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CA 72221

IN THE COURT OF APPEALS OF WASHINGTON

DIVISION I SEATTLE, WASHINGTON

LAVELLE XAVIER MITCHELL, Appellant,

Vs.

STATE OF WASHINGTON, Respondent.

APPELLANT'S OPENING BRIEF

Statement of Additional Grounds

BY: LAVELLE X. MITCHELL,
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Defense counsel provided ineffective assistance by allowing Mr. Mitchell to plea to the VUCSA without receiving official indictment or any formal charging document apprising him of the charges against him and without challenging the court’s jurisdiction where information was not before it on the basis that the state represented it was “going” to be amended but not ever amended formally 5

A. Standard of Review 5

B. Mr. Mitchell’s trial counsel provided ineffective assistance by advising client to take plea agreement for charges that didn’t exist nor had relationship to the formal charges before the court 5

C. Trial court erred in accepting plea agreement that involved charges that had not been formalized and leaving Mr. Mitchell to testify against himself without being advised that anything he says will be used against him in a crime that he was not charged with but failed to do so and is reversible error 6

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1 Issues Pertaining to Assignments of Error

2 **No. 1** ___ Counsel was ineffective as to the entire trial phase for failing to move for a
3 dismissal when state lacked evidence of Robbery and Assault charges.

4 **No. 2** ___ Trial Court erred allowing Mr. Mitchell to give colloquy with regard to
5 charges that, as a matter of law, did not exist against Mr. Mitchell and thus it was error when
6 court granted and accepted plea agreement that relieved state of the burden of proving all the
7 elements of an alleged crime or filing formal charges with regard to the unfiled charge of
8 VUSCA.

9 **No. 3** ___ Trial erred in denying Mr. Mitchell's 60(b) motion as the motion challenged
10 the court's jurisdiction to find him acceptable to plea to a charge that was never filed.

11 **No. 4** ___ Trial court erred when it continued the action and the process that Mr. Mitchell
12 was due, a formal charging instrument, was not achieved denying the court jurisdiction over the
13 person as to the VUCSA.

14 **No. 5** ___ Mr. Mitchell was deprived of his Sixth and Fourteenth Amendment right to the
15 effective assistance of counsel in the post-conviction hearing conducted by Mitch Harrison,
16 attorney for defendant, when he failed to inform the court that the motion to withdraw did
17 include the component of ineffective assistance of counsel and thereby denied a meaningful
18 opportunity for Mr. Mitchell to be heard in a meaningful manner and at a meaningful time.

19 **No. 6** ___ Defense counsel unreasonably proposed that accepting a plea agreement
20 without state ever formally charging Mr. Mitchell relieved the prosecution of its burden to prove
21 an essential element of the charge as well as any elements of the charge when he refused to go
22 forward on the only charges before the court, Armed Robbery and Assault in the Second Degree
23

1 and insisted that Mr. Mitchell take the deal for possession as well as his brother, who was the
2 owner of the car where the substance was found.

3 **No. 7** ___ A criminal defense attorney provides ineffective assistance of counsel by
4 proposing that client take a plea instead of continuing to plead not guilty when the state informs
5 him that the state's case cannot go forward for lack of evidence and witnesses, thus defense
6 counsel's action and advise relieved the state of its burden of proof to the hurt and harm of his
7 client.

8 **No. 8** ___ An attorney that proposes to criminal defendant that they should plead guilty
9 to charge where the state has failed to establish a prima facie case against the client, and more
10 troubling is that this advice came at the time of trial, and after being told that the state does not
11 have any witnesses to produce or evidence of the charges by information, Robbery and Assault,
12 and thus wanted defense counsel to assist it where it had failed to file a proper information
13 informing the defendant and his counsel of the charges and nature against him, as required by
14 statute to commence a criminal case and if counsel had not made such a recommendation the
15 defendant, Mr. Mitchell would have been released and freed as a matter of law with regard to a
16 subsequent search warrant issuing that authorized, "with particularity, the place and the things"
17 to be seized. It is impossible for the state to have requested a search warrant that said they
18 believe evidence of illegal drugs were going to be found in the abandoned car NOT OWNED BY
19 MR. MITCHELL.

20 **No. 9** ___ Under the circumstances, the law and the record of this case was Mr.
21 Mitchell's counsel effective within the meaning of Sixth and Fourteenth Amendments where he
22 failed at every junction to protect his clients rights, and not to encourage the waiving of rights
23 necessary to maintain justice in the judicial branch of government?
24

1 No. 10 ___ Does the constitution allow that the state to fail in criminal procedures,
2 violate the law, and still gain, get a conviction in face of such failure.

3 No. 11 ___ Does not the court owe a duty to the law and not a particular party, as in this
4 case the state, based on defendant curing the failure of the adherence to law of the state?

5 No. 12 ___ Is the position of any court that where government fails to conform and
6 comply with the law the court may simply act to favor a favorable verdict for the state or is that
7 an indication that the court has a bias toward one party over the other and thereby violate the
8 “fair” mandate of both constitutions?

9 No. 13 ___ Under the circumstances where a citizens is denied rights in the viewing of
10 the courts, prosecuting attorney and defense counsel and no one comes to the aid of the law is
11 that not a violation of the principle that government is restricted and prohibited from acting with
12 a bias and entitles such a person to an order of dismissal with prejudice?

13
14 **Statement of the Case**

15 This matter began as a criminal action for Armed Robbery and Assault. The defendant
16 was charged with his twin brother of being at and participating in an armed robbery and assault
17 on June 3, 2012. Mr. Mitchell was not arrested at the “scene” of any crime but was subsequently
18 arrested and charged as expressed in the record and above.

19 After a series of pretrial motions with regard to suppression related to the Armed
20 Robbery and Assault, the matter became moot as there was, in fact, no evidence to suppress
21 linking either brother to a robbery and assault.

