

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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March 28, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,)	NO. 29974-1-III
Respondent,)	
)	
vs.)	
)	
DAVID A. DODD,)	
Appellant.)	

BRIEF OF THE RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
Table of Cases.....	ii
I. STATEMENT OF FACTS.....	1
II. PROCEDURAL HISTORY.....	4
III. ISSUES.....	7
3.1 Where the record does not support that Defendant requested a jury instruction defining the term “willfully”, is the issue waived by Defendant?.....	7
3.2 Did defense counsel provide ineffective assistance by failing to request a jury instruction defining the term “willfully”?.....	7
3.3 Did the trial court error in imposing discretionary legal financial obligations without inquiring into the defendant’s ability to pay?.....	7
3.4 Response to Statement of Additional Grounds on Review.....	7
3.5 Response to Personal Restraint Petition.....	7
IV. ARGUMENT.....	7
4.1 When, at the trial court level, a defendant fails to request a specific jury instruction defining the term “willfully”, he cannot later claim error for the first time on appeal.....	7

4.2 Defense Counsel Was Not Ineffective for Failing to Request a Jury Instruction Defining “Willfully”.....	12
A. Defense Counsel’s Performance Was Not Deficient.....	13
B. Assuming Defense Counsel’s Performance Was Deficient, The Defendant Was Not Prejudiced.....	17
4.3 The Trial Court Did Not Error in Finding That the Defendant Would Have The Future Ability to Pay Discretionary Fees and Costs.....	20
4.4 Response to Statement of Additional Grounds for Review.....	22
4.5 Response to Personal Restraint Petition (#302342).....	24
V. CONCLUSION.....	25

TABLE OF AUTHORITIES

Table of Cases

	<u>Page</u>
<u>Henderson v. Kibbe</u> , 431 U.S. 145, 154, 97 S.Ct. 1730, 1736-37, 52 L.Ed.2d 203 (1977).....	10
<u>In re Palodichuck</u> , 22 Wash.App. 107, 589 P.2d 269 (1978).....	25
<u>Santobello v. New York</u> , 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).....	25
<u>Seattle v. Harclaon</u> , 56 Wn. 2d 596, 597, 354 P.2d 928 (1960).....	10
<u>Seattle v. Rainwater</u> , 86 Wn. 2d 567, 571, 546 P.2d 450 (1976).....	10
<u>State v. Baldwin</u> , 63 Wash.App 303, 312, 818 P.2d 1116 (1991).....	21
<u>State v. Blank</u> , 131 Wn.2d 230, 253, 930 P.2d 1225 (1997).....	20
<u>State v. Castro</u> , 32 Wn. App. 559, 564-65, 648 P.2d 485 (1982).....	15
<u>State v. Coe</u> , 109 Wn. 2d 832, 842, 750 P.2d 208 (1988).....	9
<u>State v. Curry</u> , 118 Wn.2d 911, 916, 829 P.2d 166 (1992).....	20
<u>State v. Emmanuel</u> , 42, Wn.2d 799, 259 P.2d 845 (1953).....	14
<u>State v. Flora</u> , 160 Wn.App 549, 249 P.3d 188 (2011).....	12,17,18,19
<u>State v. Guloy</u> , 104 Wn. 2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).....	15

<u>State v. Hall</u> , 104 Wash.2d 486, 706 P.2d 1074 (1985).....	25
<u>State v. Hartz</u> , 65 Wash.App 352, 355-56, 828 P.2d 618 (1992).....	21,22
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).....	13
<u>State v. Hermann</u> , 138 Wash.App. 596, 158 P.3d 96 (2007).....	17
<u>State v. Kroll</u> , 87 Wn.2d 829, 843, 558 P.2d 173 (1976).....	11
<u>State v. Ng</u> , 110 Wn.2d 32, 44, 750 P.2d 632 (1988).....	14
<u>State v. Peterson</u> , 73 Wn. 2d 303, 306, 438 P.2d 183 (1968).....	9
<u>State v. Scott</u> , 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988).....	11,13,14
<u>State v. Silva</u> , 106 Wash.App. 586, 599, 24 P.3d 477 (2001).....	17
<u>State v. Thomas</u> , 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).....	12,13
<u>State v. Tili</u> , 139 Wn.2d 107, 126, 985 P.2d 365 (1999).....	13
<u>State v. Tourtellotte</u> , 88 Wash.2d 579, 564 P.2d 799 (1977).....	25
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	12,13,17,20,25

