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Court of Appeals
Division II
State of Washington
11/18/2021 1:27 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
11/18/2021
BY ERIN L. LENNON
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SUPREME COURT NO. 100391-9
COA NO. 54858-5-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARLON HOUSE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

Marlon House asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

House requests review of the decision in State v. Marlon Octavius Luvell House, Court of Appeals No. 54858-5-II (slip op. filed October 19, 2021), attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Where the conviction on plea of guilty must be vacated because the charge exceeds the statute of limitations and there is no express waiver of the limitation, whether the remedy in this case is dismissal with prejudice, not remand for the State to file other charges that are within the statute of limitations?

D. STATEMENT OF THE CASE

The State originally charged Marlon House with two counts of first degree child rape. CP 3-4. On January 27, 2020, the State filed an amended information charging House with one count of second degree assault with sexual motivation. CP 7-8. The offense was alleged to have occurred between November 19, 2009 and November 8, 2013. CP 7-8. House pleaded guilty to second degree assault as charged in the amended information. CP 9-20. The plea statement did not reference the statute of limitations. CP 9-20. A plea colloquy took place after which the court accepted the guilty plea, but the statute of limitations was not mentioned. 1RP¹ 3-7.

At the sentencing hearing, the State filed a second amended information that corrected the child's date of

¹ The verbatim report of proceedings is cited as follows: 1RP – 1/27/20; 2RP – 4/24/20.

birth but otherwise remained unchanged. 2RP 2-4; CP 39-40. The court imposed an indeterminate sentence of 60 months to life, to run consecutive to a previously imposed sentence from another case. CP 52. No one referenced the statute of limitations at the sentencing hearing. 2RP 2-12.

On appeal, House argued the court lacked authority to accept the plea and enter the judgment and sentence because the amended information was filed after the statute of limitations had run out and there was no express waiver of the limitations period on the record. See Brief of Appellant at 3-8. The Court of Appeals agreed and vacated the plea and judgment and sentence. Slip op. at 1.

House argued the case should be dismissed with prejudice, without allowing the State to file additional charges on remand. See Brief of Appellant at 8-9; Reply Brief at 1-5. The Court of Appeals disagreed, holding "on

remand the State may proceed on any charges not barred by the statute of limitations." Slip op. at 1. House seeks review of that part of the Court of Appeals decision.

E. WHY REVIEW SHOULD BE ACCEPTED

1. WHAT CONSTITUTES THE APPROPRIATE REMEDY FOR A PLEA THAT VIOLATES THE STATUTE OF LIMITATIONS IS A SIGNIFICANT ISSUE OF LAW WARRANTING REVIEW.

House pleaded guilty to a single charge and that charge was barred by the statute of limitations. The Supreme Court has not definitively decided the appropriate remedy in a case like this. House seeks review under RAP 13.4(b)(3) and (b)(4).

a. Everyone agrees the plea and judgment and sentence must be vacated because of the statute of limitations violation.

House does not seek review of the part of the Court of Appeals decision that holds the plea and resulting judgment and sentence must be vacated because of the statute of limitations violation. Some context, however, is

helpful in addressing the debated issue of whether the State can file additional charges on remand.

RCW 9A.04.080 is the statute of limitations for criminal offenses. The statute of limitations "bars prosecution of charges commenced after the period prescribed in the statute." In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000).

The statute of limitations "is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." Toussie v. United States, 397 U.S. 112, 114-115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970). Statutes of limitations "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."

United States v. Marion, 404 U.S. 307, 322, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); U.S. Const. amend. V, VI, XIV.

Apart from the offenses specifically identified in the statute, "[n]o other felony may be prosecuted more than three years after its commission." RCW 9A.04.080(1)(i). Second degree assault, a felony under RCW 9A.36.021(2), is not specifically listed in RCW 9A.04.080. The statute of limitations for the State to commence a prosecution for second degree assault is therefore three years. The Court of Appeals accepted the State's concession that it did not prosecute this offense within the statute of limitations. Slip op. at 3-4.

