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NO: 67529-01

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALEX CHAVEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

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**A. ISSUES PRESENTED**

1. A defendant may only raise an error for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). The voluntariness of a guilty plea may be raised for the first time on appeal, but the defendant must show he was prejudiced by the error. The record shows that Chavez made a knowing, intelligent, and voluntary decision to enter a plea. Has Chavez failed to show that his plea was involuntary?

2. A sentencing court's denial of a defendant's request for a Drug Offender Sentencing Alternative (DOSA) is within the trial court's discretion. Chavez has a long history of committing crimes of domestic violence, ignoring court orders, and his crimes did not appear to be motivated by his drug use. Is the trial court's decision not to impose a DOSA reviewable?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State originally charged appellant Alex Chavez under King County cause 10-1-03073-1 KNT with two counts of domestic violence felony violation of a court order for his actions on April 16 and April 19, 2010. CP 1-5. The State also charged Chavez with

one count of domestic violence felony violation of a court order on May 18, 2010 under King County cause 10-1-05560-2 KNT. Supp CP \_\_\_\_ (sub no. 49B). The State learned additional facts supporting additional charges, and notified defense that it would add an additional count of felony violation of a court order and a count of tampering with a witness.

On April 13, 2011, the parties were assigned to the Honorable Judge Regina Cahan for trial. Supp CP \_\_\_\_ (sub no. 49B). The State moved to join the two cause numbers for trial and to add the charge of tampering. Id. The trial court granted the State's motions. Id. The trial court denied the defendant's motions to sever the charges and to dismiss for a speedy trial violation. Id. Chavez's final charges for trial were four counts of felony violation of a court order and one count of tampering with a witness. CP 96-99.

The following day, Chavez pleaded guilty to four counts of felony violation of a court order in exchange for the dismissal of the tampering charge. CP 100-11; Supp CP \_\_\_\_ (sub no. 49B). On August 5, 2011, the court sentenced Chavez to 55 months confinement. 5RP 11-12; CP 163-71.

## 2. SUBSTANTIVE FACTS

Chavez was prohibited from contacting his ex-girlfriend, Kyla Wilson, by a protection order issued by King County Superior Court on May 10, 2004 and in effect until May 4, 2015. CP 3. Despite the court order, he called Wilson on April 16, 2010. Id. Wilson saw the call was from a private number and answered it. Id. She heard a man say "What's up trouble?" CP 136. She immediately recognized the man's voice as Chavez, her ex-boyfriend. CP 3. She had ended her relationship with Chavez five years previously. CP 135. She asked him why he was calling her and he responded, "I'm in Fife, why don't you come and pick me up?" CP 3. She told him to stop calling her. Id. The defendant asked her why she was being so mean. CP 135. She hung up the phone. Id. She then called the police. Id. A few days later, Chavez called her again. Id. The State filed two counts of felony violation of a court order under King County cause 10-1-03073-1 KNT.

On May 18, 2010, Chavez called Wilson again. CP 116. Again, Wilson answered the call from a private number. Id. Chavez asked her why she had called the police the last time they spoke and said he received paperwork from the King County court

at his mother's house in Spokane. Id. She told him to leave her alone and that she was not talking to him, then she hung up the phone. CP 135. As soon as she did, she received three more calls from a private number. Id. Wilson called the police. Id. The State filed one count of felony violation of a court order under King County cause 10-1-05560-2 KNT. Id.

After filing the initial charges, the State learned that Wilson had received a series of messages on her MySpace account from Chavez from May 21 and May 22, 2010. CP 135-36. In the messages, Chavez repeatedly asked for her phone number to talk and referred to the pending King County court case in Kent. Id. The State added an additional charge of felony violation of a court order for trial and joined 10-1-05560-2 with cause 10-1-03073-1 KNT. Supp CP \_\_\_\_ (sub no. 49B).

