov's statement in the plea form. RP 9-10 (4/29/2010).

On May 7, 2010, the court entered an order allowing Basov's appointed counsel to withdraw and authorizing the appointment of new counsel for the purpose of investigating a motion to withdraw the plea. CP 29. On May 14, 2010, another order was entered appointing Janet Carello to represent Basov and setting a date of July 18, 2010 for Basov to file a brief in support of a motion to withdraw the plea. CP 30. The date for filing the brief was subsequently extended to August 17, 2010. CP 31.

Counsel did not file a brief in support of the motion. On September 24, 2010, a hearing was held. At the hearing, counsel informed the court she needed additional time to prepare because Basov had been out of state and only returned two weeks earlier. RP 3-4 (9/24/2010). Counsel also informed the court she had been on vacation and returned the previous Monday. Id. She stated she had only briefly spoke with Basov and Basov indicated he was not clear about the process. RP 4 (9/24/2010). Counsel told the court Basov did not understand the procedure that led to his plea or the consequences of his plea. RP 5-6 (9/24/2010).

The court denied the motion. CP 32. The court believed counsel and Basov had enough time to prepare. RP 5 (9/24/2010). Consequently, there was no hearing on a motion to withdraw the plea.

On October 1, 2010, a sentencing hearing was held. Basov was sentenced to five days in jail with credit for the five days he already served, consistent with the State's recommendation. RP 4 (10/1/2010); CP 24-27. At the hearing Basov insisted he was innocent, that he did not understand what had happened and that he signed the plea form because his attorney told him to sign it "and nothing will happen to you." RP 3-4 (10/1/2010).

C. ARGUMENT

BASOV'S GUILTY PLEA WAS INVOLUNTARY BECAUSE THE CONDUCT HE ADMITTED TO WAS THE FACTUAL BASIS FOR THE PLEA BUT THAT CONDUCT WAS INSUFFICIENT TO SUPPORT THE ELEMENTS OF THE CHARGED OFFENSE AND HE DID NOT UNDERSTAND THE LAW IN RELATION TO THE FACTS.

A defendant may raise "manifest error[s] affecting constitutional right[s] for the first time on appeal." RAP 2.5(a)(3). An allegation a plea is involuntary is a constitutional error that can be raised for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001).

Due process requires an affirmative showing that a defendant entered a guilty plea knowingly, intelligently, and voluntarily. U.S. Const.

amend. 14; Wash. Const. art. 1, § 3; Boykin v. Alabama, 395 U.S. 238, 243-44, 23 L. Ed. 2d 274 (1969); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A plea can not be 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). “[A]n accused must not only be informed of the requisite elements of the crime charged, but also must understand that his conduct satisfies those elements.” In re Pers. Restraint of Hews, 99 Wash.2d 80, 87-88, 660 P.2d 263 (1983). The State bears the burden of proving the validity of the guilty plea from the record or by “clear and convincing extrinsic evidence.” State v. Ross, 129 Wn.2d at 287.

A defendant is entitled to withdraw a guilty plea when necessary to correct a manifest injustice. CrR 4.2(f); State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001); State v. Davis, 125 Wn.App. 59, 68, 104 P.3d 11 (2004);. A manifest injustice exists if the plea was involuntary. Marshall, 144 Wn.2d at 281. A manifest injustice is “an injustice that is obvious, directly observable, overt, not obscure.” State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). An involuntary plea constitutes a manifest injustice. Saas, 118 Wn.2d at 42.

CrR 4.2 requires that the court not accept a guilty plea without first determining that the defendant is making it voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. Ross, 129 Wn.2d at 284. Additionally, under CrR 4.2(d), “[t]he court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.” Before accepting a plea the judge must determine that the defendant’s admitted conduct constitutes the charged offense. In re Crabtree, 141 Wn.2d 577, 585, 9 P.3d 814 (2000).

The requirement in CrR 4.2(d), that there be a factual basis for the plea, is procedural and not constitutionally mandated. In re Pers. Restraint of Hews, 108 Wn.2d 579, 592 n. 2, 741 P.2d 983 (1987); State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). The purpose behind the factual basis requirement, however, is to protect a defendant who may enter a plea with an understanding of the nature of the charge, but without realizing that his conduct does not actually fall within the charge. Ferguson, 13 Washington Practice, § 3613 (2d ed. 1997); In re Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980). The factual basis of a plea is constitutionally significant where it relates to the defendant’s understanding of his plea. Hews, 108 Wn.2d at 591-92. The failure to establish an adequate factual basis leaves the plea open to challenge that it

was involuntary. Hews, 108 Wn.2d at 592; State v. Rigsby, 49 Wn. App. 912, 916, 747 P.2d 472 (1987).