"The pre-filing expiration of a statute of limitations for a crime affects the authority of the court to enter a judgment and sentence." In re Pers. Restraint of Swagerty, 186 Wn.2d 801, 808, 383 P.3d 454 (2016). Subject to one exception, "once the statute of limitations expires for a crime, the State lacks the authority to charge

a defendant and the court lacks the authority to sentence a defendant under a plea agreement based on untimely charges." Id.

The one exception is that "a criminal defendant may expressly waive an expired statute of limitations on lesser charges during plea negotiations to take advantage of a favorable plea offer." Id. at 804. "This waiver must be express." State v. Peltier, 181 Wn.2d 290, 297, 332 P.3d 457 (2014). The Court of Appeals accepted the State's concession that House did not expressly waive the expired statute of limitations. Slip op. at 3-4.

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. Amend. V, XIV, Wash. Const. art. I, § 3. A guilty plea is otherwise constitutionally defective. Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S.

Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).

Here, the statute of limitations had expired on the charge. In the absence of an express waiver of the statute of limitations, the court lacked authority to sentence House for second degree assault. Swagerty, 186 Wn.2d at 808. House was therefore misinformed that judgment and sentence could be entered on his plea to second degree assault. For this reason, the plea was not knowing, voluntary and intelligent, in violation of due process.

There is no dispute that the Court of Appeals appropriately vacated the plea and the judgment and sentence. Slip op. at 4.

b. The State should not be allowed to file other charges on remand.

House seeks the remedy of dismissing the case without allowing the State to refile any charges that are

still within the statute of limitations. The Court of Appeals, however, held that on remand the State may proceed on any charges not barred by the statute of limitations. Slip op. at 4.

In Stoudmire, the Supreme Court vacated the convictions on which the statute of limitations had run and remanded for resentencing on the remaining, unaffected convictions, with no allowance made for the State to file any charges on which the statute of limitations had not expired on remand. Stoudmire, 141 Wn.2d at 356. In House's case, there are no remaining convictions once the second degree assault conviction is vacated.

While the defendant in Stoudmire pleaded guilty to the charges in the original information, the potential for the State to file related, more serious charges on remand that were still within the limitations period remained had the Supreme Court not foreclosed the opportunity. The outcome in Stoudmire is consistent with the mandatory

joinder rule, under which "[a] defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense." CrR 4.3.1(3). The Supreme Court in Stoudmire, by simply vacating the convictions that violated the statute of limitations without remanding for the State to file any related charges, in effect implemented the mandatory joinder rule without naming it.²

The Court of Appeals was unimpressed with Stoudmire, concluding Swagerty controlled House's case because Stoudmire was "silent on whether the State could refile any other charges against the defendant." Slip op. at 5, 7. The Swagerty court "acknowledged that the State could refile the original charges against Swagerty, so long as the statute of limitations had not

² In another case, the Supreme Court decided the mandatory joinder issue on appeal rather than wait for the issue to be resolved on remand as a matter of judicial economy. State v. Dallas, 126 Wn.2d 324, 326, 332, 892 P.2d 1082 (1995).

expired." Slip op. at 5 (citing Swagerty, 186 Wn.2d at 811).

Swagerty, however, did not outright repudiate Stoudmire. Instead, it distinguished Stoudmire. Swagerty, 186 Wn.2d at 812. And the manner in which it distinguished Stoudmire shows why Swagerty does not control House's case in terms of what the State may or may not do on remand.

The Supreme Court gave Mr. Swagerty the option of accepting "the Court of Appeals' vacation of all convictions on all four charges that were part of an indivisible plea agreement," but if he did so, "the State will still be able to refile the original charges as the statute of limitations has not yet run on those charges." Id. at 811. Distinguishing Stoudmire, Swagerty rejected the request for resentencing only on the remaining third degree child rape charge, stating "[t]his would be an unreasonable windfall for Swagerty, allowing him to negotiate a deal

with the State that would spare him a life sentence and then repudiate that deal to his benefit." Id. at 812.

