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FILED
COURT OF APPEALS

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY AMM
COURT CLERK

34208-1

IN RE THE PERSONAL) NO. ~~35180-3-II~~
RESTRAINT PETITION OF) RESPONSE TO PERSONAL
JOSHUA MICHAEL ICE) RESTRAINT PETITION

Comes now Edward G. Holm, Prosecuting Attorney
in and for Thurston County, State of Washington, by
and through James C. Powers, Deputy Prosecuting
Attorney, and files its response to petitioner's
personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Petitioner is currently in the custody of the
Washington Department of Corrections pursuant to a
sentence of 26 months for vehicular homicide, RCW
46.61.520(1)(c), and pursuant to a concurrent
sentence of 12 months for vehicular assault, RCW
46.61.522(1)(c), imposed in Thurston County
Superior Court Cause No. 04-1-01916-1 on December
1, 2005, based upon the defendant's pleas of guilty
in this cause. CP 36-44. (Note: This personal
restraint petition has been consolidated with this

defendant's direct appeal in Court of Appeals Cause No. 34208-1-II, and so references are to the Clerk's Papers and Report of Proceedings filed with the Court of Appeals pursuant to that appeal.)

II. STATEMENT OF PROCEEDINGS

On October 25, 2004, an Information was filed in Thurston County Superior Court Cause No. 04-1-01916-1 charging the defendant, JOSHUA MICHAEL ICE, with one count of vehicular homicide in violation of RCW 46.61.520(1)(c) and one count of vehicular assault in violation of RCW 46.61.511(1)(c), both counts alleged to have occurred on or about the 9th day of May, 2004. CP 3. For the vehicular homicide count, the defendant was alleged to have operated a motor vehicle in a reckless manner and with disregard for the safety of others. For the vehicular assault count, the defendant was alleged to have operated a vehicle in a reckless manner. CP 3.

Also on October 25, 2004, a Certification of Probable Cause was filed by the State in support

of the Information. That document detailed how three witnesses had observed the defendant driving at approximately 70 miles per hour in a 50-mile-per-hour zone while proceeding through a series of "S" curves on a two-lane road. According to the Certification, one witness had observed the defendant pass that witness's vehicle at approximately 70-75 miles per hour in the lane for opposing traffic in a legal passing zone, but then observed the defendant pass another vehicle ahead in the "S" curves by pulling into the lane for opposing traffic at that same high speed in a marked no-passing zone. There was no reference to a second car passing behind the defendant's vehicle. CP 4-5.

The Certification further detailed that the driver of the vehicle ahead confirmed that the defendant had passed him at 67-70 miles per hour in a no-passing zone, and that when the defendant sought to bring his vehicle back into the proper lane after the pass, the defendant lost control and

was fishtailing, and was then immediately involved in a head-on crash with another car. CP 4-5.

The Certification further summarized that a third witness had been driving from the opposite direction, observed the defendant driving toward him at approximately 70 miles per hour, and saw that the defendant's vehicle was out of control. This witness observed the defendant's vehicle swerve toward the ditch on the right side of the defendant's proper lane, then swerve the other way heading into the lane for opposing traffic where the third witness's vehicle was. That witness was able to get by the defendant, but the defendant then struck the vehicle traveling behind that witness. Thus, the collision was alleged to have occurred after the defendant crossed into the lane for opposing traffic and struck the other vehicle head on in that lane. CP 4-5.

On October 28, 2004, a First Amended Information was filed. It contained the exact same charging language as had been in the original

Information. The only change was the identified address of the defendant. CP 6.

On July 22, 2005, a Second Amended Information was filed, in which the defendant continued to be charged with one count of vehicular homicide and one count of vehicular assault. However, the charging language for vehicular assault now alleged that the defendant operated a vehicle in a reckless manner and/or operated a vehicle with disregard for the safety of others. CP 68.