Here, Basov was initially charged with felony harassment by threatening “to cause bodily injury immediately or in the future to Melanie Golden, by threatening to kill Melanie Golden.” CP 1-5. There are alternative means for committing the crime of harassment. Under RCW 9A.46.020(1), in pertinent part, a person commits harassment if he either knowingly threatens “[t]o cause bodily injury immediately or in the future to the person threatened or to any other person” or “[t]o cause physical damage to the property of a person other than the actor.” RCW 9A.46.020(1)(a)(i) and (ii). Under RCW 9A.46.020(2)(b)(ii), “A person who harasses another is guilty of a class C felony if ... the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.” Otherwise, the offense is a gross misdemeanor. RCW 9A.46.020(2)(a).

The initial information charged Basov with harassment, under the knowingly threatened to cause bodily injury alternative means. The information also alleged a threat to kill, making the offense a felony. The amended information also charged Basov under the knowingly threatened to cause bodily injury alternative means but it deleted the threat the kill allegation, making the offense a gross misdemeanor.

In his plea statement Basov only admitted he threatened to cause physical damage to the victim's property. While the threat to cause physical damage to another's property is an alternative means of committing harassment, Basov was not charged with that alternative. Basov's admitted conduct, which was the sole basis for the court's factual basis finding, does not establish the elements of the charged offense. Thus, there was no factual basis for the plea to the charged offense.

Additionally, the court erred in finding the plea was knowing and voluntary because it failed to determine Basov understood the nature of the charge in relation to the facts. In re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984) is instructive. There, Barr pleaded guilty to one count of indecent liberties after being originally charged with second and third degree statutory rape. Id. at 266. The parties believed that the indecent liberties statute required the victim to be 14 or less, when the statute actually required the victim to be less than 14. Id. at 267. Barr argued his plea was invalid because the trial court accepted it without obtaining a factual basis for the indecent liberties charge because of the victim's age. Id. at 269. The Court held where the record establishes a factual basis for the crimes originally charged and reveals the defendant's understanding of his complicity in those crimes, the failure to state a basis for all the

elements of the substituted offense will not preclude a finding that the plea is voluntary and intelligent. Id. at 271.

In Hews, the Court later explained its holding in Barr.

Barr simply stands for the proposition that an otherwise voluntary plea based on a general understanding of the charged crime and relevant facts which constitute the crime is not invalidated by a mere technical deficiency in one's understanding. To the extent Barr may be read to abolish the due process requirement that one understands the critical elements of the charges to which one pleads and understands one's conduct to fall within those charges, it is herein modified.

Hews, 108 Wn.2d at 593-94.

A plea is only valid where the defendant has knowledge of the elements of the charged offense and how the facts relate to charge. Hews, 99 Wn.2d at 87-88. Unlike in Barr, there is nothing in the record that shows Basov understood the critical elements of the charged offense and that his conduct fell within those charges. What the record does show is that Basov's admitted conduct may have satisfied the threat to cause physical damage to the property of another means of committing harassment, but he was not charged with that means. Moreover, at no time during the plea colloquy does the court explain to Basov that the threat to cause bodily injury, and not his admitted conduct--a threat to cause physical property damage, was a critical element of the charge.

In sum, there is no showing on this record that Basov understood (1) the critical elements of the charged offense, (2) that his admitted conduct did not satisfy the essential elements of the offense as charged or (3) that he was pleading guilty to an uncharged offense. Basov's statements at the sentencing hearing "I did not commit any crimes, and I didn't cause any physical or moral damage to anybody." (RP 3 (10/1/2010)), further shows he did understand the facts in relation to the law when he entered his plea.

The record shows Basov's plea was not voluntary, knowing and intelligent and that the court failed to comply with CrR 4.2. Basov's plea should be vacated and the case remanded. State v. Sandoval, \_\_ Wn. 2d \_\_, \_\_ P.3d \_\_, (2011 WL 917173); Wood v. Morris, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976).

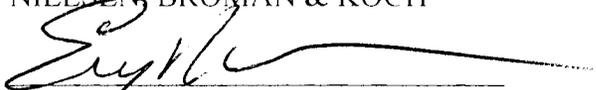
D. CONCLUSION

For the above reasons this Court should vacate Basov's guilty plea and remand to the trial court.

DATED this 13 day of April, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ERIC J. NIELSEN,

WSBA 12773

Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66173-6-I
	)	
SERGEY BASOV,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13<sup>TH</sup> DAY OF APRIL, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SERGEY BASOV  
20034 15<sup>TH</sup> AVENUE N.E.  
#206  
SHORELINE, WA 98155

**SIGNED** IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF APRIL, 2011.

x *Patrick Mayovsky*

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