The Court of Appeals acknowledged House is already serving a life sentence from a prior case. Slip op. at 2. But it proclaimed "[t]hat House is currently serving a life sentence . . . has no bearing on the State's authority to file timely charges on remand." Slip op. 8. Not so. The appropriate remedy in a given case is not so black and white.

The Supreme Court in Swagerty looked to RAP 12.2 in fashioning an appropriate remedy for a statute of limitations violation in the plea context. Swagerty, 186 Wn.2d at 810; see RAP 12.2 ("The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require."). In fashioning that remedy, the Supreme Court looked to whether the defendant would obtain an "unreasonable windfall" if the

State were not allowed to refile charges on remand. Swagerty, 186 Wn.2d at 812.

There is no unreasonable windfall for House because he is already serving a life sentence in another case. Vacating the second degree assault charge in the present case without allowing the State to refile the original charges does not change that fact. House would not be escaping meaningful punishment in the present case because he is already being punished with a life sentence in the other case. Unlike in Swagerty, he would not be "spared a life sentence" if the State were unable to pursue additional charges on remand. Swagerty, 186 Wn.2d at 812.

Moreover, Swagerty's plea to multiple charges was indivisible. Id. It was an all or nothing deal. In that circumstance, the Supreme Court gave Swagerty the option of having the convictions vacated with the State

being able to refile the original charges on which the statute of limitations had not yet run. Id. at 810-11.

Unlike Swagerty, House's case does not involve an indivisible plea to multiple charges. The Court of Appeals claimed the fact that House's case does not involve an indivisible plea agreement is "a distinction without a difference" and plays no role in affecting the remedy. Slip op. at 8.

The Swagerty court, though, didn't think the presence of an indivisible plea agreement was insignificant. The remedy in Swagerty was driven by the fact that the plea was a package deal. The Swagerty court distinguished Stoudmire on this precise ground, pointing out Stoudmire did not address "whether the plea agreement was indivisible or what the consequences of indivisibility would be," so "the relief granted there does not govern the relief appropriate here." Swagerty, 186 Wn.2d at 812.

Swagerty stands for the proposition that when a plea to multiple charges is indivisible and the plea is deemed infirm on appeal, the defendant will not be allowed to vacate one or more charges while keeping the charges unaffected by the error intact, thereby avoiding a harsher sentence. Swagerty's plea was an all-or-nothing deal, so Swagerty was not allowed to be resentenced only on the remaining count that was not affected by the statute of limitations. Id.

Unlike in Swagerty, House pleaded guilty to only one charge and that charge is barred by the statute of limitations. The remedy House requests does not run afoul of any consideration involving an indivisible plea agreement.

Under the distinguishable circumstances of House's case, dismissal of the case without allowing the State to file more charges on remand is the appropriate remedy.

F. CONCLUSION


For the reasons stated, House requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 2,232 words excluding those portions exempt under RAP 18.17.

DATED this 18th day of November 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

October 19, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARLON OCTAVIUS LUVELL HOUSE,

Appellant.

No. 54858-5-II

UNPUBLISHED OPINION

WORSWICK, J. — Marlon House pleaded guilty to one count of second degree assault with sexual motivation after the State amended the information from two counts of first degree child rape. He now appeals, arguing that the court exceeded its authority by accepting the plea and sentencing him because the amended information was filed after the statute of limitations period for second degree assault had expired. He further argues that this court must vacate the conviction and dismiss this case with prejudice. The State concedes that the statute of limitations on the assault charge expired before the charge was filed, but it disagrees on the remedy. Instead, the State asks this court to vacate House’s plea and sentence and remand for trial on the original charges.

We agree with the State and accept the State’s concession, vacate House’s guilty plea and judgment and sentence, and remand for the State to proceed on any charges for which the statute of limitations has not run.

