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COURT OF APPEALS
DIVISION II

No. 37918-01-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BY  DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

MARKUS C. WILLIAMSON,

Appellant/Defendant.

PIERCE COUNTY SUPERIOR COURT

CAUSE NO. 07-1-05870-4

THE HONORABLE KATHERINE M. STOLZ

Presiding at the Trial Court.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page(s)</u>
A. ASSIGNMENT OF ERROR.....	1
B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....	1
C. STATEMENT OF THE CASE.....	1-3
D. ARGUMENT.....	3-11
THE TRIAL COURT ERRED WHEN IT ACCEPTED MR. WILLIAMSON'S GUILTY PLEA TO FELONY HARASSMENT BECAUSE THE STATE FAILED TO ESTABLISH A FACTUAL BASIS FOR THE OFFENSE.	
E. CONCLUSION.....	11,12

TABLE OF AUTHORITIES

Washington Cases

Page(s)

In re Barr, 102 Wn.2d 265,684 P.2d 712 (1984).....7

State v. Alvarez, 74 Wn.App. 205,261,872 P.2d 1123
(1994), aff'd, 128 Wn.2d 1 (1995).....9

State v. Binkin, 79 Wn.App. 284,902 P.2d 673 (1995),
review denied, 128 Wn.2d 1015 (1996).....9

State v. C.G., 150 Wn.2d 604,80 P.3d 54 (2003).....9

State v. Keene, 95 Wash.2d 203, 622 P.2d 360 (1980).....6

State v. Mendoza, 157 Wash. 2d 582,141 P.3d 49 (2006).....10,11

State v. Newton, 87 Wn.2d 363,552 P.2d 682 (1976).....2,7,8

State v. S.M., 100 Wn.App. 401,996 P.2d 1111 (2000).....7

State v. Van Buren, 101 Wn.App. 206,2 P.3d 991 (2000).....8

State v. Walsh, 143 Wn. 2d 1,17 P.3d 591 (2001)..... 8,11

Washington Court Rules and Statutes

CrR 4.2.....6,7

RCW 9A.36.080.....1,2

RCW 9A.46.020.....1,8,9

TABLE OF AUTHORITIES (continued)

	<u>Page(s)</u>
<u>Washington Court Rules and Statutes (continued)</u>	
RCW 9A.36.041.....	1
RCW 9A.52.020.....	2
RCW 9A.52.080.....	2
RCW 9A.76.040.....	2
RCW 9A.76.180.....	2

Federal Cases

<i>Boykin v. Alabama</i> , 395 U.S. 238,89 S.Ct. 1709,23 L.Ed.2d 274 (1969).....	6
<i>McCarthy v. United States</i> , 394 U.S. 459,89 S.Ct. 1166,22 L.E.D. 2d 418 (1969).....	6
<i>North Carolina v. Alford</i> , 400 U.S. 25,91 S. Ct. 160, 27 L.Ed.2d 162 (1970).....	2,7

Constitutional Provisions

Washington State Constitution, Article 1, § 3.....	6
United States Constitution, Fourteenth Amendment.....	6

A. ASSIGNMENT OF ERROR

The record fails to establish that the police officers were placed in reasonable fear that Mr. Williamson would kill them, or that he understood the relationship between his conduct and the crime of felony harassment.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Is a guilty plea to felony harassment entered voluntarily where the defendant denies committing the crime and the court fails to establish the existence of the essential element of “reasonable fear?”

C. STATEMENT OF THE CASE

On November 20, 2007, the defendant/appellant was charged by Information with one count of malicious harassment,¹ two counts of felony harassment,² two counts of fourth degree assault,³ one count

1

RCW 9A.36.080 (1)(c)

2

RCW 9A.46.020 (2)(b), RCW 9A.46.020 (1) (a)(i)(b)

3

RCW 9A.36.041(1) and (2)

Williamson, Markus C. - Opening Brief COA No. 37918-0--II

of second degree criminal trespass,⁴ and one count of resisting arrest.

⁵. CP 1-4.

An Amended Information was filed on April 18, 2008. The Amended Information substituted the charge of first degree burglary⁶ for the previous charge of second degree criminal trespass, and added two counts of intimidating a public servant.⁷ CP 18-21.

On May 8, 2008, Mr. Williamson entered Alford/Newton⁸ pleas to one count of felony harassment and two counts of fourth degree assault, as charged in the Second Amended Information. CP 25-26, CP 28-36, CP 37-41, RP 5-8-08 3-10.⁹

4

RCW 9A.52.080 (1) and (2)

5

RCW 9A.76.040 (1)

6

RCW 9A.52.020 (1)(b)

7

RCW 9A.76.180 (1)

8

North Carolina v. Alford, 400 U.S. 25,91 S. Ct. 160, 27 L.Ed.2d 162 (1970),
State v. Newton, 87 Wn.2d 363,552 P.2d 682 (1976).

9

The Verbatim Report of Proceedings are unnumbered. They will be referred to by the date of the proceeding followed by the applicable page numbers.

