103040-1

SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH LEE STONE, PETITIONER

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Kenneth Lee Stone breached a plea agreement, admitting he lied while giving testimony during the trial of Colby Vodder. Despite admitting his breach, Mr. Stone moved the court to enforce that agreement, casting blame on his defense attorney for "failing" to attend the trial. Former counsel and the prosecutor testified at an evidentiary hearing, explaining *Mr. Stone* had excused his attorney's attendance and insisted his attorney need not be present. The court denied the motion, expressly finding Mr. Stone not credible, and the two attorneys credible.

Mr. Stone then entered a second plea agreement with the State. After sentencing, Mr. Stone filed a notice of appeal. In that appeal, Mr. Stone did not challenge the validity of the *second* plea agreement, instead contending the court erred by refusing to enforce the *first* plea agreement—which Mr. Stone admitted to breaching. Notably, Mr. Stone did not acknowledge the court

expressly found him not credible, and relied on his self-serving testimony, an omission repeated now. In response, the State argued Mr. Stone's second plea agreement waived the request to enforce the first plea agreement because any error preceded the second plea agreement, and Mr. Stone did not challenge the validity of his second plea agreement. The State nonetheless conceded Mr. Stone was entitled to relief from LFOs. The Court of Appeals agreed with both of the State's arguments.

Mr. Stone appears to now assert the Court of Appeals denied his constitutional right to appeal. Mr. Stone misapprehends the distinction between a complete waiver of the right to appeal and the doctrine of waiver as applied to specific issues raised after a guilty plea. Put simply, one of the "errors" Mr. Stone raised in his direct appeal was waived by Mr. Stone's decision to plead guilty and not challenge the plea itself. Review is not warranted.

II. STATEMENT OF RELIEF SOUGHT

Mr. Stone has filed a petition for review. The State seeks denial of Mr. Stone's petition for review of the unpublished opinion issued by the Court of Appeals on February 1, 2024, *State v. Stone*, No. 38808-5-III, 2024 WL 1460999 (Wash. Ct. App. April 4, 2024) (Op.).[1]

III. ISSUE PRESENTED FOR REVIEW

The issues which may be raised after a guilty plea are limited by the doctrine of waiver, regardless of the terms of a plea agreement. Does Mr. Stone fail to demonstrate review is warranted, where he exercised his right to appeal, and obtained relief from LFOs on appeal, but chose to also raise an issue that was barred by the doctrine of waiver because he did not challenge his valid guilty plea?

[1] This case is unpublished and cited pursuant to GR 14.1(a) for context only.

IV. STATEMENT OF THE CASE

Mr. Stone pleaded guilty to second degree murder, and his conviction was entered on March 9, 2021. CP 328.

Background.

In 2017, Mr. Stone pleaded guilty in federal court to drug distribution charges. CP 298. One year later, in 2018, the State of Washington charged Mr. Stone and several co-defendants with the kidnapping and murder of Bret Snow, alleged to have occurred in 2015. CP 1-2. The murder was related to Mr. Stone and his co-defendants' drug distribution scheme. CP 3. As part of negotiations in Mr. Stone's federal case, Mr. Stone's appointed defense attorney for his federal charges requested and arranged a "free talk" with the federal government and Washington State law enforcement for "Mr. Stone to freely discuss the facts surrounding the homicide of Mr. Snow including his own involvement." CP 39.

First plea agreement.

Subsequently, Mr. Stone agreed to testify truthfully on behalf of the State against Colby Vodder and pleaded guilty to kidnapping. RP 21. In exchange, the State agreed to recommend credit for time served and concurrent sentencing for the state and federal sentences, a recommendation Mr. Stone wished the State to make because the sentence on the kidnapping offense would "dovetail[] nicely" with the federal sentence. RP 20-22, 34-35, 72-73; CP 69, 230.

Mr. Stone testified at the Vodder trial that the plea agreement required him to tell the truth. CP 32, 236. Mr. Stone's attorney, Brian Whitaker, was not present during Mr. Stone's testimony because Mr. Stone told Mr. Whitaker his presence was not needed. RP 24; CP 228, 230, 236. Notwithstanding that decision, the deputy prosecutor asked Mr. Stone two times if Mr. Stone wished to have his attorney present for his testimony

at the Vodder trial; Mr. Stone "unequivocally" responded he did not, and that his attorney did not need to be present. RP 75, 80, 82; CP 65, 228, 230, 236.

