IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GERMAN DURAN-MADRIGAL AKA GERMAN DURAN-MADRICAL, Appellant.	)))))))))	No. 65396-2-I (consolidated with No. 65397-1-I and No. 65398-9-I) DIVISION ONE OPINION PUBLISHED IN PART FILED: September 12, 2011

Grosse, J. — The authority granted by the state constitution and statute to pro tempore judges to try a case includes any judicial examination of issues of law or fact. This includes acceptance of a guilty plea, which involves judicial determination of whether the defendant is knowingly, intelligently, and voluntarily entering the plea and whether there is a factual basis for the plea. Accordingly, we affirm.

FACTS

The State filed a series of charges against German Duran-Madrigal (Madrigal) for multiple offenses alleged to have occurred at various times throughout 2007. On February 2, 2007, the State charged him with second-degree unlawful possession of a firearm and fourth-degree assault. On November 15, 2007, he entered a plea of guilty to those charges before Judge Pro Tempore Johanna Bender. The judge noted that Madrigal had signed stipulations allowing the judge to hear his cases that day.[1]

On September 21, 2007, the State charged him with a misdemeanor violation of a protection order and a violation of the Uniformed Controlled Substances Act

[1] An oath and order signed by Judge Palmer Robinson appointing Johanna Bender as judge pro tempore is in the court file.

(VUCSA), possession of cocaine.[2] On November 15, 2007, again before Judge Pro Tempore Bender, Madrigal pleaded guilty to the misdemeanor protection order violation and a reduced charge of attempted possession of cocaine. As part of the plea agreement the State also agreed not to file additional charges for other pending alleged offenses.

On November 20, 2007, the State filed another charge against Madrigal, alleging felony violation of a no-contact order. On December 27, 2007, he pleaded guilty to a reduced charge of a misdemeanor violation of a no-contact order. This guilty plea was accepted and entered by another pro tempore judge, the Honorable Barbara Harris.[3]

All three cases were consolidated for sentencing on January 11, 2008, before the Honorable Michael Heavy, an elected superior court judge. Madrigal received concurrent suspended sentences with credit for time served. He appeals the judgment and sentence.

ANALYSIS

Madrigal first contends that his guilty pleas are invalid because the pro tempore judges that accepted the pleas lacked statutory and constitutional authority to do so. The Washington State Constitution article IV, section 7, provides in relevant part:

> A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case.

RCW 2.08.180 provides in relevant part:

> A case in the superior court of any county may be tried by a judge pro tempore,

[2] RCW 69.50.4013.

[3] An oath and order signed by Judge Palmer Robinson appointing Barbara Harris as judge pro tempore is in the court file.

> who must be either: (1) A member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; or (2) pursuant to supreme court rule, any sitting elected judge. Any action in the trial of such cause shall have the same effect as if it was made by a judge of such court.

Madrigal contends that because both of these provisions state only that a case "may be tried" by pro tempore judges, they only have authority to preside over actual trials, not guilty pleas. We disagree. As the State argues, such a narrow construction of this language is not supported by the case law and would result in strained consequences.

The Washington Supreme Court has interpreted this language broadly to include judicial determination of both questions of fact and law:

> The statute reads: "A case . . . may be tried by a judge pro tempore. . . ." We construe the statute to mean that a judge pro tempore acquires jurisdiction of a cause from the time of his appointment and qualification, and he thereafter tries what remains to be done in the case, whether it be the trial of questions of fact or of law, or both. In this case the trial upon the facts had been heard, and there remained certain questions of law to be determined, viz., those raised by the motion for new trial and the entry of judgment.[4]

Consistent with this broad interpretation, more recently in Mitchell v. Kitsap County,[5] the court rejected the argument that RCW 2.08.180 applied only when a pro tempore judge presided over an actual trial and concluded that a pro tempore judge's authority under the statute included conducting hearings on motions for summary judgment:

> Although RCW 2.08.180 does speak of cases in superior court being "tried" by a judge pro tempore, we believe that the term trial should be viewed broadly. "A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact." CR 38. In our judgment, hearings on motions for summary judgment fall within the definition of a trial.

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[4] Nelson v. Seattle Traction Co., 25 Wash. 602, 603-04, 66 P. 61 (1901) (emphasis omitted) (boldface omitted).

[5] 59 Wn. App. 177, 185, 797 P.2d 516 (1990).

Applying this broad view of what amounts to a case that "may be tried," we conclude that acceptance of a guilty plea falls within a pro tempore judge's authority to try a case as provided by the state constitution and statute. Much like a ruling on a summary judgment motion, the acceptance of a guilty plea involves judicial examination of legal and factual issues. In doing so, the court determines whether the defendant is knowingly, intelligently, and voluntarily entering the plea and whether there is a factual basis for the plea.