Other References

CrR 6.15(a).....10
CrR 6.15(c).....10
RCW 10.01.160(3).....22

I. STATEMENT OF FACTS

On October 19, 2010 Officer James Marshall of the East Wenatchee Police Department was on patrol and parked at the entrance to the George Sellar Bridge. (RP 84-86). Officer Marshall was operating a marked patrol vehicle equipped with an emergency light bar. (RP 85). Officer Marshall was dressed in an official East Wenatchee Police Department uniform identifying him as a law enforcement officer. (RP 85). While parked at that location Officer Marshall heard over his radio that David Dodd was driving a vehicle on a suspended license and traveling in his direction. (RP 87). Dispatch confirmed that Mr. Dodd's license was suspended. (RP 87). Shortly thereafter Officer Marshall observed David Dodd driving a pickup across the bridge into East Wenatchee. (RP 88-89). Officer Marshall was previously familiar with Mr. Dodd and visually identified him as the driver and lone occupant of the vehicle. (RP 89). At that point Officer Marshall pulled into traffic to initiate a traffic stop, activating his emergency lights. (RP 89-91).

After pulling into traffic Officer Marshall observed that Mr. Dodd changed his lane to get into the right inside lane that intersects with Grant Road. (RP 92). Mr. Dodd did not use his

turn signal when changing lanes and his speed of travel accelerated. (RP 93). As Officer Marshall attempted to catch up to the vehicle he observed a vehicle in front of Mr. Dodd's vehicle which was stopped at the red light at the Grant Road intersection. (RP 94). Mr. Dodd drove around the left side of the stopped vehicle and made a right hand turn in front of the stopped vehicle. (RP 94). Mr. Dodd's vehicle then drove west on Grant Road in the direction of the Fred Meyer Store. (RP 94). At that point Officer Marshall activated his emergency siren. (RP 94). It was apparent to Officer Marshall that Mr. Dodd was trying to evade him. (RP 95). Officer Marshall turned west on Grant Road and caught up to Mr. Dodd's vehicle. (RP 97). Officer Marshall followed Mr. Dodd with his emergency lights and sirens activated as he traveled directly behind him. (RP 97). After approximately 100 yards Mr. Dodd made a right hand turn into the Fred Meyer store parking lot. (RP 97). Mr. Dodd passed a set of cars that were parked or driving through the parking lot in front of him. (RP 97). He actually drove his vehicle between two vehicles, splitting between them on the roadway. (RP 98-99). At this point Officer Marshall observed pedestrians coming out of the Fred Meyer store. (RP 97). Other vehicles were in the parking lot milling

around. (RP 97). Mr. Dodd traveled through the parking lot at approximately 25 mph. (RP 98). Mr. Dodd accelerated to the end of the building approximately 75 - 100 yards away, made a quick right hand turn, not showing any signs of slowing or stopping. (RP 99). While proceeding to the back of the store Mr. Dodd made another right hand turn continuing behind the store and came to a stop, throwing the door open and jumping out of the pickup. (RP 99).

At no time during the pursuit did Mr. Dodd use his brakes, signal lights or attempt to pull over. (RP 100). Officer Marshall described many areas in the roadway or parking lot that Mr. Dodd could have pulled over and stopped. (RP 100). The turns made by Mr. Dodd during the pursuit were made jerky and under acceleration. (RP 100). During the pursuit in the parking lot Officer Marshall was at the most two (2) car lengths behind Mr. Dodd. (RP 102). Officer Marshall's emergency lights and sirens were activated during the entire pursuit in the parking lot. (RP 102).