FACTS

In March 2018, A.C.'s mother reported to the police that Marlon House sexually assaulted her then 14-year-old daughter, A.C., sometime between November 2009 and November 2013. A.C. disclosed that House raped her twice during a weekend she spent at his house when she was in the third grade. At the time of A.C.'s disclosure, House was serving a life sentence for two counts of first degree rape of a child involving two other victims.

As a result of A.C.'s allegations, the State timely charged House with two counts of rape of a child in the first degree on May 15, 2019.¹ Based on a plea agreement, the State filed an amended information charging House with only one count of second degree assault with sexual motivation on January 27, 2020. By that time, the statute of limitations had expired on any second degree assault charge. Former RCW 9A.04.080(1)(i) (2017). House pleaded guilty to the assault charge in exchange for a recommendation for an indeterminate sentence of 57 months to life, and the trial court accepted House's plea.² A statute of limitations waiver was not discussed in the plea form or at the plea hearing or sentencing. The trial court imposed an indeterminate sentence of 60 months to life, to run consecutive to his previously imposed life sentence.

House appeals his conviction and sentence.

¹ At the time the State charged House, the statute of limitations for first degree child rape did not expire until the victim's thirtieth birthday. Former RCW 9A.04.080(1)(b)(vi)(c); Laws of 2013, ch.17, § 1.

² At sentencing on April 24, 2020, the State filed another amended information correcting A.C.'s date of birth but otherwise remained unchanged. House acknowledged that this minor correction did not affect his plea.

ANALYSIS

I. THE TRIAL COURT'S AUTHORITY AND DUE PROCESS

A. *Standard of Review and Legal Principles*

Where the facts are not in dispute, alleged violations of the statute of limitations are questions of law we review de novo. *State v. Peltier*, 181 Wn.2d 290, 294, 332 P.3d 457 (2014); *State v. Merritt*, 193 Wn.2d 70, 77, 434 P.3d 1016 (2019). A charge of second degree assault must be filed within three years after the commission of the crime. Former RCW 9A.04.080(1)(i). A trial court exceeds its authority when it enters a judgment to untimely charges. *In re Matter of Swagerty*, 186 Wn.2d 801, 810, 383 P.3d 454 (2016); *In re Stoudmire*, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000). A defendant may waive a lapsed statute of limitations, but only if that waiver was expressly made. *Peltier*, 181 Wn.2d at 297.³

B. *The Trial Court Did Not Have Authority to Accept House's Plea or Enter the Judgment and Sentence*

House argues that the trial court lacked authority to accept his guilty plea because the State charged him with second degree assault after the statute of limitations had expired. The State concedes this error. We accept the State's concession and hold that the trial court exceeded its authority when it accepted House's plea.

³ Washington is among the states that have held that the criminal statute of limitations is not jurisdictional. *Peltier*, 181 Wn.2d at 296. Among those states, Washington appears to be unique in requiring that a statute of limitations waiver be expressly made. *Peltier*, 181 Wn.2d at 297. Other state, as well as federal, courts have held that the plea itself is a waiver of the statute of limitations defense. See *e.g. Conerly v. State*, 607 So.2d 1153, 1156-58 (Miss. 1992) (referring to cases from the Second, Third, Fourth, Sixth, Seventh, Tenth, and D.C. Circuit Courts).

The State alleged in the amended informations that House committed second degree assault against A.C. sometime between November 2009 and November 2013. The statute of limitations for second degree assault is three years. Former RCW 9A.04.080(1)(i). The State filed the amended information on January 27, 2020. The charge was filed more than three years after the commission of the crime, which exceeded the statute of limitations. It is undisputed that House did not waive the statute of limitations.

Because the trial court entered a judgment on untimely charges, the judgment and sentence was entered in excess of the court's authority. Consequently, we vacate House's plea and judgment and sentence.