Additionally, as the State contends, the narrow interpretation urged by Madrigal would result in absurd or strained consequences, invalidating scores of rulings made by pro tempore judges that did not occur during an actual trial, such as arraignments, rulings on motions and continuances, divorce decrees, custody orders, and protection orders. Applying such a narrow construction would also prevent a pro tempore judge who is presiding over a trial from accepting a guilty plea that a defendant decides to enter either on the day of trial or at some other point during the trial. Neither the state constitution nor the statute should be interpreted to force such absurd or strained consequences.[6]

The remainder of this opinion has no further precedential value and will not be published.

Madrigal next contends that the trial judge erred by accepting his pleas to the charges of felon in possession of a firearm, attempted possession of cocaine, and violation of a protection order because they lacked a factual basis. The State contends that by failing to raise this issue below, Madrigal has waived it on appeal. We agree.

[6] State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

The requirement that a trial judge determine whether there existed a factual basis for a plea is found in CrR 4.2(d):

> The court shall not accept a plea of guilty without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The State is correct that an alleged violation of CrR 4.2(d) is not by itself an issue of constitutional magnitude that may be raised for the first time on appeal. Rather, it "is constitutionally significant only insofar as it relates to the defendant's understanding of his or her plea."[7] Here, Madrigal did not raise this issue below nor does he challenge on appeal the voluntariness of plea or otherwise contend that he did not understand the nature of the charges. Thus, he may not now challenge his pleas by simply asserting a violation of CrR 4.2(d) for the first the time on appeal.[8]

Madrigal next challenges the sufficiency of the information charging him with second-degree felon in possession of a firearm. When, as here, the sufficiency of an information is first challenged on appeal, we must liberally construe it in favor of validity than those challenged before or during trial.[9] We must decide whether (1) there is at least some charging language that gives notice of the allegedly missing elements, and (2) if so, whether the defendant can show actual prejudice.[10]

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[7] Matter of Hews, 108 Wn.2d 579, 591-92, 741 P.2d 983 (1987); see also Matter of Hilyard, 39 Wn. App. 723, 727, 695 P.2d 596 (1985) ("[S]trict adherence to the rule is 'not a constitutionally mandated procedure;'" the "duty imposed by court rule that the judge must be satisfied of the plea's factual basis should not be confused with the constitutional requirement that the accused have an understanding of the nature of the charge.").

[8] See State v. Zumwalt, 79 Wn. App. 124, 129, 901 P.2d 319 (1995) (challenge to factual basis of plea appealable only because raised in the trial court).

[9] State v. Borrero, 147 Wn.2d 353, 360, 58 P.3d 245 (2002).

[10] State v. Kjorsvik, 117 Wn.2d 93, 106, 812 P.2d 86 (1991).

> Here, the information states:
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> That the defendant . . . in King County, Washington, on or about January 31, 2007, previously having been convicted in King County Superior, Washington, of Telephone Harassment, a felony, knowingly did own, have in his possession, or have in his control, a shotgun, a firearm defined in RCW 9.41.010; [c]ontrary to RCW 9.41.040(2)(a)(i).

Madrigal argues that the charging language did not include all the elements of the crime because it did not allege that he was statutorily ineligible to possess a firearm. He first contends that the information failed to charge that he was ineligible to possess a firearm under subsections (3) and (4) of the statute, which provide in part:

> A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. . . .
>
> [A] person convicted or found not guilty by reason of insanity of an offense prohibiting the possession of a firearm under this section other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401 and 69.50.410, who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from possession of a firearm as a result of the conviction or finding of not guilty by reason of insanity.[11]

While he is correct that these sections address exceptions where a felon may have the right to possess a firearm, they do not constitute additional elements of the crime. Rather, as the State contends, they simply provide defenses to the crime, which need not be affirmatively disproved unless raised. Thus, they need not be addressed in the information in order to provide sufficient notice of the charges. The charging language need only track the statutory elements of the crime, as it did here, to satisfy

[11] RCW 9.41.040(3),(4).

notice requirements.[12]

Madrigal also contends that the information failed to allege that his right to possess a firearm had not been restored as set forth in the statute.[13] But again, the

[12] Indeed the Washington Pattern Jury Instructions do not include these as elements of the crime. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 133.02, at 573 (3d ed. 2008) (WPIC). Rather, WPIC 133.02.02 simply tracks section (2) of the statute:

> **WPIC 133.02.02 Unlawful Possession of a Firearm—Second Degree—Previous Felony Conviction—Elements**
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> To convict the defendant of the crime of unlawful possession of a firearm in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
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> (1) That on or about (date), the defendant *[knowingly owned a firearm][or]* [knowingly had a firearm in *[his][her]* possession or control];
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> (2) That the defendant had previously been *[convicted][adjudicated guilty as a juvenile][or][found not guilty by reason of insanity]* of [(name of felony other than serious offense)] *[or][a felony]*; and
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> (3) That the *[ownership][or][possession or control]* of the firearm occurred in the State of Washington.