22 However, the state did obtain a search warrant for the car to look for evidence of the
23 Robbery and Assault of a car describe as the “suspect” vehicle. Appellant does not know the
24 basis for the warrant as it was not Mr. Mitchell’s car and the state need not have given him a

1 copy of the warrant or inventory as a practical matter because everything found in an abandoned
2 automobile belongs to the owner as the proof to the contrary is apparent and links another. In
3 addition, the search produced evidence of the crime of VUCSA, to wit, a package that contained
4 a white substance that was field tested and showed positive for cocaine.

5 That was not the case for which Mr. Mitchell or his attorney had prepared to defend
6 because it did not exist until the day of the trial on the other charges. Nothing found on the basis
7 of the warrant that linked or would have linked Mr. Mitchell to any crime, including VUCSA.
8 But though the state found nothing related to those charges it subsequently, at the time of trial,
9 informed Mr. Mitchell's counsel and the court that it would be amending the information to
10 include a charge of VUCSA.

11 Nonetheless, Mr. Mitchell's attorney recommended that he take the plea agreement being
12 offered for the VUCSA. Fatally, Mr. Mitchell took the advice of counsel and later found that
13 such advice was not proper by Phil Mahoney, WSBA #1292, as well as Mitch Harrison, WSBA
14 # 43040, and he subsequently tried Mr. Mitchell's motion for relief from guilty plea, albeit, he
15 never read the original motion and thus did not argue the proper point, ineffective assistance of
16 counsel by trial attorney and court simply rejected that Mr. Mitchell had not had advice of
17 counsel prior to entering into the plea agreement for the VUCSA.

18 At the hearing on the motion to withdraw plea of guilty the court said, "the motion to
19 withdraw the plea is predicated on something that the defense learned of, new information,
20 regarding the underlying charge, which was robbery. . ." *See, VRP, at page 8, lines 2 thru 7.* At
21 that juncture Mr. Mitchell tried to inform the court that the motion filed by himself was
22 "predicated" on "ineffective assistance of counsel" but the court, off the record, advised him to
23 speak through his counsel of record. Moreover, the court admits that there was no "factual basis"
24

1 for the charge of VUCSA and that under the advice of counsel had “provided the factual basis”
2 instead of the state prosecutor doing so.

3 The court denied the motion to withdraw and Mr. Mitchell filed a 60(b) motion to vacate
4 the judgment on the grounds that it was void. The court heard the matter without oral arguments
5 and denied the motion. Appellant took this appeal and filed and served respondents with his
6 notice of appeal and certificate of service informing the state that he would be seeking this
7 appeal with Court of Appeals Division One, Seattle, Washington.

8 9 **SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS**

10 *Mr. Mitchell was charged, inter alia, with felony Armed Robbery in the First Degree*
11 *and Assault in the Second Degree. The state alleged that he, and a co-defendant, had*
12 *participated in an armed robbery and assault. The state did not allege any type of VUCSA,*
13 *however the trial could not proceed as the state did not have any witnesses nor any*
14 *physical evidence to support a robbery or assault charge and offered counsel for Mr.*
15 *Mitchell a “plea agreement”. The agreement was that the state would drop the two charges*
16 *for which Mr. Mitchell was under the jurisdiction of the court; to wit: Armed Robbery and*
17 *Assault in the Second Degree, all Mr. Mitchell had to do to receive the benefit of this*
18 *“agreement” was to say that drugs found in someone else's car belonged to himself. That*
19 *his counsel said was better than facing the state on the charges, though they had no*
20 *evidence. Mr. Mitchell informed his counsel that he did not know why he should plead guilty*
21 *to a VUCSA that he knew nothing about until the morning of the beginning of the state's*
22 *case.*

23 *The court instructed Mr. Mitchell that it would accept the plea agreement if the*
24 *defendant could, 1) place himself in the abandoned vehicle at some point unknown, 2)*

1 assert that though it was a different registered owner of the vehicle that somehow he had
2 exerted custody and control in the fashion of the automobile owner, 3) that he knew the
3 substance recovered by the police in the abandon car was there, and 4) that the substance
4 was illegal and belonged to him.

5 The Court decided to substitute Mr. Mitchell's colloquy as satisfaction of the statutory
6 requirements for commencing a criminal action, **RCW 10.16.110**, which states in pertinent
7 part that **"It shall be the duty of the prosecuting attorney of the proper county to**
8 **inquire into and make full examination of all the facts and circumstances connected**
9 **with any case . . . provided by law, touching the commission of any offense wherein**
10 **the offender shall be committed to jail, or become recognized or held to bail; and if**
11 **the prosecuting attorney shall determine in any such case that an information ought**
12 **not to be filed, he or she shall make, subscribe, and file with the clerk of the court a**
13 **statement in writing containing his or her reasons, in fact and in law, for not filing an**
14 **information in such case, and such statement shall be filed at and during the session**
15 **of court at which the offender shall be held for his or her appearance: PROVIDED,**
16 **That in such case such court may examine such statement, together with the**
17 **evidence filed in the case, and if upon such examination the court shall not be**
18 **satisfied with such statement, the prosecuting attorney shall be directed by the court**
19 **to file the proper information and bring the case to trial."**, and legally falls upon the
20 *State of Washington, King County Prosecuting Attorney, an elected official*, CRIMINAL
21 PRECEDURE: to prove constructive possession the state must demonstrate that the defendant had
22 knowledge of, and control over, the drugs, see Johnson, 18F. 3d at 647, all of which is known to the state
23 and subject to the laws of the State of Washington with regard to how official charges are
24 process within the meaning of the due process of law clauses for both constitutions.