Mr. Stone testified on behalf of the State as a witness against Mr. Vodder, but Mr. Stone lied. CP 65, 231, 236. Mr. Stone admitted he lied. CP 66, 231, 236. A mistrial was declared in Mr. Vodder's trial. RP 25. The State contacted Mr. Whitaker and alleged Mr. Stone breached the plea agreement. RP 25, 43.

Defense motion to enforce first plea agreement.

Mr. Stone subsequently moved the court to enforce the plea agreement. CP 37, 235.[2] Despite seeking to enforce the first

[2] The trial court jointly held a CrR 3.5 hearing, and later issued separate findings of fact and conclusions of law. CP 223-32 (CrR 3.5), 236-37 (order denying motion to enforce plea). Some of the relevant findings stem from the ruling on the first hearing, which mainly addressed CrR 3.5, while some come from a second hearing that readdressed the motion to enforce the plea agreement. CP 223-32, 235-37.

plea agreement, Mr. Stone admitted he materially breached the first plea agreement by lying at the Vodder trial. RP 12, 139; CP 226, 231, 236. The trial court reviewed the transcripts and briefing provided by both parties, and heard testimony from Mr. Stone, his former defense counsel Mr. Whitaker, and deputy prosecutor Mark Cipolla. CP 225, 235, 236.

Mr. Whitaker testified he had advised Mr. Stone to be truthful and that he had discussed the agreement with Mr. Stone and was satisfied Mr. Stone understood the nature of the agreement. RP 21-22; CP 228, 236. Mr. Whitaker testified his typical practice was to be present when a client testified pursuant to a plea bargain, but he was not present during Mr. Stone's testimony only because of Mr. Stone's agreement. RP 24; *see also* CP 228, 236. During cross-examination, Mr. Whitaker explained Mr. Stone was "confident he could do this without me sitting here because, you know, he was going to tell them the

same thing that he told them in the two other interviews we had been in." RP 37; *see also* CP 228, 235, 236.

Mr. Cipolla testified he had asked Mr. Stone multiple times prior to Mr. Stone's testimony whether Mr. Stone was comfortable going forward without Mr. Whitaker present. RP 75, 80, 82; CP 228, 236. Mr. Stone disputed the accounts of both attorneys, but also admitted to lying during his testimony in the Vodder trial. RP 99; CP 228-29.[3]

Subsequent hearing on enforcement of the plea agreement.

At the conclusion of the hearing, the trial court issued a partial order for the purposes of CrR 3.5. CP 223-32. Subsequently, at a pre-trial hearing to address motions in limine, Mr. Stone reraised the motion to enforce the plea agreement because the written order did not fully address the request. RP

[3] Because the court expressly found Mr. Stone not credible, the State does not recount Mr. Stone's testimony in detail. CP 236.

126-39. The trial court firmly told Mr. Stone it would not relitigate the issue decided in the previous ruling but would hold an additional hearing and issue a second order to address its oral denial of the motion to enforce the plea agreement. RP 137; CP 236-37. After hearing Mr. Stone's offer of proof, the court was concerned that Mr. Stone was really proposing to rehash the same testimony and ask the court to reconsider its earlier order. RP 180-81. The parties agreed the testimony from the prior hearing should be incorporated into the present hearing, including Mr. Stone's affirmative agreement that the court could consider Mr. Whitaker's prior testimony. RP 191, 222-23. Mr. Stone testified again, largely along the lines of his testimony at the joint CrR 3.5 and plea enforcement hearing. *See* RP 192-218.

Court's ruling.

The court orally found Mr. Whitaker and Mr. Stone jointly agreed that Mr. Whitaker need not be present during Mr. Stone's testimony at the Vodder trial, and had no reason to be present, based on Mr. Stone's multiple interviews and understanding of the plea agreement. RP 226, 228. This time, the court's oral ruling denying Mr. Stone's motion was reduced to written form. CP 236-37.