A Third Amended Information was filed on November 8, 2005, pursuant to a plea agreement between the parties. CP 25. It maintained the two charges of vehicular homicide and vehicular assault. However, in the vehicular homicide charge, the allegation that the defendant had driven in a reckless manner was dropped, and so now the allegation was that the defendant had driven a vehicle a vehicle in disregard for the safety of others. The elimination of the alternative means

of "driving in a reckless manner" precluded the defendant from facing the higher standard sentencing range that would accompany conviction on that basis, as opposed to the alternative means of "driving a vehicle in disregard for the safety of others". RCW 9.94A.510 and RCW 9.94A.515.

Similarly, in the vehicular assault charge, the allegation that the defendant had driven in a reckless manner was dropped, and so the remaining allegation was that the defendant had driven a vehicle in disregard for the safety of others. The elimination of the alternative means of "driving in a reckless manner" in the vehicular assault charge not only made that charge consistent with the allegations in the vehicular homicide charge, but also provided additional support for the State's agreement to recommend the low end of the sentence range for the vehicular homicide charge. Thus, on 11-8-05, the same day the Third Amended Information was filed, the defendant entered guilty pleas to both counts pursuant to his

plea bargain with the State. CP 15-21.

In the defendant's Statement on Plea of Guilty, the defendant acknowledged he was entering his guilty pleas freely and voluntarily, and that he had discussed the Information with his attorney and understood the nature of the charges to which he was pleading guilty. CP 20. At the change of plea hearing on 11-8-05, defense counsel stated that he had met with the defendant and the defendant's family on numerous occasions, had discussed the case with them in a great amount of detail, and that he had reviewed the plea form with the defendant and believed the defendant understood what he was doing at the hearing. 11-8-05 RP 4-5.

The defendant stipulated to the court reviewing the prosecution's probable cause statement in order to establish a factual basis for the plea. The court then reviewed the Certification of Probable Cause outlined above. 11-8-05 Hearing RP 5, CP 4-5. The court found that the Certification did provide a factual basis for

the pleas. 11-8-05 Hearing RP 5.

A sentence hearing in this case was held on December 1, 2005. The State and defense presented a joint sentence recommendation for 26 months in prison on the vehicular homicide charge, which was the low end of the applicable sentence range, pursuant to the plea agreement between the parties. 12-1-05 Hearing RP 8-9. The court imposed a sentence of 26 months in prison for the vehicular homicide conviction, and a concurrent sentence of 12 months for vehicular assault. CP 36-44.

In an affidavit dated 12-13-05, and filed with the Thurston County Superior Court on 12-21-05, the defendant moved to withdraw his guilty pleas. He claimed that he had newly discovered evidence in the form of a new witness to the driving and the collision in this case. Along with the affidavit, the defendant filed a letter directed to the sentencing judge indicating he was attempting to get a statement from this new

witness. CP 47. See also Appendix A.

On January 26, 2006, the Honorable Superior Court Judge Gary Tabor considered the defendant's motion to withdraw his guilty plea. A statement had not yet been provided to the court from the new witness. The court denied the motion on the basis that there was an insufficient factual basis provided to support the defendant's request. 1-26-06 Hearing RP 4-5.

On December 20, 2006, the defendant filed a Notice of Appeal with regard to the convictions in this case. Then, on June 25, 2006, the defendant filed his personal restraint petition seeking the withdrawal of his guilty pleas and a trial in this cause.

III. RESPONSE TO ISSUES RAISED

1. The defendant has failed to show any manifest injustice in regard to his guilty pleas that would provide a basis for withdrawal of those pleas.

In order to obtain relief by means of a personal restraint petition, a petitioner has the

burden of showing either an error of constitutional magnitude that gives rise to actual prejudice, or a nonconstitutional error that inherently results in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Similarly, the standard for determining whether to permit withdrawal of a guilty plea is whether the defendant has shown that such a withdrawal is necessary to correct a manifest injustice. This is a demanding standard, and the defendant bears the burden of showing that he has suffered an injustice that is obvious, directly observable, overt, and not obscure. State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996).

