IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES PHILIP DOUGLAS, Appellant.	No. 39429-4-II ORDER AMENDING OPINION AND DENYING MOTIONS FOR RECONSIDERATION, FOR EXTENSION OF TIME, TO APPOINT COUNSEL, and FOR FEES

Appellant, James Douglas, has filed a motion asking the court to reconsider its unpublished opinion filed on March 1, 2011. In his motion to reconsider, he objects that we failed to consider arguments he included in (1) a "response brief" which he filed with the trial court; as well as (2) a motion for an extension of time that he filed on November 10, 2010; and (3) two additional motions seeking appointment of counsel and payment of attorney fees that he filed on December 30, 2010, in our court.

A pro se litigant's failure to comply with all procedural rules on appeal may preclude review. *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999). An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). We do not consider

arguments that are unsupported by any reference to the record or by any citation of authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Appellate courts are not required to search the record to locate the portions relevant to a litigant's arguments. *Mills v. Park*, 67 Wn.2d 717, 721, 409 P.2d 646 (1966).

It appears Douglas mistakenly filed a "response brief" related to this case with the trial court on July 30, 2010. This court granted Douglas's motion to proceed pro se on August 27, and advised him that any additional briefing he wished the court to consider would first require a motion explaining the need for any such briefing. Douglas did not file a motion to submit the July 30 response brief he now requests that we consider in this case. Because we hold Douglas to the same standard as an attorney on appeal and he failed to submit the July 30 response brief for our review, we do not consider any arguments contained therein. *Battan v. Abrams*, 28 Wn. App. 737, 739 n.1, 626 P.2d 984 (1981).

We address Douglas's remaining motions as follows:

(1) Douglas's motion for extension of time is denied. On November 10, 2010, Douglas filed a motion to supplement the record and for an extension of time and this court directed the State to respond. The documents Douglas wished to supplement the record with are (a) a December 8, 2008 motion to dismiss charges; (b) a January 12, 2009 hearing transcript; and (c) an October 22, 2010 hearing transcript. The December 8 motion appears to relate to the question of whether the trial court should vacate the assault-related convictions—an issue this court resolved in an unpublished opinion filed on September 3, 2008, affirming those convictions. Douglas fails to explain why either hearing transcript is necessary or relevant to the issues on appeal. RAP 9.10.

(2) Douglas's motion to appoint counsel is denied. On December 30, 2010, Douglas filed a motion to appoint counsel to "deal with the additional supplement to the record and to be available for oral argument in this case." Because this court granted Douglas's own motion to proceed pro se, he is precluded from later demanding assistance of counsel as a matter of right. *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991); U.S. Const. amend. VI. As discussed above, if Douglas wished to supplement the record or file additional briefing, he, as a pro se appellant, was responsible not only for filing the relevant motions with this court but also for adequately explaining the need for any such motion.

To the extent the December 30 motion is to set the case for oral argument, it is untimely. This court sent a letter to Douglas on November 10, 2010, notifying him that the case would be decided without oral argument and that he had 10 days to request oral argument. This court did not receive any request.

(3) The motion for fees is denied. On December 30, 2010, Douglas filed a motion requesting fees pursuant to RCW 49.48.030 and CR 54(d)(2). RCW 49.48.030 deals with attorney fees in an action on wages or salary and is inapplicable here. CR 54(d)(2) deals with attorney fees requested by motion to the superior court in a civil case and is likewise inapplicable to this case.

(4) We have reconsidered our decision and, for the reasons stated above, amend the opinion to include a footnote following the first sentence on the first page to read as follows:

> This court granted Douglas's motion to proceed pro se on August 27, 2010, advising Douglas that if he wished to submit additional briefing, he must file a motion in this court, making that request, and explaining the need for it. On September 2, Douglas wrote a letter to this court stating that he relied on his former appellate counsel's opening brief and his statement of additional grounds. Douglas also stated he relied on a "response brief," but that brief was never filed

with this court. Because pro se litigants are held to the same standard as attorneys and must comply with all procedural rules on appeal, our review of this case is limited to the arguments put forth in Douglas's former appellate counsel's opening brief, Douglas's statement of additional grounds (SAG) and a "motion to

dismiss cause" attached to his SAG. *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999).

IT IS SO ORDERED.

DATED this _____day of _____, 2011.

QUINN-BRINTNALL, J.

We concur:

HUNT, P.J.