1 Therefore, when court asserted that Mr. Mitchell's "colloquy" was sufficient to establish the
2 elements necessary in lieu of the state meeting its burden was a miscarriage of justice. It is
3 designed that the state be limited and prohibited from certain conduct in this way we,
4 citizens, avoid a miscarriage of justice and mete out the credo in our Declaration of
5 Independence and Constitution, "We the People", adhering to these authorities of law
6 we establish justice. And that prior to his admission there was not any evidence linking Mr.
7 Mitchell to the VUCSA even had it been filed Mr. Mitchell could not have been named a
8 defendant because the state had made no showing and connection between the substance
9 found in the abandoned car and the elements the state must be able to prove and Mr.
10 Mitchell, who the state acknowledged was not the owner of the abandoned car. And the law
11 established that **"Mere presence as a passenger in a car from which the police recover contraband
12 or weapons does not establish possession" United States v Flenoid, 718F. 2d 867, 868 (8th circuit
13 court 1983)",** is well settled and still controlling upon the issue of a prima facie criminal case against a
14 "mere passenger" in an abandoned automobile. Indeed, the owner of the car had already pleaded guilty
15 to the possession charge. Moreover, the Court points out that criminal defendants are to be afforded due
16 process of law and that includes the right see the charges and understand the nature of the charge before
17 even entering a plea let alone a plea agreement. The Court held that "Sixth Amendment guarantee that a
18 defendant be informed of the nature and cause of the accusation, US v Willis 89 F 3d 1371 (8th circuit
19 court)". The argument that Mr. Mitchell's counsel was effective is absurd considering that "In order to be
20 legally sufficient an indictment must contain the elements of the offense charged, fairly inform a
21 defendant of the charge, and enable the defendant to plead double jeopardy as a defense in a future
22 prosecution for the same offense US v Loayaza 107 F 3d 257," is also well settled, yet without an
23 indictment meeting the laws standard, counsel for Mr. Mitchell did not so require of the state to meet its
24 burden before advising Mr. Mitchell to take such an improper offer of plea agreement. Counsel was

1 clearly deficient with regard to the rights, and thereby, the protections to be afforded persons accused of
2 criminal offenses under the due process clauses of both constitutions. The record will bear out that this is
3 the accurate portrayal of the events that led the court to subsequently deny Mr. Mitchell's 60(b) motion
4 alleging that the judgment was void because the court lacked jurisdiction over the person and subject
5 matter because neither was properly before the court as a matter of law once the state's case for Robbery
6 and Assault failed for lack of evidence there were no charges pending related to the original charges for
7 which in formations did exist.

8 *Moreover, the charge of VUCSA is not a lesser included of the two formally charged*
9 *offenses and thereby not possible to be included as any type of bargaining tool of the state*
10 *to assist them in getting someone to plead guilty. At the very least, the citizen must be*
11 *facing the charge that they are pleading to. In other words, the state cannot "fairly" say, "we*
12 *can't make the original charges stick so this is the deal we will offer. We let you go home*
13 *and not face the charges we cannot prove, if you plead guilty to a charge that you were*
14 *never charged with and there is no formal charges today, but after you get the judge to*
15 *believe that you committed a crime that is not charged against yourself, and where the*
16 *prima facie case for the VUCSA is made with regard to the owner of the car, you must*
17 *convince the judge that not only is the owner of the car guilty, he plead guilty to possession*
18 *of the substance found in his car, but so are you, and that you just wanted to testify to it in*
19 *lieu of going free because that was "good", "effective assistance of counsel" said it was the*
20 *best thing for him to do.*

21 *On the basis of the above a subsequent trial was held to withdraw the guilty plea*
22 *entered into with the State of Washington through its King County Prosecuting Attorney. At*
23 *that hearing Mr. Mitchell was represented by Mitch Harrison. The court heard oral*
24 *arguments from both counsels and denied the motion to withdraw the guilty plea,*

1 essentially, she stated, because Mr. Mitchell confessed to the possession charge, placed
2 himself in the vehicle and admitted that what was found in a warrant under someone else
3 was his for the purpose of making the agreement. This was/is an unconscionable
4 agreement and unenforceable at law because it lacked mutual consideration and there was
5 no meeting of the minds between the effected parties. Torts, Law of Contracts 2d.

6
7 **ARGUMENT**

8 **DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY PROPOSING TO CLIENT THAT ACCEPTING THE PLEA**
9 **AGREEMENT AND MAKING NO CHALLENGES TO THE STATE'S FAILURES TO COMPLY WITH STATUTES THUS**
10 **RELIEVING THE STATE OF ITS BURDEN TO PROVE THE ELEMENTS OF THE CHARGES AGAINST HIM WAS THE MOST**
11 **SOUND LEGAL POSITION FOR HIM TO TAKE SINCE THERE WERE NO PENDING OR FILED CHARGES ALLEGING VUCSA**
12 **AGAINST MR. MITCHELL.**

13 A. Standard of Review.

14 *Ineffective assistance of counsel is an issue of constitutional magnitude that can be*
15 *raised for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177*
16 *(2009); RAP 2.5(a). Reversal is required if counsel' s deficient performance*
17 *prejudices the accused person. Kylo, 166 Wn.2d at 862 (citing Strickland v.*
18 *Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).*

19 *Mr. Mitchell' s trial counsel provided ineffective assistance by proposing that Mr.*
20 *Mitchell accept the plea agreement for an unfiled charge and could not advise Mr. Mitchell*
21 *with regard to the charges as they was never any formal writing, as required under CrR*
22 *clearly lacked knowing and intelligent waiver of right to trial by jury and was grossly*
23 *negligent on the part of counsel because state could prove no set of elements necessary as*
24 *they were not even listed as a formal charging instrument thereby depriving Mr. Mitchell of*
the knowledge necessary to address a formal challenge to the state's jurisdiction over the
person where a formal charge specifying what Mr. Mitchell would need to do to defend
against the charge was not present and thus Mr. Mitchell could not be advised within the