On April 14, 2011, Chavez pleaded guilty following a thorough colloquy on the record with the deputy prosecuting attorney. 2RP 1-17. Edwin Aralica represented Chavez throughout his case and at the plea hearing. 2RP 13; CP 6-15, 43-50, 64-70, 71-74, 75-76, 150-62. After the State's recommendation was read, Chavez said he had a question for his attorney. 2RP 7. Chavez consulted with Mr. Aralica off the record. 2RP 7. The court and

deputy prosecutor then confirmed with Chavez that his attorney had answered his question and that he did not need any more time to speak to his attorney. 2RP 7-8.

The deputy prosecutor also reviewed the rights that Chavez was giving up by pleading guilty, as outlined in the statement of defendant on plea of guilty. 2RP 4-5. This included the right to appeal after a trial. CP 101. Chavez said he understood that he had those rights at a trial, and that his attorney had gone through those rights with him. 2RP 4. He also said he understood that he was giving up those rights by pleading guilty. 2RP 4-5.

The court then confirmed with Chavez that he did not need any more time to consult with his attorney, his questions had been answered, and that it was his decision to plead guilty. 2RP 13-15. Chavez signed the plea form and the plea agreement form. CP 110, 119. The court accepted Chavez's plea. 2RP 14-15.

At the sentencing hearing on May 20, 2011, Chavez announced that he did not feel Mr. Aralica had represented him effectively, and he wished to withdraw his plea. 3RP 2-3. The court granted Mr. Aralica's motion to withdraw and appointed new counsel, Debra Redford. 3RP 2-7; 4RP 2-7.

Chavez's new attorney did not bring a motion to withdraw his plea. Although the court set a briefing schedule, defense never filed a motion to withdraw his plea. 4RP 3-7. The next hearing was the sentencing hearing on August 5, 2011.

Chavez sought a DOSA at the sentencing hearing. 5RP 1-15. The deputy prosecutor opposed the DOSA and requested a 51-month sentence, as set forth in the plea agreement. CP 119. The victim addressed the court and asked the court to deny Chavez's request for a DOSA. 5RP 5. She explained that Chavez's drug use had never been a motivating factor in his abuse of her. 5RP 5-6. The court denied the request for a DOSA and imposed a mid-range sentence of 55 months. 5RP 11.

**C. ARGUMENT**

**1. CHAVEZ KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY PLEADED GUILTY AND HIS NEW ATTORNEY'S COMMENT AT SENTENCING HAD NO BEARING ON THE VOLUNTARINESS OF HIS PLEA.**

Chavez asserts that he did not voluntarily enter his plea. His only basis for this claim is a single comment made by his new attorney at sentencing, four months after the plea, that she was filing a notice of appeal because "there were some pretrial issues

and other things that he would like to address on appeal." 5RP 15; CP 172. In order to prevail, Chavez must show actual prejudice as a result of the error he has raised for the first time on appeal. Chavez's claim fails because he cannot make such a showing of prejudice. A different attorney advised him at the time he entered his plea and the record shows he knowingly, intelligently, and voluntarily pleaded guilty giving up his constitutional trial rights, including the right to appeal, in order to take advantage of the State's plea offer.

Chavez has raised the issue of the voluntariness of his plea for the first time on appeal. A defendant may only raise an error for the first time on appeal if the error is a manifest error affecting a constitutional right. RAP 2.5(a)(3); see e.g. State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). A defendant may challenge the voluntariness of a guilty plea for the first time on appeal because the defendant's constitutional rights are implicated, such as the waiver of the right to appeal. Walsh, 143 Wn.2d at 8. However, the error must also be manifest. "Manifest" means that the defendant must show actual prejudice as a result of the error. Walsh, 143 Wn.2d at 8 (citing State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995)). In other words, a defendant must show

that the error had "practical and identifiable consequences" on the disposition of the case. State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). Such a showing of prejudice must be apparent from the trial record, "If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted."<sup>1</sup> Id.

Due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). In other words, a plea must be entered without coercion and with a correct understanding of the charge and the direct consequences of pleading guilty. State v. Walsh, 143 Wn.2d 1, 6, 17 P. 3d 591 (2001); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). Whether a plea is knowingly, intelligently, and voluntarily made is determined from the totality of the circumstances. Branch, 129 Wn.2d at 642.