In the context of a guilty plea, four indicia of manifest injustice have been recognized: (1) ineffective counsel; (2) a plea not ratified by the defendant; (3) an involuntary plea; or (4) a plea agreement not kept by the prosecution. State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). None of these has been claimed by the defendant in

this case. Indeed, the defendant does not allege any error in the court's acceptance of his guilty plea. Rather, he simply has indicated that he wishes to change his mind about pleading guilty because of having a new witness to counter the evidence summarized in the Certification of Probable Cause.

The defendant claims that, in pleading guilty, he never admitted guilt. However, it is quite clear that the defendant did not enter an Alford plea in this case. In the defendant's Statement on Plea of Guilty, there was a place to check off if he claimed he was not guilty but wished to plead guilty to take advantage of the State's plea offer. However, the defendant did not check that section. Instead, he checked the box above, indicating that instead of making a statement concerning his guilt, he wished to have the court review the prosecution's statement of probable cause to establish a factual basis for his plea. CP 20. The trial court found that the State's

Certification of Probable Cause established a factual basis for the defendant's guilty pleas, and the defendant has not suggested otherwise. 11-8-05 Hearing RP 5.

In support of the joint recommendation by the parties for the low end of the sentence range, defendant's counsel stressed to the sentencing judge that the defendant was being "accountable" for what happened in this incident wherein the defendant "did not exercise his best judgment". 12-1-05 Hearing RP 8. Defense counsel went on to assure the court that the defendant would carry with him for his entire life the "terrible guilt" he felt for what happened, and that the defendant was not minimizing what he had done. 12-1-05 Hearing RP 9.

When given the opportunity to speak, the defendant did not refute any of these things his counsel had told the court. Rather, he stated:

. . . I acknowledge that I did pass poor judgment, and I'm ready to get it over with and be sentenced and do my time.

12-1-05 Hearing RP 10. Thus, in this case the defendant acknowledged his guilt and took responsibility for the harm he had caused.

In State v. Arnold, 81 Wn. App. 379, 914 P.2d 762 (1996), Arnold sought to withdraw his guilty plea to several counts of fourth-degree assault based upon newly discovered evidence in the form of a recantation of one of his victims. The appellate court noted that Arnold had pleaded guilty instead of entering an Alford plea. In addition, there was a sufficient factual basis for Arnold's guilty plea even if the statements of the now recanting witness were deleted. Therefore, the appellate court held that Arnold had failed to demonstrate a manifest injustice that would justify a withdrawal of his guilty pleas. Arnold, 81 Wn. App. at 386-387.

In In re Personal Restraint of Crabtree, 141 Wn.2d 577, 9 P.3d 814 (2000), part of the relief Crabtree sought was to withdraw his guilty plea to one count of first-degree statutory rape based upon newly discovered evidence in the form of a

recantation of the victim. The Court of Appeals had denied this requested relief on two grounds: First, Crabtree had failed to show that the evidence could not have been discovered before trial by due diligence. Second, there was no merit to Crabtree's request to withdraw his plea because he had entered a guilty plea freely and voluntarily, and there was a factual basis for his plea. On review, the State Supreme Court upheld both of these bases for refusing Crabtree's request to withdraw his guilty plea. Crabtree, 141 Wn.2d at 588.

In the case of In re Personal Restraint of Clements, 125 Wn. App. 634, 106 P.3d 244 (2005), Clements had entered Alford pleas to residential burglary and fourth-degree assault. Clements had agreed that the court could review the State's certification of probable cause to determine whether there was a factual basis for his pleas. After Clements had been found guilty based on these pleas, the victim recanted some of her allegations.

