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NO. 69120-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES WIGGIN,

Appellant.

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DIVISION ONE

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

The Honorable Richard T. Okrent, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The remand court erred in denying appellant's motion for recusal.

2. The remand court erred and denied appellant's due process rights in failing to provide a fair hearing, and a hearing that appeared to be fair.

3. The remand court erred in imposing a 12-month period of community custody. CP 6-7, 364-65.

Issues Related to Assignments of Error

1. Did the remand court err in treating appellant's timely recusal motion as an untimely affidavit of prejudice?

2. Is recusal the proper remedy to cure a court's error in considering and acting on ex parte information?

3. When a sentencing court imposes conditions of sentence before affording the defense the right to allocution, is the settled remedy a new sentencing before a different judge?

4. Did the remand court abuse its discretion and err as a matter of law when it denied the recusal motion for erroneous and unpersuasive reasons?

5. The erroneous denial of fair allocution requires resentencing before a different judge unless the state shows the error

is harmless, i.e. that the sentence imposed was the least punitive sentence available. Where the record shows the remand court imposed the harshest term of community custody, does the prejudicial error require reversal and remand for a fair hearing before a different judge?

B. STATEMENT OF THE CASE

On March 22, 2010, the Snohomish County prosecutor filed an amended information charging appellant James Wiggin with one count of failing to register during the period April 7 – May 30, 2009. CP 379-80; RCW 9A.44.130. Following a bench trial, the Honorable Gerald Knight found Wiggin guilty as charged. CP 380, 390-92.

Sentencing occurred March 22, 2010. The confinement range was zero- to 12-months in jail. The court imposed 30 days with credit for time served. Judge Knight also imposed 36 months of community custody. CP 380; 2RP¹ 5.

On appeal, Wiggin argued the 36-month community custody term was erroneous and the court was limited to a zero- to 12-month

¹ This brief refers to the transcripts as follows: 1RP – 1/27/12 (Judge Wynne); 2RP - 2/17/12, 6/5/12, 6/8/12, 6/12/12 (Judge Okrent).

range.² The state conceded error, agreeing that the period of community custody could not exceed one year. This Court accepted the concession and remanded “for resentencing.” 2RP 2-5; CP 379, 385, 389 (citing former RCW 9.94A.505(2)(b) and In re Restraint of Acron, 122 Wn. App. 886, 888, 95 P.3d 1272 (2004)). After this Court denied reconsideration and the Supreme court denied discretionary review, the mandate was issued November 1, 2011. CP 378.

In the interim, Judge Knight had retired, and Judge Richard Okrent had been appointed to preside in that department. On November 22, 2011, counsel for the state presented what the state styled an “Agreed Order Modifying Judgment and Sentence.” 2RP 2; CP 374. The order imposed a 12-month period of community custody. CP 374. The problems were that the order was presented ex parte, was not agreed, and neither Wiggin nor his attorney had received notice of it. The court signed it anyway. CP 353-54, 375; 2RP 11-12.

Several months later, Wiggin learned of the court’s order. He appealed. CP 353-54, 373.

² Wiggin also raised other arguments not relevant to this appeal. CP 378-89.

Recognizing the errors, appellate counsel for the state appeared before Judge Thomas J. Wynne on January 27, 2012. Again acting ex parte, the state asked Judge Wynne to schedule a hearing and enter a transport order so Wiggin could appear before Judge Okrent on February 17, 2012. Judge Wynne signed the order. 1RP 2; CP 371-72.

The state then presented, ex parte, a transport order to Judge Okrent. That order was signed February 6, 2012. CP 369-70.

The hearing occurred February 17, 2012. CP 367; 2RP 2-14. The state again admitted its previous ex parte contact with Judge Okrent, and admitted Wiggin had been denied his right to be heard. 2RP 2-3. The state presented an order to rescind the November 22, 2011 order, which the court signed. 2RP 3-4; CP 366.