[13] That provision of RCW 9.41.040(4) states:

> Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:
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> (a) Under RCW 9.41.047; and/or
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> (b)(i) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525; or
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> (ii) If the conviction or finding of not guilty by reason of insanity was for a

fact that the statute permits a felon to restore the right to possess a firearm does not add an element to the crime; it is simply a defense that the State would not be required to disprove unless raised.

Finally, Madrigal contends that his plea to attempted possession of cocaine must be vacated because he was informed of the incorrect maximum penalty for that crime. He contends that he was informed of the penalty for a misdemeanor under the general attempt statute, rather than an attempted VUCSA, which is an unranked felony that carries a maximum penalty of five years and $10,000.[14]

Under RCW 69.50.407, a conviction for an attempted VUCSA carries the same maximum penalty as the VUCSA offense:

> Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Possession of a controlled substance is a class C felony with a maximum sentence of five years in prison and a $10,000 fine.[15] Under RCW 9A.28.020(3)(d), a conviction for an attempted class C felony is a gross misdemeanor with a maximum penalty of one year in prison and a $5,000 fine.[16]

Madrigal contends that because he should have been charged under the

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> nonfelony offense, after three or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525 and the individual has completed all conditions of the sentence.

[14] RCW 69.50.407; RCW 9.94A.505(b).
[15] RCW 69.50.4013, RCW 9A.20.021(1)(c).
[16] RCW 9A.20.021(2).

specific statute, which made the crime a felony, he was misinformed of the maximum penalty for the crime and should be permitted to withdraw his plea on that basis.[17] But as the record makes clear, he was not misinformed of the maximum penalty for the crime with which he was in fact charged. It is undisputed that the State charged, and Madrigal pleaded guilty to, an attempted VUCSA as a misdemeanor under the general intent statute and he was informed of the correct maximum penalty for that crime.[18] Accordingly, there is no support for withdrawal of his guilty plea on the basis that he was misinformed of a direct consequence of his plea to that charge.

While Madrigal may be correct that he should have been charged under the specific statute,[19] he did not object to the charging decision in the trial court and in fact agreed to it as part of the plea bargain. Thus, by failing to raise the claimed error below and in fact inviting it, he is now barred from asserting it on appeal.[20]

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[17] See In re Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004); State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006).

[18] The statement on plea of guilty indicates that it was a plea to a misdemeanor charge only. The form itself is entitled "STATEMENT OF DEFENDANT ON PLEA OF GUILTY (Misdemeanor)" CP 8. The "JUDGMENT AND SENTENCE, NON-FELONY" also indicates that the conviction entered was for an attempted VUCSA charged under the general attempt statute. CP 22 ("IT IS ADJUDGED that the defendant is guilty of the crime(s) of: . . . ATTEMPTED VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT-POSSESSION OF COCAINE/RCW 9A.28.020 & 69.50.4013"). The court's colloquy with Madrigal further indicated that the attempted VUCSA was a misdemeanor charge and that the only felony to which he was pleading guilty was the firearm possession charge. RP 4 ("With respect to the felony matter, . . . maximum penalty to that is five years and $5,000. . . . So the maximum penalty for the [f]irearms [p]ossession charge is five years in custody and $10,000 fine. . . . With respect to each of the misdemeanor charges, the maximum penalty is one year in jail and a $5,000 fine.").

[19] See State v. Roby, 67 Wn. App. 741, 747-48, 840 P.2d 218 (1992) (recognizing that "RCW 69.50.407 is the specific statute relating to attempts to commit drug-related crimes, and precludes charging such crimes under . . . the general attempt statute").

[20] See State v. Henderson, 114 Wn.2d 867, 868-70, 792 P.2d 514 (1990) (under the invited error doctrine, a party who sets up an error at trial cannot claim it as error on

We affirm.

Grosse, J.

WE CONCUR:

Ellington, J.

Becker, J.

appeal); City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (invited error doctrine applies even when the alleged error is of constitutional magnitude).