IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RYAN ALEXANDER MILTON, Appellant.	No. 39518-5-II (consol. with 39542-5-8-II) PUBLISHED IN PART OPINION

Penoyar, C.J. — Ryan Milton pleaded guilty to numerous felonies. About two months after the sentencing hearing, the trial court held a restitution hearing and ordered Milton to pay restitution to the crime victims. Milton waived his appearance at the restitution hearing and his appointed counsel did not appear. We hold that, under CrR 3.1(b)(2), Milton was entitled to have his appointed counsel present at his restitution hearing. Therefore, we vacate the trial court's restitution orders and remand for a new restitution hearing with counsel.

FACTS

The State charged Milton with 15 felonies under two separate cause numbers. Milton pleaded guilty to 2 felony counts and entered *Alford*[1] pleas on the remaining 13 felony counts.

On June 23, 2009, Milton and his appointed counsel appeared at the sentencing hearing. The trial court entered a judgment and sentence which, *inter alia*, scheduled a restitution hearing for August 28, 2009. Milton initialed a notice provision in the judgment and sentence that stated, "Defendant waives any right to be present at any restitution hearing." Clerk's Papers (CP) at 102. On June 23, Milton and his attorney also signed two scheduling orders—one for each cause

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

number—each of which included the August 28 restitution hearing date and contained a handwritten notation above the trial court's signature, which stated "[defendant] waives presence, see [judgment and sentence]." CP at 27, 71.

Before the restitution hearing, the State filed restitution information with the trial court. This information included victims' restitution declarations and related attachments, including theft inventory lists, insurance estimates, and insurance claim details.

Only the State appeared at the August 28 restitution hearing. The trial court entered restitution orders directing Milton to pay $2,869.12 in cause no. 08-1-01775-5, and $60,434.58 in cause no. 08-1-04625-9. On both orders, the handwritten notation "Did not appear" occupies the signature line for the defendant's attorney. CP at 31, 112.

Milton filed a handwritten notice of appeal on both cause numbers. We consolidated the appeals.

ANALYSIS

I. Right to Counsel at Restitution Hearing

In this appeal, Milton originally argued that the trial court deprived him of his Sixth Amendment[2] right to counsel when it entered the restitution orders. We asked the parties to address the applicability of CrR 3.1(b)(2) in light of our well-established policy to avoid reaching constitutional questions when it is unnecessary to do so. *See State v. Speaks*, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992); *see also* RAP 12.1(b).

CrR 3.1(b)(2) provides, "A lawyer shall be provided at every stage of the proceedings, *including sentencing*, appeal, and post-conviction review." (Emphasis added). This rule applies

[2] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend VI.

"to all criminal proceedings for offenses punishable by loss of liberty," including Milton's numerous felonies here. *See* CrR 3.1(a). We interpret a court rule as though the legislature had enacted it, giving effect to the rule's plain meaning as an expression of legislative intent. *State v. Chhom*, 162 Wn.2d 451, 458, 173 P.3d 234 (2007). We conclude that CrR 3.1(b)(2)'s plain language requires the provision of counsel at restitution hearings because, as we have previously stated, "the setting of restitution is an integral part of sentencing."[3] *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). Although the State argues that we should not reverse unless Milton demonstrates prejudice, it is the lack of counsel at the restitution hearing itself that prevented a reviewable record on this issue. Thus, because Milton was entitled to appointed counsel at the restitution hearing, we vacate the restitution orders and remand for a new restitution hearing with counsel.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

[3] Aside from CrR 3.1(b)(2)'s plain language, we note that the legislature has enacted statutory language suggesting that restitution is a component of sentencing. At the time of Milton's crimes, the legislature defined restitution as "a specific sum of money *ordered by the sentencing court* to be paid by the offender to the court over a specified period of time as payment of damages." Former RCW 9.94A.030(34) (Laws of 2006, ch. 139, § 5) (emphasis added). Additionally, the legislature makes the sentencing court's imposition of restitution mandatory "whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property . . . unless extraordinary circumstances exist which make restitution inappropriate." RCW 9.94A.753(5). And, when the sentencing court orders restitution, it shall, in relevant part, "determine the amount of restitution due *at the sentencing hearing* or within one hundred eighty days." RCW 9.94A.753(1) (emphasis added).