In his initial trial and sentencing, Wiggin had been represented by attorney Caroline Mann. CP 386. Mann was not available to attend the 2/17/12 hearing, so the hearing was covered by a different attorney, Sara Ayoubi. 2RP 3-4, 17-18; CP 354, 365-67. Ayoubi briefly noted Wiggin had been sentenced for a robbery offense to an 18-month period of community custody. Ayoubi argued there was no reason for the court to impose community custody for this offense too.

Ayoubi asserted Wiggin was homeless at the time of this offense and did not willfully skirt the registration requirement. 2RP 3-4.

When allowed to speak, Wiggin objected to the hearing, explaining that he had been transported to the County Jail without notice about what matter was going to be heard. He had not been given the opportunity to meaningfully confer with any attorney before the hearing. He had not been able to obtain the mental health records to support his allocution for mitigation, or to show why the court should impose zero rather than 12 months of community custody. Nor had Mann timely obtained those records to support Wiggin's proposed trial defense. He nonetheless offered his hope that the court would impose no additional community custody. 2RP 4-7, 10-12.³

³ The transcript filed October 31, 2012, has three obvious errors, which the state likely will concede in context. First, Wiggin made clear he had "not" been given ample notice of the 2/17/12 hearing. 2RP 12, lines 15-16. Nonetheless, at 2RP 7, line 8, the transcript erroneously omits the word "not." Second, the transcript states Wiggin is "vigorously pursuing my guilt in both of these cases." 2RP 10, lines 22-23. The context shows he said he was vigorously pursuing his "appeals," not his "guilt." 2RP 10-13. Finally, the transcript erroneously states Wiggin filed a "note" rather than a "notice" of appeal. 2RP 12, line 12. Wiggin has filed a pro se objection to the transcript and may file a pro se motion to seek correction of these errors. It is counsel's understanding that he also plans to challenge other alleged omissions from the transcript, and may assert he personally addressed the court during the June 5 and June 8

Ayoubi admitted there had been no chance to meaningfully confer with Wiggin before the 2/17/12 hearing. 2RP 8.

Counsel for the state argued the court could impose a 12-month period of community custody and run it concurrently with the 18-month period for the robbery conviction. According to the state, this would have the net effect of no additional time. The state asserted there were two conditions imposed at the prior sentencing: (1) that Wiggin have no other criminal law violations, and (2) that he continue to register, which was a requirement anyway. 2RP 9.⁴

Wiggin offered one response at this hearing to the state's "no harm, no foul" theory, and additional responses at later hearings. He did not agree that his robbery conviction would withstand appellate or collateral review.⁵ The court therefore could not assume there would be an 18-month period of community custody for that offense.

hearings. The current transcripts do not include any remarks by Wiggin on those dates. 2RP 15-23.

⁴ The state's summary of conditions is only partly correct. See note 20, infra.

⁵ This Court's final decision in the robbery appeal was filed October 22, 2012, after the supreme court granted the state's limited petition for review and remanded to this Court. 2RP 26; see also Docket in No. 65214-1-I. From review of the ACORDS docket, it appears Wiggin has filed a personal restraint petition of the robbery conviction, which is pending in No. 69676-9-I.

Judge Okrent briefly pondered a continuance to allow Wiggin to confer with counsel. 2RP 8. At the end of the hearing he instead “impose[d] the 12 months to run concurrently. The net effect of that is, as I understand it, essentially zero, because he won’t have to serve the additional 12 months.” 2RP 13. The court entered a written order modifying the prior judgment and sentence, imposing 12 months of community custody. CP 354-65. The court commended Wiggin for his efforts to seek review of his convictions. 2RP 14.

Wiggin again appealed. CP 362-63. The state again agreed that the procedure in resentencing Wiggin at the 2/17/12 hearing had been flawed. To resolve the appeal, the parties agreed that Wiggin should have the opportunity for a meaningful resentencing hearing, where he: had notice, could confer with counsel, and present evidence in mitigation to support his allocution. CP 354-56; 2RP 17.⁶

On May 1, 2012, the state presented and the court signed a transport order to secure Wiggin’s presence at a hearing scheduled for June 5. CP 360-61. The parties appeared on June 5, but due to delays in transport, the court continued the hearing to June 8 to allow Wiggin to confer with counsel. CP 355, 357-59; 2RP 15-16.

⁶ See also, ACORDS docket in No. 68229-6-I.

On June 5 the court said it had received no working copies of any paperwork, on “what supposedly is a motion for reconsideration.” 2RP 16. The court requested “written materials so I’m up to speed on what’s happened since the last time I looked at this case[.]” 2RP 18. The parties agreed to do that. 2RP 18-19.

On June 6, the state filed its “Memorandum for Sentence Modification Hearing.” CP 353. In that memorandum the state summarized the procedure leading to the current hearing. CP 353-55.

On June 8, Wiggin filed a “Memorandum in Support of Motion to Reconsider.” CP 58. The memorandum stated Wiggin’s opposition to additional community custody. It also stated “[c]onditions of supervision for a Failure to Register offense are considerably more restrictive than for any other non-sex offense.” CP 59. The memorandum pointed out that Wiggin was a homeless, mentally ill person at the time of the offense, not someone who willfully flouted or ignored the registration law. Wiggin had registered for three years and this was his first offense. CP 59.

Attached to the memorandum were 292 pages of exhibits, including mental health and medical records. The exhibits confirmed Wiggin’s homelessness and substantial medical and mental health

issues during the time leading up to this 2009 offense (CP 88-351), including problems with prior supervision conditions. CP 137.

At the hearing on June 8, the state noted the case “comes on for a resentencing issue.” 2RP 20. The court said it had not seen the attachments to the defense brief. Mann then explained her office’s efforts to provide working copies to the court. 2RP 20-21.

At that hearing Wiggin also moved to recuse Judge Okrent, arguing Judge Okrent initially considered and acted on ex parte information from the state, then entered a second order at a procedurally flawed hearing where Wiggin was denied important rights. The court had shown a bias and predisposition to impose a 12-month period. 2RP 21.

The state responded that it had no position on recusal, suggesting only that Judge Okrent “was familiar with the matter.” 2RP 21. The court took the motion under advisement and continued the hearing, stating “if I decide to recuse myself, I’ll do it by a written entry so you’ll know ahead of time.” 2RP 22.

The next hearing occurred June 12, 2012. The state maintained its prior position that the court should impose 12 months. 2RP 24.

Wiggin again raised the recusal motion. 2RP 24. The court responded:

I'm not going to recuse myself as I have already made a decision in this case. I will not recuse myself and the record will reflect that. Let's proceed.

2RP 25.

Mann then discussed Wiggin's position regarding the appropriate period of community custody. Because Judge Okrent had not heard the trial, he was not familiar with the trial record. But the mental health records showed Wiggin had longstanding issues. Nonetheless, Wiggin also had a long history of properly registering, and he strongly believed this offense had resulted from a unique and particularly acute mental health crisis. 2RP 25-26.

Mann described changes in Wiggin in the years since the charges were filed. Although at one point during the prior representation they had very difficult communication issues, Wiggin had since become more articulate and willing to listen. His mental health crisis had resolved and he was no longer experiencing side-effects from multiple medications. 2RP 28.

Mann also pointed out her experience with the Department of Corrections (DOC) and how DOC imposes substantially more onerous supervision conditions for sex offenses than for robbery offenses. For

that reason, an additional 12 months would in fact add onerous conditions of supervision. CP 59; 2RP 27.

The court asked if it could direct DOC not to impose sex offender conditions of supervision. Mann responded that DOC had, in her experience, taken the position that it could impose many non-judicial supervision conditions. 2RP 29. The state responded that Wiggin could challenge conditions of supervision in a PRP if DOC imposed additional conditions. 2RP 29-30.

Judge Okrent then started to discuss his decision. He noted that Judge Knight had originally heard the case, and it returned on remand to this department. Judge Okrent initially imposed a 12-month period of community custody based on the state's ex parte order, and then again following the flawed 2/17 hearing. He said the case had returned "for a motion essentially for reconsideration of that 12-month community custody requirement that I imposed." 2RP 30. Judge Okrent said he had read the entire file, including the supplemental materials outlining Wiggin's mental health and mental history. 2RP 30.

At that point Mann apologized for interrupting, but reminded Judge Okrent that Wiggin wanted to address the court before it ruled.⁷ The court apologized, then said “[g]o ahead, sir.” 2RP 30.

Wiggin briefly discussed the prior flawed procedures that had led to the imposition of a 12-month period of custody. Wiggin felt that he had a valid mental defense to the charge and had not been able to present that evidence to Judge Knight. In his experience, the conditions of community custody would be onerous and little different from actual custody, and could lead to extensive jail time if there were violations. 2RP 31-33.

Wiggin pointed out that the legislature had established a range of 0-12 months for community custody. Logically, given that range, there must be cases and circumstances that would justify less than 12 months. Wiggin had faithfully registered for years before this offense. 2RP 32-33.

Wiggin confirmed that he had seen people who had been back in custody for violating DOC-imposed conditions in failure to register cases. He knew the conditions were different than those that had been imposed for his robbery sentence. 2RP 33-34.

⁷ There is a statutory right to allocution in Washington. RCW 9.94A.500(1).

He mentioned prior offenses, where he had not taken the state to trial. He had pled guilty and been afforded his right to allocution, and had accepted the court's sentence. He had never before been denied the opportunity to present a defense, or experienced the type of problems that had plagued this case. He wanted his opportunity to be heard, and he felt at least he had finally been afforded that opportunity. 2RP 34-35.

Judge Okrent then made his oral ruling. First, he explained his reasoning:

Thank, sir [sic]. As I said, I've read the entire record. Interesting enough, this case began because there was 92 days [sic] that he essentially did not register. I believe it was in 1998, 1999. Let me make sure I get that correct. Right. Between March 19, 1998 [sic], and roughly March 31, 1999 [sic], with him reappearing July 2nd, 1999 [sic]. So essentially it was a 92 [sic]-day gap.⁸

It's consistent, however, with the medical history and the mental health history that I was provided that there would be such a gap. I noticed that during that period of time there was [sic] some hospitalizations for various things and he was homeless and he was

⁸ Although Judge Okrent said he read the entire record, this paragraph casts substantial doubt on that claim. The amended information charged Wiggin with committing the offense during the period between April 7, 2009 and May 30, 2009. Supp. CP __ (sub number 37). In written findings and conclusions, Judge Knight found the offense to have been committed during that 57-day period. CP 391.

required to check in because of his homelessness, but did not do that.

Why he didn't do it, I can't say. I wasn't the trial judge. I'm not going to retry the case. I'm just telling you what the material tells me. And I've heard the argument from Mr. Wiggin and I appreciate his point of view and I think he's had his chance to explain to me his rationale, and the file certainly indicates that.

2RP 35. Judge Okrent then stated his decision:

Nonetheless, he's similarly situated with this crime to others. As a result, I'm going not to change my original sentence. It will be 12 months concurrent with the other conviction in terms of community custody.⁹

2RP 35.

The court's written order was titled "ORDER ~~Modifying~~ ON RECONSIDERATION JUDGMENT AND SENTENCE." CP 2
(handwritten strikeout and underscored insertion of new material).

The order states:

THIS MATTER having come on regularly before the undersigned Judge of the above court on remand from the Court of Appeals:

AND THE COURT having considered the records and files herein, the arguments of counsel and the defendant, and being fully advised;

⁹ Counsel understands that Wiggin believes this paragraph of the transcript omits important language from the oral ruling.

Now Therefore, The order entered February 17, 2012, shall remain the order of the court. The motion for reconsideration is denied.

CP 2.

After the court entered the June 12 order, the pending appeal of the February 17 order was dismissed as moot. See ACORDS docket in No. 68229-6-I (ruling of August 23, 2012). Wiggin then timely filed this appeal from the June 12 order. CP 1.

C. ARGUMENT

THE COURT ERRED IN REFUSING THE REQUEST FOR RECUSAL.

The trial court initially erred in imposing a 36-month period of community custody. On appeal, this Court accepted the state's concession and remanded for resentencing to a term of community custody within in the correct zero- to 12-month range. CP 385, 389.

Judge Okrent then entered the state's ex parte written order that imposed a disputed period of 12 months of community custody – without affording Wiggin the rights to notice, to be present, to be heard, or to be represented by counsel. Recognizing these errors, the state reversed itself and agreed to a hearing.

At the next flawed hearing, however, Wiggin was denied the rights to notice, to present his mitigating evidence, and to

meaningfully confer with counsel. Recognizing these errors, the state again agreed to a new hearing.

Wiggin then properly requested that his allocution be heard by a different judge who was not affected by the bias of already-made decisions and the influence of ex parte contact. Although the state did not oppose recusal, Judge Okrent denied Wiggin's request. This was reversible error.

A person being sentenced has the right to due process of law. Const. art. 1, § 3; U.S. Const. amends. 5, 14. An unbiased judge and the appearance of fairness are hallmarks of due process. In re Murchison, 349 U.S. 133, 99 L. Ed. 942, 55 S. Ct. 623 (1955); Ward v. Village of Monroeville, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270 (1993). The right to allocution is a statutorily afforded to all persons sentenced in Washington. RCW 9.94A.500(1); In re Echevarria, 141 Wn.2d 323, 333-35, 6 P.3d 573 (2000).

A trial court's denial of a recusal motion should be reversed where the court abuses its discretion. Tatham v. Rogers, 170 Wn. App. 76, 87, 283 P.3d 583 (2012) (citing State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995)). A trial court also has wide discretion in determining the length of a sentence within the standard range.

State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). The risk of prejudice from a failure to recuse is heightened where an appellate court's review of the underlying decision is limited to finding an abuse of discretion. Tatham, 170 Wn. App. at 104-07.

In denying Wiggin's motion, the court stated "I'm not going to recuse myself as I have already made a decision in this case. I will not recuse myself and the record will reflect that." 2RP 25. This ruling is reversible error for five reasons.

1. The Court Erred in Misidentifying the Timely Recusal Motion as an Untimely Affidavit of Prejudice.

First, the court's statement that it had "already made a decision in this case" reveals a profound misunderstanding of the motion's actual basis. Wiggin properly moved for recusal; he did not file an affidavit of prejudice. A previous ruling is only relevant to reject a statutory affidavit of prejudice. See RCW 4.12.050 (affidavit of prejudice is not timely unless "filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case"); State v. Espinoza, 112 Wn.2d 819, 774 P.2d 1177 (1989) (affidavit of prejudice is untimely when filed after court has made ruling involving court's discretionary powers).

A trial court abuses its discretion when it fails to follow the controlling law, or to consider matters it must consider before rendering its decision. In re Mulholland, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007) (court's failure to apply controlling law is not merely error, but a "fundamental defect"); State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) ("a court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'") (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash.2d 299, 339, 858 P.2d 1054 (1993)). By considering the recusal motion under an incorrect standard, Judge Okrent erred as a matter of law, and abused his discretion.

2. The Court's Consideration and Granting of the State's Ex Parte Motion and Order Required Recusal.

Second, the court erred by failing to recognize the disqualifying effect of its prior ex parte order. This was error under the Code of Judicial Conduct and violated the appearance of fairness doctrine.

"The right to a fair hearing under the federal due process clause prohibits actual bias and the probability of unfairness." State v. Chamberlin, 161 Wn.2d 30, 38, 162 P.3d 389 (2007) (quoting Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) and In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99

L.Ed. 942 (1955)). The appearance of fairness doctrine seeks to prevent “the evil of a biased or potentially interested judge or quasi-judicial decisionmaker.” State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). The appearance of fairness doctrine not only requires the judge to be impartial but “it also requires that the judge appear to be impartial.” Post, at 618 (quoting State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)).

The Code of Judicial Conduct prohibits judges from ex parte contacts with lawyers for one party. In pertinent part, CJC Canon 3(A)(4) states: “Judges should . . . except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.” The comment states the “proscription against communications concerning a proceeding includes communications from lawyers[.]” Canon 3(A)(4), comment. Ex parte communications are communications to or from a judge “[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested.” State v. Watson, 155 Wn.2d 574, 579, 122 P.3d 903 (2005) (quoting Black's Law Dictionary 616 (8th ed.2004)).¹⁰

¹⁰ Watson quotes several definitions, including: “[a] communication between counsel and the court when opposing counsel is not

Wiggin timely sought recusal as the proper remedy for the judge's acceptance and granting of the state's ex parte motion and order imposing the maximum term of community custody. "Judges must disqualify themselves from hearing a case if they are actually biased against a party or if their impartiality may reasonably be questioned." Skagit County v. Waldal, 163 Wn. App. 284, 289, 261 P.3d 164 (2011) (citing In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056, rev. denied, 167 Wn.2d 1002 (2009)); accord, State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996) (quoted in Chamberlin, 161 Wn.2d at 393). Washington courts have recognized that a judge's acceptance of ex parte information requires recusal. Sherman v. State, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995) (recusal required where court received ex parte communications; Supreme Court remanded for new proceeding before different judge); Romano, 34 Wn. App. at 569-70 (court's ex parte inquiry "clouded the proceeding" requiring remand to a different judge). The trial court not only considered the ex parte

present," and "communications made by or to a judge, during a proceeding, regarding that proceeding, without notice to a party." Watson, at 579-80.

communication, but acted on it and imposed, at the state's request, the maximum possible community custody term.¹¹

On these facts there can be no doubt that the errors inherent in the first two orders were not remedied by granting Wiggin a belated third hearing before the same judge. The state may concede this, because the prosecution and the court several times said they felt the matter was on for "reconsideration."¹² The court only asked for briefing on "what's happened since the last time I looked at this case" (2RP 18), confirming the court's view that it would not consider the remanded question as an initial decision. The ultimate ruling erased any doubt, when the court said "I'm not going to change my original sentence," (2RP 35) and entered what it called an "order on reconsideration." CP 6.

The problem is that Wiggin's due process and statutory rights entitled him to the court's first fair consideration, unaffected by the

¹¹ The state therefore cannot claim this case is like those cases where the court did not consider the ex parte communication. Cf., In re Marriage of Davison, 112 Wn. App. 251, 257-58, 48 P.3d 358 (2002) (recusal not required simply because a party sends ex parte information the judge does not consider).

¹² CP 2; 2RP 2, 15-16, 30, 36. By the time of the June 5 hearing, defense counsel had also adopted the court's erroneous "reconsideration" label. 2RP 18; CP 58.

bias of prejudice and ex parte communications. The record shows he never received that fair hearing.

3. Recusal is the Proper Remedy.

Third, the recusal motion should have been granted because it sought the same remedy that would have followed successful appeals from the prior error-plagued hearings.¹³ By entering the first ex parte order, the court denied Wiggin the statutory right to allocution before the court imposed sentence, as well as the right to counsel and the due process rights to be heard and to be present. U.S. Const. amend. 6, 14; Const. art. 1, §§ 3, 22; RCW 9.94A.500(1).¹⁴ By entering the second (2/17) order, the erred by failing to afford Wiggin adequate notice to prepare, and by failing to allow Wiggin the right to meaningfully confer with counsel prior to allocution.¹⁵

¹³ By agreeing the third hearing was necessary, the state conceded the first two orders were erroneous.

¹⁴ The state will concede that the imposition of sentencing conditions is a critical stage at which the accused has the right to be present and the right to counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987); State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997).

¹⁵ See e.g., State v. Tinkham, 74 Wn. App. 102, 871 P.2d 1127 (1994) (court's refusal to allow meaningful access to counsel during presentencing evaluation violated Sixth Amendment and required reversal of sentence).

The settled remedy for the denial of fair allocution is to remand to a different judge who has not already prejudged the matter. State v. Roberson, 118 Wn. App. 151, 159, 162, 74 P.3d 1208 (2003)¹⁶; State v. Beer, 93 Wn. App. 539, 546, 969 P.2d 506 (1999); State v. Aguilar-Rivera, 83 Wn. App. 199, 203, 920 P.2d 623 (1996). This rule makes sense. It is not fair, nor does it appear fair, to force a defendant to allocute and seek mitigation from a judge who has already made up his mind and imposed a harsher sentence. This is basic human nature, and the case law recognizes that judges are still human. State v. Crider, 78 Wn. App. 849, 859, 899 P.2d 24 (1995) (granting the opportunity to speak “for the first time after sentence has been imposed is ‘a totally empty gesture’”).

Even when the court stands ready and willing to alter the sentence when presented with new information . . . from the defendant's perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position.

¹⁶ Roberson has since been overruled sub silentio on other grounds, in State v. Hughes, 154 Wn.2d 118, 152–53, 110 P.3d 192 (2005) (sentencing court's error in failing to allow allocution cannot be raised for the first time on appeal, at least where the accused was present with counsel at the sentencing hearing). Hughes also has been overruled in part on other grounds in Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

Aguilar-Rivera, 83 Wn. App. at 203 (quoting Crider, 78 Wn. App. at 859). This rule applies with even greater force in cases like Wiggin's, where the trial court has already entered two written orders, not merely an oral pronouncement. See, State v. Hatchie, 133 Wn. App. 100, 135 P.3d 519 (2006) (court's oral expression before the defendant's allocution may be considered informal, while a written order may not), aff'd on other grounds, 161 Wn.2d 390, 166 P.3d 698 (2007).

Transfer to a different judge is also the remedy for a proper and timely recusal request and a timely filed affidavit of prejudice. Skagit County v. Waldal, 163 Wn. App. at 288-89 (once grounds for recusal are established, that judge should take no further action in the case except the ministerial action of transferring the case to a different judge); State v. Dixon, 74 Wn.2d 700, 703, 446 P.2d 329 (1968) (granting writ of prohibition to require transfer of case to different judge); State v. Waters, 93 Wn. App. 969, 974, 971 P.2d 538 (1999) (remanding for new trial before different judge).¹⁷

¹⁷ Remand to a different judge is appropriate to ensure fair proceedings in a variety of similar contexts. See e.g., State v. Sledge, 133 Wn.2d at 846 n.9 (remanded to different judge "in light of the trial court's already-expressed views on the disposition"); State v. Harrison, 148 Wn.2d 550, 559-60, 61 P.3d 1104 (2003) (resentencing before different judge should be the remedy where state breaches a

In light of the settled remedy for the previous errors, Wiggin properly requested that the third resentencing be heard by a different judge. Wiggin was denied a fair hearing before a judge who had not already made up his mind.

4. No Persuasive Grounds Support the Court's Denial of Recusal.

Fourth, in determining whether a trial court has abused its discretion, appellate courts often consider the persuasive weight of any countervailing reason that might support the trial court's decision. Here there is none. Wiggin did not create the problems that led to the recusal motion, so that was not a concern.¹⁸ The state did not oppose recusal, suggesting only that Judge Okrent was "familiar" with the case. But Judge Okrent was not the trial judge; he was appointed to fill the department after Judge Knight retired. And as shown above,

plea agreement and the defense seeks specific performance); State v. Talley, 134 Wn.2d 176, 182, 188, 949 P.2d 358 (1998) (remanded to different judge where it appeared that initial judge may have "prejudged the matter"); State v. M.L., 134 Wn.2d 657, 661, 952 P.2d 187 (1998) (remand to different judge required where disposition was found clearly excessive); State v. Romano, 34 Wn. App. 567, 570, 662 P.2d 406 (1983) (remanded to different judge where initial sentencing suffered from appearance of unfairness).

¹⁸ Cf., State v. Turner, 143 Wn.2d 715, 728, 23 P.3d 499 (2001) (denial of recusal motion is not error when granting the motion would reward a defendant's misbehavior).

any alleged case familiarity was not deep enough to even encompass the correct charging period.¹⁹ The only familiarity was a disqualifying familiarity resulting from the court's prior erroneous imposition of punitive sentence conditions in violation of Wiggin's rights. Further, as argued above, the oral reason for denying the recusal motion shows that the court considered the motion under an incorrect standard applicable only to affidavits of prejudice.

5. The Errors are not Harmless.

Fifth, the state cannot show the errors were harmless. The denial of allocution can be harmless only when a trial court imposed the lowest statutorily-authorized sentence. State v. Gonzales, 90 Wn. App. 852, 854-55, 954 P.2d 360 (1998). The state will not dispute that community custody is punitive and a substantial restriction on liberty.²⁰ In addition, as Wiggin and Mann asserted

¹⁹ See note 8, supra.

²⁰ The judgment and sentence directed compliance with 10 conditions, including: "(1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC- approved education, employment and/or community restitution; (3) notify DOC of any change in the defendant's address or employment; (4) not consume or possess controlled substances except pursuant to lawfully issued prescriptions; (5) not own, use, or possess firearms or ammunition; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts as necessary to monitor compliance with orders of the court as required by DOC; and

without rebuttal from the state, DOC imposes stricter conditions of community custody for sex offenses than it does for robbery offenses. CP 59; 2RP 27, 33. Because Judge Okrent imposed 12 instead of zero months, the error cannot be harmless.

Wiggin's allocution and mitigation also had facial merit. At the initial sentencing, where Wiggin faced a confinement range of zero- to 12 months, Judge Knight recognized mitigating circumstances and imposed only 30 days, with credit for time served. Supp. CP __ (sub no. 45, judgment and sentence, at 3-4).²¹ Given these facts, the state cannot show that an unbiased judge in a fair hearing would reject Wiggin's request for a mitigated community custody term.

Nor does Judge Okrent's final ruling merit deference. He said only that Wiggin was "similarly situated with this crime to others," suggesting the court routinely imposes such a sentence on others. This exhibits a broader failure to exercise individualized discretion, not a reasoned rejection of Wiggin's personal allocution.

(8) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The residence location and living arrangements are subject to the prior approval of DOC while on community custody." Supp. CP __ (sub no. 45, Judgment and Sentence, at 6).

²¹ Judge Knight imposed the 36-month community custody term only because the parties erroneously believed that term was statutorily required. CP 380, 385.

The "due process" right to a fair hearing is a fundamental right. It is not merely a hollow command to "do process." Remanding for a fair hearing should never be seen as a waste of judicial resources. This is particularly true where the errors that have so far denied this right were not Wiggin's fault. For these reasons, the denial of the recusal motion was an error of law and an abuse of discretion, and the proper remedy is remand to a different judge.

D. CONCLUSION

This Court should vacate the 12-month community custody term and remand for a fair hearing before a different judge to decide what term of community custody to impose within the correct zero- to 12-month range.

DATED this  day of March, 2013.

Respectfully Submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 6912-0-1-I
)	
JAMES WIGGIN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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Diane.Kremenich@co.snohomish.wa.us

[X] JAMES WIGGIN
DOC NO. 730559
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF MARCH 2013.

x *Patrick Mayovsky*