In the written order, the court found Mr. Stone and the State reached a plea agreement regarding Mr. Stone's involvement in the murder of Bret Snow. CP 236; RP 118. The agreement required Mr. Stone to testify truthfully as a witness on behalf of the State against Colby Vodder. CP 236; RP 118. Mr. Stone lied during his testimony, breaching his agreement; Mr. Stone admitted he lied. CP 236; RP 119-20. The court found

the agreement was not reduced to writing because of Mr. Stone's concern that he would be perceived as a snitch. RP 119; CP 236.

The trial court found Mr. Whitaker and Mr. Cipolla credible, and Mr. Stone not credible. CP 236-37; RP 119. The court found that Mr. Stone's sole credible statements were his statements that he had an obligation to testify truthfully at the trial, that he lied at the trial, and that he knew the terms of the plea agreement. CP 237.

Second state plea agreement.

Two weeks after the trial court denied Mr. Stone's motion to enforce the first plea agreement, the parties reached a second plea agreement. RP 233-34; CP 238-39. The trial court engaged Mr. Stone in a full plea colloquy. RP 235-41.

The second plea agreement required Mr. Stone to plead guilty to second degree murder. RP 234; CP 239. In exchange, the State agreed to recommend the high end of the standard

range, but to also request Mr. Stone serve his time concurrently with his federal sentence. CP 242. The second plea agreement incorporated several standard stipulations, including that Mr. Stone made the second plea "freely and voluntarily," CP 248, and that Mr. Stone's new counsel, Tim Trageser, had fully explained and discussed the terms of the plea agreement. CP 249.

Mr. Stone signed the second plea agreement, and orally acknowledged he made his plea knowingly, intelligently, and voluntarily. RP 240; CP 249. The trial court found Mr. Stone entered the second plea agreement knowingly, intelligently, and voluntarily. CP 250.

At sentencing, the court did not indicate Mr. Stone was indigent, and imposed the $500 victim penalty assessment, $200 criminal filing fee, and community custody supervision costs. CP 316 (lack of indigency finding), 319 ("(7) pay supervision fees

as determined by DOC"), 320-21 (other fees). One year later, Mr. Stone filed a notice of appeal. CP 328. Three months later, Mr. Stone filed an affidavit of indigency. CP 329-33.

V. ARGUMENT

A. THIS COURT SHOULD DENY REVIEW.

This Court should deny Mr. Stone's petition for review, brought under RAP 13.4(b)(1) and (3). Pet. at 12.

1. RAP 13.4(b).

This Court has discretion to grant review when a decision of the Court of Appeals is in conflict with a decision of the Supreme Court, or when the petition presents a significant question of constitutional law. RAP 13.4(b)(1), (3). Mr. Stone cites these two provisions in his petition for review. Pet. at 2, 12.

No conflict of law or constitutional issue of significance appears in this petition; Mr. Stone exercised his constitutional right to appeal, and the Court of Appeals followed multiple decisions from this Court in applying the doctrine of waiver to

one of the two issues raised. The Court of Appeals granted Mr. Stone relief based on legislative changes to the statutes governing LFOs. The State argued that Mr. Stone could only raise his other issue, which was whether the court erred by denying his motion to enforce a plea agreement that he admitted he materially breached, if he also challenged the voluntariness of his subsequent guilty plea. Mr. Stone did not challenge the voluntariness of the later guilty plea.

In the absence of any attempt to challenge the second guilty plea, entered and accepted by the trial court, the Court of Appeals cursorily analyzed whether the record established Mr. Stone's plea was made knowingly, intelligently, and voluntarily, consistent with a prior decision from this Court, and determined it did. This appears to be the source of Mr. Stone's current claim. The Court of Appeals correctly found Mr. Stone's unchallenged guilty plea was presumptively voluntary and

operated as a waiver of one of the two issues raised. No infringement of Mr. Stone's constitutional right occurred. This Court should deny this petition.

2. Distinction between the doctrine of waiver applied to specific issues raised on appeal and total waiver of the right to appeal.

