

NO. 45795-4-II/CONSOL W/45868-3-II

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

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BOBBY S. ZIMMERLE,

Appellant.

RESPONDENT'S BRIEF

**SUSAN I. BAUR
Prosecuting Attorney
SEAN BRITTAIN/WSBA 36804
Deputy Prosecuting Attorney
Representing Respondent**

**HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080**

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I. ISSUE PRESENTED

1. Did the trial court violate the Appellant's right to self-representation?
2. Did the trial court err in denying the Appellant's motion to withdraw his guilty plea?
3. Can the Appellant raise for the first time on appeal that the trial court improperly assessed him legal financial obligations associated with his guilty plea?
4. Should the Court grant the Petitioner's personal restraint petition?

II. SHORT ANSWER

1. No.
2. No.
3. No.
4. No.

III. STATEMENT OF FACTS

The Appellant was arrested for Felony Harassment and Assault in the Fourth Degree. RP at 1. On March 25, 2013, at his first appearance, the Cowlitz County Superior Court found probable cause for him to answer to those potential charges. RP at 1. The Appellant did not understand the nature of the charges nor the reason why he was in court. RP at 1-2. The Appellant indicated that he wished to proceed without an attorney and to plead guilty. RP at 2. The Appellant indicated numerous times that he did

not know what his standard range was if convicted. RP at 3-4. The court informed the Appellant that it could not accept his guilty plea unless he knew what his standard sentence range was. RP at 4. The court told the Appellant that it would entertain the thought of the Appellant entering a guilty plea, but only if he could correctly fill out the necessary paperwork. RP at 6. The court continued the Appellant's first appearance to the following date. RP at 9.

On March 26, 2013, at his second appearance, before any charges were formally filed against him, the Appellant again requested to plead guilty. RP at 11. The court informed the Appellant that he could not enter a guilty plea unless an information was filed. RP at 11. The court again asked the Appellant if he knew what his standard range would be upon conviction. The Appellant again indicated that he did not and the court again informed him that it could not accept his guilty plea unless he knew the standard sentencing range. RP at 12.

The Appellant explained that he wanted to plead guilty immediately, despite not knowing the standard sentencing range, because he wanted to take care of misdemeanor warrants and legal financial obligations in another jurisdiction. RP at 12. The court then explained to the Appellant that unless he knew what his standard sentencing range was and what the elements of the offenses were, he would be unable to properly fill out the necessary

paperwork. RP at 13. The court pointed out that if the Appellant accepted legal representation, then his desire to plead guilty would occur much quicker than if he proceeded pro se. RP at 13. The Appellant again refused to accept legal representation. RP at 13-15

The court then set the Appellant's arraignment for two weeks later. RP at 17. The Appellant demanded to be given guilty plea forms. RP at 17. The court told the Appellant that it could not provide him with the proper forms because the charges had not yet been filed. RP at 17-18. The court then inquired if the Appellant had previously represented himself. The Appellant indicated that he had defended himself at a jury trial and was found not guilty. RP at 20. There is nothing in the record to support this claim. The Appellant again demanded a guilty plea form. RP at 23. The court told the Appellant that the State may or may not send him a plea offer while he remained in jail. RP at 23. At that point, the Appellant requested the assistance of an attorney. RP at 23.

On April 9, 2013, at the arraignment, with the assistance of an attorney, the Appellant entered his guilty pleas. RP 24-31. The State filed an amended information charging Harassment and Assault in the Third Degree. CP 3-4. The Appellant, through his attorney, filed a Statement of Defendant on Plea of Guilty. CP 5-14. The court found the pleas to be knowingly, intelligently and voluntarily made, and found the Appellant

guilty. RP at 29. At a later sentencing date, the court followed the joint recommendation and sentenced the Appellant to 43 months of prison. RP at 37.

On October 15, nearly six months later, the Appellant filed a motion to withdraw his guilty plea. CP 30. The Appellant's motion was heard on December 3, 2013. RP 44-50. The Appellant's basis for his motion to withdraw his guilty plea was an allegation that his attorney did not properly represent him. RP at 45. The Appellant never raised an issue of self-representation, lack of factual basis for the plea, or the imposition of legal financial obligations. The court found no articulable basis for the Appellant to withdraw his plea and denied the motion. RP at 50.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE THE APPELLANT'S RIGHT TO SELF-REPRESENTATION

1. The Appellant Did Not Make an Unequivocal Request to Proceed Pro Se.

The Sixth and Fourteen Amendments of the United States Constitution affords a criminal defendant the right to represent himself. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Article I, section 22 of the Washington Constitution explicitly guarantees the right for a criminal defendant to reject assistance and

represent himself. *State v. Kolocotronis*, 73 Wn.2d 92, 97, 436 P.2d 774 (1968). “However, both the United States Supreme Court and this court have held that are courts are required to indulge in ‘every reasonable presumption’ against a defendant’s waiver of his or her right to counsel.” *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010) (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.3d.2d 424 (1977)). The standard of review for the denial of a request to proceed pro se is abuse of discretion. *State v. Hemenway*, 122 Wn. App. 787, 782, 95 P.3d 408 (2004).

A criminal defendant seeking to proceed pro se must make the request unequivocally. *State v. Dewese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). A court can deny a request to proceed pro se if the request is made equivocally, involuntary, or without a general understanding of the consequences. *Madsen*, 168 Wn.2d at 504-05. A request to proceed pro se that indicates dissatisfaction with appointed counsel may indicate the request is equivocal. *State v. Stenson*, 132 Wn.2d 668, 740-41, 940 P.2d 1239 (1997).

In the present matter, the Appellant did not ultimately make an unequivocal request to represent himself. The Appellant contends that the court “stacked the deck” against the Appellant by failing to conduct a colloquy with him in regards to self-representation. This is argument is without merit and a misrepresentation of the record. The court attempted

numerous times to converse with the Appellant about the nature of the charges, the proper procedure for entering a plea of guilty, and the possible consequences upon a conviction.

The record clearly shows that at the Appellant's first appearance, he did not understand why he was in court or what the potential charges were. RP at 1. When informed of the contents of the probable cause statement, the Appellant was confused and surprised. RP at 1. When asked if he wanted an attorney, despite not fully understanding the nature or circumstances of the charges, the Appellant indicated that he just wanted to plead guilty. RP at 2. The Appellant did not know what his standard range would be upon conviction; thus, he did not know what the possible consequences would be upon a finding of guilt. RP at 3. The Appellant then made contradicting statements:

I'm a man enough to stand accountable for my actions right now. Because this is all words. I didn't do nothing to nobody. In fact, your police officers are the ones that did all this, but anyways, I just want to plead guilty to everything.

RP at 3-4. In the space of four sentences, the Appellant said he is accountable, then denied doing anything wrong, then blamed others for committing the crimes, then states he wants to plead guilty.

At his next appearance, the Appellant again renewed his request to proceed pro se and plead guilty. The court at this hearing informed the

Appellant that he could not plead guilty because the charges had yet to be formally filed against him. RP at 11. The Appellant again stated that he did not know what the standard sentence range would be. RP at 12. The Appellant then seemingly indicated that his desire to plead guilty is essentially based on a need to get to another jurisdiction to take care of a misdemeanor bench warrant for failure to pay legal financial obligations. RP at 12-13.

The court informed the Appellant that it could not accept a plea of guilty unless the Appellant knew what the standard sentencing range would be or the elements of the crimes for which he would be pleading guilty. RP at 13. The Appellant then revealed another reason for not wanting legal representation: he did not want to pay attorney fees for the case. RP at 14. After further discussion about the correct procedure for the entry of a guilty plea, the court talked with the Appellant about his ability to represent himself. RP 20-21. Finally, after additional discussion about the timing and correct procedures for a criminal case, the Appellant agreed to have an attorney appointed for him. RP 22-24.

The above-stated facts do not rise to the level of “stacking the deck” against the Appellant. Clearly, the Appellant did not understand the correct procedure for enter a guilty plea. Each time the court attempted to inform him of the correct procedure, including the need for formal charges to be

filed, the Appellant gave a nonsensical reply. The court did nothing more than “indulge in ‘every reasonable presumption’ against a defendant’s waiver of his or her right to counsel.” *Madsen*, 168 Wn.2d at 504 (quoting *Brewer* 430 U.S. at 404).

Next, the Appellant insists that the court denied him access to the court system by not providing him with the proper forms. In doing so, he cites to *State v. Bebb*, 108 Wn.2d 515, 740 P.2d 829 (1987). This is a misstatement of the holding in *Bebb*. The court in *Beebe* clearly stated that the violation occurs when the *State*, not the court, denies access to the courts: “In order to ensure a meaningful pro se defesene, *the State must allow* the defendant reasonable access to legal materials, paper, writing materials, and the like.” *Bebb*, 108 Wn.2d at 524 (*emphasis added*). To suggest that the court did anything to deny the Appellant access to the court is a misstatement of the record. The court could not give the Appellant a guilty plea form because *the State had not yet formally charged the Appellant with any crimes*. This fact was reiterated to the Appellant numerous times.

Ultimately, there is an inherent problem with the Appellant’s argument that he made an unequivocal request to represent himself: the request was based upon the desire to plead guilty to charges that had not actually been filed. Furthermore, the Appellant stated numerous times that

he did not know what the standard sentencing range was for the possible charges he was facing. Had the court allowed him to proceed pro se and plead guilty in this manner, we would likely be facing an argument that his plea was not made knowingly because he was not aware of the possible consequences upon conviction. In review of the complete record, the court did converse with the Appellant about his ability to represent himself, and the Appellant did not unequivocally request to represent himself.

2. Even if the Court Finds that the Trial Court Violated His Right to Self-Representation, the Appellant Waived His Right to Appeal When He Entered His Plea of Guilt.

“A guilty plea waives even constitutional violations occurring before the plea, unless the violation involves the government’s power to prosecute.” *State v. Martin*, 149 Wn. App. 689, 693, 205 P.3d 931 (2009) (citing *Menna v. New York*, 423 U.S. 61, 63 n.2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975); See also *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980) (“Ordinarily, a plea of guilty constitutes a waiver by the defendant of his right to appeal, regardless of the existence of a plea bargain.”). It is the State’s position that the Appellant waived his right to challenge the trial court’s pretrial ruling when he entered his guilty plea.

The Appellant’s plea was entered pursuant to a negotiated plea agreement. The State agreed to reduce Count I from Felony Harassment to

misdemeanor Harassment. RP at 24. The Appellant agreed to plead guilty to the reduced charge and Assault in the Third Degree. Pursuant to the plea, the Appellant agreed to waive his rights to a jury trial, to remain silent, the right to confront witnesses, the right to be presumed innocent, and the right to appeal. CP 5-6; RP 24. Simply put, the Appellant was fully apprised of his rights prior to his guilty plea, and he agreed to waive those rights. As with any other pre-trial motion, whether it be a motion to suppress or a motion to dismiss, the Appellant effectively waived his right to appeal the court's pre-trial ruling when he entered his plea of guilty. Thus, the Appellant cannot now raise this issue on appeal.

B. THE APPELLANT'S GUILTY PLEA WAS SUPPORTED BY A FACTUAL BASIS; THEREFORE, THE TRIAL COURT PROPERLY DENIED HIS MOTION TO WITHDRAW HIS PLEA.

Where a defendant possesses an understanding of the law in relation to the facts to allow him to make an informed decision regarding whether to plead guilty, the plea is voluntary and there is no constitutional violation. *In re Pers. Restraint of Keene*, 95 Wn.2d 203, 209, 622 P.2d 360 (1980). "The language of the criminal information, together with his statement on plea of guilty, signed by him in open court in the presence of his attorney, provide prima facie verification of the petitioner's understanding of the nature of the charge." *In re Pers. Restraint of Hilyard*, 39 Wn. App. 723,

725, 695 P.2d 596 (1985) (citing *Keene*, 95 Wn.2d at 208-09). An adequate factual basis is not constitutionally required for a guilty plea. *Hilyard*, 39 Wn. App. at 727. “The factual basis may be established from any reliable source as long as the material is made part of the record.” *Id.* (citing *Keene*, 95 Wn.2d at 210 n.2).

This Court has interpreted *Keene* as holding that “the factual basis issues is couched entirely in terms of reference to CrR 4.2(d)...and *does not refer to constitutional principles.*” *Hilyard*, 39 Wn. App. at 726 (emphasis added) (citing *Keene*, 95 Wn.2d at 209, 10). “Strict adherence to the rule is ‘not a constitutionally mandated procedure.’” *Hilyard*, 39 Wn. App. at 727 (quoting *In re Pers. Restraint of Vensel*, 88 Wn.2d 552, 554, 564 P.2d 326 (1977)). This Court specifically rejected the holding in *In re Pers. Restraint of Taylor*, 31 Wn. App. 254, 640 P.2d 737 (1982), which the Appellant relies upon in making his argument.

For a plea to be constitutionally sound, the Appellant must be aware that he is waiving his rights “(1) to remain silent, (2) to confront his accusers, and (3) for a jury trial; (4) his awareness of the essential elements of the offense with which he is charged; and (5) his awareness of the direct consequences of pleading guilty.” *Hilyard*, 39 Wn. App. at 727 (citing *State v. Holsworth*, 93 Wn.2d 148, 153-57, 607 P.2d 845 (1980)).

The duty imposed by court rule that the judge must be satisfied of the plea's factual basis should not be confused with the constitutional requirement that the accused have an understanding of the nature of the charge.

Hilyard, 39 Wn. App at 727.

In the present matter, all of the constitutionally required elements were present when the Appellant entered his guilty plea. Prior to the plea, the State filed an amended information charging one count of Harassment and one count of Assault in the Third Degree. RP at 24. The amended information contained all of the necessary elements to support both charges. CP 3-4. The Appellant, through his attorney, entered a Statement of Defendant on Plea of Guilty. CP 5-14. That document incorporated the amended information by reference: "The elements are: as set forth in the charging document." CP 5. The Appellant acknowledged that he received a copy of the amended information. CP 12. There is no contention that the amended information did not contain the necessary elements. When asked, the Appellant unequivocally stated that he understood that he was waiving his rights by entering his guilty plea. RP at 24. The Appellant likewise indicated that he understood what charges he was pleading guilty to. RP at 24-25.

The facts of this matter essentially mirror that of *Hilyard*. The Appellant completely ignores this Court's holding in *Hilyard* and instead

relies upon *Taylor* and its progeny. Any error in not ascertaining a factual basis for the plea is not a constitutional violation. The record in this case supports the finding that there was a factual basis for the Appellant's guilty plea. The amended information was incorporated by reference, the Appellant indicated that he understood the charges he was pleading guilty to, and he admitted to assaulting a public transit employee and making threats of bodily injury. CP 5-14; RP 27-28

C. THE APPELLANT'S RIGHT TO COUNSEL WAS NOT VIOLATED BY THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS.

"RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012)). Furthermore, under RAP 2.5(a), appellate courts can refuse to address an issue sua sponte. *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012). In fact, in regards to the imposition of legal financial obligations being raised for the first time on appeal, this Court has previously declined to review such claims. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) ("Because he did not

object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.”)

Additionally, “[n]either RCW 10.01.160 ‘nor the constitution requires a trial court to enter formal specific findings regarding a defendant’s ability to pay [discretionary] court costs.’” *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013) (quoting *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). “The State’s burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one.” *Lundy*, 176 Wn. App. at 106. A showing of indigency is the defendant’s burden. *Id.* at 108.

Here, this Court should not review the trial court’s imposition of the legal financial obligations because the Appellant did not object at the time of sentencing. The Appellant’s attempt at shoehorning a constitutional issue into this argument is without merit. As stated above, the Appellant did not unequivocally request to proceed pro se and the trial court did not force an attorney upon him.

D. THE APPELLANT’S PERSONAL RESTRAINT PETITION SHOULD BE DENIED.

A petitioner may request relief through a PRP when he is under an unlawful restraint. RAP 16.4(a) - (c). Our Supreme Court has limited collateral relief available through a PRP “because it undermines the

principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders.” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992)). For a personal restraint petition to succeed, it must prove either a “(1) constitutional error that results in actual and substantial prejudice or (2) nonconstitutional error that ‘constitutes a fundamental defect which inherently results in a complete miscarriage of justice.’” *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010) (quoting *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004)). “Additionally, the petitioner must prove the error by a preponderance of the evidence. *Monschke*, 160 Wn. App. at 488 (citing *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004)).

When a personal restraint petition is based on matters outside the appellate record, a petitioner must show that he has competent, admissible evidence to support his arguments. *In re Pers. Restraint of Brennan*, 117 Wn. App. 797, 802, 72 P.3d 182 (2003). The evidence must be more than speculation, conjecture, or inadmissible hearsay. *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999), *cert. denied*, 528 U.S. 1009, 120 S.Ct. 507, 145 L.Ed.2d 392 (1999).

The evidentiary prerequisite enables courts to avoid the time and expense of a reference hearing when the petition, though facially adequate, has no apparent basis in provable fact. In other words, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. Thus, a mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992)
(emphasis in the original).

Here, the Petitioner offers no evidence, other than contradictions with the record, to support his claims that there existed a conflict of interest between himself and his attorney, and himself and the judge. Likewise, the Appellant cannot produce a shred of evidence that he did not receive a fair hearing. The Petitioner first claims that on “on 4-15-13, a woman judge didn’t take my plea to she did not feel comfortable and told my lawyer and the prosecutor that she was going to postpones my plea...” Petition at 3. The record clearly shows that on April 9, 2013, the “woman judge” did in

fact take his plea. RP at 24-31. The judge merely set the sentencing hearing over to April 16, 2013 to allow for the judgment and sentencing to be produced. RP at 30.

The Petitioner also claims that he had conflicts with his court appointed counsel, namely about the charges he was enter his guilty pleas to and his offender score. Petition at 3. However, as the record shows, at his plea hearing, the Petitioner indicated that he understood the charges and their elements. RP at 23-24. He also agreed to his offender score, the standard sentencing range, and the maximum sentence for each charge. RP at 25. He further agreed that he understood what the State's sentence recommendation would be. RP at 27. When asked, he indicated that he was pleading guilty to both Harassment and Assault in the Third Degree. RP at 27-28. All of this information was contained in the Statement of Defendant on Plea of Guilty. CP 5-14. The Petitioner's claims are based on assertions outside of the record and are unsupported by any corroborating evidence.

The Petitioner's final claims seems to indicate that he did not receive a fair hearing when his motion to withdraw his guilty plea was heard. Again, much of his argument is based on claims outside of the record, contradictions with the actual record in this case, and speculation. Because the Petitioner cannot base his personal restraint petition on mere conjecture and disagreements, the petition therefore fails to establish that the court

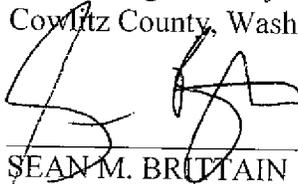
erred in denying his motion to withdraw his guilty plea. The petition's fanciful assumptions are not evidence, and the Court should deny this claim.

V. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to affirm the trial court's denial of the Appellant's motion to withdraw his guilty plea. As such, the Appellant's convictions should stand.

Respectfully submitted this 7 day of November, 2014.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington



SEAN M. BRITTAIN
WSBA #36804
Deputy Prosecuting Attorney

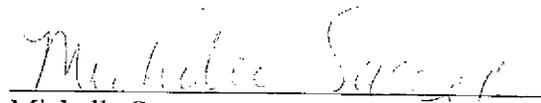
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund
Attorney at Law
P.O. box 6490
Olympia, WA 98507
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November ^{11/16}~~4~~, 2014.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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Comments:

Please find the Brief consolidated with PRP 45868-3-II. Thanks Michelle Sasser

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com