IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28428-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JEREMY MICHAEL BAUGH,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. – Jeremy M. Baugh appeals his first degree malicious mischief conviction, contending the trial court lacked a factual basis for establishing the damage element ($1,500 or more) when accepting his guilty plea. Because Mr. Baugh failed to raise this contention below, and considering he stipulated to the damage element as part of his plea agreement, we affirm.

FACTS

On April 13, 2009, Jeremy M. Baugh was charged with one count of residential burglary and one count of harassment. The affidavit of facts shows Mr. Baugh caused over $250 in damage to a screen door. On August 18, 2009, as part of a plea

agreement first suggested by Mr. Baugh, the State successfully moved to amend the information to one count of first degree malicious mischief based on evidentiary issues with the original charges and in the interest of justice. The amended charge states the defendant, Jeremy M. Baugh, "did knowingly and maliciously cause physical damage in excess of $1,500 to a door, the property of Staci L. Williamson." Clerk's Papers at 9.

Also on August 18, 2009, Mr. Baugh entered his plea and was sentenced to a jointly recommended sentence. Mr. Baugh acknowledged he had been fully informed of and fully understood the first degree malicious mischief charge, including the elements that included damage exceeding $1,500. By colloquy with Mr. Baugh, the court ascertained the plea was knowing, intelligent, and voluntary. Relevant here, Mr. Baugh acknowledged he had carefully reviewed the charging document; he understood the rights he was giving up by entering his plea; he was aware of the maximum punishment based on his offender score of nine that was partly calculated using his juvenile offense history; and he agreed the court could review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.

Mr. Baugh indicated that he did not have any other questions regarding the sentence. He told the court that his plea was made freely, voluntarily, and without threats or promises. The State then elaborated on the factual basis for the plea:

> Had this case gone to trial as it relates to the charge of malicious mischief, Staci Williamson would have testified that on April 12th, 2009, she was involved in an intimate

> partner relationship with the defendant; that on that day, the defendant entered her residence by breaking into the screen door. For purposes of the plea, we're stipulating that the value of that door exceeded $1500. These acts occurred in Spokane, Washington.

Report of Proceedings (RP) at 10. When the court thereafter inquired, Mr. Baugh had no comment to make as to the facts. The court found a factual basis supported the plea and that the plea was knowingly, intelligently, and voluntarily made. Following a joint recommendation, the court sentenced Mr. Baugh to prison-based Drug Offender Sentencing Alternative (DOSA), with 25 months in custody and 25 months in community custody. Mr. Baugh appealed.

ANALYSIS

A. Factual Basis Raised for the First Time on Appeal

The issue is whether, based on this record, Mr. Baugh may claim for the first time on appeal that no factual basis existed to support his guilty plea.

We note the State contends Mr. Baugh waived his appeal right by pleading guilty. "Ordinarily, a plea of guilty constitutes a waiver by the defendant of his right to appeal, regardless of the existence of a plea bargain." *State* v. *Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980) (citing *Young* v. *Konz*, 88 Wn.2d 276, 283, 558 P.2d 791 (1977)). But, "a guilty plea in Washington does not usually preclude a defendant from raising collateral questions such as the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made."

Id. Mr. Baugh's appeal arguably relates to the circumstances in which his plea was made.

Turning to our issue, RAP 2.5(a)(3) provides that the court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a)(3).

The factual basis requirement is not constitutionally based. *In re Pet. of Hilyard*, 39 Wn. App. 723, 727, 695 P.2d 596 (1985). Although CrR 4.2(d) requires the court to find a factual basis exists for the plea, this rule is not the embodiment of a constitutionally valid plea; strict adherence to the rule is not a constitutionally mandated procedure. *In re Vensel*, 88 Wn.2d 552, 554, 564 P.2d 326 (1977).

Mr. Baugh not did raise this issue below. Indeed Mr. Baugh stood silent when the State represented to the court that the plea was the result of negotiations advanced by him and he stood equally mute when the State explained to the court that the parties were "stipulating that the value of that door exceeded $1500." RP at 10. Mr. Baugh now obscurely contends his plea lacked a factual basis and thus, was not knowing, intelligent, and voluntary. At best, he seems to argue his stipulation amounted to a manifest error affecting a constitutional right.