After exiting the pickup Mr. Dodd failed to comply with the directions and commands of Officer Marshall. (RP 103-106). Ultimately, backup officers arrived and assisted in the arrest of

Mr. Dodd. (RP 105-106). After arrest Mr. Dodd advised Officer Marshall that he drove to the back of the store building to "bail out". (RP 109).

David Dodd testified in his defense. Mr. Dodd claimed he first became aware that an officer was behind him when he "come down to turn into Fred Meyer." (RP 189). He observed the officer's lights and sirens on prior to turning into Fred Myer. (RP 191-192, 207). He claimed that he didn't know the officer was attempting to stop him. (RP 192). He later testified that he wasn't sure whether the officer was after him. (RP 192). After pulling off of Grant Road into the Fred Meyer parking lot he then began thinking that the officer was after him. (RP 193). Mr. Dodd then testified he figured out that the officer was trying to stop him but gave various explanations why he didn't stop when he had the opportunity. (RP 193-194, 209-214).

II. PROCEDURAL HISTORY

On October 22, 2010 the Defendant was charged by Information with Attempting to Elude a Pursuing Police Vehicle, Driving While License Suspended in the Second Degree and Felony Harassment. (CP 1-3). The Information was subsequently amended on January 3, 2011 to add a special

allegation to the charge of eluding that the Defendant's conduct endangered others. (CP 5). Additionally, the amendment added aggravating circumstances to the charge of eluding and harassment concerning the Defendant's prior misdemeanor and felony history. (CP 5-7).

During the course of proceedings trial was continued four (4) separate occasions at the request of the Defendant (CP 270, 271, 272, 275). The Defendant was represented at various times by three (3) different attorneys. (CP 268, 269, 273-274).

Prior to trial the State filed several motions in limine. (CP 8-9, 17-22). The focus of the State's motions were to exclude the Defendant from testifying or admitting evidence of prior law enforcement contacts with Officer James Marshall. (CP 8-9, 17-22). On April 25, 2011 the trial court granted the State's motions. (RP 54, CP 103). On May 12, 2011 the Defendant brought a motion in limine seeking to limit how much of Officer Marshall's car camera video would be played for the jury. (RP 73). The court ruled that the video would be stopped at the point the Defendant exited the pickup and put his hands up. (RP 76). The Court noted, however, that the balance of the video might come in if the Defendant opened the door. (RP 77).

Trial commenced on May 12, 2011. (CP 305). Mid-trial the Defendant elected to enter a guilty plea to the charge of Driving While License Suspended in the Second Degree. (RP 167-171, CP 131-139). The Defendant testified at trial. (RP 188-228). During cross examination by the State the Defendant claimed he was cooperative during the arrest procedure and was nice to Officer Marshall. (RP 218-220). The State requested the court allow the rest of the video to be played for the jury to controvert the Defendant's testimony. (RP 221). The Defense objected and argued against the playing of the remainder of the video. (RP 222-225). The trial court took a recess and viewed the balance of the video. (RP 223). After viewing the video the court ruled that the rest of the video could be shown to the jury. (RP 226). The Defendant was ultimately convicted of Attempting to Elude Pursuing Police Vehicle, including the special allegation that his conduct endangered others. (CP 164, 166).

On May 31, 2011 the defendant was sentenced. (RP 297-319). Based upon the court's finding regarding Defendant's recidivism aggravators it imposed an exceptional high sentence of 50 months on the eluding, and a 12 month consecutive

sentence on the driving suspended in the second degree. (RP 313, CP 242-252, 255).

Defendant timely filed his notice of appeal on June 14, 2011. (CP 256).

III. ISSUES

3.1 Where the record does not support that Defendant requested a jury instruction defining the term "willfully", is the issue waived by Defendant?

3.2 Did defense counsel provide ineffective assistance by failing to request a jury instruction defining the term "willfully"?

3.3. Did the trial court error in imposing discretionary legal financial obligations without inquiring into defendant's ability to pay?

