IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. REGINALD WAYNE WILTON, Appellant.	)	No. 62412-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 9, 2009

Appelwick, J. — The defendant bears the burden of demonstrating that withdrawal of his guilty plea is necessary to correct a manifest injustice. Wilton fails to meet that burden, and he invited any procedural error on the part of the trial court in declining to transfer his motion to withdraw his plea to this court for consideration as a personal restraint petition. We affirm the denial of his motion to withdraw his guilty plea. We remand, however, for clarification or correction of the no-contact provisions of Wilton's sentence.

FACTS

In 2005, the State charged Reginald Wilton with three counts of first degree robbery, two counts of second degree robbery, one count of first degree

burglary, and one count of first degree assault. Two of the seven counts were alleged to have been committed while armed with a deadly weapon. The certificate of probable cause filed for the charges also referenced an uncharged second degree robbery incident that occurred in Burien. In addition, under a separate cause number, Wilton was charged with robbery arising from a Seattle purse-snatching incident. All of the incidents occurred within a short period following Wilton's release from prison for earlier crimes.

Wilton was evaluated for competency. Following a diagnosis of polysubstance dependence, antisocial personality disorder, and malingering he was found competent to stand trial. Wilton thereafter moved to discharge his counsel, but the motion was denied.

Wilton eventually reached a plea agreement with the State. Under the terms, Wilton agreed to plead guilty to the seven counts alleged in the first charges, and the State agreed dismiss the deadly weapon allegations, to file no charges relating to the Burien incident, and to dismiss the separate robbery charged for the Seattle incident.

During Wilton's guilty plea colloquy he indicated his understanding of the charges, the maximum and recommended penalties he would face, and the State's agreement regarding dismissing the deadly weapon allegations and the other charged count. Wilton further stated that no one had made any threats or promises to get him to change his plea. No specific reference was made, either in the plea documents or during the colloquy, to the Burien incident. Wilton did

agree that the court would be able to consider the certificate of probable cause for purposes of sentencing.

After the plea was entered, but before Wilton's sentencing, the prosecutor sent Wilton's counsel an e-mail indicating that, in response to a communication from her, he was confirming that the plea agreement to file no additional charges specifically included the Burien incident referred to in the probable cause certification. Wilton's counsel, in turn, sent Wilton a copy of the e-mail accompanied by her own note indicating that Wilton could have the e-mail attached to the judgment and sentence at the time of sentencing so it would be included in the court record.

Wilton was sentenced in January 2007 to standard range terms of confinement and community custody. Wilton made no objection to the state of the record and did not ask to have the e-mail attached to the judgment and sentence or otherwise mention it at the hearing. Wilton did not appeal.

Later, in October 2007, Wilton filed a pro se motion to withdraw his guilty plea pursuant to CrR 7.8, which governs requests for relief from a judgment following conviction. In his lengthy motion, Wilton primarily relied on theories that his plea was invalid, because his sentence constituted an improper exceptional sentence under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). He also claimed that his plea should be withdrawn, because there was no official record of the promise not to charge the Burien robbery incident, and because the no-contact provision in his sentence

for the two victims of the second degree robbery counts ran longer than the ten-year maximum sentence for such offenses. Wilton further acknowledged that CrR 7.8 provided for the potential transfer of his motion to the Court of Appeals for consideration as a personal restraint petition, but objected to any such transfer, noting that only a ruling on the merits would preserve his right to appeal the ruling with counsel provided for him at public expense.

On its own motion, the trial court appointed counsel for Wilton. At the court's request, Wilton's counsel thereafter filed letters with the court outlining her understanding of the legal grounds for Wilton's motion. Without specifically addressing Wilton's claim regarding the failure to include the State's promise regarding the Burien robbery in the official record, counsel summarized Wilton's exceptional sentence claims and indicated that communication with Wilton by letter and telephone had not been helpful in allowing her to fully understand his position. Although counsel discussed obtaining funding to be transported to meet with Mr. Wilton in person in the penitentiary, the trial court thereafter denied the motion, concluding there was no prima facie showing that withdrawal of the plea was justified. Wilton apparently then filed additional requests for counsel or other relief pro se, but the trial court denied those as well.

This appeal follows.

DECISION

Wilton contends that the trial court acted without authority and abused its discretion when it failed to hold a hearing on his motion to withdraw his plea. He

also contends that his counsel for the motion to withdraw his plea provided ineffective assistance by failing to substantively brief a viable basis for his motion to withdraw the plea. We reject both claims.

On appeal, Wilton now correctly acknowledges that the claims in his CrR 7.8 motion, based on theories relating to the applicable maximum sentences for his offenses under Blakely are clearly without merit. See State v. Kennar, 135 Wn. App. 68, 74–76, 143 P.3d 326 (2006), review denied, 161 Wn.2d 1013 (2007); State v. Adams, 138 Wn. App. 36, 51, 155 P.3d 989 (2007), review denied, 161 Wn.2d 1006 (2007).

Wilton nonetheless contends that the other grounds raised to in his pro se pleadings, specifically the failure to include the State's promise regarding the Burien robbery in the plea record and his contention regarding the length of the no-contact provisions for two of his victims, provided enough of a potential basis for relief that the trial court was required to grant an evidentiary hearing under CrR 7.8(c). Under the current version of that rule, in effect since September 2007, the trial court has only the options of transfer to the Court of Appeals as a personal restraint petition, or setting the motion for a show cause hearing. See State v. Smith, 144 Wn. App. 860, 863–64, 184 P.3d 666 (2008).

