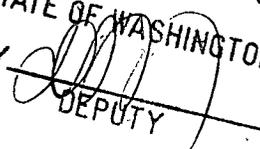


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 43159-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

ROBERT CHARLES KINNAMAN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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BY:



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RESPONDENT'S COUNTER STATEMENT OF THE CASE

The defendant was charged by Information on January 11, 2012, with Attempt to Elude a Police Vehicle RCW 46.61.024. The information contained a supplemental allegation that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the defendant. RCW 9.94A.834. RCW 9.94A.533(11)(CP 1-3). A warrant of arrest was issued. The warrant was supported by a declaration which set forth the following facts. (CP 38-41).

January 10, 2012, Deputy Schrader of the Grays Harbor County Sheriff's Department was on patrol, in uniform, in a marked police vehicle equipped with emergency lights and sirens. Schrader was looking for the defendant who had outstanding warrants. Schrader observed the defendant's vehicle being operated in Westport, Grays Harbor County, Washington. When Schrader pulled in behind the vehicle, it sped off.

Eventually, the vehicle slowed down to 10 mph and the passenger jumped out of the vehicle. Thereafter, a high speed pursuit ensued. The defendant's vehicle traveled in both lanes of travel causing pedestrians and other vehicles to have to move off the roadway. Eventually, the pursuit continued at speeds of approximately 100 mph, through a Department of Transportation construction zone that was active on State Route 105. Flaggers stopped traffic in both directions as Deputy Schrader pursued the defendant through the construction zone. Eventually, the vehicle passed a

school bus in a no passing zone. At one point the vehicle turned abruptly and drove directly toward the deputy's patrol vehicle. The vehicle eventually drove into the brush and the defendant ran off on foot. Schrader caught up with the driver, who he identified as the driver, and placed him under arrest.

The defendant was arraigned on January 17, 2012. (RP 3-5). The defendant appeared on February 6, 2012, and entered a plea of guilty to the original charge, Attempting to Elude a Pursuing Police Vehicle, and admitted that there were facts to support the sentence enhancement. The defendant was specifically told by the Court that there was a sentence range of 14 to 18 months plus a 12 month enhancement for a total sentence range of 26 to 30 months. (RP 6-7). The defendant affirmed that he had reviewed and understood the terms of the plea agreement and that he had signed it. (RP 7-8, CP 13-17). The Court found the plea agreement to be consistent with the interests of justice and prosecutorial standards. (RP 8).

The defendant affirmed that he had reviewed that Statement of the Defendant of Plea of Guilty and discussed it with his attorney (CP 4-12). The defendant told the Court that he understood it. (RP 8). The Court was informed that the defendant wished to apply for Drug Offender Sentencing Alternative or work ethic camp, but that he may not be eligible because of a prior assault. This matter was reviewed with the defendant by the Court and the defendant affirmed that he wished to plead guilty nevertheless. (RP 8-10). The Court found that the defendant made a knowing intelligent

waiver of his rights. The defendant entered a plea of guilty. (RP 11-12). The defendant, by his own words, while addressing the Court, set forth the factual basis for both the underlying charge and the sentence enhancement. (RP 12-14).

At sentencing, counsel for the defendant argued that the imposition of the sentence enhancement should be discretionary with the Court. (RP 18-20). The defendant addressed the Court and claimed that there was no factual basis for the sentence enhancement because the DOT workers were not afraid. (RP 20-22). The Court found that the defendant had admitted the aggravating circumstance at the time of his guilty plea and imposed a sentence of 30 months. (RP 22-23).

RESPONSE TO ASSIGNMENTS OF ERROR

The defendant made a knowing and intelligent admission to the special allegation. (Response to Assignment of Error 1, 2, 4, 5)

Although it is difficult to tell, the defendant is apparently not challenging his plea of guilty to the underlying charge but the defendant asks only that this court vacate the sentence enhancement. (Brief of Appellant, P. 23). Presumably, this means that the defendant admits that he made a knowing and intelligent plea of guilty to the charge of Attempt to Elude and that there was a factual basis for that plea. In fact, he admitted the elements of the offense to the court. (RP 12-13). The issue the defendant presents herein is whether he had an understanding of the

nature of the elements of the sentence enhancement and whether he made a knowing and intelligent admission to the sentence enhancement. Once again, the court told him the specific elements required to prove the enhancement. The defendant admitted facts to establish endangerment to others. (RP 13-14).

Due process does require that a defendant be apprised of the nature of the offense in order for a plea of guilty to be accepted as knowing, intelligent, and voluntary. State v. Osborne, 102 Wn.2d, 87, 92-93, 684 P.2d 683 (1984). In order to find that there has been voluntary admission as to the sentence enhancement, this Court need only find that the defendant was aware of the acts necessary to prove the sentence enhancement. State v. Holsworth, 93 Wn.2d, 148, 153 n.3, 607 P.2d 845 (1980).

It is difficult to understand what more the Court should have told the defendant. The State informed the Court, in the presence of the defendant, that the information contained an allegation that persons other than the defendant were endangered by his driving. (RP 6). Counsel for the defendant acknowledged, in the presence of the defendant, that there was a 12 month sentence enhancement that could be imposed if other individuals were "... were put in jeopardy by him committing the act of Eluding from a Pursuing Police Motor Vehicle." (RP 6). The defendant acknowledged that he consulted with his attorney about this matter. (RP 7).

The defendant specifically admitted to the operation of a motor vehicle in a “reckless manner and gave supporting facts to the court. (RP 12-13). The defendant was specifically asked whether he admitted the circumstances of the enhancement. The defendant acknowledged that the pursuit had gone through a construction site where workers were present. (RP 13-14):

THE DEFENDANT: Yes, Your Honor. There was a construction site going on - there was construction going on the highway and I went through the construction site and I guess the individuals that were working, the flaggers were pretty distraught about it, so yeah.

THE COURT: -- so they were flagging a construction site and you were trying to elude and you ran right through, is that --

THE DEFENDANT: On the first time through I ran through there it and when I came back I didn't run through it, I took a side road.

MR. FULLER: There were DOT workers doing road work.

THE COURT: All right.

MR. FARRA: Mr. Fuller did provide those and I --

THE DEFENDANT: Yeah.

MR. FARRA: -- I went over them with Mr. Kinnaman, that it was --

THE DEFENDANT: And Since they were afraid, yeah, I guess I did that so . . .

THE COURT: All right.

THE DEFENDANT: I pled guilty to that, too.

THE COURT: Okay. All right. And you did sign this then after carefully read - read everything and understood everything?

THE DEFENDANT: Yes, sir.

The record before the Court provided a factual basis for both the criminal charge and the sentence enhancement. In particular, the Court had the declaration in support of the warrant of arrest that had been issued by the Court. The defendant drove his motor vehicle at a speed of about 100 mph through an active construction zone on State Route 105 (CP 38-41). The Court also had the defendant's admission that he "ran over" the passenger who jumped from the vehicle as the pursuit began. (RP 12).

A factual basis is sufficient to support a guilty plea if there is sufficient evidence for a jury to conclude that the defendant is guilty. In Re: Personal Restraint Petition of Ness, 70 Wn.App. 817, 824, 855 P.2d 1191 (1993) review denied 123 Wn.2d 1009 (1994). This may be established by the admissions of the defendant. State v. Hennings, 34 Wn.App 843, 845-46, 664 P.2d 10 (1983). The trial court, however, is not limited to the defendant's admissions in his statement of defendant on plea of guilty to determine the factual basis. The trial court may rely on any reliable source, as long as the source is made part of the record. State v. Elmore, 139 Wn.2d 250, 262-263, 985 P.2d 289 (1989). This includes the declaration of probable cause.

In the case at hand, as indicated previously, the defendant did, by his own admissions, establish that he knew the elements of the sentence enhancement. He acknowledged that he drove at high speed through a construction zone. This acknowledgment is supported by the declaration in support of the warrant of arrest on file.

In the end, what the defendant is claiming now is that he shouldn't have pled guilty. He is claiming that perhaps witnesses at trial, who were working in the construction zone, may not have been afraid. (RP 21). That is not the issue. The issue is whether by his conduct, driving through a construction zone at 100 mph, that he endangered others. There is a factual basis for such a finding. The defendant admitted this at the time of plea of guilty. His change of heart does not mean that he's entitled to withdraw his admission to the supplemental allegation.

The defendant may withdraw his admission only if it is necessary to correct a "manifest injustice" CrR 4.2(f). The Courts have determined the circumstances that may establish a "manifest injustice." The defendant's change of heart is not included. State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

This assignment of errors without merit.

The sentence enhancement does not violate double jeopardy. (Response to Assignment of Error 3)

In order to convict a defendant of Attempt to Elude, the State must prove beyond a reasonable doubt that the defendant operated a motor vehicle "in a reckless manner." While this term is not defined by statute, the Supreme Court has established the proper meaning of this phrase. State v. Roggenkamp, 153 Wn.2d 614, 621-22, 106 P.3d 196 (2005):

However, through a series of decisions by this Court, a definition of the term "in a reckless manner" for purposes of the

vehicular homicide and vehicular assault statutes has evolved and is now well settled. This evolution culminated in our decision in State v. Bowman, 57 Wn.2d 266, 270, 271, 356 P.2d 999 (1960), in which we indicated that driving “in a reckless manner” means “driving in a rash or headless manner, indifferent to the consequences”

This standard is a lesser standard than the definition of reckless driving contained in the motor vehicle code. This standard does not require “willful or wanton disregard of the safety of persons or property.” State v. Hunley, 161 Wn.App. 919, 926, 253 P.3d 448 (2011); State v. Ridgley, 141 Wn.App. 771, 782, 174 P.3d 105 (2007). The phrase “in a reckless manner” has the same meaning in both the vehicular assault and vehicular homicide statutes as it does in RCW 46.61.024. Ridgley, supra. As the Court Ridgley pointed out, RCW 46.61.024 was amended in 2003 to adopt the “reckless manner” standard for attempting to elude. The legislature specifically struck the previous language requiring that a motor vehicle be driven in a manner “indicating a wanton or willful disregard for the lives or property of others.” Laws of 2003, Ch. 101, § 1.