3.4 Response to Statement of Additional Grounds on Review.

3.5 Response to Personal Restraint Petition.

IV. ARGUMENT

4.1. When, at the trial court level, a defendant fails to request a specific jury instruction defining the term "willfully", he cannot later claim error for the first time on appeal.

Defendant characterizes the issue in this case as one in which he offered an instruction defining the term "willfully", and the trial court refused to provide the proposed instruction to the jury. This is a mischaracterization of what actually occurred and is not supported by the record.

The Defendant's proposed jury instructions filed with the court included an instruction defining the term "willfully" (CP 118). However, the record is silent as to whether the Defendant affirmatively orally requested the court give that instruction. There is no other reference in the record concerning that particular instruction, and there is no record that suggests the trial court refused the instruction. Prior to reading the court's instructions to the jury, the trial court asked whether Defendant had any exceptions to the court's instructions, and defense counsel responded:

Mr. DiTommaso: In reference to the instructions not given, I take exception to the Court not giving Instruction N, O and P of our proposed jury instructions dealing with the lesser included harassment charge from a felony to a gross misdemeanor.

(RP 229-230). The instructions referenced by defense counsel (N, O, and P) did not include the instruction defining "willfully". The absence of any reference to the "willfully" instruction by defense counsel leaves the issue subject to speculation by this court. First, it is possible that defense counsel withdrew the proposed instruction defining "willfully", removing it from the court's consideration. Second, it is possible that the court refused the instruction and defense counsel agreed with the

court's decision and did not take exception to the court's refusal to so instruct. Third, it is possible the court refused the instruction and defense counsel failed to take exception to the court's refusal to so instruct. The record is devoid of any discussion, ruling or pleading which would enable this court to conduct meaningful review to resolve this factual issue. Defendant's general characterization that the trial court "refused" the giving of the instruction defining "willfully" is not supported by the record and should not be accepted by the court.

A mere "omission" is not the same thing as arguing on the record with an actual "ruling" entered on the record. The general rule under RAP 2.5(a) states that issues not raised in the trial court will not be entertained by appellate courts. See, e.g., State v. Coe, 109 Wn. 2d 832, 842, 750 P.2d 208 (1988); State v. Peterson, 73 Wn. 2d 303, 306, 438 P.2d 183 (1968). The purpose of the rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to

correct to avoid an appeal and a consequent new trial. See Seattle v. Harclan, 56 Wn. 2d 596, 597, 354 P. 2d 928 (1960).

The courts have specifically addressed this principle with respect to claimed errors in jury instructions in criminal cases. CrR 6.15(c) requires that timely and well stated objections be made to instructions given or refused "in order that the trial court may have the opportunity to correct any error." Seattle v. Rainwater, 86 Wn. 2d 567, 571, 546 P. 2d 450 (1976); cf. Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736-37, 52 L.Ed.2d 203 (1977).

CrR 6.15(a) provides in part:

Proposed Instructions. Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury.

Furthermore, CrR 6.15(c) provides:

Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state

the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instruction in their final form.

Generally, a party claiming that the trial court's instructions were erroneous must have objected on the same ground below or the party has waived the right to raise the issue on appeal. CrR 6.15(c); State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). "No error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made." State v. Kroll, 87 Wn.2d 829, 843, 558 P.2d 173 (1976). The above principles are applicable to the present case. The trial court appropriately assembled its instructions to the jury and provided copies to defense counsel and the State. (RP 229). The trial court provided both parties with an opportunity to state any objections or exceptions to the court's instructions consistent with CrR 6.15(c). (RP 229). The record clearly establishes defense counsel had reviewed the court's instructions and exercised his judgment in making objections and exceptions to the court's failure to instruct on other instructions submitted by the Defendant. The record is also clear defense counsel did not at that time request an instruction defining "willfully," or take exception to the court's failure

to give that instruction. Accordingly, the defendant has waived his right to raise this issue on appeal.