1 meaning of Strickland and such deprivation was a violation of fundamental right to counsel
2 and such error is reversible. Counsel's performance is deficient if it (1) falls below an
3 objective standard of reasonableness based on consideration of all of the circumstances
4 and (2) cannot be justified as a tactical decision. **U.S. Const. Amend. VI; Kylo, 166 Wn.2d**
5 **at 862.** The accused is prejudiced by counsel's deficient performance if there is a
6 reasonable probability that it affected the outcome of the proceedings. *Id.* The right to a jury
7 trial includes the right to have all elements that increase the punishment for an offense
8 proven to the jury beyond a reasonable doubt. **Alleyne v. United States, 133 S. Ct. 2151,**
9 **186 L.Ed.2d 314 (2013); U.S. Const. Amends. VI; XIV; Wash. Const art. I, §§ 21, 22.**
10 **This includes factors that increase the mandatory minimum sentence. Alleyne, - --**
11 **U.S. at .** Defense counsel provides ineffective assistance by proposing jury instructions that
12 relieve the state of its burden of proof, absent a tactical justification. **Kylo, 166 Wn.2d at**
13 **871. "The statutory scheme for the elements of [VUCSA] includes the " indispensable**
14 **element" that the person first be arrested based on reasonable grounds to believe**
15 **that s /he has committed [VUCSA]." Clement v. State Dept of Licensing, 109 Wn. App.**
16 **371, 375, 35 P. 3d 1171 (2001); RCW 46.20.308(1).** As with all essential elements, the
17 [defendant is entitled to the same standard as a] jury and must be instructed on the state's
18 burden to prove an arrest based on reasonable grounds to believe the accused person has
19 committed VUCSA. *Id.*; **Alleyne, - -- U.S. at Mr. Mitchell' s trial attorney provided ineffective**
20 **assistance by proposing that he take a plea agreement that had nothing whatever to do with**
21 **the charges he faced and of the charge his counsel instructed him to plead guilty to counsel**
22 **failed to tell Mr. Mitchell that the charges lacked or omitted this essential elements that the**
23 **law required the state to prove. Defense counsel had no valid strategic reason for relieving**
24 **the prosecution of its burden to prove each element of the [charges] ... beyond a reasonable**

1 *doubt. **Kyllo, 166 Wn.2d at 871.** Mr. Mitchell was prejudiced by his attorney's deficient*
2 *performance. He originally came to the officer's attention because he was being accused of*
3 *robbery and looked exactly like his twin brother. There was an alleged chase and the*
4 *vehicle that was alleged to be the get away vehicle was found abandoned. The vehicle*
5 *identification lead to Mr. Mitchell's twin brother as the owner of the abandoned vehicle. The*
6 *evidence alleged was based solely on eye witnesses, the alleged victims, and other*
7 *unreliable sources. The jury could have concluded that the officer lacked reasonable*
8 *grounds to conclude that Mr. Mitchell had committed VUCSA at the time the breath test was*
9 *offered. Mr. Mitchell's attorney provided ineffective assistance of counsel by proposing jury*
10 *instructions that relieved the state of its burden of proof. **Kyllo, 166 Wn.2d at 871.** Mr.*
11 *Mitchell' s sentence must be vacated and his case dismissed with prejudice. A conviction*
12 *should be reversed if it is based on jury instructions that relieve the state of its burden to*
13 *prove the essential elements of an offense (or enhancement). *In re Winship, 397 U.S. 358,**
14 *90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The sole exception should be for cases in which the*
15 *error is harmless beyond a reasonable doubt. *State v. Walden, 131 Wn.2d 469, 478, 932**
16 *P.2d 1237 (1997). If Studd and the invited error rule bar Mr. Mitchell' s claim, he' ll be left*
17 *without a remedy despite the prejudicial violation of his constitutional rights. The invited*
18 *error rule should not be applied in circumstances such as these. It is fundamentally unfair to*
19 *affirm a conviction obtained in violation of the accused person' s constitutional right to due*
20 *process, solely because the error was brought about by defense counsel.*

20 CONCLUSION

21 *For the reasons set forth above and those in the Opening Brief, Mr. Mitchell' s conviction*
22 *must be reversed. And, consequently, he must be remanded for resentencing on the other*
23 *matters that included this conviction for the purpose of sentencing within the Sentencing*
24 *Grid points, which are in error. [1, 2]Generally, upon collateral review, a petitioner may raise*
a new error of constitutional magnitude or a nonconstitutional error which constitutes a
*fundamental defect that inherently results in a miscarriage of justice. *In re Pers. Restraint of**

1 *Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). Where constitutional error or
2 fundamental defect is alleged, the petitioner must show that he or she was actually and
3 substantially prejudiced by the error. *Id.* If a petitioner raises ineffective assistance of appellate
4 counsel on collateral review, he or she must first show that the legal issue that appellate counsel failed to
5 raise had merit. *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). Second, the
6 petitioner must show that he or she was actually prejudiced by appellate counsel's failure to raise the
7 issue. *Id.*

8 This court must first address whether Mitchell's petition is procedurally barred. RCW 10.73.090. If the
9 petition is not time barred then we must also determine the proper remedy for the trial court's failure to
10 remand to King County Prosecuting Attorney for further action once the state offered to drop Robbery in
11 the First Degree and Assault in the Second Degree for lack of evidence court lost jurisdiction
12 automatically. Closely related to the question of the proper remedy for any trial court error, we must
13 determine whether Mr. Mitchell's post conviction counsel was ineffective when he failed to raise the
14 court's lack of jurisdiction on his post conviction motion.

15 Procedural Bar

16 This court limited review to "the issues regarding the absence of a juvenile court decline hearing,
17 including whether trial or appellate counsel was ineffective." Order (Sept. 30, 2003). However, the Court
18 of Appeals chief judge declined to address the timeliness of the petition and disposed of the petition on its
19 merits. The State continues to argue that Dalluge's petition is time barred because he filed his personal
20 restraint petition more than one year after the mandate was issued terminating the appeal *from his*
21 *conviction.*«1»

22 [3]RCW 10.73.090 provides that "[n]o petition or motion for collateral attack on a judgment and sentence
23 in a criminal case may be filed more than one year after the judgment becomes final."
24 RCW 10.73.090 (1). However, the RCW 10.73.090 time bar applies only if the judgment and sentence
25 "[were] rendered by a court of competent jurisdiction." RCW 10.73.090 (1). Dalluge contends that
26 because the juvenile court had exclusive jurisdiction over his proceedings, the adult criminal court lacked
27 competent jurisdiction in his case. The State seems to argue, for the first time at oral argument, that the
28 adult criminal court did have jurisdiction in this case based on Dalluge's failure to object at trial to adult
29 criminal court jurisdiction or request a remand to juvenile court after the information was amended.«2»

30 [4]In *State v. Werner*, 129 Wn.2d 485, 487, 918 P.2d 916 (1996), this court specifically clarified the
31 nature of juvenile court jurisdiction. Significantly, the juvenile court is a division of the superior court; it
32 is not a separate court. *Id.* at 492. The *Werner* court recognized that there are "three jurisdictional
33 elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person,
34 and the power or authority to render the particular judgment." *Id.* at 493 (quoting *In re Marriage of*
35 *Little*, 96 Wn.2d 183, 197, 634 P.2d 498 (1981)). The superior court has jurisdiction over the subject
36 matter of juvenile offenses under article IV, section 6 of the Washington Constitution and
37 RCW 2.08.010. Superior courts also have personal jurisdiction over juveniles who commit crimes in
38 Washington. RCW 9A.04.030; *State v. Golden*, 112 Wn. App. 68, 74, 47 P.3d 587 (2002).

39 [5]However, by statute, only the juvenile division of the superior court has the power to hear and
40 determine certain juvenile matters. RCW 13.04.030 (1) provides that juvenile divisions of the superior
41 courts in Washington have "exclusive original jurisdiction over all proceedings . . . (e) [r]elating to
42 juveniles alleged or found to have committed offenses, traffic or civil infractions, or [enumerated]
43 violations," (emphasis added) unless one of the exceptions in RCW 13.04.030 (1)(e) applies. *Black's Law*
44 *Dictionary* defines "exclusive jurisdiction" as "[a] court's power to adjudicate an action or class of actions

1 to the exclusion of all other courts." BLACK'S LAW DICTIONARY 856 (7th ed. 1999). Thus, the plain
2 language of RCW 13.04.030 (1) requires juvenile court jurisdiction in certain cases.

3 [6]Two of the statutory exceptions to the juvenile division's exclusive jurisdiction are relevant to this
4 case. First, if "[t]he juvenile is sixteen or seventeen years old and the alleged offense is: (A) A serious
5 violent offense as defined in RCW 9.94A.030," the adult criminal court shall have "exclusive original
6 jurisdiction." RCW 13.04.030 (1)(e)(v)(A) (emphasis added). Second, the juvenile court may conduct a
7 decline hearing upon the request of a party or on its own motion. RCW 13.04.030 (1)(e)(i);
8 RCW 13.40.110. Key to this case is the provision that *unless waived by the juvenile court*, the
9 parties, and their counsel, a decline hearing in juvenile court *must* be held if the respondent is 15, 16, or
10 17 years old and the information alleges a class A felony such as rape in the second degree, the amended
11 charge in this case. RCW 13.40.110 (1)(a); RCW 9A.44.050. «3»After the decline hearing, the juvenile
12 court can waive its exclusive jurisdiction by "transfer[ing] jurisdiction of a particular juvenile to adult
13 criminal court," RCW 13.04.030 (1)(e)(i), "upon a finding that the declination would be in the best interest
14 of the juvenile or the public." RCW 13.40.110 (2).«4»

15 In *State v. Mora*, 138 Wn.2d 43, 49, 977 P.2d 564 (1999), this court recognized that the statutes
16 contemplate only "automatic decline, based on the nature of the crime, or an actual decline hearing by the
17 juvenile court." In *Mora*, as in this case, charges against the juvenile defendant originally subjected him
18 to automatic adult criminal court jurisdiction. *Id.* at 45. The prosecutor later amended the information,
19 reducing the charge such that automatic decline of the juvenile court's jurisdiction no longer applied. *Id.*
20 at 47. After a trial and guilty verdict in adult criminal court, defense counsel moved for arrest of judgment
21 based on lack of jurisdiction of the adult criminal court. *Id.* The *Mora* court held that:

22 With the exception of those offenses set forth in RCW 13.04.030, the Legislature intended that
23 juvenile courts maintain not only exclusive original jurisdiction over all proceedings relating to
24 juveniles, but also discretionary authority to determine whether to transfer jurisdiction to adult
court.

25 *Id.* at 49. Therefore, the legislature intended the adult criminal court to have jurisdiction over a juvenile
26 proceeding only by means of automatic decline based on the nature of the crime or as the result of an
27 actual decline hearing where the juvenile court waives its own exclusive jurisdiction. *Id.* The juvenile
28 court's decision to either maintain or decline its exclusive jurisdiction is a mandatory step absent
29 automatic decline based on the nature of the crime.

30 Finally, Washington courts have held that under very limited circumstances, where a juvenile willfully
31 deceives an adult criminal court into believing that he or she is an adult and does not correct the error, the
32 defendant waives his or her right to proceed in juvenile court, and adult criminal court jurisdiction can be
33 deemed proper on that basis alone. *Sheppard v. Rhay*, 73 Wn.2d 734, 739, 440 P.2d 422 (1968); *State v.*
34 *Mendoza-Lopez*, 105 Wn. App. 382, 387-89, 19 P.3d 1123 (2001) (finding no waiver absent willful
deception); *State v. Anderson*, 83 Wn. App. 515, 519-21, 922 P.2d 163 (1996) (finding no waiver where
juvenile's correct age was revealed at trial); *Nelson v. Seattle Mun. Court*, 29 Wn. App. 7, 10, 627 P.2d
157 (1981). To hold otherwise would burden the adult criminal court with conducting an independent
investigation as to a defendant's true age to avoid a situation where a deceptive juvenile could take his
chances in adult court, but later seek to overturn an adult court conviction based on his minority.

35 *Sheppard*, 73 Wn.2d at 740. «5»Yet in both *Sheppard* and *Nelson*, the only cases in which waiver was
36 found to have occurred, both juvenile petitioners underwent a posttrial hearing in superior court to
37 determine whether adult criminal court jurisdiction had been proper. *Sheppard*, 73 Wn.2d at
38 735; *Nelson*, 29 Wn. App. at 10; see also *Dillenburg*, 70 Wn.2d 349. As explained in more detail
39 below, such a hearing can serve as a substitute for the juvenile court's decline hearing requirement where

1 necessary. *Dillenburg*, 70 Wn.2d at 355 -56.«6»Therefore, even where Washington courts have found the
2 juvenile waived his or her right to proceed in juvenile court, adult criminal court jurisdiction was not
proper until either the juvenile court also waived its jurisdiction or the adult criminal court confirmed that
the juvenile court would have waived its jurisdiction in that case.«7»

3 In sum, absent automatic decline by statute, actual decline by the juvenile court, or waiver based on
4 deception that has been confirmed by a juvenile court or a substitute *Dillenburg* hearing in adult court,
Washington courts have held that the adult criminal court lacks jurisdiction over a juvenile's
5 proceeding. *Mora*, 138 Wn.2d at 53 ("the adult court determined the statutory criteria for its "exclusive
original jurisdiction" . . . were not met, *the court would lack jurisdiction over the juvenile*, in the absence
6 of a declination hearing'" (emphasis added) (quoting *In re Boot*, 130 Wn.2d 553, 565 n.7, 925 P.2d 964
(1996)); *id.* ("adult criminal court lacks jurisdiction if juvenile court improperly declined juvenile
7 offender" (emphasis added) (citing *State v. Pritchard*, 79 Wn. App. 14, 20, 900 P.2d 560 (1995))). See
also *Werner*, 129 Wn.2d at 494 (noting that by statute, only the juvenile division had the power to hear
and determine the case against the juvenile offender); *Mendoza-Lopez*, 105 Wn. App. at 386 -
8 87; *Anderson*, 83 Wn. App. at 518 .

9 [7]In this case, Dalluge was 17 years old when the prosecutor filed the amended information, after which
Dalluge was no longer charged with a serious violent offense. Thus, the adult criminal court no longer
10 had automatic jurisdiction over his proceedings. See RCW 13.04.030 (1)(e)(v). Once the prosecutor
amended the information to charge offenses which did not result in automatic adult court jurisdiction,
11 Dalluge's case no longer qualified for that exception to the juvenile court's exclusive jurisdiction. Most
importantly, because Dalluge was now charged with rape in the second degree, a class A felony,
12 RCW 13.40.110 (1)(a) affirmatively required a decline hearing *unless waived by the juvenile court*, the
parties, and their counsel. Thus, the trial court should have remanded the matter to the juvenile court for a
13 decline hearing because the juvenile court was the only court that could have jurisdiction over Dalluge's
case. *Mora*, 138 Wn.2d at 54 .

14 The State claims that the adult criminal court maintained jurisdiction over Dalluge, even after the
information was amended, because Dalluge did not object to the adult criminal court's jurisdiction or
15 request a hearing in juvenile court. The State argues that Dalluge waived his right to have his case
decided in juvenile court by silence.«8»Yet this court has concluded that RCW 13.04.030 (1)(e)'s decline
16 hearing requirement can be waived only by way of intentional deception. *Sheppard*, 73 Wn.2d at
739 ; see also *Mendoza-Lopez*, 105 Wn. App. at 388 -89; *Anderson*, 83 Wn. App. at 519 ; *Nelson*, 29
17 Wn. App. at 10 . The State points to no other circumstances that have been deemed to amount to waiver.

18 Similarly, the dissent claims that *Mora* established that juvenile jurisdiction is waived if a juvenile does
not present a timely objection to improper adult jurisdiction. First and foremost, nothing in the dissent
19 effectively counters the plain language of RCW 13.40.110 (1)(a), which affirmatively requires a decline
hearing unless waived by the juvenile court. While the *Mora* court noted that "[o]ther Washington case
20 law similarly holds that upon a timely challenge, [adult criminal court] jurisdiction may be terminated,
even in the middle of proceedings," 138 Wn.2d at 53 , *Mora* was not a case that directly addressed the
issue of waiver. *Id.* at 54 n.8. In addition, the *Mora* court did not go so far as to hold that the juvenile
21 court loses its legislatively granted authority to rule on declination when a juvenile fails to raise an
objection to adult criminal court jurisdiction. In fact, the *Mora* court emphasized the juvenile court's
22 essential role in declination: "With the exception of those offenses set forth in RCW 13.04.030 , the
Legislature intended that juvenile courts maintain not only exclusive original jurisdiction over all
23 proceedings relating to juveniles, but also *discretionary authority to determine whether to transfer*
jurisdiction to adult court ." *Id.* at 49 (emphasis added). We conclude that absent automatic decline based
24 on the nature of the charges, this discretionary authority must be exercised, either by the juvenile court as
the result of a decline hearing or by the adult criminal court in a substitute *Dillenburg* hearing. As noted

1 above, this conclusion is not contradicted by *Sheppard*, in which this court acknowledged that a juvenile
2 had waived his right to proceed in juvenile court by deception, but only after a court had hearing
3 requirement can be waived only by way of intentional deception. *Sheppard*, 73 Wn.2d at 739; see
also *Mendoza-Lopez*, 105 Wn. App. at 388 -89; *Anderson*, 83 Wn. App. at 519; *Nelson*, 29 Wn. App. at
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9 law similarly holds that upon a timely challenge, [adult criminal court] jurisdiction may be terminated,
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Legislature intended that juvenile courts maintain not only exclusive original jurisdiction over all
proceedings relating to juveniles, but also discretionary authority to determine whether to transfer
jurisdiction to adult court." *Id.* at 49 (emphasis added). We conclude that absent automatic decline based
on the nature of the charges, this discretionary authority must be exercised, either by the juvenile court as
the result of a decline hearing or by the adult criminal court in a substitute *Dillenburg* hearing. As noted
above, this conclusion is not contradicted by *Sheppard*, in which this court acknowledged that a juvenile
had waived his right to proceed in juvenile court by deception, but only after a court had

12 confirmed, in the context of a *Dillenburg* hearing, that adult criminal court jurisdiction was proper. In
13 sum, the relevant statutory language and this court's case law do not allow waiver of juvenile jurisdiction
absent either a decline hearing in juvenile court or a substitute *Dillenburg* hearing.