II. Statement of Additional Grounds

Milton also raises numerous challenges in his original statement of additional grounds (SAG)[4] and in a separate addendum to his SAG, which he filed with this court. These challenges have no merit.

A. Public Defender System

Milton argues that the operation of the public defender system violates various constitutional rights because public defenders are government employees who receive training from Washington's criminal justice training commission. *See* ch. 36.26 RCW; ch. 43.101 RCW; WAC 139-15-110. He suggests, therefore, that public defenders have an inherent conflict of interest.[5] This argument fails.

In addressing Milton's claim, *Polk County v. Dodson*, 454 U.S. 312 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981), is instructive. In that case, a plaintiff brought a civil rights action under 42 U.S.C. § 1983 against his county-employed public defender for inadequate representation in a criminal appeal. *Polk County*, 454 U.S. at 314. The Court held that a public defender does not act "under color of state law"—a jurisdictional requirement for a § 1983 action—when the public defender "perform[s] a lawyer's traditional functions as counsel" to an indigent defendant in a state criminal proceeding. *Polk County*, 454 U.S. at 315, 325.

Relevant here, the *Polk County* Court rejected the plaintiff's assertion that the public defender's employment relationship with the State, rather than the public defender's function,

[4] RAP 10.10.

[5] In his handwritten notice of appeal, Milton alleged without argument that his public defenders ineffectively represented him. But he does not appear to assert an ineffective assistance claim in his SAG or his addendum to SAG.

should determine whether the public defender acts "under color of state law." *See Polk County*, 454 U.S. at 319. The Court observed that a public defender "works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client" and that the State has a constitutional obligation "to respect the professional independence of the public defenders whom it engages." *Polk County*, 454 U.S. at 321-22; *accord* Washington Rules of Professional Conduct, Preamble 2 ("As advocate, a lawyer conscientiously and ardently asserts the client's position under the rules of the adversary system."). Thus, courts cannot assume that the State has attempted to control the actions of a public defender in a manner inconsistent with its constitutional obligation absent proof and pleading to the contrary. *Polk County*, 454 U.S. at 322.

Here, Milton does not assert that the State has engaged in any actions—other than employing the public defenders who represented him and providing routine training—that would constitute an impermissible control over the public defenders who represented him. Nor does Milton cite any clear support for his argument that public defenders always have a conflict of interest. Indeed, a cursory review of persuasive case law suggests that courts reject similar arguments. *See, e.g., Tamez v. Dir.*, *TDCJ-CID*, 550 F. Supp. 2d 639, 643 (E.D. Tex. 2008) (arguments that "public defenders have a conflict of interest because they are paid by the State . . . have been rejected by the courts"); *State v. Speed*, 961 P.2d 13, 27 (Kan. 1998) (rejecting defendant's argument that his public defenders had a conflict of interest and noting that the fact that the State paid the defendant's public defenders "does not deny the defendant a fair trial"); *Walters v. Kautzky*, 680 N.W.2d 1, 7-8 (Iowa 2004). Finally, Milton does not point to any actual prejudice that he suffered in this case as a result of the alleged conflict of interest.

B. Firearm Enhancements

Milton entered an *Alford* plea to two counts of first degree burglary in cause no. 08-1-04625-9, and the trial court imposed firearm sentencing enhancements on each of these counts. The trial court ordered 87 months of total confinement on cause no. 08-1-04625-9 and imposed 60 months' confinement for each firearm enhancement, for a total confinement period of 207 months in cause no. 08-1-04625-9.[6]

1. Double Jeopardy

Milton appears to argue that the firearm enhancements violated the Fifth Amendment's Double Jeopardy Clause because being "armed with a deadly weapon" is an element of the underlying crime of first degree burglary. *See* RCW 9A.52.020(1)(a). Our Supreme Court recently rejected this line of reasoning in a unanimous decision in *State v. Kelley*, 168 Wn.2d 72, 84, 226 P.3d 773 (2010).

2. Adequacy of Information

In an addendum to his SAG, Milton argues that his plea was "factually invalid" because the information and his statements on plea of guilty did not adequately inform him that the State would use firearm enhancements "to increase the sentence . . . if he . . . went to trial." Addendum to SAG at 1-2. The state and federal constitutions require that a defendant receive adequate notice of the nature and cause of the accusation in order to allow him to prepare a defense in response to charges that he committed a crime. *State v. Powell*, 167 Wn.2d 672, 681, 223 P.3d 493 (2009); U.S. Const. amend. VI; Wash Const. art I, § 22. This argument fails.