Defendant places great emphasis on State v. Flora, 160 Wn. App 549, 249 P.3d 188 (2011) as support for his position. Flora is distinguishable in that the defendant specifically requested the instruction defining “willfully” at trial on a charge of attempting to elude pursuing police vehicle. The court there specifically refused to give the instruction on the record. Unlike in the present case, the defendant in Flora preserved the issue for appeal by taking exception on the record. The defendant here is on much different footing than the defendant in Flora, and different rules and policies foreclose his ability to raise this issue for the first time on appeal.

4.2 Defense counsel was not ineffective for failing to request a jury instruction defining “willfully”.

Defendant argues in the alternative that defense counsel was ineffective in his representation for failing to request an instruction defining “willfully”.

To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) defense counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A defendant bears the burden and

must make both showings to prevail on an ineffective assistance claim. Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 687). For the first prong, scrutiny of counsel's performance is highly deferential and a reviewing court engages in a strong presumption of reasonableness. Thomas, 109 Wn.2d at 226. If defense counsel's conduct can be characterized as trial strategy or tactics it does not constitute deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The second prong requires the defendant to show there is a reasonable probability that the trial's outcome would have differed absent counsel's deficient performance. Hendrickson, 129 Wn.2d at 78 (citing Strickland, 466 U.S. at 687).

A defendant is entitled to jury instructions which allow the defendant to argue their theory of the case, as long as the instructions do not mislead the jury and properly state the applicable law. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999).

A. Defense Counsel's Performance Was Not Deficient

In discussing the first prong of Strickland, it is important to note the alleged failure of defense counsel did not involve one of constitutional magnitude. In State v. Scott, 110 Wn. 2d 682, 757 P.2d 492 (1988), the court held the failure to define the term "knowledge" contained in the accomplice liability statute did not

arise to one of constitutional magnitude. Quoting its language in State v. Ng, 110 Wn.2d 32, 44, 750 P.2d 632 (1988), the court reiterated:

The constitutional requirement is only that the jury be instructed as to each element of the offense charged. State v. Emmanuel, 42 Wn. 2d 799, 259 P.2d 845 (1953). Here the jury was so instructed. The failure of the court in the case at bench to define further one of those elements is not within the ambit of the constitutional rule. The claimed error not being of constitutional magnitude, we need not treat it here.

Scott, at 689 (quoting Ng, at 44). As in Scott, the trial court here instructed the court as to each element of the offense charged (Attempting to Elude Pursuing Police Vehicle) in instruction 8. (CP 151). Accordingly, the claimed instructional error is not one of constitutional magnitude.

Furthermore, the term “willfully” has a common meaning in the English language. Merriam-Webster defines “willfully” as “done deliberately; intentional”.¹ While the trial court in a criminal case is required to define technical words and expressions, it need not define words and expressions which are of common understanding. Whether words used in an

¹ Merriam-Webster, an Encyclopedia Britannica Company, accessed 03/16/2012, <http://www.merriam-webster.com/dictionary/willfully>

instruction require definition is a matter of judgment to be exercised by the trial court. State v. Guloy, 104 Wn. 2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986); State v. Castro, 32 Wn. App. 559, 564-65, 648 P.2d 485 (1982). The instruction included in defendant's proposed instructions defined willfully as; "a person acts willfully when he or she acts knowingly." (CP 118). The State submits the common meaning of the term "willfully" is sufficiently within the knowledge of the average juror to understand that the defendant acted with knowledge when committing the crime of eluding. Where a term has a common understanding within the grasp of a common juror the State submits that the failure of a defense attorney to request an instruction defining the term does not arise to ineffective assistance of counsel.