Accordingly, the elements of the enhancement are different from the elements of the crime. The defendant has not been punished twice for the same conduct. There can be no double jeopardy violation State v. Calle, 125 Wn. 2d 769, 888 P.2d 155 (1995). Furthermore, the imposition of the sentence enhancement does not violate double jeopardy, even if proof of the sentence enhancement necessarily involves proof of an

element of the crime charged. State v. Kelley, 168 Wn.2d 72, 226 P.3d 773 (2010).

This Court need only consider whether the legislature intended cumulative punishment. Kelley, supra, 168 Wn.2d at P. 78. The answer is apparent. To commit the crime of Attempt to Elude a person need only to operate a vehicle in a rash or headless manner without regard to the consequences. The enhancement requires additional proof, proof of endangerment to individuals other than the officer or the defendant.

This assignment of error must be denied.

**The Defendant's plea of guilty and sentence enhancement are not severable.
(Response to Assignment of Error 6)**

In support of the defendant's claim that he is entitled to sever the special allegation from the predicate offense, the defendant asserts that the sentence enhancement violates double jeopardy. The defendant claims, therefore, that this court should remand the matter and direct that he be sentenced for the underlying offense without the sentence enhancement.

The sentence enhancement does not violate double jeopardy. As indicated previously, the elements of the sentence enhancement are in addition to the elements necessary to prove the elements of the criminal offense. An individual may operate a motor vehicle "in a reckless manner" and be guilty of Attempt to Elude without endangering individuals other than the police officer and himself. Also, as stated previously, even if the proof of the sentence enhancement necessarily

involved proof of an element of a crime charged, double jeopardy is not violated. Kelley, supra.

The State does acknowledge that there was a mutual mistake concerning the length of the sentence enhancement. The plea agreement included and the court imposed a 12 month sentence enhancement when, in fact, the statute calls for a sentence enhancement of one year and one day. RCW 9.94A.834. The State further acknowledges the holding of State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006). A plea of guilty will be deemed involuntary and a defendant, even though he did not challenge the factual error at sentencing, may later, on direct appeal, challenge the error and be entitled to withdraw his guilty plea. The defendant's misunderstanding of the sentencing consequences is apparently a "manifest error affecting a constitution right" even though, for instance, the standard range turned out to be lower than he was told at sentencing. Mendoza, supra, 157 Wn.2d at page 589.

In Mendoza the parties erroneously included a juvenile conviction as part of the offender's score calculation. At sentencing this error was discovered, lowering the standard range. The defendant was sentenced pursuant to the lower standard range. Nevertheless, the Supreme Court held that the defendant was misinformed and that his plea was involuntary. Most other cases involve the situation in which the mutual mistake of fact resulted in consequences that were more onerous to the defendant. State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001) (wrong offender score resulted

in higher standard range); In Re Personal Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (parties failure to include a term of community placement).

The State is unaware of a case involving a situation in which the miscalculation only involved the term of the sentencing enhancement and is certainly not aware of any case in which there was a miscalculation of only one day. That being said, there is still no authority for this defendant to pick and choose what part of the plea of guilty he wishes to accept and what part he now wishes to reject. This was all one plea of guilty.

Personal Restraint of Bradley, 165 Wn.2d 934, 941-942, 205 P.3d 123 (2009).

If this court determines that the defendant was misinformed about the consequences of his plea of guilty because of the mistake concerning the length of the term of the enhancement, then the defendant has the option of either demanding specific performance of the entire plea offer or withdrawal of both his guilty plea to the criminal charge and his admission to the sentence enhancement. State v. Miller, 110 Wn.2d 528, 536, 756 P.2d 122 (1988). Here, the defendant received the benefit of the bargain. His only real option is to withdraw the entire plea.

A plea agreement is a “package deal.” The plea agreement in this matter contemplated the plea of guilty to the criminal charge and to the sentence enhancement. It is not severable. State v. Smith, 137 Wn.App.

431, 438, 153 P.3d 898 (2007); State v. Turley, 149 Wn.2d 395, 69 P.3d 338 (2003).

CONCLUSION

The State asks that the conviction and sentence enhancement be affirmed.

DATED this 6 day of September, 2012.

Respectfully Submitted,

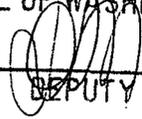
By: Gerald R. Fuller
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Chief Criminal Deputy
WSBA #5143

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

No.: 43159-9-II

v.

DECLARATION OF MAILING

ROBERT CHARLES KINNAMAN,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 6th day of September, 2012, I mailed a copy of the Brief of Respondent to Jordan B. McCabe, McCabe Law Office, PO Box 7424, Bellevue, WA 98008, by depositing the same in the United States Mail, postage prepaid.

I 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 and belief.

DATED this 6th day of September, 2012, at Montesano, Washington.

Barbara Chapman