When a defendant completes a written statement on plea of guilty in compliance with CrR 4.2(g), and acknowledges that he or she has read and understands the form and that its contents are

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<sup>1</sup> If Chavez wished to raise issues based on matters outside of the trial record, such as his attorney's advice to him prior to pleading guilty, then he must do so by filing a personal restraint petition. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251, 1257 (1995).

true, the written statement provides prima facie verification of the plea's voluntariness. In re Pers. Restraint of Scott, 150 Wn. App. 414, 427, 208 P.3d 1211 (2009); Branch, 129 Wn.2d at 642 n.2. When a judge inquires orally of the defendant and "satisfies himself on the record of the existence of various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable." State v. Perez, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

Chavez relies solely on State v. Smith, 134 Wn.2d 849, 852-53, 953 P.2d 810 (1998), in asserting that his plea was involuntary due to his attorney's one comment at sentencing. Appellant's Brief at 4. However, Chavez's case is readily distinguishable from Smith.

In Smith, the Washington State Supreme Court found that the defendant's plea was not voluntary when he pleaded guilty following denial of his suppression motion because his attorney stated during the plea hearing that the defendant "was waiving certain rights on appeal, but was retaining the right to appeal the trial court's suppression ruling." 134 Wn.2d at 853. His attorney "in open court expressed an erroneous legal interpretation of the plea statement which [was] at odds with a valid waiver." Id. Neither the prosecutor nor the trial court corrected the erroneous statement by

Smith's attorney. Id. Therefore, the Washington State Supreme Court held that the record did not establish Smith pleaded guilty knowing the effect on his right to appeal the suppression ruling. Id. Smith's case was remanded to the trial court to permit him to withdraw his plea. Id. at 854.

Here, Chavez pleaded guilty on the second day of trial following denial of his several pretrial motions. Supp CP \_\_\_\_ (sub no. 49B); 2RP 1. Edwin Aralica represented Chavez at the plea and at all prior proceedings until May 20, 2011. 1RP 3; 2RP 2-3. Chavez signed the statement of defendant on plea of guilty. CP 110. The deputy prosecuting attorney then inquired of Chavez on the record whether he understood the plea form and all that it contained. 2RP 2-12. This included asking the defendant whether he understood that he was giving up important rights by pleading guilty and that those were the rights listed on the plea form, which included the right to appeal. 2RP 4-5; CP 101. Chavez answered out loud on the record that he understood the rights he had at a trial, that his attorney had gone through each of those rights with him, and that he understood he was giving up those important rights by pleading guilty. 2RP 4-5. He affirmed he still wished to

enter the plea. 2RP 5. He expressed no hesitation in answering the deputy prosecutor's questions.

Chavez also spoke up when he did have a question about the plea. He said he had a question after the deputy prosecutor read the State's recommendation. 2RP 6-7. He conferred with his attorney off the record. 2RP 7. Prior to resuming the colloquy, the court asked the defendant if he needed more time. 2RP 7. The defendant said he did not and that his attorney had answered his question. 2RP 7. The parties also corrected the numbering of the counts in the plea form and the statutory citation in the factual statement. 2RP 7-8, 15-16. Both times, Chavez affirmed that he understood the changes and that it did not change his desire to plead guilty. 2RP 7-8, 15-16.

Chavez's attorney, Mr. Aralica, represented to the court that Chavez was making a knowing, intelligent, and voluntary decision and wished to enter the plea. He stated: "Your Honor, on multiple occasions, Mr. Chavez and I have had discussions about his rights, including right to trial and right to plead guilty. I believe at this point that he's making a knowing, intelligent, and voluntary decision, and I would ask the Court to accept his plea of guilty to these four counts." 2RP 13.

The court then inquired of Chavez whether he understood everything contained in the plea statement and if he had reviewed it with his attorney. 2RP 13-14. Chavez answered affirmatively to each question. 2RP 13-14. The court also asked whether he had enough time for his attorney to answer any questions he had about the consequences of his plea. 2RP 13-14. Chavez answered "Absolutely, your Honor." 2RP 14. The court then accepted Chavez's plea and found that Chavez was making a free and voluntary decision with full knowledge of the consequences of his plea. 2RP 14.

In sharp contrast to Smith, Chavez's attorney at the time of the plea never represented anything other than that Chavez understood all that was in the plea document, including the rights he was giving up by pleading guilty, and that Chavez wanted to plead guilty. Not once during the hearing did Chavez's attorney or anyone else mention that Chavez wished to appeal the pretrial rulings. The record shows Chavez himself represented he understood the plea form and he repeatedly expressed his desire to plead guilty. The totality of the circumstances show Chavez voluntarily pleaded guilty. See Perez, supra. There is no indication that counsel had erroneously interpreted the law, as in Smith.

At a hearing over a month later Chavez expressed his belief that his attorney had been ineffective. 3RP 2. Chavez specified that he wanted to withdraw his plea because he thought that the deputy prosecutor was agreeing to the DOSA. 3RP 4. The court allowed counsel to withdraw and appointed new counsel to look at the issue of whether Chavez should pursue a motion to withdraw his plea. 3RP 5-6. The new attorney never brought a motion to withdraw, and Chavez proceeded to sentencing.

The new attorney's comment on August 5, 2011, has no bearing on the voluntariness of his plea on April 14, 2011. Such a comment could not have had any effect given it came four months after Chavez pleaded guilty. The totality of the circumstances and record of the plea proceeding show that Chavez knowingly, intelligently, and voluntarily pleaded guilty. See Perez, 33 Wn. App. at 261; see also Smith, 134 Wn.2d at 852-53. Chavez has not shown actual prejudice as a result of any alleged error, therefore, his plea must be upheld.

**2. THE TRIAL COURT'S DECISION NOT TO IMPOSE A DOSA IS NOT REVIEWABLE.**

A sentencing court may impose a drug offender sentencing alternative (DOSA) for certain offenders provided certain statutory requirements are met. An offender is eligible for a DOSA if:

The conviction is not for a violent or sex offense, the offender does not have previous convictions for a sex offense or for a violent offense within ten years, the felony is not a felony driving while under the influence of intoxicating liquor or any drug, the offender has not been found by the United States attorney as subject to deportation, the offender has not received a DOSA more than once in the prior ten years, and the end of the standard sentencing range is greater than one year.

RCW 9.94A.660(1)(a-g).

The sentencing court has discretion on whether to grant a DOSA. RCW 9.94A.660(2). State v. Watson, 120 Wn. App. 521, 529, 86 P.3d 158 (2004). A court's decision to impose a standard range sentence, not a DOSA, is not reviewable. Id. See also State v. Grayson, 154 Wn.2d 333, 338, 342, 111 P.3d 1183 (2005); State v. Smith, 118 Wn. App. 288, 292, 75 P.2d 986 (2003).

The sentencing court reviewed the reports presented by defense, the defense social worker, and by the State. 5RP 7-8. The sentencing court also heard from the victim, the defendant, and had presided over a number of hearings involving the defendant. The State pointed out the defendant's long history of committing domestic violence offenses, specifically by violating court orders. 5RP 3-5. The facts of the violations also showed that he violated the order over the period of a month, not as simply one violation made while he was under the influence of drugs. 5RP 4-5. Wilson also explained to the court that in her relationship, Chavez's abuse of her did not appear to have any connection to his drug use. 5RP 6-7. The State and the victim both expressed serious concern that Chavez simply was seeking an excuse to avoid more prison time and to manipulate the court process. 5RP 2-3, 6-7.

The court considered all of these factors in determining that a DOSA sentence was not an appropriate sentence. The court followed proper procedure. The court's decision is not reviewable. Grayson, 154 Wn.2d at 338.

**D. CONCLUSION**

For the foregoing reasons, Chavez's conviction and sentence should be affirmed.

DATED this 9<sup>th</sup> day of May, 2012.

Respectfully submitted,

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