Additionally, defense counsel's conduct here can be legitimately characterized as trial strategy or tactic. The defense offered in this case was not whether the Defendant *knew* he was being pursued by a police officer, but rather whether he drove *recklessly* as he attempted to elude the officer. Defense counsel recognized that the evidence clearly

established, even based upon the Defendant's own testimony, that Defendant had knowledge Officer Marshall was trying to stop him. It would have been futile to argue to the contrary, and counterproductive in defense counsel's attempt to persuade the jury the defendant's driving did not rise to the level of recklessness required for a conviction. At closing defense counsel argued:

But if you actually look at the instruction here, element number 5, it doesn't say driving poorly, it says that while you're attempting to elude a pursuing police vehicle, the Defendant drove his vehicle in a reckless manner. And we – Again, the video shows initially that Officer Marshall turned his lights on when he was turning out to follow Mr. Dodd's vehicle, and then turns them off. And, then, we don't see them turned on again until the – as he approaches the intersection to turn right on Grant Road to get into the Fred Myer, not at the Fred Myer entrance. And I think even Mr. Biggar admits that at that time Mr. Dodd was into or turning into the Fred Meyer parking lot, at that point he knew or should have known that Officer Marshall was after him. I mean, we hear the sirens; we see the lights. And you people are not stupid. I mean, obviously, he should've known that the officer was after him at that point. But – And he doesn't stop until he gets to the back. But, where is the reckless driving? Where is he driving in a reckless manner?

(RP 263-264). Defense counsel's argument accomplished two things. First he gained credibility in front of the jury by conceding the obvious strength in the State's case regarding knowledge and

avoiding the appearance of presenting a meritless defense; and second he focused the jury's attention on Defendant's challenge to the sufficiency of the State's case regarding the reckless driving prong of eluding. Analogously, in State v. Silva, 106 Wash.App. 586, 599, 24 P.3d 477 (2001), the court held that defense counsel's concession to the state's evidence on lesser drug charges "was a legitimate tactical decision, one designed to gain credibility with the jury and to secure her client's acquittal on the two more serious charges." See also State v. Hermann, 138 Wash.App. 596, 158 P.3d 96 (2007) (defense counsel's concession to lesser theft charges constituted a legitimate trial tactic). The State sees no difference in conceding guilt on lesser offenses to that of conceding guilt to an element of the charged offense. Accordingly, defense counsel was not ineffective for failing to request a jury instruction defining "willfully" where the issue of knowledge was conceded under a legitimate trial tactic.

B. Assuming Defense Counsel's Performance Was Deficient, The Defendant Was Not Prejudiced

Even if trial counsel's performance was deficient under Strickland, Defendant has not established that he was prejudiced. Although Division I in Flora held the trial court's

refusal to define "willfully" for the jury (after affirmatively requested by defendant) was not harmless, that decision was based upon the unique facts presented at trial. In discussing whether the failure to give the instruction was harmful the court focused on the interplay between the defendant's theory of the case and the absence of the instruction. In particular the court stated:

"In other words, the driver must not only know he is being signaled to stop but must also know that the pursuing vehicle is a police vehicle.

There was evidence to support Flora's theory that he did not know the vehicle chasing him was a police vehicle. It was dark and rainy. The license plate was not a Washington plate. Photographs of the vehicle were admitted showing that the police markings on Officer Radley's car are only on the sides. There was a female passenger in the car, a civilian who was participating in a ride-along program."

Flora, at page 555. Because the defense in Flora was that he did not know he was being pursued by a police officer, and because evidence seemed to support that defense, the court held that the absence of an instruction defining "willfully" may have affected the verdict. Under those circumstances the court remanded the case back for new trial.

The defense presented in Defendant's case is not the same as that in Flora. In the present case there is no question the Defendant was aware the vehicle behind him was a police vehicle. Defendant testified that he first became aware that an officer was behind him when he "come down to turn into Fred Meyer." (RP 189). He observed the officer's lights and sirens prior to turning into Fred Myer. (RP 191-192, 207). After pulling off of Grant Road into the Fred Meyer parking lot he then began thinking that the officer was after him. (RP 193). Defendant then testified he figured out the officer was trying to stop him but gave various explanations why he didn't stop when he had the opportunity. (RP 193-194, 209-214). As argued above, defense counsel clearly recognized the strength of the evidence establishing Defendant's knowledge that an officer was pursuing him and conceded that point. This legitimate concession by defense counsel, and the facts and circumstances in this case, clearly distinguish it from Flora. Unlike in Flora, the absence of the instruction defining "willfully" had no effect on the verdict as the instruction would have been offered on an element conceded by defense counsel and not at issue. Accordingly, because the failure to give the instruction defining "willfully" had no effect on

the jury verdict, the Defendant is unable to establish the second prong under Strickland.

4.3 The Trial Court Did Not Error In Finding That The Defendant Would Have The Future Ability to Pay Discretionary Fees and Costs.

There is no requirement for a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). The imposition of fines is within the trial court's discretion, and that decision is reviewed only for abuse of discretion. *Id.*, At 916. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or sentence modified. *Id.* The Washington State Supreme Court has stated as such: "If in the future repayment will impose a manifest hardship on defendant, or if he is unable, through no fault of his own, to repay, the statute allows for remission of the costs award." State v. Blank, 131 Wn.2d 230, 253, 930 P.2d 1225 (1997). Furthermore, "[T]he meaningful time to examine the defendant's ability to pay is when the government seeks to

collect the obligation.” State v. Baldwin, 63 Wash.App 303, 312, 818 P.2d 1116 (1991).

Defendant has suffered no harm as a result of the imposition of costs. When the State attempts to collect from him (which it has not yet done), he will be given a chance to be heard and make arguments about his ability to pay. The court has made it clear: “There is no reason at this time to deny the State’s cost request based upon speculation about future circumstances.” *Id.*, at 253.

Defendant’s Judgment and Sentence, Finding 2.5, simply indicates that the Court believed that Defendant may be able to pay his legal financial obligations. (CP 245). The Defendant did not challenge the imposition of the legal financial obligations imposed by the court, or suggest that he would not have a future ability to pay. Defendant claims the court’s entry of the order finding him indigent for purposes of appeal is inconsistent with Finding 2.5 of the Judgment and Sentence. However, the finding of indigency relates to Defendant’s current ability to pay for his appeal, not the ability to pay future costs. As stated in State v. Hartz, the court did not contradict itself by finding the defendant indigent for purposes of his appeal but

not indigent for court costs and restitution. State v. Hartz, 65 Wash.App 352, 355-56, 828 P.2d 618 (1992).

The trial court acted within the statutory authority under RCW 10.01.160(3) in imposing costs. The issue is moot and/or not ripe since there is no current enforcement action pending. The trial court did not abuse its discretion.

4.4 Response to Statement of Additional Grounds for Review

Defendant asserts in his Statement of Additional Grounds for Review that a “deal that was made between my council, the State and the Courts.” The alleged “deal” that Defendant refers to arises from the trial court’s ruling on the Defendant’s motions in limine.

Prior to trial the Defendant brought a motion in limine seeking to limit how much of Officer Marshall’s car camera video would be played for the jury. (RP 73). The court ruled that the video would be stopped at the point the Defendant exited the pickup and put his hand up. (RP 76). The Court noted, however, that the balance of the video might come in if the Defendant opened the door. (RP 77). During its case in chief the State played the car video for the jury, constraining itself to the limitations imposed by the court. However, during cross

examination of the Defendant he opened the door by testifying he was wholly cooperative with law enforcement, an assertion contradicted by the car video. (RP 218-220). The State moved to admit and play the balance of the car video to the jury. (RP 221). Defense counsel objected to the State's motion. After argument the court allowed the rest of the video to be shown to the jury. (RP 222-226).

Defendant alleges that the State, his attorney, and the court were in league together in presenting the remainder of the car video to the jury. The Defendant's position is not supported by the record and is meritless. The record reflects typical, customary and usual litigation practices that occur throughout courts of jurisprudence. The State brought a motion during trial; defense counsel objected and stated reasons for his objections; and the court ruled on the motion, exercising its discretionary authority. There is no evidence that the State, defense counsel, and the trial court conspired with each other to play the car video to the jury. Defendant's Statement of Additional Grounds for review is speculative at best and without merit.

4.5 Response to Personal Restraint Petition (#302342)

Defendant's personal restraint petition challenges his conviction on the charge of Driving While License Suspended in the Second Degree. The petition asserts; (1) Defendant was eligible to reinstate his driver's license on October 6, 2010, and (2) the State called a custodian of records with the Department of Licensing as a witness at trial to persuade the jury Defendant had a motive to elude law enforcement.

The issues raised by the Defendant do not support a viable basis for relief from the Judgment and Sentence. Defendant fails to assert a violation of any court rule, statute or constitutional provision which justifies relief. In fact, the Defendant fails to assert any cognizable basis in law or fact warranting review by this court.

The Defendant plead guilty to the charge of Driving While License Suspended in the Second Degree. (CP 131-139). In doing so Defendant waived any challenges to pretrial issues relating to search and seizure, the legality of his license suspension, and his right to have the State prove the elements of the case beyond a reasonable doubt. A plea of guilty constitutes a waiver of significant rights by the defendant, among which are the right to a

jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt. State v. Tourtellotte, 88 Wash.2d 579, 564 P.2d 799 (1977) (citing Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)). Once entered by the court, a plea agreement creates a right analogous to a contract right. State v. Hall, 104 Wash.2d 486, 706 P.2d 1074 (1985) (citing In re Palodichuk, 22 Wash.App. 107, 589 P.2d 269 (1978)). Accordingly, the defendant has waived his right to challenge his conviction for Driving While License Suspended in the Second Degree.

Defendant's personal restraint petition should be denied.

V. CONCLUSION

The record before the court fails to establish that Defendant affirmatively requested an instruction defining the term "willfully," and therefore he is barred from raising it for the first time on appeal. Defendant failed to establish his counsel was ineffective under Strickland. Defense counsel's conduct can be legitimately characterized as trial tactic or strategy. Alternatively, if defense counsel's performance was deficient under Strickland, Defendant cannot carry his burden to show prejudice since the offered instruction related to an element conceded at trial.

The trial court did not error in failing to inquire as to Defendant's present and future ability to pay prior to imposing discretionary legal financial obligations. Defendant's Personal Restraint Petition and Statement of Additional Grounds on Review lack legal and factual support and should be denied.

Defendant's conviction and sentence for Attempting to Elude Pursuing Police Vehicle and Driving While License Suspended in the Second Degree should be affirmed.

Dated: 3/28/12

Respectfully Submitted by:


Eric C. Biggar, WSBA 17475
Deputy Prosecuting Attorney
Attorney for Respondent

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

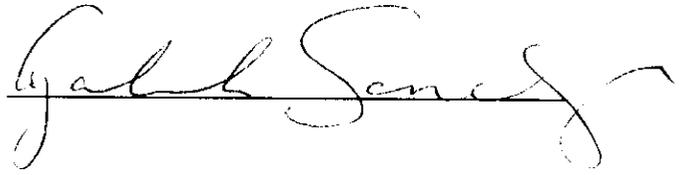
STATE OF WASHINGTON,) NO. 29974-1-III
Appellant,)
)
vs.) AFFIDAVIT OF MAILING
)
DAVID A. DODD,)
Respondent.)

STATE OF WASHINGTON)
: ss.
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath deposes and says: That on the 28TH day of March 2012, affiant deposited in the United States Mail at Waterville, Washington, postage prepaid thereon, an envelope containing a copy of this Affidavit and a copy of the Brief of the Respondent, addressed to:

David L. Donnan
Marla Leslie Zink
Washington Appellate Project
1511 3rd Ave., STE 701
Seattle, WA 98101-3635

David A. Dodd
#291866
Airway Heights Correction Center
PO Box 2049
Airway Heights, WA 99001



SUBSCRIBED AND SWORN to before me this 28th day of March,
2012.



NOTARY PUBLIC in and for the State
of Washington, residing at East
Wenatchee; my commission expires
02/26/2015.