A guilty plea operates as a waiver by the defendant of their right to appeal, regardless of the existence of a plea bargain. *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). Notwithstanding, a guilty plea "does not usually preclude a defendant from raising collateral questions such as the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made." *Id*. at 356.[4] Thus, this Court has held the issues which may be raised

[4] The circumstances in which the plea was made means "that the defendant did not voluntarily plead guilty with a full and complete knowledge of his rights and the effect of his plea." *State v. Eckert*, 123 Wash. 403, 406, 212 P. 551 (1923); *see also*

after a guilty plea are limited by the doctrine of waiver. *Woods v. Rhay*, 68 Wn.2d 601, 606, 414 P.2d 601 (1966).

Notably, "'[a] guilty plea waives or renders irrelevant all constitutional violations that occurred before the guilty plea, except those related to the circumstances of [the] plea or to the government's legal power to prosecute regardless of factual guilt.'" *State v. Brandenburg*, 153 Wn. App. 944, 948, 223 P.3d 1259 (2009) (quoting *State v. Amos*, 147 Wn. App. 217, 225-26, 195 P.3d 564 (2008)), *review denied*, 170 Wn.2d 1009 (2010).

Guilty pleas have long foreclosed collateral inquiry into allegations of pre-plea error, even constitutional violations, under federal law. *Tollett v. Henderson*, 411 U.S. 258, 266, 93 S.Ct. 1602, 64 L.Ed.2d 235 (1973); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S. Ct. 1029, 145 L. Ed. 2d 985

State v. Haddon, 179 Wash. 669, 672, 38 P.2d 227 (1934); *State v. Alberg*, 156 Wash. 397, 400, 287 P. 13 (1930).

(2000) ("a guilty plea reduces the scope of potentially appealable issues"). Under the United States Supreme Court's analysis, this is not simply an application of the doctrine of waiver, but a recognition that entry of a guilty plea supersedes "antecedent constitutional violations" and therefore "forecloses independent inquiry" into the claims. *Tollett*, 411 U.S. at 266. The Court further explained:

> …a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

Tollett, 411 U.S. at 267 (emphasis added).[5]

[5] This analysis suggests the doctrine of mootness also limits the issues that may be raised after a guilty plea. Because Mr. Stone did not challenge his plea, conviction, or sentence, this Court has

Mr. Stone pleaded guilty. The guilty plea rendered irrelevant most claims of error, other than the specific claims identified by this Court as exempt from the doctrine of waiver. Consequently, Mr. Stone's right to appeal is limited, as he acknowledged in his plea agreement. RP 236; CP 240. Mr. Stone did not challenge the voluntariness of that plea. One exemption from that limitation of the right to appeal is the ability of an appellant to challenge a trial court's sentencing decision when the sentencing decision exceeds the court's statutory authority. *State v. Moten*, 95 Wn. App. 927, 931 n.4, 976 P.2d 1286 (1999) (citing *In re Personal Restraint of Hews*, 108 Wn.2d 579, 594, 741 P.2d 983 (1987) *and In re Personal Restraint of Moore*, 116 Wn.2d 30, 38, 803 P.2d 300 (1991)). Mr. Stone did so and obtained relief in the form of his LFOs being struck,

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no effective relief to grant. *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)

because the court did not have statutory authority to impose them. Op. at 13.

Another exception to the waiver doctrine is when the record rebuts the presumption of voluntariness. *State v. Smith*, 134 Wn.2d 849, 953 P.2d 810 (1998). In *Smith*, the appellant entered an otherwise standard plea agreement, but stated in open court that he was retaining the right to appeal a suppression ruling, apparently due to a misunderstanding in the difference between a stipulated facts bench trial and a guilty plea. *Id*. at 853. Unfortunately, neither the trial court nor the prosecutor corrected this misapprehension. *Id*. Under these circumstances, this Court determined the record rebutted the presumption of voluntariness of the plea, and remanded for the limited remedy of permitting Smith to withdraw his plea and proceed on a stipulated facts bench trial. *Id*. at 853-54.