The defendant then moved to withdraw his guilty pleas, but the trial court denied this request. Eventually, the matter was presented to the Court of Appeals as a personal restraint petition. Clements, 125 Wn. App. at 638, 643.

The Court of Appeals noted that a review of whether there were facts sufficient for a guilty plea must be confined to the record at the time of the plea. The court then determined that, even after deleting portions of the probable cause certification which had been retracted by the victim, there was a sufficient factual basis for Clements' guilty pleas. Because of this factual basis and because the trial court had not found the recantation reliable, the Court of Appeals held that the trial court had not abused its discretion in refusing to allow Clements to withdraw his guilty pleas. Clements, 125 Wn. App. at 643-644.

In the present case, the defendant entered guilty pleas freely and voluntarily, acknowledging a culpability he now denies. A factual basis for

the pleas was provided by a certification of probable cause which summarized the observations of three independent witnesses who provided a consistent picture of a defendant who acted with criminal disregard for the safety of others and thereby caused the harm alleged. There has been no showing of a manifest injustice in the court's acceptance of the defendant's guilty pleas, nor any error which would justify relief by a personal restraint petition.

2. The defendant has failed to show that the newly discovered evidence would probably change the result in this case.

When a defendant seeks a new trial based upon a claim of newly discovered evidence in a personal restraint petition, the defendant must establish that the newly discovered evidence (1) will probably change the result of the proceeding; (2) was discovered since the proceeding; (3) could not have been discovered before the proceeding by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The

absence of any one of these five factors is grounds for a denial of the relief requested. In re Personal Restraint of Stetson, 153 Wn.2d 137, 147, 102 P.3d 151 (2004); State v. Williams, 96 Wn.2d 215, 222-223, 634 P.2d 868 (1981).

The defendant has presented two affidavits in support of his claim of newly discovered evidence. One is his own affidavit setting forth the version of events he now asserts. This, of course, is not new evidence, as it was information available to the defendant before the change of plea. Thus, the new evidence consists of the existence of a new witness, Charles Godwin, who claims to have met the defendant for the first time on the "chain ride" to Shelton Corrections Center.

Godwin further claims that, while driving a stolen car, he happened to pull in behind the defendant just in time to see all of the driving at issue in this case, and then quickly disappeared before he could be identified as a witness. He contradicts the two witnesses who observed the

defendant make an unsafe and illegal pass. His version offers no explanation for the defendant's sudden loss of control over the vehicle he was driving. His affidavit further contradicts the third independent witness, who observed the defendant slide into the wrong lane of travel and strike the other vehicle. According to Godwin's account, the defendant never left his proper lane of travel, and for no apparent reason the other vehicle came into the defendant's lane of travel and struck the defendant's vehicle, even though it was the defendant who was out of control at that moment.

It is the defendant's burden to demonstrate that Godwin's testimony would probably change the result in this case. Other than make the conclusory statement that Godwin's testimony would do that, the defendant offers no explanation as to why that would be. Godwin's statement is contradicted by the other witnesses in all important respects. The circumstances of Godwin's

statement coming forward hardly inspire confidence in its reliability. While the information from the other witnesses was provided close in time to the event, Godwin's statement was made in December, 2005, a year and seven months after the collision, apparently after discussing the details with the defendant.

While the prosecution's probable cause statement did not detail the physical evidence in this case, it is reasonable to infer from the information provided that there would have been physical evidence of the collision observed and recorded by investigators that would either support the version supported by the three witnesses or Godwin's version. As the defendant notes in his affidavit, he and his passenger were still trapped in the vehicle when law enforcement arrived. Yet the defendant has made no effort to demonstrate that such evidence would do anything but contradict Godwin's claims.

As noted above, a defendant who seeks to

withdraw his guilty pleas has a heavy burden to satisfy the requirements for doing so. Branch, 129 Wn.2d at 641. This defendant has failed to satisfy that burden for two reasons: first, he has failed to establish that there was any manifest injustice with regard to his guilty pleas; second, he has failed to even make an effort to demonstrate that his newly discovered evidence would probably result in an acquittal at a trial.