14 [8]Therefore, the adult criminal court in this case erred when it failed to remand to the juvenile court for a
15 decline hearing after the charges against Dalluge were amended. Absent the juvenile court's waiver of its
16 exclusive jurisdiction, the adult criminal court did not have jurisdiction, i.e., it did not possess the power
or authority to render a judgment in these proceedings. Because the judgment in this case was not
"rendered by a court of competent jurisdiction," RCW 10.73.090 (1), Dalluge's personal restraint petition
is not procedurally barred, regardless of the timing of its filing.

17 Remedy for the Trial Court's Failure to Remand

18 [9]This court has clearly concluded that once a prosecutor amends an information to charge offenses that
19 do not result in automatic adult court jurisdiction, the adult criminal court must remand the matter to the
juvenile court for a decline hearing. *Mora*, 138 Wn.2d at 54. However, the parties disagree as to the
appropriate remedy for the trial court's failure to remand for a decline hearing.

20 In *Dillenburg*, 70 Wn.2d at 333, the petitioner filed for a writ of habeas corpus in superior court, arguing
21 he was improperly tried in adult court. This court initially concluded that the petitioner had been
improperly transferred to adult court and reversed for a new trial. *Id.* at 345-46. However, upon
22 reconsideration, the court concluded that where the petitioner has demonstrated that a transfer from
juvenile court was faulty, the proper remedy is a de novo hearing in superior court on whether declination
of juvenile jurisdiction would have been appropriate.⁹ *Id.* at 355. If declination would have been
23 appropriate, then the conviction stands. *Id.* Otherwise, the conviction is set aside and a new trial must
occur in adult criminal court if the defendant has since turned 18. *Id.* at 356. Subsequently, Washington

1 courts have consistently applied this remedy when lack of adult criminal jurisdiction is successfully
argued on appeal. See *Mendoza-Lopez* , 105 Wn. App. at 390 ; *Anderson* , 83 Wn. App. at 522 .

2 The petitioner asserts that the *Dillenburg* remedy is no longer applicable, and the appropriate remedy is
3 now outright dismissal, rather than remand for a *Dillenburg* hearing. Dalluge bases this argument on a
4 post- *Dillenburg* case, in which the defendant claimed that the prosecution delayed filing charges until
5 after his 18th birthday, resulting in a loss of juvenile court jurisdiction. See *State v. Dixon* , 114 Wn.2d
6 857 , 860, 792 P.2d 137 (1990) The *Dixon* court adopted a three-part test for determining whether
7 preaccusatorial delay violated a defendant's right to due process where the result was a loss of juvenile
jurisdiction, but the test is clearly inapplicable here since there is no claim of preaccusatorial delay. See
8 *id* . Moreover, unlike the prosecutor in *Dixon* , the State in this case did not have any particularized duty
9 to ensure that Dalluge's case was remanded after the amended information. See , e.g ., *Mora* , 138 Wn.2d
10 at 54 (containing no discussion of a prosecutorial duty to insist on remand). Therefore, *Dixon* is
11 inapposite. Most fundamentally, *Dillenburg* has not been overruled, and Washington courts continue to
12 implement its remedy.

13 The dissent asserts that a *Dillenburg* hearing is not required here, claiming that there is no authority for
14 the proposition that an automatic decline that was valid when it occurred is retroactively invalid as the
15 result of a subsequent amendment to the charging instrument. Dissent at 795. Yet *Mora* seems to be
16 exactly that case, and in *Morawe* remanded for further proceedings. 138 Wn.2d at 54 . Here too, we
17 remand for further proceedings, specifically a *Dillenburg* hearing, the proper remedy under Washington
18 case law. We conclude that where the defendant has since turned 18, the appropriate remedy for a trial
19 court's failure to remand to juvenile court is remand to the adult criminal court for a de novo hearing on
20 whether declination would have been appropriate. If declination would have been appropriate, then the
21 conviction stands, but if not, the defendant is entitled to a new trial.

22 Ineffective Assistance of Appellate Counsel

23 Dalluge's appellate counsel neglected to argue that the trial court had erred by failing to remand for a
24 decline hearing once the amended information was filed. Because the appellate court would have been
required to remand to superior court for a *Dillenburg* hearing, Dalluge argues that he suffered prejudice as
a result.

[10]The United States Supreme Court has recognized that a criminal defendant has a right to have
effective assistance of counsel on his first appeal of right. *Evitts v. Lucey* , 469 U.S. 387, 396, 105 S. Ct.
830, 83 L. Ed. 2d 821 (1985). A criminal defendant's first opportunity to raise an ineffective assistance of
appellate counsel claim is often on collateral review. See , e.g ., *Maxfield* , 133 Wn.2d 332 . This court has
held that

[i]n order to prevail on an appellate ineffective assistance of counsel claim, petitioners must
show that the legal issue which appellate counsel failed to raise had merit and that they were
actually prejudiced by the failure to raise or adequately raise the issue.

Id . at 344. Failure to raise all possible nonfrivolous issues on appeal is not ineffective assistance, and the
exercise of independent judgment in deciding what issues may lead to success is the heart of the appellate
attorney's role. *Lord* , 123 Wn.2d at 314 . Yet if a petitioner can show that his appellate counsel failed to
raise an issue with underlying merit, then the first prong of the ineffective assistance test is
satisfied. *Maxfield* , 133 Wn.2d at 344 .

[11]In this case, it is important to note that *Mora* , 138 Wn.2d 43 , was decided in June 1999, before the
decision in Dalluge's first appeal was filed in November 1999. *Dalluge* , 1999 WL 1079190, 1999 Wash.

