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DEC 14, 2011
Court of Appeals
Division III
State of Washington

29694-6-III
COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRAIDEN M. CONNOR, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....5

 A. DEFENDANT KNOWINGLY, INTELLIGENTLY,
 AND VOLUNTARILY WAIVED HIS RIGHT TO
 APPEAL BY THE ENTRY OF HIS GUILTY PLEA
 AND BEING SENTENCED TO A STANDARD
 RANGE SENTENCE5

 B. THE TRIAL COURT PROPERLY CALCULATED
 DEFENDANT’S OFFENDER SCORE BECAUSE
 THE SECOND DEGREE ASSAULT AND FIRST
 DEGREE ROBBERY AS CHARGED HEREIN
 DO NOT MERGE FOR SENTENCING PURPOSES.....9

 C. THE JUDGMENT AND SENTENCE ORDERED
 PAYMENT OF RESTITUTION WHICH THE
 DEFENDANT ACKNOWLEDGED COULD BE
 AS HIGH AS \$10,000 WITHIN THE STATUTORY
 PERIOD12

CONCLUSION.....15

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. KIER, 164 Wn.2d 798,
194 P.3d 212 (2008)..... 10

STATE V. MAJORS, 94 Wn.2d 354,
616 P.2d 1237 (1980)..... 5

STATE V. SMITH, 134 Wn.2d 849,
953 P.2d 810 (1998)..... 7

YOUNG V. KONZ, 88 Wn.2d 276,
558 P.2d 791 (1977)..... 5

STATUTES

RCW 9.94A.753(1)..... 1

RCW 9A.36.021(1)(a) 9

RCW 9A.56.200(1)(a) 9

COURT RULES

RAP 2.5(a) 6, 8

I.

APPELLANT'S ASSIGNMENTS OF ERROR

- (1) The trial court erred in miscalculating defendant's offender score by not finding that the convictions for second degree assault and first degree robbery merged for sentencing purposes.
- (2) The trial court's restitution order entered 191 days after entry of the judgment and sentence is unenforceable because it violated the provisions of RCW 9.94A.753(1).

II.

ISSUES PRESENTED

- (1) Did defendant's guilty plea waive his right to appeal the standard range sentence imposed by the trial court?
- (2) Do convictions for first degree robbery and second degree assault *necessarily* merge for purposes of calculating an offender score under the Sentencing Reform Act ("SRA")?
- (3) Did the entry of the Restitution Order in this case violate the provisions of RCW 9.94A.753(1) to thereby relieve defendant from the obligation of paying restitution?

III.

STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case with the following additions. At the plea hearing, the trial court inquired of the parties whether the victim had been apprised of the negotiated plea agreement. Report of Proceedings ("RP") 4. Counsel advised the court that the victim supported the amendment of the charges and the recommended sentence based upon defendant's level of involvement in the incident vis-à-vis the several other participants. RP 4.

The defendant thereafter entered his Statement on Plea of Guilty. CP 25-32; RP 5-21. Therein, defendant stipulated to the trial court using the Investigating Officer's Affidavit of Facts and/or police reports filed in support of the Information as the factual basis for the guilty plea. CP 23-32; RP 5-12. Defendant's Statement on Plea of Guilty acknowledged his constitutional rights and his waiver thereof by his execution of the Statement. CP 25-32; RP 5-21.

The parties jointly recommended that defendant be sentenced pursuant to an agreed upon Offender Score of "4" based upon defendant's agreement that the first degree robbery and the second degree assault constituted separate offenses based upon separately committed acts. CP 25-32; RP 5-21.

At the plea hearing, the court went through defendant's statement on plea of guilty section by section. CP 25-32; RP 5-21. The defendant acknowledged and agreed that he had thoroughly gone over the plea statement and signed it with his counsel. CP 25-32, RP 5-21. Defendant and defendant's counsel orally acknowledged that defendant understood that the recommended sentence would include restitution for the damages caused. RP 14-15. Defendant orally acknowledged that he understood that the sentencing judge was not bound by the plea recommendation. RP 5-21. Defendant acknowledged and agreed to waive the rights set forth in the plea statement, including the right to appeal his guilty plea in §6(h). CP 25-32, RP 5-21. Defendant acknowledged that the court would consider the document as defendant's own statement. Defendant indicated that he understood what he was giving up and that he did not have any other questions regarding his pleading guilty. RP 5-21. As a result, the court indicated that it had reviewed the defendant's written statement, listened carefully to his verbal statement, and was satisfied that the plea had been given freely and voluntarily with an adequate understanding of the nature of the charge and the consequences of the plea. CP 25-32, RP 5-21. Thereafter, the victim addressed the trial court regarding the imposition of an exceptional sentence below the standard range. RP 22-26. The Victim's comments caused the trial court to require the parties to

provide briefing regarding the viability of the imposition of an exceptional sentence in this case. RP 25-26. The trial court then rescheduled sentencing for January 7, 2011.

At sentencing, the trial court took testimony regarding the Victim's statements to law enforcement during the investigation to reconcile that with his comments to the court at the plea hearing. RP-28-127. State recommended the sentence per the plea agreement. RP 128-130. The court listened to the comments of the counsel and defendant before imposing the sentence. RP 127-130. The trial court even inquired whether defendant wanted to withdraw his guilty plea based upon the victim's comments, but defendant acknowledged that he did not and wished to proceed with sentencing. RP 130. Thereafter, the trial court denied defendant's motion for an exceptional sentence below the standard range based upon a lack of a factual and legal basis. RP 130-131. The trial court then imposed the sentence as agreed upon and recommended by the parties. CP 44-56, RP 130-139.

On February 28, 2011, the trial court entered its written factual findings and legal conclusions denying defendant's motion for an exceptional sentence.

On July 20, 2011, the trial court entered its restitution order herein. Defendant then filed this appeal.

IV.

ARGUMENT

A. DEFENDANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO APPEAL BY THE ENTRY OF HIS GUILTY PLEA AND BEING SENTENCED TO A STANDARD RANGE SENTENCE.

Defendant appeals his guilty plea despite having knowingly, intelligently, and voluntarily agreed to waive his right to appeal the finding of guilt (CP 25-32) and the right to appeal the standard range sentence imposed pursuant thereto (§6(h)). RP 5-16. “Ordinarily, a plea of guilty constitutes a waiver by the defendant of his right to appeal, regardless of the existence of a plea bargain.” *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980) (citing *Young v. Konz*, 88 Wn.2d 276, 283, 558 P.2d 791 (1977)). Nothing in the pleadings executed by the defendant indicates that he had any concerns regarding the fact that his offender score included his agreement that the first degree robbery and the second degree assault convictions constituted separate offenses legally and factually for sentencing purposes. Nothing in the record indicated that defendant had any concerns regarding his decision to enter a guilty plea. Rather, the record affirmatively reflects that the defendant knowingly, intelligently, and voluntarily entered his guilt plea

to the amended charges and thereby obtained the benefit of the bargain negotiated with the State to resolve the case.

Now, on appeal, defendant contends that the trial court's failure to *sua sponte* merge the subject convictions herein for sentencing purposes constituted a "manifest injustice" which permits the defendant to disregard his plea agreement that the convictions be considered separate for sentencing purposes. Generally, a party's failure to raise an issue before the trial court invokes the provisions of RAP 2.5(a) empowers this Court to refuse to review a claim of error. Here, defendant voluntarily elected not to argue the merger issue to the trial court because defendant's guilty plea agreement included his agreement that the subject offenses be considered separate. CP 25-32 (§6(h)). The trial court committed no error in not merging the subject convictions for purposes of calculating his offender score and imposing the agreed upon recommended sentence. Defendant's written guilty plea statement set forth each of the constitutional rights which he waived by the entry of his plea. CP 25-32. The trial court only accepted defendant's guilty plea after defendant acknowledged in writing and orally the rights he was waiving and his agreement to the offender calculation. CP 25-32; RP 5-21. When a defendant completes a plea statement and admits to reading, understanding, and signing such a statement, there is a strong presumption

that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). Here, the trial court's colloquy regarding the basis for defendant's plea coupled with his signed plea statement gives rise to a presumption of voluntariness that is "well nigh irrefutable." *Id.* To overcome this presumption, Mr. Connor must provide objective proof that his plea was entered involuntarily. Specifically, that he did not know, was not advised, or involuntarily agreed that his current convictions would count against each other as separate convictions for purposes of calculating his offender score. No such proof has been proffered. The Statement on Plea of Guilty reflects that: defendant certified to the court that his counsel had explained to him, and they had fully discussed, all the sections of the Statement; he understood all the sections; he had no further questions to ask the judge; defendant's counsel certified to the trial court that counsel had read and fully discussed the Statement with defendant and believed that defendant is competent and fully understands his statement. CP 25-32; RP 5-21. Finally, defendant's Statement reflects that the trial court found that defendant had read the entire Statement and fully understood its content and effect. CP 25-32; RP 5-21. The trial court found that defendant's counsel had previously read to him the entire statement and that he fully understood its content and effect. CP 25-32; RP 5-21. The record reflects that the trial court did not finally accept

defendant's guilty plea until after it had gone over his written plea statement with him and was satisfied that he was entering his guilty plea knowingly, intelligently, and voluntarily. CP 25-32; RP 5-21.

The record supports that defendant stipulated that the convictions reflected separate offenses for which there existed a factual basis as such for each to be counted as separate current offenses in calculating his offender score. CP 25-32; RP 5-21. Accordingly, there is nothing in the record to support the claim that defendant did not knowingly, voluntarily, and intelligently agree that his convictions for first degree robbery and second degree assault counted separately in determining his offender score.

At no point during the plea and sentencing, did the defendant claim he did not understand the events. The circumstances support quite the contrary perspective. Defendant was best positioned in this change of plea and sentencing process to know what he stood to gain if the court accepted the negotiated plea (i.e. a sentence of no more than 51 months as opposed to the 10-15 years for the originally charged offenses). Accordingly, the trial court committed no "manifest injustice" which would overcome the threshold bar to appellate consideration of defendant's standard range sentence imposed by RAP 2.5(a).

B. THE TRIAL COURT PROPERLY CALCULATED DEFENDANT'S OFFENDER SCORE BECAUSE THE SECOND DEGREE ASSAULT AND FIRST DEGREE ROBBERY AS CHARGED HEREIN DO NOT MERGE FOR SENTENCING PURPOSES.

Aside from the legal fact that defendant plea bargained to enter guilty pleas to the robbery and assault offenses as separate offenses each of which counted separately in calculating his offender score. Now, defendant contends on appeal that the trial court miscalculated his offender score because the convictions for first degree robbery and second degree assault should have merged since the assault elevated the robbery. The amended information charged the defendant with first degree robbery assault as defined in RCW 9A.56.200(1)(a) which provides, in pertinent part:

COUNT III: FIRST DEGREE ROBBERY, committed as follows: That the defendant...with the intent to commit theft, did unlawfully take and retain personal property...from the person and in the presence of ...DAHLEN, against such person's will, by use or threatened use of immediate force, violence or fear of injury to said person or the property of said person...and in the commission of...the defendant inflicted bodily injury upon...DAHLEN,

The amended information charged the defendant with the crime of second degree assault as defined in RCW 9A.36.021(1)(a) which provides, in pertinent part:

COUNT II: SECOND DEGREE ASSAULT, committed as follows: That the defendant...did intentionally assault...DAHLEN, and did thereby inflict substantial bodily harm,

The defendant was charged with first degree robbery based upon the fact that the victim was severely beaten and thereby incurred substantial bodily harm. The defendant was convicted of first degree robbery based upon the fact that personal property was taken from the victim by the use of force that inflicted some bodily harm. The defendant was convicted of second degree assault because defendant inflicted substantial bodily harm upon the victim. Defendant cites *State v. Kier*, 164 Wn.2d 798, 194 P.3d 212 (2008).

Initially, it should be noted that the *Kier* case involved a jury finding of the convictions as opposed to the circumstance herein *where defendant negotiated a guilty plea to the offenses contained in the amended information*, including that the robbery and assault constituted separate conduct. In *Kier*, the defendant threatened the victim with a firearm and thereby threatened the use of force to facilitate the carjacking robbery. The Supreme Court found in *Kier* that the convictions therein merged “in light of the way [the] case was charged and presented to the jury.” *Id.*, 164 Wn.2d at 805. Specifically, that “because no clear election had been made outside of closing argument, the verdict was ambiguous

and the rule of lenity required merger of the convictions.” *Id.* at 813. Here, the severe beating of Mr. Dahlen was entirely gratuitous since the defendant and his two accomplices outnumbered the victim and had the element of surprise when they set upon Mr. Dahlen in his sleep. The use of *so much force* to thereby inflict substantial bodily harm upon Mr. Dahlen was neither necessary nor an integral element of the completion of the robbery. Accordingly, the second degree assault and the first degree robbery were not subject to automatic merger for sentencing purposes. Moreover, it cannot be successfully argued that the trial court’s failure to merge the two separate offenses constituted a “manifest injustice” because the first degree robbery statute requires no more of an assault than either the communication of an immediate threat of harm or the infliction of bodily harm (i.e. only the amount of harm required to support a fourth degree assault). Here, the defendant intentionally inflicted substantial bodily harm, an amount of harm well in excess of that required to facilitate a first degree robbery, so based upon the violent beating of the victim, the trial court properly did not, *sua sponte*, merge the convictions for sentencing purposes.

Considering that the defendant specifically negotiated that the robbery and the assault convictions constituted separate acts for purposes of his guilty plea to achieve his desired sentencing range, there is no

ambiguity or legitimate constitutional requirement that the trial court should have disregarded the negotiated guilty plea agreement to merge the convictions for sentencing purposes. Accordingly, this Court should be equally hesitant to invade the province of the plea agreement to impose a result that the parties actually negotiated out of their contract when there is no identified basis for this Court to so act.

Here, defendant specifically requested that the trial court accept the amendment of the information and, then, his guilty plea to the offenses charged therein. It is not just a little concerning that defendant seeks on appeal a resolution of his case that he actually negotiated away to obtain the sentence actually imposed by the trial court.

C. THE JUDGMENT AND SENTENCE ORDERED PAYMENT OF RESTITUTION WHICH THE DEFENDANT ACKNOWLEDGED COULD BE AS HIGH AS \$10,000 WITHIN THE STATUTORY PERIOD.

On December 6, 2010, the parties were scheduled to enter defendant's change of plea and have the trial court impose its sentence; however, the victim appeared at that hearing. As a result of the victim's comments, the trial court ordered the sentencing continued to January 7, 2011, to afford the parties the opportunity to consider and brief the prospect of the trial court declaring an exceptional sentence was justified.

On January 7, 2011, a sentencing hearing was held wherein several witnesses testified. The testimony caused the trial court to inquire of the defendant whether it was still his intention to plead guilty or to withdraw his guilty plea. After consultation, defendant assured the trial court that it was not his intention to withdraw his guilty plea. RP 128-130. After considering the evidence presented, the trial court concluded there was an insufficient basis to support the imposition of an exceptional sentence below the standard range for the subject convictions. RP-010711 at 131-133. The trial court then sentenced defendant to a standard range sentence, including ordering restitution, joint and several with his co-defendants. CP 44-56; RP 134-135. Thereafter, the trial court set a hearing on February 28, 2011, for the presentment of its written factual findings and legal conclusions denying the defendant's motion for an exceptional sentence.

On February 9, 2011, the defendant filed a motion for Order of Indigency which included his Affidavit of Indigency. CP 65-71.

On February 28, 2011, the trial court entered its written findings and conclusions memorializing its oral denial of the defendant's motion for an exceptional sentence.

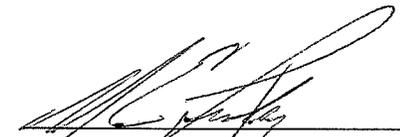
On March 29, 2011, the trial court entered a restitution order with regard to co-defendant, Lisa J. Wareham aka EHLLI, including \$4,489.84 to be paid to the victim, Mr. Dahlen. CP 61-64. On May 17, 2011, the trial court entered a restitution order with regard to co-defendant, Levi R. EHLLI, including \$2,595.92 to be paid to the victim. CP 61-64. Finally, on July 20, 2011, the trial court entered the restitution order at issue herein, including \$2,595.92 to be paid to the victim. The record reflects that the defendant actually benefited from the delay because the amount of restitution ordered in his case was substantially less than was ordered to be paid by Ms. EHLLI. Finally, it is noteworthy that in defendant's Affidavit of Indigency filed February 9, 2011, in support of defendant's Motion for Order of Indigency, defendant lists the victim herein, William Dahlen, as someone to whom defendant owes "\$10,000." CP 65-71. Apparently, defendant was well aware of the possible extent of the restitution that he could be ordered to pay to Mr. Dahlen because defendant used that as a basis to obtain an Order of Indigency from the trial court despite the fact that defendant's trial counsel was privately retained.

V.

CONCLUSION

For the reasons stated herein, the appeal should be dismissed;
alternatively, the sentence should be affirmed.

Respectfully submitted this 14TH day of December, 2011.



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Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 29694-6-III
 v.)
) CERTIFICATE OF MAILING
 BRAIDEN M. CONNOR,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on December 14, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

Dennis Morgan
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12/14/2011
(Date)

Spokane, WA
(Place)


(Signature)