IV. CONCLUSION

For the reasons set forth above, the State asks that this personal restraint petition be denied.

RESPECTFULLY SUBMITTED this 6th day of
November, 2006.

EDWARD G. HOLM
Prosecuting Attorney



JAMES C. POWERS/WSBA #12791
Deputy Prosecuting Attorney

APPENDIX

A

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

05 DEC 21 AM 11:24

BETTY J. GULLO, CLERK

BY DS DEPUTY

SUPERIOR COURT OF WASHINGTON

COUNTY OF Thurston

STATE OF WASHINGTON,
Plaintiff

No. 04+01916-1

AFFIDAVIT IN SUPPORT OF
MOTION OF WITHDRAWAL
OF GUILTY PLEA
C.R. 7.8, 4.2

Joshua Ice,
Defendant

Joshua Ice, pro se, affirms under the penalty of perjury

1. That I am acting pro se and make this affidavit in support of my motion to withdraw my guilty plea entered into the record on 8th day of November, 2005, in Thurston County Superior Court in the court of the Honorable Judge Hicks.

2. I pled guilty on 8th day of November, 2005 to the charge(s) of: vehicular Assault & vehicular Homicide.

3. I now claim that a manifest injustice occurred, the specific claims I now make are: _____

I took a plea based on Advice by My lawyer
along with having no powerful evidence or
witnesses that came forth before the plea
was taken. Now, a witness has stepped
forward, has new information about the
car accident, and is willing to testify.

4. At the time of acceptance of the plea agreement, I was questioned by the court as to whether or not I understood the effect of the guilty plea and as to whether I had the consultation of defense counsel. I now submit to the court that I did not fully understand the consequences of the plea agreement because of: Due to newly

discovered exculpatory evidence. I am
withdrawing my guilty plea.
Affidavit by witness to the crime.

5. I did/did not admit to committing the acts as charged. I now make the following statement

in support I took the plea based on advise
of my lawyer and the current evidence,
however, new evidence from an eye
witness has surfaced.

6. I, Joshua Ice should be permitted to withdraw my guilty plea since there existed only ambiguous expression of guilt coupled with a statement of the facts.

7 My colloquy with the court shows that I was in fact declaring my innocence despite my formalistic recitations of guilt. Under these circumstances, I should be allowed to withdraw my guilty plea and interpose a plea of not guilty.

I declare under the penalty of perjury that the forgoing is true and correct to the best of my knowledge Executed on 12/13/05 Pursuant to 28 U.S.C. ss. 1746.

Dated: 12/13/05


Signature

Joshua Ice
Printed Name

614 Nw Quincy Pl
Address

Chelalis wa 98532

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NO. 35180-3-II

STATE OF WASHINGTON)
IN THE COURT OF APPEALS
BY James C. Powers) OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
Respondent) DECLARATION OF
v.) MAILING
JOSHUA M. ICE,)
Petitioner)

STATE OF WASHINGTON)
COUNTY OF THURSTON) ss.

James C. Powers declares and affirms:

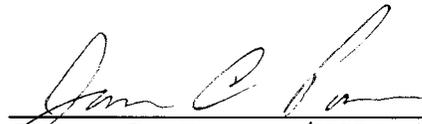
I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 6th day of November, 2006, I caused to be mailed to the appellant, JOSHUA M. ICE, and to Appellant's attorney in the direct appeal of this case, Thomas E. Doyle, a copy of the Respondent's Response to Personal Restraint Petition, addressing said envelopes as follows:

Joshua M. Ice
#889255
Monroe Corrections Center/WSRU
P.O. Box 777
Monroe, WA 98272

Thomas E. Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that the
foregoing is true and correct to the best of my
knowledge.

DATED this 6th day of November, 2006 at Olympia,
WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney