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 Judge Gary Tabor

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

On 6/12/2006, Hulet was charged by citation in Olympia Municipal Court with the crime of Driving While Under the Influence (DUI). CP 5. On 6/13/2006, Hulet appeared in person and was arraigned. He entered a plea of 'not guilty.' CP 5. On 6/28/2006, attorney Leslie Ching filed a Notice of Appearance on Hulet's behalf. CP 5 and CP 150. On 8/22/2006, Mr. Ching appeared with Hulet and petitioned the Municipal Court for a Deferred Prosecution pursuant to RCW 10.05. CP 6 and CP 106. The Olympia Municipal Court granted the petition and placed the matter on Deferred Prosecution. CP 7 and CP 147, CP 151.

On 3/15/2011, Hulet appeared in the Municipal Court with his attorney, Mr. Charles Clapperton, who filed a Notice of Appearance (CP 124) on 9/30/2010, for a hearing on an allegation that Hulet had violated the terms and conditions of his Deferred Prosecution. CP 9. Specifically, it was alleged that Hulet committed a new DUI offense on 8/4/2010 that resulted in a charge being filed in Thurston County District Court. CP 140. Hulet eventually pleaded guilty to this DUI charge in District Court. The Municipal Court revoked the Deferred Prosecution, found Hulet guilty of the DUI as alleged in the citation, and set the matter for a sentencing hearing. CP 9. On 5/17/2011, the Municipal Court held a sentencing hearing. Hulet appeared with counsel, Mr. Clapperton. CP 10. He

submitted a lengthy sentencing statement (CP 50) with several attached statements of support. Hulet requested that he be relieved of the mandatory jail time required in DUI sentences, as allowed by RCW 46.61.5055(2)(b)(i), because the jail time would "impose a substantial risk to the offender's physical or mental well-being."

The Municipal Court imposed the mandatory minimum sentence based on Mr. Hulet's alcohol concentration and number of prior DUI offenses. CP 10 and CP 119. This is the sentence requested by Hulet in his sentencing memorandum (RP 57), with the exception that the Municipal Court did not allow the jail time to be served as less than total confinement. (RP 119).

On 6/7/2011, Hulet filed a Notice of Appeal with the Thurston County Superior Court. The Olympia Municipal Court notified counsel for Mr. Hulet that the audio recordings of all of the 2006 hearings in this case were destroyed in 2009. CP 204. The Honorable Judge Ahlf ruled on 7/27/2011, that the loss of the audio recordings of the 2006 arraignment and Deferred Prosecution hearings was not significant or material. CP 199.

The hearing on the RALJ appeal was heard before Honorable Judge Gary Tabor on 2/12/2012, at which time the decisions of the Olympia Municipal Court were affirmed. (Final Appendix, Ruling on Appeal to Superior Court).

II. ARGUMENT

This Court has limited the issues to be reviewed in this appeal to the following: 1) The denial of Hulet's RALJ 5.4 motion for a new trial, and 2) his sentencing hearing.

A. The Trial Court did not commit error in denying Hulet's RALJ 5.4 motion for a new trial, nor in finding that the loss of the audio recordings of the 2006 hearings was not significant and material.

Courts of limited jurisdiction are generally required to make audio recordings of their proceedings by electronic means. RALJ 5.1(a). The purpose of this electronic record is to preserve the matter for review. *State v. Osman*, 168 Wn. 2d 632, 642, 229 P.3d 729 (2010). The loss or damage of the electronic record will result in a new trial if the portions lost or damaged are significant or material. RALJ 5.4

In *Osman*, the Supreme Court extensively analyzed the meaning of "significant or material" in the context of missing portions of the electronic record which contained testimonial hearings, arguments of counsel, and the trial court's findings of fact and conclusions of law.

The Supreme Court held that it is the obligation of the court of limited jurisdiction to make the initial determination of whether the missing portions of the electronic record are "significant or material."

Osman, at 637. This obligation also encompasses the determination of the content of the loss as well as whether it is significant or material. *Osman*, at 638-639. For purposes of RALJ 5.4, the missing portions of the electronic record are significant or material if they are "important, influential, or warrants consideration." The matter is 'material' if it is "of such a nature that knowledge of the item would affect a person's decision-making; significant; essential…." And the matter is 'significant' if it is "having or likely to have influence or effect." *Osman*, at 642.

While the court of limited jurisdiction makes the initial finding, under RALJ 5.4, the review on appeal is *de novo*. *Osman*, at 639.

Using this standard, the Supreme Court in *Osman* held that the missing portions of the electronic record in that case were significant and material, and that the appellant in that case was therefore entitled to a new trial. The missing portions of the electronic record in *Osman* included the State's cross examination of the defendant, defense counsel's redirect examination, arguments of counsel, admission of an exhibit which was objected to, and the trial court's oral findings of fact and conclusions of law. All of these were part of a suppression hearing in a DUI case, held by the District Court in which the court suppressed evidence of a breath test refusal, admitted the defendant's post-*Miranda* statements, found that there was reasonable suspicion to pull him over, and that there was

probable cause to arrest him. Osman appealed these rulings. *Osman*, at 636.

Hulet argues that since there are missing portions of the electronic record in this case, this Court should also find, *de novo*, that those missing portions of the electronic record are significant and material, reverse the Trial Court and grant him a new trial pursuant to RALJ 5.4.

Since the missing portions of the electronic record in this case do not touch on significant and material issues to the appeal, the Trial Court should be affirmed.

As an initial matter, it is important to distinguish between what constitutes 'the record' in a court of limited jurisdiction from the 'electronic record' as contemplated by RALJ 5.1. The 'electronic record' is the required audio recording of the proceedings in the court of limited jurisdiction. RALJ 5.1. The definition of 'the record' is more fully described in RALJ 6.1 as "the record of proceedings in the court of limited jurisdiction for appeal shall include the original or a copy of the log prepared for the recording, and the originals or copies of the docket, pleadings, exhibits, orders, and other papers filed with the clerk of the court. . . ." All of these still exist in this matter and they clearly show what happened as this case proceeded through the Court to final judgment,

and they make clear that any lack of an 'electronic record' is not significant and material.

The 'electronic record' is important, as in *Osman*, because it will necessarily contain the testimony of witness, arguments of counsel, objections made, and the oral findings of fact and conclusions of law. Such findings and conclusions are contemplated to be placed on the 'electronic record' in courts of limited jurisdiction. RALJ 5.2(b), *Osman*, at 642.

In the current case, the loss of portions of the 'electronic record' is not significant and material because it is clear from 'the record' that no proceedings occurred in which testimony was taken, witnesses examined, exhibits admitted, objections made, or findings and conclusion entered, until Hulet petitioned for Deferred Prosecution. At that time, the record clearly indicates that a written petition for Deferred Prosecution was filed (CP 106), and a written order granting Deferred Prosecution was issued, complete with findings and conclusion (CP 147 and CP 151).

None of the considerations articulated by the court in *Osman* that led to the finding of significant and material loss were present in Hulet's case. This should not be surprising. All of the hearings prior to Hulet's Deferred Prosecution being granted were preliminary, involved no testimony, no disputed evidence, no exhibits, no arguments of counsel,

and no rulings by the Court. Hulet's counsel filed a Notice of Appearance on 6/28/2006. CP 160. Under CrRLJ 4.1(g), such a notice constitutes an arraignment and a waiver of defects in the charging document. An examination of this document in the record clearly shows that no objections were made, and therefore none were preserved. Hulet and his attorney appeared at a pretrial hearing on 7/25/2006, at which time the hearing was continued to 8/22/2006. CP 6. On 8/22/2006, Hulet again appeared with his attorney and filed a written petition for Deferred Prosecution. CP 6 and CP 106. The petition was granted by the Court in a written order. CP 7, CP 147, and CP 151.

While there is no electronic record of these proceedings, the question is whether this absence is significant and material. In *Osman*, nearly all of the contents of a suppression hearing, along with the court's ruling, were lost. This fact clearly impaired Osman's opportunity to have the contents of that hearing meaningfully reviewed by the appellate court. The only way witness testimony, counsels' arguments, and judges' oral findings and conclusions are preserved in a court of limited jurisdiction is via the 'electronic record' contemplated by RALJ 5.1.

The loss of the electronic record of the 2006 hearings in Hulet's case had no such similar effect because no hearings were conducted in which testimony was taken or decisions made affecting the disposition of

Hulet's case. Indeed, 'the record' that still exists in this matter clearly shows not only that the 'electronic record' was not significant and material, but that Hulet received exactly what he requested in this case, a Deferred Prosecution.

Hulet should not be heard to object, at this point in the case, that he was granted the Deferred Prosecution that he asked the Court to grant him. To allow this would be to allow Hulet to benefit from an error that he invited, if any error occurred. The invited error doctrine prevents a defendant from appealing an act of the trial court that the defendant himself procured. *State v. Young*, 129 Wn. App. 468, 472 (2005), *State v. Marks*, 90 Wn. App. 980 (1998).

B. The Trial Court did not commit error when it imposed a sentence within the lawful maximum for the crime for which Mr. Hulet was convicted.

When Hulet's Deferred Prosecution was revoked on 3/15/2011, the Court convicted him of the crime of DUI (RCW 46.61.502) and set the case for sentencing. The sentencing hearing was held on 5/17/2011, at which time Mr. Hulet appeared with counsel. Mr. Hulet filed a sentencing memorandum (CP 50) and several supporting statements. The Prosecutor and Mr. Hulet made the same sentencing recommendation to the Court with the exception of the manner in which the sentence was to be served.

Mr. Hulet requested that the Court allow him to serve the sentence on less than total confinement as allowed by former RCW 46.61.5055(2)(b)(i), in cases in which total confinement would impose a substantial risk to the offender's physical or mental well-being. The Court imposed the sentence that was requested by both parties, however, it did not allow for the less than total confinement alternative sentence. (CP 119).

The maximum jail time for the crime of DUI under RCW 46.61.502 was 365 days at the time of sentencing. Former RCW 46.61.502(5). The Court sentenced Mr. Hulet to 365 days in jail, suspended 230 days in jail, imposed a fine of $1,546, and imposed several probationary conditions including law abiding behavior, abstinence from alcohol, and an alcohol treatment program. (CP 119). This sentence required Mr. Hulet to serve 45 days in jail and 90 days on electronic home monitoring.

Mr. Hulet devotes significant argument in his brief to the issue of whether the Court improperly referred to other DUI crimes allegedly committed by Mr. Hulet in imposing the sentence. This issue is not relevant for two major reasons. The first is that Mr. Hulet acknowledged in his sentencing memorandum that he had a prior DUI offense. (CP 50, Defendant's Sentencing Statement, p. 1) The second is that Mr. Hulet requested to the Court at sentencing that he receive the 45 day sentence

(CP 50, Defendant's Sentencing Statement, p. 8), with the 45 days converted to electric home monitoring. The only part of Mr. Hulet's requested sentence that he did not get was the conversion of 45 days jail to 45 days electric home monitoring.

Additionally, in sentencing misdemeanor offenders, the court has discretion to fashion sentences that combine punitive and rehabilitative purposes. *Harris v. Charles*, 171 Wn. 2d 455, 465, 256 P.3d 328 (2011). The sentence Mr. Hulet received, while requiring some jail time to be served, also required a period of electronic home monitoring, as well as several rehabilitative conditions which the Court clearly meant as mechanisms to reduce the chance that Mr. Hulet would commit another offense. A sentence that takes advantage of a wide range of tools to enhance offender accountability through punishment and a chance at rehabilitation cannot be said to be an abuse of the court's discretion. A court abuses its discretion only when it bases its decision on untenable grounds or makes the decision for untenable reasons. *State v. Richie*, 126 Wn 2d 388, 894 P.2d 1308 (1995).

III. CONCLUSION

Therefore, the City of Olympia, the Respondent in this case, requests that the Court affirm the Trial Court and deny the Appellant's

request for a new trial under RALJ 5.4. The lack of an electronic record audio recording of some of the proceedings in the Trial Court is not substantial or material to any of the issues on appeal because none of the hearings for which the electronic record was lost concerned any testimony, argument, exhibits, objections, or any findings of the Court that were not made in writing. The City of Olympia also requests that the sentence imposed by the Trial Court be affirmed because the sentence was within the legal maximum, was based on tenable grounds and reasons that were partially punitive, partially rehabilitative, and were largely consistent with the Appellant's own requests.

Respectfully submitted March 29, 2013.

/s/
Paul D. Wohl, WSBA# 21251
Attorney for Respondent

OLYMPIA CITY ATTORNEY

March 29, 2013 - 1:20 PM

Transmittal Letter

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