The Court of Appeals relied on and followed this Court's analysis in *Smith* by first reviewing the record to determine that Mr. Stone's plea was made knowingly, intelligently, and voluntarily. Op. at 10-11. Unlike in *Smith*, Mr. Stone expressed no confusion over his waiver and did not express that he intended to seek review of issues barred by the doctrine of waiver. After that review, the Court of Appeals was satisfied that Mr. Stone's plea was valid, so it declined review of one of the two issues because it was precluded by the guilty plea, in accordance with this Court's holdings. No error occurred.

Mr. Stone appears to contend that the limitation on the right to appeal (as opposed to the plea) is invalid because the record does not contain an explanation of each and every limitation on the right to appeal after a guilty plea. Pet. at 9-10, ("The trial court did not explain the limits at the plea hearing or specifically confirm trial counsel had explained them"), 10-11

("Where the guilty plea statement implied Mr. Stone retained a limited right to appeal, but did not list what those limits were, the Court of Appeals could not conclude Mr. Stone knew his motion to enforce the plea agreement fell outside the scope of his remaining appellate right").[6] He has cited no caselaw for the proposition that such an exhaustive recitation is necessary, and so this Court may presume none exists. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

To the contrary, this Court stated in *Majors* that a guilty plea operates as a waiver of the right to appeal even in the absence of a plea agreement. 94 Wn.2d at 356; *see also State v. Lee*, 132 Wn.2d 498, 505-06, 939 P.2d 1223 (1997) (parties may

[6] For that matter, Mr. Stone acknowledges that his attorney likely explained the limitations outside the record. *See* CP 249. That means that a PRP is the appropriate vehicle for such a claim. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). That said, from the context it appears that Mr. Stone still does not seek to withdraw his plea.

bargain separately for a total waiver of all appellate rights). This is consistent with the notion that the guilty plea is a superseding event that renders irrelevant (or moot) errors unrelated to the validity of the plea or sentencing. Even in *Smith*, which Mr. Stone relies on as analogous to his case, the record rebutted the presumption of voluntariness because it expressly contained the appellant's misunderstanding that a suppression ruling could be raised on appeal even after a guilty plea. No such misunderstanding appears in this case. The Court of Appeals properly reviewed the record, determined Mr. Stone's plea was knowingly, intelligently, and voluntarily made, and applied the doctrine of waiver to one of his two issues.

3. Invited error.

As an alternative basis to decline review, invited errors are not subject to review, even where the error is not based in negligence or bad faith. *City of Seattle v. Patu*, 147 Wn.2d 717,

720-21, 58 P.3d 273 (2002). The doctrine applies even to claims of constitutional error. *Matter of Griffith*, 102 Wn.2d 100, 101-02, 683 P.2d 194 (1984); *State v. Mullen*, 186 Wn. App. 321, 326, 345 P.3d 26 (2015).

The trial court found that Mr. Stone had excused his attorney's presence during his testimony at the Vodder trial, based on the testimony and the court's express findings that Mr. Whittaker and Mr. Cipolla were credible, while Mr. Stone was not.[7] The doctrine of invited error would then preclude review of the substantive merits of the underlying issue Mr. Stone attempted to raise at the Court of Appeals. *See* State's Response at 23-25. There is no reason to grant review in this

[7] Those credibility determinations are not subject to review and may not be disregarded by this Court or the Court of Appeals, notwithstanding that Mr. Stone has never mentioned them in his briefing. *In re Davis*, 152 Wn.2d 647, 680, 101 P.3d 1 (2004).

case where the invited error doctrine would preclude review even if waiver did not.

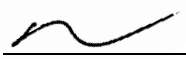
VI. CONCLUSION

Because Mr. Stone knowingly, intelligently, and voluntarily pleaded guilty, his claim of error relating to his motion to enforce a prior plea agreement, which he stipulated to materially breaching, is subject to the doctrine of waiver. The Court of Appeals properly assessed the record and was satisfied Mr. Stone's second plea agreement was voluntary. This case does not warrant further review.

This document contains 3,715 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 22 day of May, 2024.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KENNETH LEE STONE, Petitioner.	NO. 103040-1 CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 22, 2024, I e-mailed a copy of the Answer to Petition for Review in this matter, pursuant to the parties' agreement, to:

Christopher Petroni
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Gregory Link
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5/22/2024 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

May 22, 2024 - 9:54 AM

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