II. REMEDY

Next, House argues that his remedy is dismissal with prejudice, without allowing the State to refile any charges that may still fall within the statute of limitations. The State argues that although this court should vacate the assault conviction, it should remand for trial on the original charges. We hold that on remand the State may proceed on any charges not barred by the statute of limitations.⁴

If a trial court lacks authority to enter a conviction, the conviction must be vacated. *Swagerty*, 186 Wn.2d at 810. The remedy for an invalid agreement returns the parties to the same position they were in before they entered into the plea bargain. *In re Thompson*, 141 Wn.2d 712, 729-30, 10 P.3d 380 (2000). On remand after a conviction has been vacated for

⁴ The State requests this matter be remanded for trial on "the original charges," Brief of Respondent at 11, and our decision would allow that. However, whether the State proceeds on the original charges, or any other charge for which the statute of limitations has not run is within prosecutorial discretion.

violation of the statute of limitations, the State may refile charges for which the statute of limitations has not run. *Swagerty*, 186 Wn.2d at 811; *Peltier*, 181 Wn.2d at 298. At the time the State charged House, the statute of limitations for first degree child rape did not expire until the victim's thirtieth birthday. Former RCW 9A.04.080 (1)(b)(vi)(c); Laws of 2013, ch.17, § 1.

Here, the State had timely charged House with first degree child rape. Moreover, the statute of limitations has not yet run on the crime of first degree child rape. We return the parties to the positions they were in before House pleaded guilty. Consequently, we hold that the remedy upon remand is not dismissal of the case, but a remand for the State to charge House with the crimes for which the statute of limitations has not run, and allow the matter to proceed accordingly.

House relies solely on *Stoudmire* to support his position that we should dismiss this case, but *Stoudmire* does not control here. In *Stoudmire*, the defendant pleaded guilty to two counts of indecent liberties, one count of statutory rape, and one count of rape of a child in the second degree among other crimes. *Stoudmire*, 141 Wn.2d at 347. He then filed a personal restraint petition (PRP) alleging that the statute of limitations had run on the two indecent liberties charges. *Stoudmire*, 141 Wn.2d at 347. Our Supreme Court agreed, and held that the charges were filed in violation of the three-year statute of limitations. *Stoudmire*, 141 Wn.2d at 354 (relying on RCW 9A.04.080). The Supreme Court vacated and dismissed the untimely convictions, but was silent on whether the State could refile any other charges against the defendant. *Stoudmire*, 141 Wn.2d at 352-56.

In contrast, the *Swagerty* court acknowledged that the State could refile the original charges against Swagerty, so long as the statute of limitations had not expired. *Swagerty*, 186

Wn.2d at 811. There, the State had charged Swagerty with rape of a child in the first degree and first degree child molestation. *Swagerty*, 186 Wn.2d at 805. Because of his criminal history, he would have faced a life sentence without possibility of parole if convicted of those crimes. *Swagerty*, 186 Wn.2d at 805. To avoid a life sentence, he negotiated a guilty plea in exchange for four lesser offenses, some of which were barred by the statute of limitations. *Swagerty*, 186 Wn.2d at 806. The trial court accepted Swagerty's plea to the lesser charges and imposed an exceptional sentence. *Swagerty*, 186 Wn.2d at 806. Swagerty filed a pro se PRP. *Swagerty*, 186 Wn.2d at 810.

We raised the issue that the statute of limitations had run on three of the amended charges sua sponte, and we vacated all the convictions because the plea agreement was indivisible. *Swagerty*, 186 Wn.2d at 806. We held that the State "may then refile any charges for which the statute of limitations has not yet expired." *Swagerty*, 186 Wn.2d at 806.

Our Supreme Court held that although the State would be allowed to refile the original charges on which the statute of limitations had not run, we erred in vacating all the charges without giving Swagerty an option to withdraw his PRP. *Swagerty*, 186 Wn.2d at 811. This was because Swagerty was not aware of the statute of limitations issue and was not represented by counsel, thus he may not have been aware of the consequences of his PRP, which could have included a life sentence. *Swagerty*, 186 Wn.2d at 811.