Williamson, Markus C. - Opening Brief COA No. 37918-0--II

On May 29, 2008, the trial court imposed a low end standard range sentence of twenty-two (22) months in the Department of Corrections for the felony harassment conviction, and three hundred sixty-five (365) days suspended with twelve (12) months probation for the gross misdemeanor fourth degree assault convictions. The gross misdemeanor sentences were ordered to be served consecutive to the felony sentence. CP 44-45, CP 56-60, RP 5-20-08 p. 2-17.

D. ARGUMENT

**THE TRIAL COURT ERRED WHEN IT
ACCEPTED MR. WILLIAMSON'S GUILTY
PLEA TO FELONY HARASSMENT BECAUSE
THE STATE FAILED TO ESTABLISH A
FACTUAL BASIS FOR THE OFFENSE.**

Mr. Williamson initialed the following statement, which was written by his attorney, in his felony Statement of Defendant on Plea of Guilty:

I believe I am innocent of the charges, but after discussing the evidence with my attorney realize the likelihood of conviction is substantial and I want to take advantage of the prosecutor's offer because at the time of the incident I was off of my prescription medication, intoxicated, grieving for both my mother and sister who had recently died and I do not recall

much of what occurred.

CP 37-41.

The lower court record does not indicate what evidence or documents, if any, were used by the trial court to form a factual basis for Mr. Williamson's guilty plea. 5-8-08 3-10.

The Declaration for Determination of Probable Cause filed on November 20, 2007, however, states the following in its entirety:

On November 19, 2007, at approximately 1852 hours, Lakewood P.D. officers D. Tenney and E. Bell were dispatched to a disturbance at Gibbon and Sons Towing at 15408 Union Avenue S.W. in Lakewood. When they arrived they observed the defendant, MARKUS CHARLES WILLIAMSON, being held down by three men, including Gibbon & Sons employees B. Spencer and T. Darnell.

Officer Tenney ordered WILLIAMSON to give him his hands. WILLIAMSON did not comply and stated, "Fuck off." Officer Tenney stated he was a police officer and to do as instructed. WILLIAMSON still failed to comply. Officers Tenney and Bell then each grabbed an arm and forcibly placed WILLIAMSON in handcuffs. WILLIAMSON was ordered to stand up, but again he refused and had to be brought forcibly to his feet.

Spencer explained to the officers that WILLIAMSON had entered onto the business property, had become belligerent and had refused to leave. Mr. Spencer also explained that WILLIAMSON had punched him in the face. Mr. Spencer is

Williamson, Markus C. - Opening Brief COA No. 37918-0--II

African-American; WILLIAMSON is Caucasian. When the Officers then advised WILLIAMS he was under arrest, WILLIAMSON screamed at Mr. Spencer, "You black nigger, I'm going to kill you!" WILLIAMSON was told to stop making racial comments, but he replied, "Fuck you, I'll kill all niggers."

WILLIAMSON was taken to a patrol car, where he began to kick, spit and yell. He was placed in restraints, including a spit mask.

Mr. Darnell and Mr. Spencer explained as follows: WILLIAMSON had come onto the property from a Pierce Transit bus and began yelling at Mr. Darnell regarding towing his vehicle. Mr. Darnell asked WILLIAMSON to leave the property. WILLIAMSON refused. Mr. Darnell requested assistance from Mr. Spencer. WILLIAMSON then threw a punch at Mr. Darnell, connecting a glancing blow off Mr. Darnell's chin. When Mr. Spencer attempted to separate the two, WILLIAMSON punched Mr. Spencer in the face. Mr. Spencer and Mr. Darnell then took WILLIAMSON to the ground and waited for the police to arrive.

When officers returned to the patrol vehicle to transport WILLIAMSON to the jail, WILLIAMSON threatened to kill both Officer Tenney and Officer Bell. He made repeated threats to kill the officers, and also continued with his racial slurs.

CP 5-6.

Additionally, the Prosecutor's statement Re: Amended

Information states:

defendant has significant mental and health and substance abuse

Williamson, Markus C. - Opening Brief COA No. 37918-0--II

issues that, while not rising to level of a defense, do somewhat reduce culpability and present issue of diminished capacity.

CP 27.

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The requirement that a guilty plea be voluntary, knowing, and intelligent is not satisfied where a sufficient factual basis for the plea does not exist. *State v. Keene*, 95 Wash.2d 203, 622 P.2d 360 (1980).

CrR 4.2(d) provides “[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.” In order for a guilty plea to be truly voluntary “[t]he judge must determine ‘that the conduct which the defendant admits constitutes the offense charged in the indictment or information.’ *Keene*, 95 Wn.2d at 209, quoting *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.E.D. 2d 418 (1969). “Requiring this examination protects

Williamson, Markus C. - Opening Brief COA No. 37918-0--II

a defendant ‘who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that this conduct does not actually fall within the charge.’ State v. S.M., 100 Wn.App. 401,414,996 P.2d 1111 (2000).

The court’s duty to ensure that a guilty plea is knowingly, voluntarily, and intelligently entered is heightened when the defendant enters an Alford or Newton plea as did the defendant in this case. Under the decision in North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970), the United States Supreme Court held that a defendant who denies guilt may nonetheless enter a guilty plea if the court finds a factual basis for the plea.

A plea is voluntary under the Washington and federal constitution, and under CrR 4.2(d), only if the record shows that (1) there was a factual basis to support the charge; (2) the defendant understood the relationship between his conduct and the charge; and (3) the defendant believed that the evidence was sufficient to convict him of the charge. In re Barr, 102 Wn.2d 265,269-270,684 P.2d 712 (1984).

Finally, since pleas which are not knowingly, voluntarily, and intelligently entered violate a defendant's right to due process, they may be challenged for the first time on appeal. *State v. Van Buren*, 101 Wn.App. 206, 2 P.3d 991 (2000), *State v. Walsh*, 143 Wn. 2d 1, 17 P.3d 591 (2001).

In the case at bar, Mr. Williamson entered an *Alford/Newton* plea to the charge of felony harassment. To determine whether a factual basis exists the elements of the crime must first be examined. Under RCW 9A.46.020 (1)(a)(i) and (1)(b) a person is guilty of harassment if (1)(a) without lawful authority, the person knowingly threatens: (i) to cause bodily injury immediately or in the future to the person threatened or to any other person;. . . and (b) the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

A person who harasses another under RCW 9A.46.020(1)(a)(i) by a threat to kill is guilty of a class C felony. ¹⁰

¹⁰

RCW 9A.46.020(2)(b).

Under the plain language of RCW 9A.46.020 (1) and (2) therefore, not only a threat to kill is required, but also required is that the victim be placed in reasonable fear that such threat will be carried out. State v. C.G., 150 Wn.2d 604,80 P.3d 54 (2003). The essential element of “reasonable fear,” on the part of the victim, contains both a subjective and an objective component. State v. Binkin, 79 Wn.App. 284,292-293,902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996).

Here, no evidence was presented that police officers, D. Tenney or E. Bell, who were both named in the Information and Amended Information(s), experienced any actual fear that Mr. Williamson would kill them. The trial court’ duty in formulating its factual basis was to objectively determine whether the police officers’ fear that the threat to kill would be carried out was a reasonable fear. This objective standard required the trial court to “consider the defendant’s conduct in context and to sift out idle threats from threats that warrant the mobilization of penal sanctions.” State v. Alvarez, 74 Wn.App. 205,261,872 P.2d 1123 (1994), aff’d, 128 Wn.2d 1 (1995).

Williamson, Markus C. - Opening Brief COA No. 37918-0--II

In addition to the fact that no subjective fear was expressed by the police officers, from an objective standpoint no reasonable fear was established or even mentioned in the lower court record. The relevant context here was that Mr. Williamson, who was in an emotionally distraught state, lashed out at the police officers with verbal recriminations that included the idle threat to kill them and to kill “all niggers.” CP 27. While reprehensible, such language does not rise to the level of felony harassment as charged and pleaded to.

The essential element of reasonable fear was not established here under either a subjective or an objective standard. Moreover, the record fails to show that Mr. Williamson understood the nature of the felony harassment charge in the context of his own conduct, because there was simply no discussion of the matter on the record.

The State may argue that Mr. Williamson waived his right to challenge the validity of his guilty plea by failing to move to withdraw the plea at the trial court. See *State v. Mendoza*, 157 Wash. 2d 582, 141 P.3d 49 (2006). In *State v. Mendoza*, the Supreme Court held that the defendant waived his right to challenge the validity of his guilty

plea where he was informed of a sentencing mistake prior to the imposition of the sentence, and failed to move to withdraw the plea. *State v. Mendoza, Supra.* At 587. Contrastly, in *State v. Walsh*, the defendant was not advised of any error effecting his guilty plea or his available remedies until post-sentencing. The Supreme Court correctly held, therefore, that *Walsh* had not waived his right to present a challenge to the validity of his plea for the first time on appeal. See *State v. Walsh, Supra., State v. Mendoza, Supra.* RAP 2.5 (a)(3).

Here, Mr. Williamson was not advised that he could challenge the validity of his guilty plea. On the contrary, the trial court specifically told him he could not withdraw his plea. RP 5-8-08 8. Any waiver argument by the State must, therefore, fail.

E. CONCLUSION

For all of the foregoing reasons and conclusions, Mr. Williamson respectfully requests that this Court vacate his guilty plea.

RESPECTFULLY SUBMITTED this 16th day of January,

2009.

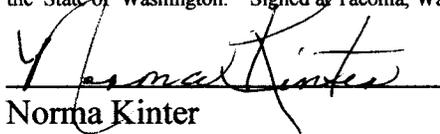


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CERTIFICATE OF SERVICE

The undersigned certifies that on January 16, 2009, I delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and by U.S. mail to appellant, Markus C. Williamson, DOC # 972049, Stafford Creek Corrections Center, 191 Constantine Way, G A - 23, Aberdeen, Washington 98502, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on January 16., 2009.



Norma Kinter

Williamson, Markus C. - Opening Brief COA No. 37918-0--II