Here, the information included the following language for both first degree burglary

[6] The trial court also imposed 84 months' confinement in cause no. 08-1-01775-5, which runs concurrent to the confinement in cause no. 08-1-04625-9.

counts:

> That RYAN ALEXANDER MILTON . . . did unlawfully and feloniously, with intent to commit a crime against a person or property therein, enter or remain unlawfully in a building . . . and in entering or while in such building or in immediate flight therefrom, *the defendant or another participant in the crime was armed with a deadly weapon*, contrary to RCW 9A.52.020(1)(a), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, *and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530*.

CP at 53, 56 (emphasis added). Accordingly, the information communicated to Milton that (1) the State alleged that he or his accomplice was armed with a firearm during commission of the burglaries, and (2) the fact that he or his accomplice was armed would add additional time to the standard sentence range under RCW 9.94A.530.[7] The information therefore adequately informed Milton that he would need to prepare a defense against two charges of first degree burglary with firearm enhancements.[8]

3. Factual Basis for Plea to Firearm Enhancements

Milton argues that he is "actually innocent of a weapons finding" and the trial court erred by imposing the firearm enhancements without "requir[ing] proof Mr. Milton knew that his accomplice was armed." Addendum to SAG at 2, 7. He asserts that "there is no evidence that he knew that his codefendants had armed themselves by placing stolen firearms in a bag and then taking them from the premises." Addendum to SAG at 5. The trial court found a factual basis for

[7] RCW 9.94A.530(1) mandates that additional time for firearm enhancements, as specified in RCW 9.94A.533, "be added to the entire standard sentence range."

[8] Contrary to Milton's assertions, his statement of defendant on plea of guilty also explicitly references the firearm enhancements. The agreed sentencing recommendation also states, "[a]ll counts are to run concurrent with each other but consecutive to two 60-month firearm sentencing enhancements imposed on [the first degree burglary counts]." CP at 63.

all of the counts against Milton.

The record on appeal is not sufficiently developed to determine whether a factual basis for Milton's plea exists. *See* CrR 4.2(d) ("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."). Here, Milton's *Alford* plea statement authorized the court to review the declaration of probable cause and police reports to find a factual basis, but these documents are not in the record. Nor is the CrR 3.5 hearing testimony in the record; the trial court referenced this testimony during its factual basis determination. Finally, although the trial court put the prosecuting attorney under oath to discuss the factual basis for one of the first degree burglary charges, this testimony did not involve any discussion of the firearm supporting the enhancement. Therefore, we cannot address Milton's SAG claim because the record on appeal is inadequate.[9]

4. Eighth Amendment

Milton asserts that the imposition of firearm enhancements violated the Eighth Amendment, which prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend VIII. Milton must show his sentence is disproportionate to his crime. *See Graham v. Florida*, __ U.S. __, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825 (2010). As the United States Supreme Court has forthrightly acknowledged, it is "difficult for the challenger to establish a lack of proportionality." *Graham*, 130 S. Ct. at 2021. Here, we do not believe that Milton has made a threshold showing that the severity of his sentence is disproportionate to the gravity of his offenses. *See Graham*, 130 S. Ct. at 2021. Therefore, we reject his claim.

5. Thirteenth Amendment

[9] Milton's remedy is to file a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 339, 899 P.2d 1251 (1995).

Milton asserts that the imposition of firearm enhancements violated the Thirteenth Amendment. That amendment reads, "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend XIII (emphasis added). Because the trial court imposed the enhancements as a punishment for crimes for which Milton entered *Alford* pleas, the trial court did not violate the Thirteenth Amendment. *See* U.S. Const. amend XIII; *see also* former RCW 9.94A.030(11) (Laws of 2006, ch. 139, §5) ("'Conviction' means an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.")

C. Prosecutorial Misconduct

Milton also appears to argue that the prosecuting attorney "committed [i]ntentional [w]illful acts of Malfeasance." SAG at 10. Milton does not explain the basis for this assertion. Therefore, we decline to address it. *See* RAP 10.10(c).

We vacate the trial court's restitution orders and remand for a new restitution hearing with counsel.

Penoyar, C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.