The State argues that Mr. Baugh's plea was entered knowingly, intelligently, and

voluntarily. It points to the trial court's change-of-plea colloquy. Mr. Baugh represented to the court he had read and understood the undisputed provisions in the written guilty plea. The colloquy bears this out. Considering the record of Mr. Baugh's guilty plea, we agree he entered his plea knowingly, intelligently, and voluntarily. Thus, he fails to show a manifest error affecting a constitutional right. Therefore, we conclude Mr. Baugh cannot raise the factual-basis issue for the first time on appeal.

Moreover, considering the case circumstances, Mr. Baugh's factual-basis challenge is inapt. He was originally charged with residential burglary and harassment and he pleaded guilty to a single, less serious charge as part of a joint plea agreement and sentencing recommendation. The record shows he stipulated to the factual basis for damages exceeding $1,500. Thus, Mr. Baugh does not come within the umbrella of *State v. Zhao*, 157 Wn.2d 188, 137 P.3d 835 (2006), as argued in his appellate briefing. There, the court held that a defendant may plead guilty to amended charges when no factual basis is shown, if a factual basis exists for the original charges and the plea is knowing, intelligent, and voluntary. *Id.* We are not required to determine if a factual basis for the original charges exists because Mr. Baugh specifically stipulated to the factual basis supporting first degree malicious mischief.

A stipulation is "an admission that if the State's witnesses were called, they would testify in accordance with the summary presented by the prosecutor." *State v. Wiley*, 26 Wn. App. 422, 425, 613 P.2d 549 (1980). When the court asked the defense

if it had any comments to make regarding the facts, it replied that it did not. Mr. Baugh further acknowledged stipulating to that value in his brief.

B. Offender Score

The issue is whether Mr. Baugh's previously "washed out" juvenile adjudications should have been used to calculate his offender score at sentencing.

Until 1997, prior juvenile offenses were not included in a defendant's criminal history for purposes of calculating his adult offender score once the defendant turned 23 years old. *See* former RCW 9.94A.030(12)(b) (1996). The prior juvenile offenses were said to "wash out" and not be included in the offender score calculation. *State v. Smith*, 144 Wn.2d 665, 30 P.3d 1245 (2001), 39 P.3d 294 (2002). In 1997, the legislature eliminated this wash out provision. *See* Laws of 1997, ch. 338, § 2.

Mr. Baugh, who was born on April 14, 1973, turned 18 in 1991, and turned 23 in 1996, before the 1997 amendment took effect. Accordingly, he argues that his juvenile offenses should not have been included in his offender score under *State v. Dean*, 113 Wn. App. 691, 54 P.3d 243 (2002) (discussing *Smith*, 144 Wn.2d at 670-71; *State v. Cruz*, 139 Wn.2d 186, 985 P.3d 384 (1999)). But effective June 13, 2002, the legislature amended RCW 9.94A.030 to clarify that all prior offenses, no matter how they were treated under prior versions of the Sentencing Reform Act of 1981, remains part of an offender's criminal history. Laws of 2002, ch. 107, § 1.

Additionally, RCW 9.94A.345 provides "any sentence imposed under this

chapter shall be determined in accordance with the law in effect when the current offense was committed." Mr. Baugh committed the current offense in April 2009, well after the effective date of these statutory amendments, so they apply to him. *State v. Varga*, 151 Wn.2d 179, 86 P.3d 139 (2004); *In re Pers. Restraint of Jones*, 121 Wn. App. 859, 88 P.3d 424 (2004). And, *Dean* is distinguishable from the present case because the offense committed in that case was before the effective date of the 2002 legislative amendment. *Dean*, 113 Wn. App. at 693 n.2.

In sum, the trial court did not err in including Mr. Baugh's juvenile adjudications in his offender score calculation.

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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Brown, J.

_____ _____
Kulik, C.J. Siddoway, J.