Our Supreme Court offered Swagerty an option of either vacating the judgment enforcing the plea agreement and risking the possibility of the State refiling the original charges, or withdrawing his PRP and maintaining the plea agreement. *Swagerty*, 186 Wn.2d at 811. The Supreme Court expressly rejected Swagerty's requested remedy: to vacate the three untimely

convictions and resentence him based on the single remaining charge. *Swagerty*, 186 Wn.2d at 812. The Court noted that allowing resentencing on only one of the four charges would result in an “unreasonable windfall,” allowing Swagerty to unfairly take advantage of the plea deal by avoiding a life sentence without being convicted of the other lesser charges. *Swagerty*, 186 Wn.2d at 812. The Court then remanded for resentencing on the remaining amended charge that was not time barred and left open the possibility of the State refiling the original charges. *Swagerty*, 186 Wn.2d at 807.

Here, House relies on the *Stoudmire* court’s silence to argue that the State here should not be able to refile the original charges. However, House’s reliance on *Stoudmire* is misguided because the facts are distinguishable.

In *Stoudmire*, the Supreme Court was silent on the possibility of recharging Stoudmire because he pleaded guilty to the *original* charges, which were untimely filed. *Stoudmire*, 141 Wn.2d 352-56. House argues that the absence of an amended information in *Stoudmire* is irrelevant because the court could have allowed the State to file other, more serious charges against Stoudmire. This argument is unpersuasive. It would be unreasonable to conclude that the Supreme Court’s failure to mention the possibility of recharging Stoudmire necessarily forecloses the opportunity for the State in that case, or in this case, to refile timely charges against a defendant. Not only is the interpretation unreasonable, it is also unsupported by any legal authority. Moreover, the *Swagerty* court similarly dismissed this argument, recognizing that, “*Stoudmire* almost exclusively concerned whether the petition could be heard at all, not the remedy should we reach the merits.” *Swagerty*, 186 Wn.2d at 812.

House also argues that, unlike *Swagerty*, a dismissal with prejudice in this case would not result in an “unreasonable windfall” because he is serving a life sentence for his prior convictions regardless of the outcome of this case. Brief of Appellant at 4. That House is currently serving a life sentence, however, has no bearing on the State’s authority to file timely charges on remand. Our Supreme Court has specifically held that the appropriate remedy in situations such as this is to place the parties “back in the position they were in before they entered into the agreement.” *Swagerty*, 186 Wn.2d at 811 (quoting *Thompson*, 141 Wn.2d at 730).

House tries to further distinguish *Swagerty* by arguing that his case here involved no indivisible plea agreement, but this is also a distinction without a difference. House makes no real attempt to explain how the nature of the plea agreement should affect his remedy on remand.

We hold that upon remand, the State would have the option to refile any charges for which the statute of limitations has not run. House’s requested remedy is not supported by authority, nor is it persuasive.

Because the assault charge was filed outside the statute of limitations period, the trial court was without authority to accept House’s plea and enter the judgment and sentence. Consequently, we vacate House’s plea and the judgment and sentence. The appropriate remedy allows the State to refile any charges for which the statute has not run.

Accordingly, we vacate House’s plea and judgment and sentence, and remand for the State to refile any charges for which the statute of limitations has not run.

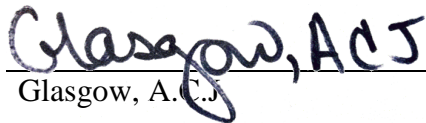
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A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

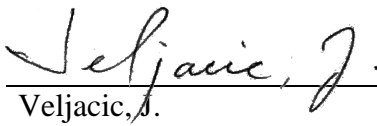


Wolswick, J.

We concur:



Glasgow, A.C.J.



Veljacic, J.

NIELSEN KOCH P.L.L.C.

November 18, 2021 - 1:27 PM

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Superior Court Case Number: 19-1-01796-3

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