VAN DEREN, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES PHILIP DOUGLAS, Appellant.	No. 39429-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — James Philip Douglas appeals his judgment and sentence for second degree assault and bail jumping convictions, claiming that he was denied his right to counsel at the resentencing hearing and that a 10-year no-contact order entered at the resentencing hearing improperly exceeds the statutory maximum sentence for second degree assault. Because Douglas validly waived his right to counsel when he asserted his right to represent himself and because ch. 10.99 RCW, not ch. 9.94A RCW, governs the order prohibiting contact he seeks to challenge, neither claim has merit and we affirm.

FACTS

On August 10, 2004, the State charged Douglas under Pierce County Superior Court cause number 04-1-03902-1 with one count of second degree assault and one count of fourth degree assault (the "assault charges"). The State filed an amended information on November 18,

to add one count of bail jumping to the assault charges. On November 1, the State charged Douglas under Pierce County Superior Court cause number 04-1-05086-5 with one count of first degree arson, one count of residential burglary, and violation of a domestic violence court order (the "arson charges").

On March 3, 2005, the trial court joined and consolidated the assault and arson charges for trial. The jury found him guilty on all counts as charged. The trial court then sentenced Douglas on February 10, 2006, and Douglas filed his first timely notice of appeal on March 10. In an unpublished opinion issued on September 3, 2008, we reversed Douglas's arson convictions, affirmed his assault convictions, and remanded. *State v. Douglas*, noted at 146 Wn. App. 1046 (2008).

On December 1, 2008, the trial court held a remand hearing. The State called the case using the cause number for the arson charges because the charges remained consolidated under that number. At this hearing, Douglas moved to proceed pro se. The trial court granted Douglas's motion and appointed standby counsel.[1] A week later, on December 8, Douglas filed a motion to sever the two charges. On December 16, the trial court granted Douglas's severance motion so that the assault charges could be resentenced without including the vacated arson

[1] During colloquy, the trial court stated,

> If things aren't going well and you decide, well, I'd like my standby counsel to take things over, your standby counsel isn't going to be prepared to the extent that a counsel preparing and having to do the trial themselves would be. You are not going to get to say, oh, well, sorry, now we are going to scrap the trial in the middle of the State's case because you don't like the way things are going and you can't handle things for yourself and you don't like the way your standby counsel is handling things. So, you have to live with the consequences of your choice.

Report of Proceedings (RP) (Dec. 1, 2008) at 14.

> I will appoint standby counsel for Mr. Douglas and accept his written waiver.

RP (Dec. 1, 2008) at 16.

convictions in Douglas's offender score. It also vacated the original judgment and sentence and set the assault charges for resentencing. In addition, Douglas filed a motion for relief from judgment on the assault charges, which the trial court later denied.

On February 6, 2009, the trial court approved and signed two subpoenas for witnesses that Douglas claimed were necessary to present mitigating circumstances testimony at resentencing. At the March 27 resentencing hearing, these two witnesses testified and the trial court sentenced him to 12 months incarceration for the second degree assault conviction and 8 months incarceration for the bail jumping conviction, to be served concurrently, with the same number of months credit for time served. The trial court also entered a 10-year domestic violence no-contact order barring Douglas from contacting the two victims in the assault charges. Douglas timely appeals.

DISCUSSION

Right to Counsel at Resentencing

For the first time on appeal, Douglas argues he was denied his right to counsel at the resentencing hearing. Douglas argues that because the December 1, 2008 hearing was called under the cause number for the arson charges, the court's colloquy addressing his waiver of counsel did not relate to the assault charges. Therefore, Douglas asserts that he did not waive his right to counsel with respect to the assault charges and was entitled to representation at the resentencing hearing on those charges. At the time of the December 1 hearing, however, the assault and arson charges were consolidated under the arson cause number. The trial court's colloquy addressed Douglas's self-representation on the charges before it which included both the arson charges pending retrial and the assault convictions pending resentencing.

Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). The appellant must show actual prejudice in order to establish that the error is "manifest." *State v. Munguia*, 107 Wn. App. 328, 340, 26 P.3d 1017 (2001) (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)), *review denied*, 145 Wn.2d 1023 (2002). Under both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel at critical stages in the litigation. *State v. Heddrick*, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009) (citing U.S. Const. amend. VI; Wash. Const. art. 1, § 22; *State v. Everybodytalksabout*, 161 Wn.2d 702, 708, 166 P.3d 693 (2007)). Sentencing is a critical stage of a criminal proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal. *Heddrick*, 166 Wn.2d at 910 (citing *United States v. Cronic*, 466 U.S. 648, 658-59, 659 n.25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

A criminal defendant has a right to represent himself, however, and may waive the constitutional right to be represented by counsel. *State v. Joyner*, 69 Wn. App. 356, 362, 848 P.2d 769 (1993) (citing *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Smith*, 50 Wn. App. 524, 528, 749 P.2d 202, *review denied*, 110 Wn.2d 1025 (1988)). A valid waiver must be knowing and intelligent. *Joyner*, 69 Wn. App. at 362 (citing *Smith*, 50 Wn. App. at 528). A colloquy on the record establishes a knowing and intelligent waiver if it demonstrates that the defendant made the decision to represent himself with at least minimal knowledge of (1) the nature and classification of the charge, (2) the maximum penalty upon conviction, and (3) the existence of technical rules which will bind a defendant in the

presentation of his case. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

On December 1, the State introduced the case under the arson charges cause number and informed the trial court that "[t]here were two charges, or multiple charges, but two separate cases consolidated for trial." Report of Proceedings (RP) (Dec. 1, 2008) at 4. The trial court conducted colloquy before granting Douglas's motion to proceed pro se and appointing standby counsel. The trial court made it clear to Douglas that standby counsel was a resource but would not jump in to represent him in the matter—the consolidated arson and assault charges. Douglas was also made aware that the assault conviction was a "strike offense" under the Persistent Offender Accountability Act, RCW 9.94A.570, and could affect sentencing in any subsequent convictions, e.g., in the pending arson charges trial.

Douglas demonstrated knowledge of some of the sentencing implications when he moved to sever the assault charges from the arson charges, presented mitigation testimony at the resentencing hearing as permitted under former RCW 9.94A.535(1) (2003), ensured his concurrent sentences were credited with time already served, and inquired as to how to obtain proof of payment to the Department of Corrections for previous fees assessed. Douglas also expressed his intent to appeal the resentence. Accordingly, Douglas knowingly and intelligently waived his right to counsel on both the arson and assault charges and his Sixth Amendment rights were not violated when he represented himself at his resentencing.

No-Contact Order

Also for the first time on appeal, Douglas contends that the March 27, 2009 no-contact order exceeds the statutory maximum term for the assault conviction because the order began the 10-year prohibition on March 27, 2009, rather than from the original sentencing date in 2006.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Second degree assault is a Class B felony which carries a 10-year statutory maximum sentence. RCW 9A.36.021(2)(a); RCW 9A.20.021(1)(b). A no-contact order may be entered as a condition of a sentence but may not exceed the statutory maximum term for the sentence. *State v. Parsley*, 73 Wn. App. 666, 669, 870 P.2d 1030 (1994).

Douglas is correct that the trial court's jurisdiction to enforce the terms of Douglas's sentence expires 10 years from the original date of sentence, February 10, 2006. However, here the no-contact order was not imposed under ch. 9.94A RCW as a condition of community custody or community placement. Rather the no-contact order referenced in Douglas's judgment and sentence is a separate civil no-contact order under ch. 10.99 RCW and ch. 26.50 RCW. Thus, the provisions of those statutes, not Douglas's judgment and sentence, control the duration of the prohibition against his contact with the victims who petitioned the court for an order prohibiting Douglas from having contact with them. Because this action is a direct appeal of Douglas's judgment and sentence and not the victims' petition for a no-contact order, we do not address this issue further.

Statement of Additional Grounds (SAG)[2]

In his SAG, Douglas asserts three grounds for review and requests that we dismiss the assault charges convictions. First, Douglas argues that his assigned appellate counsel misstated the facts in his opening brief and the misstatement amounts to ineffective assistance of counsel. The brief of appellant states, "The convictions for the assaults and bail jumping were remanded

[2] RAP 10.10.

for resentencing." Br. of Appellant at 1. Douglas asserts that the trial court vacated his convictions in its December 16, 2008 order.[3]

To establish ineffective assistance of counsel, Douglas must show that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wn.2d at 334-35. Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). To show prejudice, Douglas must establish that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. "'[A] reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (emphasis omitted) (quoting *Strickland*, 466 U.S. at 694).