Wilton, however, clearly objected to any such transfer for tactical reasons, and affirmatively sought a ruling on the merits. Thus, he invited any procedural error. See In re Pers. Restraint of Thompson, 141 Wn.2d 712, 723–24, 10 P.3d 380 (2000). Accordingly, Wilton cannot now be heard to complain that, at his

request, the trial court effectively applied the version of CrR 7.8 in effect prior to September 2007, which provided the court discretion to deny his motion without a hearing when the alleged facts did not establish grounds for relief. See Smith, 144 Wn. App. at 863.

We further conclude the trial court did not abuse its discretion when it found that Wilton failed to state a basis for his claim that justified either relief or a hearing on the merits.

Under CrR 4.2(f), a defendant must be allowed to withdraw a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." The defendant bears the burden of proving a manifest injustice. State v. Hurt, 107 Wn. App. 816, 829, 27 P.3d 1276 (2001). A "manifest injustice" is one that is "obvious, directly observable, overt, not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). A superior court's denial of a motion to withdraw a guilty plea is reviewed for an abuse of discretion. State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

Wilton's specific claim of error regarding his plea record was that, in violation of CrR 4.2(e), "there was no official record of the State's promise not to proceed with charges in regard to the [Burien] incident." It is clear from Wilton's pro se pleadings, however, that the prosecutor, Wilton's counsel, and Wilton personally all completely understood the State's promise and were fully aware before sentencing that the plea record had not expressly addressed that aspect of the agreement. Wilton's materials also showed that he could easily have

memorialized that aspect of the agreement in the official record at the time of sentencing, just as his counsel suggested, and neither did so nor otherwise voiced any objection or moved to withdraw his plea.

Wilton accordingly did not meet his burden of showing a manifest error requiring withdrawal of his plea, because he waived the objection to the state of the record he sought to assert for the first time in his CrR 7.8 motion. C.f. State v. Mendoza, 157 Wn.2d 582, 592, 141 P.3d 49 (2006) (defendant waived his right to withdraw his plea where he failed at sentencing either to object to a new sentencing recommendation or to move to withdraw his plea on the grounds his plea was involuntary, because the standard range was different than he had expected).[1]

Wilton's additional argument regarding the no-contact provisions of his sentence also provides no basis for reversing the trial court's denial of his motion to withdraw his plea. Review of a trial court's decision regarding a CrR 7.8 motion is limited to the issues raised in the hearing. State v. Gaut, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). While Wilton now argues that he made a prima facie showing justifying a hearing to clarify or correct the no-contact provisions, the only relief he sought in the trial court was the withdrawal of his guilty plea. As Wilton now concedes in his reply, his claim about the no-contact

[1] Because we reach this conclusion, we need not address the tension between the language in the cases the State cites, particularly State v. Branch,129 Wn.2d 635, 642, 919 P.2d 1228 (1996), and State v. Ridgley, 28 Wn. App. 351, 358–59, 623 P.2d 717 (1981), which require some showing of prejudice to justify withdrawal of a plea based on noncompliance with the requirements of CrR 4.2, and the case on which Wilton principally relies, State v. Perez, 33 Wn. App. 258, 654 P.2d 708 (1982), which announced a prospective rule that noncompliance with CrR 4.2(e) would thereafter provide an automatic basis to withdraw a guilty plea.

orders provided no basis to withdraw his plea. Accordingly, he has not shown that the trial court's denial of his motion to withdraw his plea was in error for this reason.

Wilton has, however, made a sufficient showing on appeal that there is an ambiguity in his sentence. It is unclear whether the life-term no-contact orders for the victims of the two class B felony offenses were intended to be imposed as crime-related prohibitions based on their status as witnesses in the other counts, or whether they were mistakenly imposed based upon their status as victims in the counts for which there is a ten-year statutory maximum. Because a criminal sentence must be "'definite and certain,'" this issue must be addressed. State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2(1998) (quoting Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). We see no purpose in awaiting a personal restraint petition. We remand only for the trial court to clarify, and if necessary, to correct those provisions.

Finally, Wilton's claim of ineffective assistance of counsel during the proceedings regarding his CrR 7.8 motion also fails. His primary argument is that his counsel unreasonably failed to advance his claim about the record of the plea agreement.[2] For the reasons stated above, however, that claim provides him no basis for relief. Wilton therefore has failed to make the necessary

[2] While Wilton also faults his trial counsel for failing to perfect his CrR 7.8 motion by having him sign a formal affidavit, he correctly concedes that he cannot at this time show any prejudice from this alleged deficiency. Wilton has also filed a pro se statement of additional grounds for review and a subsequent motion to amend his pro se statement. We grant the motion to amend, but Wilton's pro se contentions are all answered by our rejection of the arguments raised by his appellate counsel.

showings of deficient performance and resulting prejudice to sustain his claim of ineffective assistance of counsel in failing to advance the argument. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002).

We find no abuse of discretion by the trial court and accordingly affirm the denial of Wilton's motion to withdraw his guilty plea. We remand only for clarification or correction of the no-contact provisions of the judgment and sentence relating to the victims of the two counts of second degree robbery.

Appelwick, J.

WE CONCUR:

Dwyer, A.C.J. Becker, J.