

NO. 38237-7-II

FILED
COURT OF APPEALS
DIVISION II

09 JUN -2 PM 4: 29

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY  CLERK

STATE OF WASHINGTON, RESPONDENT

v.

SHALAMAR JANUARY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 07-1-05700-7

**Brief of Respondent
(to Consolidated Brief of Appellant and
Personal Restraint Petition)**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. (Appeal) Whether January's plea was voluntary where the alleged threats made against January and his family were not directed toward getting him to plead guilty, but were rather directed to recovering losses the person making the threat attributed to January?
2. (Personal Restraint Petition) Is the Petitioner's request that he be released from prison because he should have been incarcerated in the Pierce County Jail moot where he was released from custody on December 29, 2008?
3. (Personal Restraint Petition) The defendant's claim that he should have served his time in the Pierce County Jail rather than prison is without substantive merit where the minimum total sentence the court could impose was 12 months and a day, and the court imposed that sentence?

B. STATEMENT OF THE CASE.

1. Procedure

On November 7, 2007, Shalimar January was charged with two counts: Count I, Unlawful Possession of a Controlled Substance, Cocaine; and Count II, No Valid Operator's License. CP 1-2. These charges were based upon an incident that occurred on November 6, 2007. CP 1-2. On April 7, 2008, the State filed an Amended Information adding Count III, Bail Jumping, based upon the defendant's failure to appear in court on December 3, 2007. CP 7-8. On April 22, 2008, the State filed a Second Amended Information adding Count IV, Bail Jumping based, upon the defendant's failure to appear in court on April 8th, 2008.

The defense filed a Notice of Unwitting Possession Defense on June 24, 2008. CP 18-21. On June 5, 2008, the defendant, on his own behalf, filed in open court a motion to dismiss his defense counsel. CP 14-15. On July 7, 2008, the defendant, on his own behalf, filed in open court a motion to suppress evidence. CP 22-27.

The case proceeded to trial. Prior to jury selection, the defendant advised the court that he wished to proceed pro se and represent himself, “to a certain extent.” RP 07-07-08 p. 4, ln. 2-19. The defendant apparently felt that the attorneys were not pursuing his defense in the manner he wished. *See* RP 07-07-08, p. 4, ln. 2-3, ln. 16-19; p. 5, ln. 3-19; p. 8, ln. 20 to p. 9, ln. 15; p. 10, ln. 7-22; p. 36, ln. 20 to p. 38, ln. 18. At that time, the court denied the defendant’s request to proceed pro se. RP 07-07-08, p. 10, ln. 7-10. The court then held the CrR 3.5 hearing regarding the defendant’s statements to police, and the court decided to use that as an opportunity to also address the defendant’s pro se suppression motion. RP 07-07-08, p. 11, ln. 9 to p. 12, ln. 24; p. 32, ln. 11 to p. 35, ln. 18. The court admitted the statements and denied the suppression motion. RP 07-07-08, p. 34, ln. 16 to p. 35, ln. 19. The defendant again got upset that the case wasn’t being pursued as he believed it should be. RP 07-07-08, p. 35, ln. 19 to p. 39, ln. 10.

The defendant then abruptly changed course and asked the court to plead guilty because he could “see the writing on the wall.” RP 07-07-08, p. 39, ln. 11 to p. 40, ln. 20. After a recess, the defendant apparently no

longer wanted to plead guilty and was again interested in going to trial. RP 07-07-08, p. 40, ln. 20 to p. 42, ln. 7. The defendant then had a question about whether the court denied his motion, to which the court explained that it had, and explained the reasons why it did so. RP 07-07-08, p. 42, ln. 8 to p. 43, ln. 22. Jury voir dire was held. RP 07-07-08, p. 44, ln. 1-3. After voir dire, counsel for the defendant made a record about the defendant's conduct during voir dire and his concerns about future conduct by the defendant, and that he had "zero control" over the defendant. RP 07-07-08, p. 45, ln. 6. Defense counsel thought that given the defendant's problematic conduct, the defendant might be better served by representing himself rather than having defense counsel do so in order that the jury not hold his conduct against him.¹ RP 07-07-08, p. 45, ln. 7-14. After further lengthy interchange with the court, the defendant again renewed his request to represent himself, and the court told him to think about it overnight and recessed for the day. RP 07-07-08, p. 45, ln. 16 to p. 53, ln. 24.

The following morning, the defendant advised the court that he wished to change his plea to one of guilty. RP 07-08-08, p. 55, ln. 10 to p. 59, ln. 20. It was pursuant to the plea that the State filed a Third Amended

¹ The State cannot help noting that it speaks to the sorry state of our profession that it is assumed that conduct a jury would likely hold against a criminal defendant, would not be held against, and might even be expected of a trial attorney. Incidentally, nothing in this comment is personally directed at the defense attorney in this case who is well regarded for his professionalism.

Information that dismissed the misdemeanor charge of No Valid Operator's license. CP 28-29.

The defendant then proceeded to plead guilty before the court. RP 08-08-09, p. 59, ln. 2 to p. 67, ln. 6. As part of the plea colloquy when the court asked the defendant if anyone had made any threats to get him to plead guilty, he initially did not respond. RP 07-08-08, p. 64, ln. 8-10. The court then asked him again if anyone had threatened him to get him to plead guilty. RP 07-08-08. The defendant responded with the question, "Somebody in the courtroom? Somebody in the courtroom you talking about?" RP 07-08-08, p. 64, ln. 12-13. The court clarified, that it didn't have to be someone in the courtroom, and did anyone say they would do something bad to the defendant unless he pleaded guilty. RP 07-08-08, p. 64, ln. 14-16. At that, the defendant nodded affirmatively and upon inquiry revealed that the person who owned the car he was driving in the underlying incident had threatened him. RP 07-08-08, p. 64, ln. 17-24. Upon further inquiry by the court, the defendant claimed that the owner of the car had drugs and money in the trunk, and that once the vehicle was impounded he wanted the drugs and money returned. The third party therefore threatened the defendant and his family, and told the defendant that he better not get out of jail, and that the defendant had better have the vehicle owner's money. RP 07-08-08, p. 64, ln. 24 to 65, ln. 20.

The court then went on to clarify that it was making a determination as to whether the defendant was pleading of his own free will. RP 07-08-08, p. 65, ln. 22-24. The court further clarified and asked whether anyone had threatened him and said he had to plead guilty. RP 07-08-08, p. 66, ln. 7-9. The defendant answered that no one had. RP 07-08-08, p. 66, ln. 10. Then when asked if he was pleading of his own free will, the defendant stated that he was. RP 07-08-08, p. 66, ln. 18. He then pleaded guilty to each of the counts. RP 07-08-08, p. 66, ln. 19 to p. 67, ln. 2.

2. Facts

The underlying facts of the case are irrelevant where the issues raised are all procedural and no trial occurred.

However, to provide some context, the following facts are taken from the probable cause declaration. Against a red light, the defendant drove into an intersection and then stopped in the middle of it. The officer, who was behind the defendant stopped and contacted the defendant. Upon contact, the defendant stated that he did not have a valid driver's license and that he did not have any identification on his person. The officer then arrested the defendant and a search revealed a long thin metal rod that the officer recognized as being commonly used as a tool to smoke crack cocaine, and an off white rock substance that field-tested positive [as cocaine].

C. ARGUMENT.

1. (Appeal) THE DEFENDANT'S PLEA WAS VOLUNTARY WHERE THE ALLEGED THREATS SOUGHT TO RECOVER MONEY AND CONTROLLED SUBSTANCES, NOT TO COERCE THE DEFENDANT TO PLEAD GUILTY.

Where a defendant has previously pleaded guilty, and in doing so has admitted in open court that the plea was voluntary, the defendant has a heavy burden to convince the court that the plea was in fact coerced. *State v. Frederick*, 100 Wn.2d 550, 558, 674 P.2d 136 (1983). When, at the time of the plea, the defendant denies that the plea was coerced, that denial is highly persuasive, although it is not in and of itself conclusive.

Frederick, 100 Wn.2d at 557. See also, *Frederick*, 100 Wn.2d at 554 (discussing federal standards, and citing *Blackledge v. Allison*, 431 U.S. 63, 75, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977); *Fonaine v. United States*, 411 U.S. 213, 214-15, 93 S. Ct. 1461, 36 L.Ed.2d 169 (1973)(*per curiam*); *Camillo v. Wyrick*, 640 F.2d 931, 935 (8th Cir. 1981).

The court may permit withdrawal of a guilty plea whenever it appears that withdrawal is necessary to correct a manifest injustice. *State v. Ross*, 129 Wn.2d 279, 283, 916 P.2d 405 (1996) (citing CrR 4.2(f)). (Compare the manifest injustice standard of CrR 4.2(f) with RAP 2.5(a)(3) (discussing errors raised for the first time on review that are manifest

errors affecting a constitutional right); *see also*, ***State v. Walsh***, 143 Wn.2d 1, 7, 17 P.3d 591 (2001), discussing 2.5(a)(3) in the context of CrR 4.2(f).

‘The defendant bears the burden of proving manifest injustice, defined as “obvious, directly observable, overt and not obscure.”’ ***Ross***, 129 Wn.2d at 283-84 (citing ***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))). The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed. ***Walsh***, 143 Wn.2d at 8.

Here, the defendant’s claim is without merit because the alleged threats did not attempt to coerce the defendant to plead guilty. Even if true, the threats were generalized threats conveying the vehicle owner’s hostility to the defendant and attempting to coerce the defendant to reimburse the vehicle owner for money and drugs, the loss of which the vehicle owner blamed on the defendant. The defendant admitted as much when he acknowledged to the court that no one had threatened him and said he had to plead guilty. RP 07-08-08, p. 65, ln. 13-20; p. 66, ln. 7-18.

Here, the defendant has put forth no evidence other than the record of the plea. Because the record shows that the plea was voluntary, he fails to meet his burden, and the defendant's claim should be denied without merit.

By the defendant's own admission, the alleged threats were not directed toward getting him to plead guilty, but to obtaining reimbursement. RP 07-08-08, p. 64, ln. 20 to p. 65, ln. 20; p. 66, ln. 7-18. Because the alleged threats only expressed the third party's hostility toward the defendant, and their only objective was to obtain compensation for money and controlled substances that the third party believed the defendant cost him, the plea was not coerced and the defendant's claim should be denied without merit.

2. (Personal Restraint Petition) THE RELIEF THE DEFENDANT SEEKS OF BEING INCARCERATED IN THE PIERCE COUNTY JAIL RATHER THAN PRISON IS MOOT WHERE THE DEFENDANT WAS RELEASED FROM CUSTODY ON DECEMBER 29, 2008.

A case is moot if the court can no longer provide effective relief. *See In re Cross*, 99 Wn.2d 373, 377, 622 P.2d 828 (1983) (citing *State v. Turner*, 98 Wn.2d 731, 658 P.2d 658 (1983)). Courts will generally not consider a moot case unless it involves matters of continuing and

substantial public interest. *See In re Cross*, 99 Wn.2d at 377. The court looks to three factors to determine whether a sufficient public interest is involved: 1) the public or private nature of the question presented; 2) the desirability of an authoritative determination which will provide future guidance to public officers; and 3) the likelihood the question will recur. *In re Cross*, 99 Wn.2d at 377. None of these factors warrant further consideration of this issue by the court.

The defendant asks to be released from confinement and claims that he was told that if he pleaded guilty he would only receive jail time, not prison time. *See Personal Restraint Petition*, p. 4-5. He more specifically claims that he was only to receive a sentence of 12 months, not 12 months and a day. *Personal Restraint Petition*, p. 4, para. 2.

Here, the defendant completed his period of incarceration and was released on December 29, 2008. *See*, Appendix A (Affidavit of Deniese Kenfield.). Accordingly, at this point the court cannot provide the relief sought or any other effective relief and the petition should be denied.

3. (Personal Restraint Petition) THE DEFENDANT’S CLAIM THAT HE SHOULD HAVE SERVED HIS TIME IN THE PIERCE COUNTY JAIL RATHER THAN PRISON IS WITHOUT SUBSTANTIVE MERIT WHERE THE MINIMUM TOTAL SENTENCE THE COURT COULD IMPOSE WAS 12 MONTHS AND A DAY AND THE COURT IMPOSED THAT SENTENCE.

As indicated above, the defendant claims asks to be released from custody, claiming that he was told he would receive a 12 month sentence, not a sentence for 12 months plus a day.

The Statement of Defendant On Plea of Guilty lists the sentence ranges respectively as 6+ to 18 months, 12+ to 16 months, and 12 to 16 months.² CP 31, 39. The prosecutor’s recommendation is listed as “unknown at this time”. See, CP 33. This was because the defendant unexpectedly decided to plead guilty, and the attorneys were unsure of the defendant’s criminal history or offender score. RP 07-08-08, p. 58, ln. 17 to p. 59, ln. 4. The defendant indicated that he just wanted to plead guilty, and that he understood the recommendation was unknown. RP 07-08-08,

² The standard range for the final bail jumping count incorrectly listed the standard range as 12 to 16 months. This was a scrivener’s error as it should have been 12+ months, which is how the other count of bail jumping was correctly listed. However, this error was a scrivener’s error. See, *State v. Mayer*, 128 Wn. App. 694, 702-03, 708, 117 P.3d 353 (2005). The error, in addition to not being raised by the defendant, is also harmless where the other bail jumping count correctly listed the range as 12+ to 16 months, so that the minimum total sentence the court could impose was 12+ months.

p. 56, ln. 20; p. 59, ln. 22-25. The court also advised January that the standard range on the bail jumping count was 12+ to 16 months, and January indicated that he understood that. RP 07-08-08, p. 61, ln. 14-19.

At sentencing, for all three counts the defendant had an offender score of 4. CP 45, para. 2.3. Count I was a level I drug offense, while counts II and III were level III offenses on the standard grid.³ CP 45, para. 2.3; RCW 9.94A.518; RCW 9.94A.515. Thus, the standard range for Count I was 6+ to 18 months. RCW 9.94A.517. The Standard range for Counts II and III was 12+ to 16 months. RCW 9.94A.510. Here the court imposed sentences of 12+ months on all three counts, with a combined total sentence of “12 months + one day.” CP 48. That sentence could only be served in a state facility or institution and could not be served in jail. *See*, RCW 9.94A.190.

³ Scrivener’s errors also occurred as to the numbering of the counts on both the Statement of Defendant on Plea of Guilty and on the Judgment and Sentence. This was because Count II had been dismissed. On the Third Amended Information, the counts were listed as I, Unlawful Possession of a Controlled Substance; III, Bail Jumping; and IV, Bail Jumping. On the pre-printed plea form, the count III, Bail Jumping was entered in the pre-printed box for Count “2” and the count number was not corrected. CP 31. On the Judgment and Sentence, the counts were incorrectly listed as Counts I, II and III, respectively. CP 44, 45, 48. Again, the defendant has raised no challenge to these scrivener’s errors

D. CONCLUSION.

The defendant's plea was voluntary where the alleged threats were, as the defendant acknowledged, not directed toward coercing a plea, but rather, toward recovering money and drugs for the vehicle owner, and where even the defendant said the plea was made voluntarily. The defendant's request that he be released from custody because his sentence should have been served in jail, not prison, is moot where the defendant has already been released from custody. That claim is also without merit where the defendant's plea paperwork indicates that he would receive a sentence of at least 12 months and a day on at least one count. For these reasons, the defendant's appeal and personal restraint petition should be denied as without merit.

DATED: June 8, 2009.

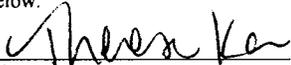
GERALD A. HORNE
Pierce County
Prosecuting Attorney



STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

6/8/09 
Date Signature

APPENDIX “A”

Affidavit

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CHOOSE COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHALIMAR JANUARY,

Appellant.

NO. 38237-7-II

AFFIDAVIT DENIESE KENFIELD

STATE OF WASHINGTON)

COUNTY OF PIERCE) : ss.

The undersigned, being first duly sworn upon oath, deposes and says:

1. That I am a Legal Assistant currently employed by the Pierce County
Prosecutor's Office.

2. That my current duties primarily involve the compilation of defendant
criminal histories. In that capacity, I have access to and regularly use the Department of
Correction's Felony Offender Reporting System (FORS).

3. FORS includes data on a defendant's custody status with the department of
corrections, including whether the defendant is incarcerated in prison, or jail, and if

1 released whether the person is supervised or unsupervised. The FORS system also
2 indicated the dates when these various changes in status have taken place. Attached to this
3 declaration are two Attachments which are printouts of information from the FORS
4 system. Attachment A is the general information on Shalimar January. Attachment B
5 includes the "Movement History" which is the incarceration history for Shalimar January.
6 I have reviewed both the information on the screen and these printouts. Attachment B
7 indicates that Shalimar January was released from prison custody on December 29, 2008
8 and has been on supervised status since that time to the present.

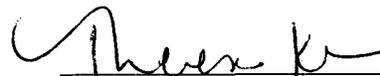
9 Further your affiant sayeth naught.

10
11 
12 DENIESE KENFIELD

13 SUBSCRIBED AND SWORN to before me this 5th day of June, 2009.



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NOTARY PUBLIC, in and for the
State of Washington, residing
at Secluded Was
My Commission Expires: 10-15-09

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or
ABC-LMI delivery to the attorney of record for the appellanta and appellant
c/o his or her attorney or to the attorney of record for the respondent and
respondent c/o his or her attorney true and correct copies of the document to
which this certificate is attached. 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 the date below.

6-5-09 
Date Signature

09 JUN -8 PM 4:29
STATE OF WASHINGTON
BY  DIVISION II
COURT OF APPEALS

Attachment A



FORS

SUPERVISED: JANUARY, Shalamar



Home

Search For An Offender

| | | | |
|-------------|-------------|-----------------|-----------------------|
| DOC Number: | SID Number: | Current Status: | Current Location: |
| 728908 | WA16465035 | SUPERVISED | Parkland South Office |

Offender

General Information

General Information

Confidential Offender Information

Conviction Information (Law Enforcement Only)

Board, Court and DOC Imposed Conditions

Offender Movement History

DOC Sex / Kidnap Offender Registration Information

| Aliases | Dates Of Birth | Languages | |
|-----------------------------|----------------|----------------------|-------------------|
| JENKINS, Robert | 9/26/1948 | Comprehends English? | Spanish Speaking? |
| HAMILTON, JANUARY, Shalamar | 10/11/1955 | Y | N |
| HAMILTON, JANUARY, Shalamar | | | Hispanic Origin? |
| HAMILTON, JANUARY, Shalamar | | | N |
| OWENS, Tony H | | | |

Help

FORS User's Guide (.pdf)

Personal Characteristics

| | | | |
|-----------------------|---------------------------|---------------------------|-------------|
| Age: | Gender: | Height: | Weight: |
| 60 | Male | 5'06 | 190 |
| Race (Self-Reported): | Skin Complexion: | Eye Color: | Hair Color: |
| Black | Black | Brown | Gray |
| DNA Test Required? | Blood Drawn For DNA? | Scars, Marks And Tattoos: | |
| N | Y | | |
| Sex Offender? | Serious Violent Offender? | | |
| NO | NO | | |

Attachment B



FORS

SUPERVISED: JANUARY, Shalamar



Home

Search For An Offender

DOC Number: 728908 SID Number: WA16465035 Current Status: SUPERVISED Current Location: Parkland South Office

Offender

Offender Movement History

General Information

Confidential Offender Information

Conviction Information (Law Enforcement Only)

Board, Court and DOC Imposed Conditions

Offender Movement History

DOC Sex / Kidnap Offender Registration Information

CCO: Frank, William CCO Telephone: (253)983-7134 CCO Location: Parkland South Office
 Latest Projected Release Date: Last Release From: Airway Heights Corrections Center

Movement History

| Status | Date | Status | Date | Status | Date |
|-------------|--------------|--------|------|--------|------|
| SUPERVISED | 12/29/2008 | | | | |
| | - PRESENT | | | | |
| PRISON | 7/29/2008 - | | | | |
| | 12/29/2008 | | | | |
| NO WA DOC | 1/22/2004 - | | | | |
| JURIS | 7/29/2008 | | | | |
| | 1/07/2003 - | | | | |
| SUPERVISED | 1/22/2004 | | | | |
| | 11/01/2002 | | | | |
| UNAVAILABLE | - 1/07/2003 | | | | |
| NO WA DOC | 10/05/2001 | | | | |
| JURIS | - 11/01/2002 | | | | |
| | 5/30/2001 - | | | | |
| SUPERVISED | 10/05/2001 | | | | |
| | 5/15/2001 - | | | | |
| UNAVAILABLE | 5/30/2001 | | | | |
| | 9/16/1998 - | | | | |
| SUPERVISED | 5/15/2001 | | | | |
| | 12/09/1997 | | | | |
| PRISON | - 9/16/1998 | | | | |

Help

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