Court of Appeals No. 43059-2-II

IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

CITY OF OLYMPIA,
Respondent,

v.

AARON HULET,
Petitioner.

ON PETITION FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary Tabor

BRIEF OF PETITIONER

Christopher W. Bawn, WSBA #13417
1700 Cooper Pt. Rd. SW, #A-3
Olympia, WA 98502
voice: (360) 357-8907
cwbawn@justwashington.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT RULES, STATUTES, and OTHER AUTHORITIES

CASES

I. ASSIGNMENTS OF ERROR

The Court of Appeals' Order, Entered July 3, 2012, limited the acceptance of review of the following: "We... accept issues related to (1) the denial of his RALJ 5.4 motion for a new trial, and (2) his sentencing."

Assignment of Error #1: The trial court erred in denying Aaron Hulet's RALJ 5.4 motion for a new trial.

Assignment of Error #2: Material and/or substantial portions of the trial court record were destroyed by the trial court in 2009, in violation of RALJ 5.4

Assignment of Error #3: The trial court record lacks assurance that Aaron Hulet received his constitutional right to be informed at arraignment and deferred prosecution of the nature and cause of the charges, the sentencing consequences, and his right to a knowing, intelligent and lawful on the record waiver of his rights upon entry into a deferred prosecution

Assignment of Error #4: The trial court erred in sentencing Aaron Hulet, including:

a) Insufficient evidence to support the sentence;
b) The Deferral Petition and Order were unconstitutionally defective and misrepresented the sentencing consequences;
c) Misuse of a "3rd DUI" at sentencing"
d) Misuse of "good time" at sentencing
e) Misuse of the Medical Exception to Confinement (RCW 45.61.5055)

ISSUES RELATED TO ASSIGNMENTS OF ERROR:

1. Whether the destruction of the entire arraignment and deferred prosecution hearings was material or substantial under RALJ 5.4

2. Whether the home-made order entered without the mandated "on the record" process is violates the mandatory findings under former RCW 10.05.020.

3. Whether the record contains sufficient evidence to support the sentence for a second or third DUI.

4. Whether the Deferral Petition and Order were constitutionally defective and misrepresent the sentencing consequences.

5. Whether the trial court should not have repeatedly referred to the basis for the sentence the deferred prosecution as one for a "3rd DUI."

6. Whether the trial court should not have relied upon the alleged availability of "good time" as a basis for the sentence.

7. Whether the trial court misapplied RCW 45.61.5055.

III. STATEMENT OF THE CASE

Factual Summary of the Case

Introductory note: The Statement of the Case is supposed to be based upon the entire record in the trial court, but the City of Olympia has previously conceded that the entire arraignment and deferred prosecution hearings were destroyed. Moreover, the "clerk's papers" in the municipal court contain no filing stamps or contextual explanation as to how they became a part of the record. See CP. 1 (Clerk: "hearings not available"), CP. 205 ("destroyed… in 2009"), 7/27/2011 RP. 8 (City judge: "best case, [the Municipal Court] would have that record, and we don't").

On June 12, 2006, a citation was filed by the Olympia Police Department with the City of Olympia Municipal Court Clerk, asserting a violation of RCW 46.61.502. CP 12-13. The Defendant's signature does not appear on the citation, and there is no evidence in the record that it was served on him. Instead the citation contains the word "booked" where the record is supposed to show the Defendant's signature. CP. 12. Attached to the citation is an account of a traffic stop of Aaron Hulet for violating RCW 46.37.530 (not wearing a motorcycle helmet), until "He got off the bike and I could tell right away the [sic] he was intoxicated." CP. 13. The officer conducted field tests, placed Hulet in custody, and obtained BAC results. CP. 13.

The record shows that Aaron Hulet received "Instructions for Release from Custody" to appear for an arraignment hearing the next day. CP. 163. At the arraignment hearing in front of a pro tem judge, the clerk's minute entry indicates that Aaron Hulet appeared without counsel. The record does not indicate that Hulet was provided the citation and the judge did not go over the charges. Aaron Hulet apparently did sign an "Advisement of Rights" which notified him that "You have been charged with a crime. If convicted, you could receive a fine and/or a jail sentence." CP. 13. The minute entry indicates that Aaron Hulet was "Arraigned on Charge 1 [and a] Plea/Response of Not Guilty Entered on Charge 1" and a pre-trial order was signed and given to Aaron Hulet, indicating that he had entered a plea of not guilty to a charge identified in the order as "DUI." CP. 161.

On August 22, 2006, a municipal court clerk named TMI (Tana Ingle?, see CP. 142) kept the minutes of the hearing. Ms. Ingle wrote nothing except that a "PETITION FOR DEFERRED PROSECUTION" was "ENTERED" and the municipal judge made a "Finding/Judgment of Deferred Prosecution for Charge 1." CP. 6.

After the court granted the deferred prosecution, the clerk wrote down some details concerning the order. Later that day, another Court Clerk "TLR" filed minute entry, describing how Aaron Hulet appeared at the "F[ront]/C[ounter]" of the Clerk's Office to "REQ(est) LOWER P[ay]M[e]NTS" and he was given a "FIN[ancial] AFF[idavit]" to complete, and "ADVISED OF TPA PROCEDURE – WILL RETURN W/IN 2 WKS." After that, a third Court Clerk "JXD" docketed an ORDER GRANTING DEFERRED PROSECUTION which was signed by the prosecutor, the judge and by Hulet's attorney, but not by Hulet. CP. 7, CP. 154.

After 20 months of complying with the terms of the deferred prosecution (CP. 143, 144), the City of Olympia moved to "revoke DP and sentence" due to another alleged failure to provide proof AA/NA attendance, and directed the judge to "see attached tx letter". CP. 92-105. According to the court docket, the 2008 non-compliance hearing was stricken because the motion was filed in error, because Aaron Hulet was "in compliance." CP. 8. On August, 3, 2010, four years after the entry of the deferred prosecution, the City filed a motion revoke the Deferred Prosecution, identifying "New Offenses

as noted: DUI" and in the "Comment(s) on compliance with Probation: 3rd DUI charge since 2003." CP. 78. In the Clerk's Papers, the next 12 pages appear to be the 2010 citation number 29785TC (CP. 79) and attachments. CP. 79-91.

At the first pre-revocation hearing, Aaron Hulet's attorney pointed out that Hulet had to care for a 2-year old child, he was compliant with all orders out of Thurston County and still following his probation requirements with the City of Olympia, and, "at this point, we will enter denials" and the court rescheduled to a date that would occur after the 2010 charges were heard in Thurston County District Court. 9/1/2010 RP. 2. At the second pre-revocation hearing, Aaron Hulet's attorney explained that the Thurston County trial had been delayed, and so the court rescheduled again. 10/19/2010 RP. 2. On January 25, 2011, at a third pre-revocation hearing, a visiting judge read from the motion to revoke the deferred prosecution:

> It says that there was a new DUI out of Thurston County on 8/4/2010, it says it is a third DUI charge since 2003, completed drug/alcohol treatment on 10/22/2008, recommendation is to revoke the deferred prosecution and sentence and add a $100 probation fee. Is that why you think you are here?... I am assuming then the allegations are not admitted at this time ..." 1/25/2011 RP. 2. Hulet's attorney answered "Right" and the court

responded, "Still denied, so I will identify that this FTC and motion to revoke is denied." 1/25/2011 RP. 2.

At the revocation hearing on March 15, 2011, Aaron Hulet's counsel moved for a continuance of the hearing. The attorney confirmed that Hulet had entered a guilty plea to the 2010 Thurston County DUI charges, but as a part of accepting the plea and entering sentence, that judge had found that "jail would be detrimental to his physical and mental health." 3/15/2011 RP. 2. Although the findings of fact had allegedly been agreed upon by the attorneys involved, before findings of fact and conclusions of law could be entered, according to Hulet's attorney, the State sought reconsideration and appealed "the judgment and sentence and entry of plea" and Hulet cross-appealed. 3/15/2011 RP 3. Hulet's attorney explained, the "findings of fact and conclusions of law that are required for the judgment and sentence" had not yet been entered in the Thurston County matter. 3/15/2011 RP. 3.

The court ruled: "reviewing the docket of the other case, it appears there is a conviction now for driving under the influence out of Thurston County District Court Cause Number C29785TC. Based on that, I do find that that is a violation of the deferred prosecution here. ... now I need to review the police report to determine whether there is a sufficient factual basis for the charge of driving under the influence in this cause number CR206351. So I am going to do that now.

(pause) Based on the driving pattern, the allegations in this case, and then breath test results, .183 and .178, I do find that there was a sufficient factual basis for the charge of driving under the influence. Therefore, I will enter a finding of guilty on that charge." 3/15/2011 RP. 3.

At sentencing, the City's attorney said:

If I understand correctly Mr. Hulet's um criminal history for purposes of sentencing this case occurred in 2003..." and the trial court interrupted, "No this was in 2006," and the State continued, "...I'm sorry ... 2006 awaiting sentencing. He had a prior at that time from 2003, a conviction for DUI, and then in 2010 he was arrested for another DUI and that case resulted in a conviction that resulted in the revocation of the deferred prosecution." 5/17/2011 RP. 2. The court responded, "Correct, so this would be a second within seven years." 5/17/2011 RP. 2. The court confirmed that the prosecutor was asking for a "mandatory minimum sentence" of 360 days, with 230 suspended, 45 in jail and 90 on EHM. 5/17/2011 RP. 3.

Aaron Hulet's attorney presented a declaration from Dr. K. Burnell Schaetzel-Hill (CP. 21) detailing Hulet's treatment history, his mental and physical diagnoses, his custodial parent status, that the displacement to his spine from not being on a prescribed mattress would be "extraordinarily painful and could lead to further disability, and the doctor concluded that, and due to Hulet's mental health and physical condition, the doctor concluded that "incarceration would definitely pose a substantial risk to his physical and mental well-being." CP. 19.

Hulet's attorney also filed a 27-page "Sentencing Statement" containing several additional exhibits (CP. 50-77), again detailing the disability to his lumbar spine (CP. 62), that he was suffering depression and anxiety over the loss of his drug-addicted wife, resulting in Aaron Hulet being the sole parent of his 2-year old daughter, and he submitted a separate psychological assessment from a family therapist, stating that Hulet was suffering from "stress, grief and loss" and that incarceration "would bring undue harm to his child." CP. 62, 65. Hulet's attorney argued that Aaron Hulet was seeking treatment, and asked the judge to "convert that 45 days to additional scram and EHM, to tag it on at the end of the 9 months ten days that he is doing at Thurston County." 5/17/2011 RP. 4.

The City prosecutor conceded that Dr. Schaetzel-Hill addressed the "physical and mental conditions as they relate to serving time in the jail," but then argued:

> This is 3 DUI's since 2003... I think that is marking Mr. Hulet as an extremely dangerous person... I don't dispute here that Mr. Hulet has a physical condition. It's a question of whether the court should order him to serve jail time ... he is a three-time DUI offender and I think that, given the medical condition he's presented, that's too much to ask the court to do. (5/17/2011 RP. 9)

The sentencing judge's oral ruling, repeatedly referencing the "3 DUI's" theme, appears at 5/17/2011 RP. 10-14, and is detailed further in the Argument section, below. A portion is recreated here:

"With the 3rd DUI, Mr. Hulet has put himself in this position... So, no, he will not serve that time on work release. He will serve 44 days in custody, 90 days on Electronic Home Monitoring. Now, if he behaves himself in the jail, then he will get 1/3 off of that for good time, but that is between him and the jail, so most likely, it will be 30 days, rather than 44. ... I can't have somebody with a third DUI and with serving no jail time. It's not going to happen. There is both a component of this that need to keep the community safe, and there is also a punishment, now, because this is a third DUI. Now, I understand that you are an alcoholic, and you will be dealing with that the rest of your life and that's not a crime, but when you get behind the wheel of a car [sic], then you have to come see me. As your attorney indicated earlier, you are lucky you are seeing me and not a Superior Court judge, because with a third DUI you are looking at some point you are going to kill somebody." 5/17/2011 RP. 13.

Hulet sought reconsideration, which the trial court denied without a hearing. CP. 16, 115. Hulet's attorney then filed a timely Notice of Appeal on June 7, 2011, which stated:

The Defendant Aaron Hulet appeals to the Superior Court of Thurston County all decisions in all criminal proceedings under CR 203651 in the court of limited jurisdiction, City of Olympia Municipal Court, from the date of initial appearance before municipal court, the to the date the notice of appeal was filed, and any post-appeal proceedings the court of limited jurisdiction may subsequently conduct. (CP. 15)

Hulet attempted to designate the entire record from the City of Olympia to the Superior Court, identifying every docketed court

appearance and requesting "all documents" and the "hearing tape" associated with every court appearance, including the "6/13/2006 Arraignment (all documents, include hearing tape)" and the "8/22/2006 Deferred Prosecution (all documents, include hearing tape)." CP. 1. The Clerk responded by indicating that the entire arraignment hearing in 2006 and the entire deferred prosecution hearing in 2006 were destroyed by the City of Olympia Municipal Court Clerk. See CP. 1 (Clerk: "hearings not available"), CP. 205 ("destroyed... in 2009").

Hulet's attorney filed a RALJ 5.4 motion on July 1, 2011, to request a ruling from the municipal court concerning the fact that the City of Olympia had destroyed the arraignment and deferred prosecution hearings. CP. 204. The municipal judge initially rejected the motion without a hearing, so Hulet's attorney filed a second RALJ 5.4 motion on July 5, 2011, reiterating the need for the lower court to meet the requirements of RALJ 5.4. CP. 202. The court granted the RALJ 5.4 hearing, and gave the prosecutor three weeks to file a response, but no response was filed. CP. 201.

At the RALJ 5.4 hearing, the court acknowledged that the records had been destroyed. See 7/27/2011 RP. City judge: ("best case, we would have that record, and we don't"). The court resolved the issue as follows:

> The issue of the missing recording of the session I find that the records are intact as to the deferred prosecution petition and deferred prosecution order that were entered by this court, I find that if there is a motion to withdraw that deferred prosecution it is not timely and I have not seen that motion, the only issue I have in front of this court was as a issue of sentence, so that was the only issue that we had in front of this court was as to the sentence, and so as to sentence, the recordings of the session are not material, and as to whether the deferred prosecution could be withdrawn, I find that based on CrRLJ 7.8 that it is untimely filed and so that is denied.7/27/2011 RP. 12.

ARGUMENT

PART A. The trial court erred in denying Aaron Hulet's RALJ 5.4 motion for a new trial.

RALJ 5.4 requires the court of limited jurisdiction to determine *both* whether the record is lost and whether it is significant or material. State v. Osman, 168 Wn.2d 632; 229 P.3d 729 (2010)(emphasis in the original). The trial court must make *two* distinct determinations when it considers materiality under RALJ 5.4. Id. (emphasis in the original). First, the trial court must determine the content of the lost record. Here, the trial court entered an order that

"the failure to maintain the audio recording of the [entire] arraignment and deferred prosecution hearings results in a missing record that is not significant and material." CP. 199. The court explained its reasoning that the "content" of the destroyed hearings was not material as follows:

"I find that if there is a motion to withdraw that deferred prosecution it is not timely and I have not seen that motion, the only issue I have in front of this court was as a issue of sentence, so that was the only issue that we had in front of this court was as to the sentence, and so as to sentence, the recordings of the session are not material, and as to whether the deferred prosecution could be withdrawn, I find that based on CrRLJ 7.8 that it is untimely filed and so that is denied." See 7/27/2011 RP. 12

The court's oral colloquy concerning untimeliness under CrRLJ 7.8 (procedures following conviction – relief from judgment or order) makes no sense. This is a direct appeal of the conviction and not a collateral attack occurring after the conviction. Under RCW 10.05.160, only the State is granted a conditional right to interlocutory appeal of a deferred prosecution order. The notice of direct appeal filed with the municipal court and the designation of the record in this case is clearly timely filed after the judgment and sentence were entered, challenging "all decisions in all criminal proceedings under CR 203651... from the date of initial appearance

before municipal court, the to the date the notice of appeal was filed, and any post-appeal proceedings..." CP. 15. By misapplying CrRLJ 7.8, the trial court failed to enter any findings concerning the content of the missing material except for the concession that the entire content of the arraignment and deferred prosecution hearings was destroyed.

The municipal court clearly abused its discretion by concluding that the content of the entire arraignment hearing and the entire deferred prosecution hearing are both immaterial (and the challenge is untimely) because they do not impact the deferred prosecution revocation hearing or the sentencing hearing. This misapplication of CrRLJ 7.8 would clearly abrogate the constitutional protections accorded to appellate review of arraignment and deferred prosecution hearings, upon direct appeal. As is evident from the cases cited in this brief, the Supreme Court has repeatedly allowed direct appeals of the defective arraignments, guilty plea hearings, and deferred prosecution petition hearings. The municipal judge's ruling would impermissibly shift the burden to the Defendant to preserve the record at all stages of the case, when "it is the court of limited

jurisdiction that has the duty to make and retain its electronic records. *See* RALJ 5.1, 5.2." State v. Osman, supra. See also Abad v. Cozza, 128 Wn.2d 575, 583, 911 P.2d 376 (1996). Upholding the right of the City of Olympia to destroy every arraignment and every deferred prosecution hearing after three years, under the theory that the arraignment and deferred prosecution hearings are irrelevant to the ultimate disposition of the case would abrogate the need for any RALJ's or efforts of the courts and legislature (as in RCW 10.050.020) to preserve a record of the waivers of constitutional rights inherent in the earlier proceedings. After the trial court decides that the content of the missing record is not significant or material to "*its* decision", the trial court's second determination is whether "the issue is whether the missing portion is material *to an appeal.*" State v. Osman, supra (emphasis in original). The second determination is reviewed *de novo* on appeal. Id.

Here, it is apparent that the missing record is both substantial and material to the appeal. In Osman, the court explained that RALJ 5.4 does not permit replacing a lost, material record by reconstructing it from other sources; the rule resolves that issue by

granting a new trial. In any event, as noted above, the only "other sources" available in this case are pieces of paper that are replete with errors and omissions in violation of court rules and statutes and the constitution. Thus, at a minimum, Aaron Hulet asks this court to reverse the trial court. If the errors do not compel reversal with prejudice, this court must determine the appropriate remedy, which would compel trial court to conduct a lawful arraignment, a lawful deferred prosecution proceeding, and a lawful subsequent revocation if Aaron Hulet violates the terms, or dismissal of the charges if he does not.

This appeal triggers violations of the Sixth Amendment to the United States Constitution, which guarantees that "In all criminal prosecutions, the accused shall enjoy the right _ _ _ to be informed of the nature and cause of accusation." U.S. Const. Amend VI. More specifically here, the record supports a violation of Article 1, section 22 of the Washington Constitution guarantees that the accused shall have the right to appear and "to demand the nature and cause of the accusation against him (and) to have a copy thereof." In addition Article 1, section 10 of the Washington Constitution is not

met, since that right requires that justice in all cases is conducted "openly" (not by destroying the recording of the proceeding before the appeal). The Fifth Amendment to the United States Constitution is also implicated as it provides in relevant part: "No person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...." US Const. Amend. V. The federal rights are applicable to state criminal proceedings by virtue of the Fourteenth Amendment. See Malloy v. Hogan, 378 U.S. 1, 6 (1964). Although entry into a deferred prosecution under former RCW 10.05.020 may not be the equivalent of a guilty plea, because evidentiary issues and the waiver multiple substantial constitutional rights are involved, the entry into a deferred prosecution "must be affirmative, voluntary, knowing, intelligent and on the record." Abad v. Cozza, 128 Wn.2d 575, 583, 911 P.2d 376 (1996)(citing City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984)). In Acrey, the Supreme Court held that at a minimum, the defendant must have been informed of "the nature and classification of the charge, the maximum penalty upon conviction and that technical rules exist which will bind

defendant in the presentation of his case." Acrey, 103 Wn.2d at 211. Here, there is not a sufficient showing that Hulet's waivers were affirmative, voluntary, knowing, intelligent or on the record.

Rule 13 of the Administrative Rule for Courts of Limited Jurisdiction ("ARLJ 13"), unambiguously requires a municipal court to "make an electronic record of all proceedings." Under ARLJ 9, these "tape recordings" are public records. ARLJ 13 requires the court to maintain the record "for at least as long as the record retention schedule dictates" (see further argument, below) and if a "electronic recording [is] impossible" then the proceeding may be "recorded by non-electronic means" upon an order of the court, and a transcript of the non-electronic recording "must be made at the court's expense" in the event of an appeal. Under former CrRLJ 4.1, the recording must include "reading the complaint or the citation and notice to the defendant or stating to him or her the substance of the charge and calling the defendant to plead thereto. The defendant shall be given a copy of the complaint or the citation and notice before being called upon to plead, unless a copy has previously been supplied. The defendant shall not be required to plead to the

complaint or the citation and notice until he or she shall have had a reasonable time to examine it and to consult with a lawyer, if requested." Under current and former CrRLJ 4.1, "If the defendant chooses to proceed without a lawyer, the court shall determine **on the record** that the waiver is made voluntarily, competently and with knowledge of the consequences. The defendant must be advised that waiver of a lawyer at arraignment does not preclude the defendant from asserting the right to a lawyer later in the proceedings." Current CrRLJ 4.1 provides that "The complaint or citation and notice or the substance of the charge, shall be read to the defendant, unless the reading is waived, and a copy shall be given to the defendant." CrRLJ 4.1(a,b,c,d,e,f).

The ARLJ and CrRLJ and Abad v. Cozza requirements to conduct the arraignment and deferred prosecution hearings "on the record" evoke "a term of art meaning familiar to lawyers" and the offending party that fails to conduct the proceeding on the record really has no excuse for failing to "tell it in a way that puts it on the record." State v. Hackett, 122 Wn.2d 165, 174, 857 P.2d 1026 (1993)(defense attorney cannot reset the "speedy trial rule clock" if

he does not put "on the record" that his client was present in the county). Washington courts strictly guard a defendant's constitutional rights to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009).

Due to the destruction of the record, there is no evidence that the trial court in this case properly arraigned Aaron Hulet, or provided him with any citation that so informed him of any of the charges, as required under CrRLJ 4.1. As noted in the statement of the facts, the only "charging document" that is entered on the arraignment docket states: "You have been charged with a crime. If convicted, you could receive a fine and/or a jail sentence." CP. 13. If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and the conviction is reversed. State v. Goodman, 150 Wn.2d 774, 788, 83 P.3d 410 (2004)(citing State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). See also State v. Haberman, 105 Wn.App. 926, 22 P.3d 264 (2001)(reversing on due process grounds for trial court failure to adequately inform the defendant of the crime). Since the deferred

prosecution hearing was destroyed, the paper petition for deferred prosecution (CP. 106-109) and the paper "order granting" that petition must also be closely scrutinized. The 4-page petition has no filing stamp. It was stapled with a mini-staple (small crown and legs) with a 45-degree orientation, and it was signed by Aaron Hulet on August 22, 2006. It references a "case history and assessment" that was supposed to be "filed," and police reports that were supposed to be "attached" but no case history or report of any state-approved treatment center appears on the docket or in the clerk's file with the petition; and no police reports are attached to the petition. This is error. If a deferred prosecution petition alleges an alcohol problem, the "arraigning judge" in a deferred prosecution proceeding may continue that arraignment for further diagnostic investigation and evaluation, pursuant to former RCW 10.05.030, after reviewing the "case history and written assessment prepared by an approved alcoholism treatment program" under former RCW 10.05.020(1). See also RCW 46.61.513 (1998)(criminal history and driving record must be verified immediately before the court defers prosecution).

The errors are magnified by the lack of an electronic

recording of the hearing. There currently exists no evidence that the "petition" was signed in the presence of the judge. The authenticity of Hulet's is not sworn, and the substitute jurat on the petition is improperly worded and violates two of the four requirements of RCW 9A.72.085 (it was not signed under penalty of perjury and it fails to disclose the place where it was signed). There is no evidence that the judge ever went over the petition with Hulet. There is no evidence that the judge even reviewed the terms that the judge placed in the "order granting" the deferred prosecution, which also references a "filed" report of a state-approved treatment center that does not exist, which also does not have Hulet's signature on it, and which is missing mandatory findings identifying each constitutional right Hulet waived.. CP. 151-154.

In addition to the due process violations that a lack of strict compliance with RALJ 5.4 will cause, it is notable that one part the deferred prosecution "petition" states:

"I understand that if I proceed to trial and I am found guilty, I may be allowed to seek suspension of some or all the fines and incarceration if I seek treatment." CP.107. (emphasis added)

After complying with the agreement for four years, and appearing at the revocation hearing, demonstrating that he had sought and was still seeking treatment, and seeking suspension of the incarceration, the trial court ruled that he could not suspend the "mandatory" incarceration. At the RALJ 5.4 hearing concerning the destruction of the deferred prosecution hearing, the trial court commented: "Why would there be a discussion of work release on a mandatory jail sentence on a deferred prosecution? I'm just curious why that would be something that would be discussed in the first place." 7/27/2011 RP. 7.

Obviously, the record is devoid of any notice on the record at the arraignment or in the petition for deferred prosecution that Hulet was facing any "mandatory jail sentence" on revocation of the deferred prosecution. Here, the trial judge "assumed" that there was a discussion of a "mandatory jail sentence." If such a mandatory sentence existed at the time of the deferred prosecution, why does the form state that the entire term of incarceration can be waived? This is appears to be the sort of *misinformation* that prosecutors would get questioned about (on appeal) for presenting to a defendant, so it is

unclear why misinformation to the defendant seeking a deferred prosecution would not be similarly questioned in the appellate courts of Washington.

Instead, the paper "petition" in this matter assured the Defendant that "all" of the incarceration could be suspended. CP. 107. Offering suspension of "all" jail time, contradicts the trial judge's comment at the RALJ 5.4 hearing that there was obviously a "mandatory minimum" that can't be suspended in whole or part. Absent any record to the contrary from the hearing itself, the misinformation is a manifest injustice and violates Hulet's right to a "knowing" entry into a deferred prosecution, including the procedural and sentencing consequences. See Acrey, supra; State v. Cosner, 85 Wn.2d 45, 530 P.2d 317 (1975)(lack of notice of mandatory weapons enhancement in the charging statement or at arraignment is a due process violation). State v. Turley, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003)(a guilty plea is involuntary if it fails to inform an accused person of the direct consequences of conviction). The RALJ 5.4 hearing judge asked the rhetorical question – "Why would there be discussion of work release at a deferred prosecution hearing, when

there is a mandatory sentence?" This should beg the question back, why would the paperwork suggest suspension of all jail time? What happened at this deferred prosecution hearing is anybody's guess, but the pieces of what was left from it do not replace what is missing.

Here, the error is magnified by the fact that the order granting the deferred prosecution does not contain a mandatory finding under RCW 10.05.020, that "(c) the petitioner has acknowledged and waived the right to testify, the right to a speedy [and public] trial, the right to call witnesses to testify, the right to present evidence in his or her defense, and the right to a jury trial."

The Washington Supreme Court recently used a "plain language" analysis to decide a RCW 10.05 issue involving treatment plans. See State v. Velazquez, ___ Wn.2d ___ (en banc, Jan. 17, 2013). Here, the trial court did not comply with the requirements of RCW 46.61.513 (Immediately before the court defers prosecution... or orders a sentence for any offense... the court and prosecutor shall verify the defendant's criminal history and driving record); ... The order shall include specific findings as to the criminal history and driving record.... the driving record shall include all information reported to

the court by the department of licensing" and the court violated the requirements of RCW 10.05.020(3).

RCW 10.05.020(3) clearly states: "Before entry of an order deferring prosecution, a petitioner shall be advised of his or her rights as an accused and execute... a statement..." It would render whole portions of the statute meaningless if this court feels that RAP 5.4 does not require a record of what the judge "advised" the petitioner in a deferred prosecution. The statute requires the existence of such advice "and" the executed statement. Notably, the statute further mandates that "(4) Before entering an order deferring prosecution, the court shall make specific findings that: ... (c) the petitioner has acknowledged and waived the right to testify, the right to a speedy trial, the right to call witnesses to testify, the right to present evidence in his or her defense, and the right to a jury trial; and (d) the petitioner's statements were made knowingly and voluntarily. Such findings shall be included in the order granting deferred prosecution." Again, it would violate the Supreme Court's "plain unambiguous statutory analysis" if there don't really need to be any record of any findings "before entering an order" and the order itself doesn't really need to contain all the listed findings.

In other words, the RAP 5.4 motion clearly had merit, and the trial judge appeared to concede, when asking rhetorical questions at the RAP 5.4 hearing, that it is anybody's guess what actually happened when Hulet's deferred prosecution was induced.

The missing record is a fundamental error of constitutional magnitude, precluding the trial and appellate courts from claiming that the missing records were immaterial and not substantial, since the trial court never found "on the record" or in the written orders of the court, that Aaron Hulet waived his constitutional rights to a speedy public trial, his right to call witnesses to testify, to present evidence in his defense, and to a jury/ RAP 5.4 should protect a defendant from constitutional deprivations by the municipal court of the City of Olympia, and the destruction of the arraignment and deferred prosecution clearly merits reversal.

As noted above, the "retention schedule" for the recorded hearings under ARLJ 13, for the City of Olympia Municipal Court, is dictated by the Washington Secretary of State, which requires retention of the "**log**" containing an "**index**" of the "tapes" or

"electronic recordings of court proceedings"[1] as well as the petition for deferred prosecution, and "the docket and case files" to be kept until "3 years after the case is closed" at which point, the log, the index, the petition, the docket and the case files can be destroyed. See Secretary of State District and Municipal Court Records Retention Schedule (RRS), section 2.5.6 and 2.3.5. CP. 182 and 176. RRS 2.5.11 and 2.5.12 mandate that the actual "tapes" and "electronic recordings" of the trial court proceedings must be retained until 30 days after a defendants' appeal rights in a "case" have been exhausted or the expiration of the appeal period for the case. As the trial court seemingly conceded in this case, the Clerk erroneously destroyed the hearing tapes/electronic recordings in 2009. See 7/27/2011 RP. 3 (2.3.5 refers to the petition, order and JIS form). Even RALJ 5.3 differentiates a municipal court "written log" from the "recording" itself. The log merely identifies where on the tape or other form of electronic recording, the proceeding begins and ends. Regardless of which Secretary of State section is involved, however, this "case" was not "closed" and the appeal period of the case was not

[1] As CP. 182 points out, the Secretary of State "replaced" the word "tapes" with the words

exhausted or expired, and so it was clearly an error on the part of the City of Olympia to destroy the record and it is not Aaron Hulet's fault the record was destroyed. It is clear that the Supreme Court and the Secretary of State are both trying to ensure that court records are not destroyed before a case is "closed" – and this case stands as a prime example of why cities in Washington need to receive clear guidance from Washington's Appellate Courts that RAP 5.4 is intended to ensure a fully-reviewable record. See, for example, State v. Cosner, 85 Wn.2d 45, 530 P.2d 317 (1975)(lack of notice of mandatory weapons enhancement in the charging statement or at arraignment is a due process violation); State v. Turley, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003)(plea is involuntary if it fails to inform an accused of the direct consequences of conviction). Here, the petition process violated RCW 10.05.030 (review of sentencing consequences, and criminal history), and the order granting the deferred prosecution does not contain a mandatory finding under RCW 10.05.020, that "(c) the petitioner has acknowledged and waived the right to testify, the right to a speedy [and public] trial, the right to call witnesses to

"electronic recordings" in 2007, and the term "tape" and "electronic recording" is therefore

testify, the right to present evidence in his or her defense, and the right to a jury trial." This missing finding is a fundamental error of constitutional magnitude, precluding the trial court from holding a subsequent trial without witnesses, defense evidence, and a jury (as provided in the constitution).

RAP 5.4 is the appellant's protection from municipal court violations of procedural due process. Such violations of due process were recently reiterated and emphasized by the Washington Supreme Court in State v. Morales, 173 Wn.2d 560, 269 P.3d 263 (2012)(reversing due to defective advice of rights at time of blood/alcohol testing because "No one could testify to exactly what was read to Mr. Morales. So he was not properly advised of the warning."). See also Melendez-Diaz v. Massachusetts, 129 S.Ct. 2627 (2009)(failure to authenticate records violates confrontation clause); Commonwealth v. Castillo, 66 Mass. App. Ct. 34, 37 (2006) (trial on stipulated facts not constitutionally capable of supporting conviction absent colloquy regarding constitutional rights waived).

---

used interchangeably here.

It seems a little hypocritical to hold law enforcement officers to a standard that requires identification of "exactly what was read to [a defendant]" while permitting judicial officers to flagrantly violate RCW 10.05.020, and to destroy the electronic record at these critical stages in the accused defendant's prosecution. This dichotomy between the high standards imposed on law enforcement officers and a lower standard for judicial officers is a matter of substantial public import. It is inescapable, that municipal court destroyed the entire arraignment and deferred prosecution, which violates the rule in State v. Osman, 168 Wn.2d 632; 229 P.3d 729 (2010)(RALJ 5.4 does not permit replacing a lost, material record by reconstructing it from other sources; the rule resolves that issue by granting a new trial).

In case the argument is made that CrRLJ 7.8 imposes a "reasonable time" standard upon all court proceedings, and a person in a deferred prosecution can be barred from appealing the deprivations identified here, the appellant maintains that constitutional deprivations and RALJ 5.4 are not so simply precluded by CrRLJ 7.8. Appeals are supposed to involve constitutional deprivations and to be decided on the basis of the record below, including the arraignment and the

deferred prosecution proceedings. The burden should not shift to a criminal defendant to decide on such a loose standard, when prejudice applies to his constitutional right to appeal. Here, Hulet is clearly prejudiced by not having the record the court was required to maintain. Hulet should be allowed to raise a RALJ 5.4 motion when the absence of that record is substantial (these are entire hearings) as well as material to the appeal. The RALJ's including RALJ 5.4 and ARLJ 13 are part of a consistent scheme for handling direct appeals, which include requirements concerning the record for appeal. CrRLJ 7.8 should not be misapplied on such a loose standard to preclude the specificity provided by the RALJ motion and appeal process.

PART B (Assignment of Error #4): The trial court erred in sentencing Aaron Hulet, including:

a) Insufficient evidence to support the sentence;
b) The Deferral Petition and Order were unconstitutionally defective and misrepresented the sentencing consequences;
c) Misuse of a "3rd DUI" at sentencing"
d) Misuse of "good time" at sentencing
e) Misuse of the Medical Exception to Confinement (RCW 45.61.5055)

Insufficiency of the evidence may be raised for the first time on appeal. City of Seattle v. Slack, 113 Wash.2d 850, 859, 784 P.2d 494

(1989) ("Due process requires the State to prove its case beyond a reasonable doubt; thus, sufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal.") (citing State v. Baeza, 100 Wash.2d 487, 488, 670 P.2d 646 (1983)). In City of Seattle v. Winebrenner, 167 Wn.2d 451, 219 P.3d 686 (2009), the court explained that, for purposes of sentencing, the "prior offense" must occur "in time or order" before the offense for which a sentence is being imposed. Also, "prior offenses" do not include the offense for which the deferred prosecution is being revoked. In the Winebrenner case, evidence established that the second defendant, Quezada, had a 2001 DUI conviction, a 2002 DUI on deferred prosecution for which he was being sentenced, and a 2005 conviction for reckless driving that caused the revocation of the 2002 DUI deferred prosecution. The Supreme Court explained that the trial court properly concluded that the sentence for the 2002 DUI involved one "prior offense" (the 2001 conviction), for which the trial court sentenced Quezada to 120 days of electronic home monitoring in lieu of any jail time. The Court of Appeals believed Quezada should have been sentenced on the basis of two prior offenses. The Washington Supreme Court analyzed the

language contained in RCW 46.61.5055, and reversed the Court of Appeals, reinstating the trial court's 120-day EHM sentence, because the record established that Quezada only had one "prior offense" to the 2002 DUI.

The prosecution has the burden of proving prior convictions by a preponderance of the evidence. State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). It is the obligation of the prosecution, not the defendant, to assure that the record before the sentencing court supports the criminal history determination. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). As the court recently explained in In Re Adolph, 170 Wn.2d 556, 243 P.3d 540 (2010), the best method of proving a prior conviction is by the production of a certified copy of the judgment, but other "comparable documents of record or transcripts of prior proceedings are admissible to establish criminal history." No "documents of record" were admitted here, and thus Aaron Hulet is entitled to a sentence on the basis of zero "prior" offenses.

Although the prosecutor mentioned that Aaron Hulet had a 2003 "DUI" once at the outset of the sentencing hearing

(5/17/2011 Hearing at page 2), the only "document of record" of any other offenses was the evidence that Hulet had been charged in 2010 for a DUI that occurred in 2010. Throughout the sentencing proceeding, the court and prosecutor kept repeating that it was Aaron Hulet's third DUI conviction. Use of the 2010 conviction to enhance Aaron Hulet's sentence on a 2006 offense violates the rule in Winebrenner. Moreover, the lack of any evidence of a 2003 conviction in the clerk's papers and hearing transcripts demonstrates that the prosecutor never produced anything to verify that the 2003 "DUI" resulted in a conviction. Because the City failed to introduce any evidence of any "prior offense" that Aaron Hulet's supposedly committed, the trial court erred in repeatedly claiming that the sentence imposed was based on three DUI convictions. The appropriate action on appeal when the prosecutor fails to introduce sufficient evidence of prior DUI offenses to support the conviction and sentence is to remand for entry of the lesser conviction and sentence. State v. Santos, 163 Wn. App. 780; 260 P.3d 982 (2011).

RCW 46.61.5055 sets out a penalty schedule for persons convicted of certain alcohol related offenses, when the offender has a

BAC of at least 0.15, based on the number of "prior" deferrals or convictions within seven years of the current offense. If no evidence of prior convictions is established, the sentence is 2 days to 364 days of imprisonment, with a minimum of 2 days unless the "well-being" exception applies, in which case the court will impose no less than 30 days' electronic home monitoring in lieu of imprisonment. With evidence of one or two prior convictions, the sentence can increase. See RCW 46.61.5055(2)(b)(i)-(ii)). To avoid an insufficiency of the evidence reversal, the legislature has laid out a procedure a trial and sentencing court are supposed to follow "immediately before" deferring prosecution under RCW 10.05.020, and before ordering a sentence for violations of RCW 46.61.502. The trial court must "verify the defendant's criminal history and driving record" and the orders in each proceeding "must include specific findings as to the criminal history and driving record" including "all previous convictions and orders of deferred prosecution, as reported through the judicial information system or otherwise available to the court or prosecutor." RCW 46.61.513. Here, it is indisputable that the trial court included no criminal history and driving record in its orders, it

clearly did not receive that evidence into the record at sentencing. See In Re Adolph, 170 Wn.2d 556, 243 P.3d 540 (2010), the best method of proving a requisite conviction is by the production of a certified copy of the judgment, but other "comparable documents of record or transcripts of prior proceedings are admissible to establish criminal history.

As noted above, RCW 46.61.513 was violated at both the deferral stage and the sentencing stage. This is not a trivial law, and the court should reverse any sentence that proceeds in violation of the statute, particularly here, since the record at the deferred prosecution stage was destroyed and the City and trial court were confused, at best, when the City started discussing criminal history and did not produce any evidence of any conviction in 2003. Notably, the 2010 conviction, which is the only conviction that was entered into the record to support a two-violation sentence, is the one conviction that is not a permissible one to include in the calculation at sentencing. City of Seattle v. Winebrenner, 167 Wn.2d 451, 219 P.3d 686 (2009).

As noted in the statement of the case previous PART A of this brief, the only record of what defendant was assured at his

initial arraignment was that he could receive an unspecified fine "and/or" a jail sentence. CP. 13. Similarly, the deferred prosecution "petition" in this matter assured the Defendant that "all" of the incarceration could be suspended. CP. 107. Offering suspension of "all" jail time, contradicts the trial judge's comment at the RALJ 5.4 hearing that there was obviously a "mandatory minimum" that can't be suspended in whole or part. Absent any record to the contrary from the hearing itself, the misinformation in Hulet's "petition" for deferred prosecution is a manifest injustice and violates Hulet's right to a "knowing" entry into a deferred prosecution, including the procedural and sentencing consequences. See Acrey, supra; State v. Cosner, 85 Wn.2d 45, 530 P.2d 317 (1975)(lack of notice of mandatory weapons enhancement in the charging statement or at arraignment is a due process violation).

