IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. DAVID ALLYN DODD, Appellant.	No. 29974-1-III (cons. with No. 30234-2-III) UNPUBLISHED OPINION

Korsmo, C.J. — David Dodd challenges his conviction for attempting to elude a pursuing police vehicle on appeal and his guilty plea to second degree driving while license suspended via a personal restraint petition (PRP). We conclude that his asserted instructional error was not prejudicial and that he has not established a basis to withdraw his guilty plea on the licensing charge. The convictions are affirmed and the PRP is dismissed.

FACTS

Mr. Dodd was charged with the two noted offenses, along with a charge of

harassment, after an incident in East Wenatchee. An officer who saw Mr. Dodd driving called police dispatch to inquire about Mr. Dodd's license status. The dispatcher advised officers that his license was suspended. Mr. Dodd then drove past another officer, James Marshall. Officer Marshall initiated a pursuit that was captured on video camera.

The pursuit began without lights, but the lights and siren soon were activated when Mr. Dodd turned on to another street. The pursuit continued down the second street and through a Fred Meyer parking lot. Once both vehicles were behind Fred Meyer, Mr. Dodd stopped and got out of his truck with his hands up. Mr. Dodd did not flee, but did not obey Officer Marshall's orders. After a second officer arrived, Mr. Dodd was taken into custody. He allegedly threatened Officer Marshall's life before they left the scene.

Mr. Dodd pleaded guilty to second degree driving while license suspended, but proceeded to jury trial on the two remaining felony counts. Defense counsel offered an instruction that defined the term "willfully" as acting "knowingly." However, for reasons that are not explained in the record, the instruction was not given. During closing argument, defense counsel told jurors that his client had willfully failed to stop for the officer. Instead, he defended the case on the basis that his client had not driven recklessly. Report of Proceedings (RP) at 264.

The jury nonetheless convicted Mr. Dodd of attempting to elude while acquitting him on the harassment count. The trial court subsequently imposed an exceptional sentence of 50 months based on Mr. Dodd's

extensive criminal history and a consecutive 12-month sentence for the suspended license charge.[1]

Mr. Dodd timely appealed the eluding conviction. He also filed a motion to withdraw his guilty plea. The superior court transferred the motion to this court, which converted it to a personal restraint petition. This court then consolidated the two matters.

ANALYSIS

The appeal challenges the absence of a definitional instruction on two different theories and also argues that the court erred by imposing financial obligations. We will address the two instructional challenges as one issue before addressing the financial obligations argument and the pro se issues.

"Willfully" Instruction

Mr. Dodd argues that either the trial court erred by failing to give the "willfully" definition proposed by his attorney or his counsel erred by not preserving the claim. We conclude that the issue was waived and that Mr. Dodd has not established that counsel performed ineffectively.

Different legal doctrines inform our analysis of Mr. Dodd's two competing approaches to this issue. Long-standing principles govern our review of jury instruction

[1] Mr. Dodd had 28 prior non-violent felony convictions and 22 prior misdemeanor offenses, including 13 convictions for driving with a suspended license or without a license. RP at 312. The exceptional sentence is not at issue in this appeal.

questions. Trial courts have an obligation to provide instructions that correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. *State v. Dana*, 73 Wn.2d 533, 536-37, 439 P.2d 403 (1968). The instructions must set forth the elements of the crimes that are before the jury. *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984). There is no need to define those elements that are commonly understood. *Id*. However, when the elements have technical definitions, the definitional instruction must be given when requested. *Id*. at 358, 361-62. The failure to request an instruction, or to challenge the trial court's failure to give a requested instruction, waives the issue on appeal. *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988); RAP 2.5(a).[2] Critical to this case is *State v. Flora*, 160 Wn. App. 549, 249 P.3d 188 (2011). There Division One of this court ruled that upon request, a trial court must define the term "willfully" in an attempt to elude prosecution. *Id*. at 553.

Equally settled principles govern challenges to the performance of trial counsel. Effectiveness of counsel is judged by the two-prong standard of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That test is whether or not (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id*. at 690-92. In evaluating ineffectiveness claims, courts

[2] Certain limited instructional errors, largely involving the elements or burden of proof instructions, do present issues of manifest constitutional error that can be reviewed on appeal. *State v. O'Hara*, 167 Wn.2d 91, 100-01, 217 P.3d 756 (2009).

must be highly deferential to counsel's decisions and there is a strong presumption that counsel performed adequately. A strategic or tactical decision is not a basis for finding error. *Id*. at 689-91. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Mr. Dodd's direct challenge to the trial court's failure to define "willfully" fails under *Scott*. The record does not reflect any challenge to the absence of the instruction. Technical term definitions are not so fundamental that a court must give them in the absence of a request. *Allen*, 101 Wn.2d at 358. Having not challenged the absence of the willfulness instruction in the trial court, Mr. Dodd cannot do so here. *Scott*, 110 Wn.2d at 686.