On December 16, the trial court granted Douglas's motion to sever the arson and assault charges and to enter a new and corrected judgment and sentence for the assault charges. A new judgment and sentence was necessary because the trial court in 2006 had sentenced the assault charges using the arson charges to calculate Douglas's offender score. The trial court then set the assault charges for resentencing. While Douglas is correct that the trial court vacated the original judgment and sentence from his first trial on the two charges, the act did not invalidate Douglas's assault convictions. Accordingly, Douglas's appellate counsel did not err when he stated the assault charges were remanded for resentencing and Douglas's claim for ineffective assistance of

[3] The December 16, 2008 order states, "Cause # 04-1-03902-1 (Assault) shall be subject to vacation of the Judgment & Sentence. Resentencing on this cause # shall take place on 1/12/2009." Clerk's Papers at 101.

counsel fails.

Second, Douglas asserts that the trial court erred when it set the assault charges for resentencing after granting one of Douglas's motions for relief from judgment rather than dismissing the charges and vacating the convictions. It appears Douglas made several CrR 7.8 motions for relief from judgment or order. The trial court granted one such motion to vacate an April 2006 order setting restitution and disbursement because it would have to resentence Douglas for the assault charges. Douglas also appears to have argued that the original judgment and sentence was invalid due to prosecutorial misconduct.[4] Douglas's prosecutorial misconduct claim lacks merit and the trial court did not err when it set the assault charges for resentencing.

Third, Douglas claims he has been unlawfully incarcerated because he has served 65 months and his original sentence was only for 61 months. Douglas contends that because his

> [appellate] counsel has also been ineffective in declaring the unconstitutional actions of the lower court, there is no available remedy other than dissmissal [sic] as set forth in CrR 8.4, CrR 3.3(h), CrR 7.8; also (State v. McDonald, 143 Wn.2d 506, 22 P.3d 791 (2001); also (Tower v. Glover, 467 U.S. 914, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984); also WSBA Standard 4-8.4(b), 4-8.6(a-d); also violating U.S. and State Constitutions, Due Process Clauses.

SAG at 1. It appears that Douglas is claiming that his right to a speedy trial with respect to the *arson* charges has been violated and, as a result, he has been unlawfully imprisoned for too many months. CrR 3.3(c).

On February 10, 2006, the trial court sentenced Douglas to 22 months incarceration for second degree assault and 16 months for bail jumping with a 471-day credit for time served. To the extent Douglas attempts to argue he has been improperly incarcerated since February 2006 on

[4] Douglas argues that one prosecutor signing a judgment and sentence on behalf of two other prosecutors amounted to prosecutorial misconduct.

the *assault* convictions sentences alone, his argument fails. The March 27, 2009 assault charges resentencing order clearly shows he was sentenced to 12 months on the assault conviction and 8 months on the bail jumping conviction to be served concurrently. He was fully credited for the time he served. Any time Douglas has spent incarcerated beyond the assault charges sentence will be credited on the sentence imposed following Douglas's conviction on retrial of the arson charges.[5]

Douglas's Motion to Dismiss

On March 26, 2010, Douglas filed with this court a SAG which included an attached "Motion to Dismiss Cause" asserting that his appellate counsel's misstatement of facts in the opening brief amounts to prejudice warranting dismissal of the assault charges, or, alternatively, remand for an evidentiary hearing to disclose additional evidence. Douglas asserts an evidentiary hearing is necessary to show prejudice on the following grounds: (1) violations of Fifth, Sixth, Eighth, and Fourteenth Amendment rights; (2) due process violations; (3) ineffective assistance of appellate counsel; (4) "lack of acknowledgement" with respect to Douglas's completion of the custody portion of his assault charges (re)sentence; (5) "a lack of due diligence in adjudicating this 2004 case in a timely and efficient manner"; and (6) "a lack of disclosure of evidence." SAG Mot. to Dismiss Cause at 1.

First, as discussed above, Douglas's appellate counsel did not err when he stated that this court remanded the assault charges for resentencing. Second, we affirmed the convictions for

[5] Douglas was retried and reconvicted on the arson charge in July 2010, and it appears he was sentenced on August 27, 2010. Douglas is appealing the August 27 order in a separate action before this court, cause number 41133-4-II. Any claim Douglas may make with respect to his incarceration while awaiting retrial on the arson charges should be brought in his appeal of the August 27 order.

second degree assault and bail jumping in our unpublished opinion in 2008, and Douglas fails to

raise any factual issues to support a finding of prejudice.[6] Accordingly, remand for an evidentiary hearing is unwarranted. Douglas validly waived his right to counsel at resentencing and the trial court's ch. 10.99 RCW no-contact order is not before us in this direct appeal from his judgment and sentence.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, P.J.

VAN DEREN, J.

[6] RAP 9.11(a) provides that

> [t]he appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.