PART C – Assignment of Error #2 3rd DUI, Medical Exception, and Good Time

It is clear that the trial court misapplied a heightened standard to the medical exception to confinement (RCW 45.61.5055), misused the "3rd DUI" to support the sentence and deny the exception to confinement, and misused the availability "good time" to support

the sentence and deny the exception to confinement.

RCW 46.61.5055 provides that for the first, second and third DUI conviction, the minimum terms for imprisonment and/or electronic home monitoring may not be suspended or deferred unless the court finds that the imposition of this mandatory minimum sentence would impose a substantial risk to the offender's physical or mental well-being.

At sentencing, Aaron Hulet's attorney presented uncontroverted medical evidence that Hulet's jail term would impose a substantial risk to his physical and mental well-being. The record contains medical declarations, including Aaron Hulet's physician, Dr. K. Burnell Schaetzel-Hill, whose medical opinion stated that incarceration in jail would impose a substantial risk to Aaron Hulet's physical and mental well being, for the numerous medical and mental health issues that were documented throughout the pre-sentencing pleadings. See CP. 19. The prosecutor conceded that the declaration concerning the medical evidence was sufficient, but argued that Aaron Hulet should not be excused from serving jail time because "he's a three-time DUI offender, and I think that, given the

medical condition he's presented, that's too much to ask the court to do." 5/17/2011 at p.9.

When the trial court pronounced its sentence, the trial court claimed that he could not find support in the record for the required finding that Aaron Hulet would suffer "substantial harm" from serving time in jail. 5/17/2011 hearing, page 10. On the other hand, the trial court noted that a Thurston County District Court judge (in the 2010 proceeding), considering the medical testimony involving Aaron Hulet, suspended Aaron Hulet's sentence under RCW 46.61.5055 to seven days, instead of the mandatory minimum. The trial court ruled, "I don't believe I can do it that way. So, I do not find that that is valid." 5/17/2011 hearing, page 10. Although the trial court's statement is confusing, an assertion that he could not suspend part of the sentence in the manner that the Thurston County District Court imposed sentence, is an error of law, because the statute expressly permits the sentencing court to sentence or defer the "minimum" – but does not state how many days below the minimum may be sentenced or deferred.

The sentencing court's factual basis for rejecting the

medical evidence and imposing the term of incarceration that was imposed is also legally unsound.

> "With the 3rd DUI, Mr. Hulet has put himself in this position... So, no, he will not serve that time on work release. He will serve 44 days in custody, 90 days on Electronic Home Monitoring. Now, if he behaves himself in the jail, then he will get 1/3 off of that for good time, but that is between him and the jail, so most likely, it will be 30 days, rather than 44. ... I can't have somebody with a third DUI and with serving no jail time. It's not going to happen. There is both a component of this that need to keep the community safe, and there is also a punishment, now, because this is a third DUI. Now, I understand that you are an alcoholic, and you will be dealing with that the rest of your life and that's not a crime, but when you get behind the wheel of a car [sic], then you have to come see me. As your attorney indicated earlier, you are lucky you are seeing me and not a Superior Court judge, because with a third DUI you are looking at some point you are going to kill somebody." 5/17/2011 RP. 13.

As noted throughout this brief, the sentence was clearly not capable of being imposed for a "third DUI" and even if it were, the legislature specifically provided for a medical deferment or suspension on a "third DUI" – meaning a trial court cannot avoid the medical evidence merely because the accused is allegedly being sentenced for a "third DUI."

It is also error for the sentencing court to impose what the court considers the "most likely" sentence based on the availability of "good time." State v. Buckner, 74 Wn. App. 889

(1994); see also, State v. Fisher, 108 Wn.2d 419 (1987).

With regard to the medical exception, it appears that the court rejected it because the sentencing court repeatedly stated that the sentence imposed was based upon the court's decision that Hulet was a three-time DUI offender, which is a bad thing for society. As noted above, even if this was a sentencing proceeding based upon Hulet's third DUI offense, the legislature specifically provided that a three-time DUI offender could seek an alternative to incarceration under the medical exception, and the trial court's refusal to consider the legislative provision for a medical exception, based on the fact that it was a "3rd DUI" is error. Secondly, the real fact is that the sentence involved was not Hulet's "third DUI" and the court's decision that "I can't have somebody with a third DUI and serving no jail time... this is a third DUI" is factually wrong and violates Winebrenner. In addition, the court opined:

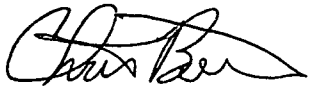
I do not find that substantial harm will come to Mr. Hulet from serving jail time.

This above finding is a misstatement of the law, which only requires a finding of a "risk" of substantial harm. The court's

erroneous application of RCW 45.61.5055 merits reversal, because the court imposed a higher "actual harm" test, rather than the "risk of harm" test the legislature set out in RCW 46.61.5055. In the context of incarcerated persons, requiring proof of "actual harm" caused to individuals in custody is repugnant to constitutional prohibitions against cruel and unusual punishment. See Farmer v. Brennan, 511 U.S. 825, 842 (1994)(cruel and unusual punishment of inmates turns upon establishing the government's knowledge of the risk of harm, not a higher proof of knowledge of actual harm).

In sum, the Appellant respectfully requests reversal of the municipal court decision.

Respectfully submitted January 29, 2013.



Christopher W. Bawn, WSBA #13417
Attorney for Defendant/Appellant

Proof of Service: I certify that the Brief of Appellant was served on the date above, to Paul Wohl, City Prosecutor, City of Olympia, 900 Plum St SE, Olympia, WA, 98501-1544 pwohl@ci.olympia.wa.us

CC: Paul Wohl, City of Olympia
900 Plum St SE Olympia, WA 98501, pwohl@ci.olympia.wa.us 360 753-8449