The remaining question then is whether defense counsel erred by failing to preserve the issue in the trial court. We think not. Even if *Flora* correctly sets forth a rule that "willfully" must be defined upon request in an eluding prosecution, a question we do not address, counsel has not necessarily failed to live up to the standards of the profession by not preserving the issue. In light of counsel's closing argument, which conceded the knowledge/willfulness issue, there was no particular point to instructing the jury on a definition that was not in question. It appears very highly likely that counsel simply decided to withdraw the requested instruction and concentrate on the recklessness element. On this record, Mr. Dodd has not

established that his attorney erred.

For the same reason, we also believe that Mr. Dodd has not established any prejudice from counsel's alleged failure. The closing argument conceded the point that the instruction would have clarified. It was of no consequence to the defense theory of the case. Accordingly, any failure by counsel concerning the willfulness instruction simply did not harm the defense.

It was Mr. Dodd's obligation in this challenge to establish both that his counsel erred and that the error was prejudicial. He did neither. Accordingly, the claim of ineffective assistance is without merit.

Legal Financial Obligations

Mr. Dodd also argues on appeal that the trial court erred by imposing legal financial obligations without first making a determination that he could pay. The trial court did not abuse its discretion.

In *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992), the court confirmed that under RCW 10.01.160(3) and governing case law that a trial court may not impose discretionary financial obligations on an offender who lacks the ability to pay them. *Id*. at 914-15. However, the court is not obligated to enter a finding that the offender has the ability to pay before imposing the costs. *Id*. at 916. Instead, the court has discretion to impose the fines after considering the offender's ability to pay. *Id*. The offender is protected because no sanction can be

imposed for a subsequent non-willful failure to pay. *Id*. at 916, 918.

Here, Mr. Dodd presented evidence about his inability to pay. In light of the fact that Mr. Dodd had been employed and had retained private counsel, the court could easily conclude that he had the ability to pay, even if that ability would be limited during his incarceration. The court did what it was required to do when it *considered* his ability to pay before imposing the discretionary costs. No more was required of it.

The court did not err by imposing the challenged costs.

Personal Restraint Petition

Mr. Dodd pro se filed a PRP, alleging that he could not have pleaded guilty to the driving while license suspended charge because he was eligible to be reinstated.[3] His PRP misreads the statute and fails to establish any grounds for relief.[4]

[3] Mr. Dodd also filed a pro se Statement of Additional Grounds that presents two issues in support of his appeal. One of the arguments is without any legal reasoning and will not be further considered. RAP 10.10(c). The other ground complains that the trial court did not permit the entire video of the incident to be played. The excluded portion involved the officer and Mr. Dodd discussing some of their previous encounters. Even if there had been error in excluding that portion of the video, it was harmless because Mr. Dodd was acquitted on the harassment count. He also testified he did not know Officer Marshall was the one pursuing him until after the stop, so evidence of their previous encounters was irrelevant to the eluding count.

[4] The PRP also claims that the superior court lacked authority to hear the gross misdemeanor licensing offense. However, the superior court has authority to hear all matters not lodged exclusively elsewhere. Wash. Const. art. IV, § 6; RCW 2.08.010. The district and municipal courts do not have exclusive authority over misdemeanor offenses. RCW 3.50.020.

The burdens imposed on a petitioner in a PRP are significant. Relief will only be granted in a PRP if there is constitutional error that caused substantial actual prejudice or if a nonconstitutional error resulted in a fundamental defect constituting a complete miscarriage of justice. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). It is the petitioner's burden to establish this "threshold requirement." *Id.* To do so, a PRP must present competent evidence in support of its claims. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992). If the facts alleged would potentially entitle the petitioner to relief, a reference hearing may be ordered to resolve the factual allegations. *Id.* at 886-87.

RCW 46.20.342(1)(b) defines the crime of second degree driving while license suspended. It applies to drivers who are not eligible for reinstatement and who have been suspended for one of the many enumerated reasons listed in the statute. The statute also contains this provision:

> For the purposes of this subsection, a person is not considered to be eligible to reinstate his or her driver's license or driving privilege if the person is eligible to obtain an ignition interlock driver's license but did not obtain such a license.

RCW 46.20.342(1)(b) (2010).[5]

Mr. Dodd contends in his PRP that he was eligible to obtain an interlock driver's

[5] We quote the current version of RCW 46.20.342(1)(b), which was amended by Laws of 2011, chapter 372, section 2 to make the language gender neutral.

license and did so shortly *after* this incident. He reasons that therefore he could not be guilty of second degree driving while license suspended. However, his argument ignores the last half of the sentence quoted above. He had to have already obtained an interlock license to fall within the exclusion of subsection (b). He admittedly did not obtain the license until after this incident. Accordingly, even under his own theory of the case, he was not eligible for reinstatement when he committed the offense.

Mr. Dodd has not shown an entitlement to relief. RAP 16.4(d). The PRP is dismissed. The convictions are affirmed.

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

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Korsmo, C.J.

WE CONCUR:

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Brown, J. Kulik, J.