1 App. LEXIS 2011. *Mora* firmly established that after an amended charge destroys the automatic
2 jurisdiction of adult criminal court, the case should be remanded to the juvenile court for a decline
3 hearing. Had Dalluge's appellate counsel raised this argument, his case would have been remanded to the
appropriate division of the superior court. Thus, Dalluge has established that his appellate counsel failed
to raise a meritorious issue. See *Maxfield* , 133 Wn.2d at 344 .

4 [12]Under the second prong of the ineffective assistance of appellate counsel test, this court has required
5 that the petitioner show that he was "actually prejudiced by the failure to raise or adequately raise the
6 issue." *Id.* ; see also *Lord* , 123 Wn.2d at 314 . In *Smith v. Robbins* , 528 U.S. 259, 120 S. Ct. 746, 145 L.
7 Ed. 2d 756 (2000), the United States Supreme Court reiterated that the proper standard for evaluating
8 claims of ineffective assistance of appellate counsel derives from the standard set forth in *Strickland v.*
9 *Washington* , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Smith* , 528 U.S. at 285. The Court
10 held that Robbins was required to demonstrate prejudice, "[t]hat is, he must show a reasonable probability
11 that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his
12 appeal ." *Id.* at 285-86 (emphasis added) (the Supreme Court's requirement that the defendant must show
13 "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would
14 have been different.' " (emphasis added) (quoting *Strickland* , 466 U.S. at 694). As noted above, had
15 appellate counsel raised the issue of the trial court's failure to remand for a decline hearing, Dalluge
16 would have been entitled to a de novo *Dillenburg* hearing. Therefore, we conclude that Dalluge was
17 prejudiced by his appellate counsel's ineffective assistance.

18 Although generally the remedy for ineffective assistance of appellate counsel is reinstatement of the
19 appeal and remand, *In re Personal Restraint of Frampton* , 45 Wn. App 554, 563, 726 P.2d 486 (1986),
20 Dalluge urges this court, in the interests of efficiency, to resolve the trial court error under the standard of
21 review applicable upon direct appeal. See *id.* (recognizing resolution on the merits would be appropriate
22 if the record were sufficient). Because no further information is needed, we conclude that the trial court
23 indeed erred when it failed to remand for a decline hearing after the amended information was filed.
24 Because Dalluge is now over 18, remedy for such error on direct appeal is remand to the adult criminal
court for a de novo *Dillenburg* hearing. Because we remand to the superior court for a de
novo *Dillenburg* hearing, we need not address the petitioner's remaining arguments.«10»

III

Conclusion

17 Dalluge's petition is not procedurally barred because the adult criminal court did not have jurisdiction
18 over his case. We hold that the trial court erred in failing to remand for a decline hearing after the
19 amended information destroyed its jurisdiction. Dalluge suffered prejudice resulting from ineffective
20 assistance of appellate counsel because his appellate counsel failed to raise this lack of jurisdiction on
21 direct appeal. The personal restraint petition is granted, the Court of Appeals is reversed, and this matter
22 is remanded to superior court for a decline hearing consistent with the procedure set forth in *Dillenburg* .

23 ALEXANDER , C.J ., and SANDERS , CHAMBERS , OWENS , and FAIRHURST , JJ ., concur .

24 MADSEN , J.(dissenting) - Petitioner Amel Dalluge did not object to the superior court's exercise of
authority over him in adult criminal proceedings following the State's amendment of the charges against
him. Thus, although the amended information no longer alleged an offense encompassed by the automatic
decline provisions of RCW 13.04.030 (1)(e)(v), Dalluge was properly tried in adult court because he
waived his right to be treated as a juvenile. The majority's determination to the contrary is therefore
incorrect as to both the substantive merits and the procedural bar of RCW 10.73.090 . Moreover, the
majority's conclusion that a *Dillenburg* hearing is necessary to comply with procedural due process

1 requirements is not warranted by its analysis or the authority on which it cites. *Dillenburg v. Maxwell*, 70
Wn.2d 331, 413 P.2d 940, 422 P.2d 783 (1966). Accordingly, I dissent.

2 ANALYSIS

3 The juvenile court is not a separate constitutional court, but rather a division of superior court. *State v.*
Werner, 129 Wn.2d 485, 492, 918 P.2d 916 (1996). The legislature has vested the juvenile court with
4 "exclusive original jurisdiction" over juvenile offenders, subject to certain exceptions.
RCW 13.04.030 (1). The court has observed that the legislature "chose to 'distribute and assign a phase of
5 the business of the superior court' and 'prescribe the mode of procedure by which the superior court shall
initiate, process and apply the remedies made available' for juveniles." *Werner*, 129 Wn.2d at 492 -93
6 (quoting *Dillenburg*, 70 Wn.2d at 352 -53). These comments, pertaining to predecessor statutes, are still
applicable. *Id*. The court has also noted that when referring to juvenile court jurisdiction, "jurisdiction" is
7 used

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9 in a "limited sense." *Sheppard v. Rhay*, 73 Wn.2d 734, 736, 440 P.2d 422 (1968). It is not, for example,
like "subject matter jurisdiction," which cannot be waived. Juvenile court jurisdiction can be
10 waived. *E.g.*, *Sheppard*, 73 Wn.2d 734; *Nelson v. Seattle Mun. Court*, 29 Wn. App. 7, 627 P.2d 157
(1981).

11 Here, the issue is whether the adult court loses the authority to try a juvenile when he or she has been
12 automatically subjected to adult criminal court jurisdiction because a serious violent offense has been
charged, and the State thereafter amends the information to charge an offense within the juvenile court's
13 jurisdiction. Nothing in the Basic Juvenile Court Act, chapter 13.04 RCW, prescribes that the adult
criminal court loses jurisdiction in these circumstances.

14 The majority assumes, however, that the court held in *State v. Mora*, 138 Wn.2d 43, 977 P.2d 564
(1999) that the adult criminal court inevitably loses its authority to render a judgment once the
15 information is amended to charge only offenses not subject to the automatic decline provisions. *Mora*,
however, simply does not stand for this proposition. Instead, *Mora* clearly contemplates the necessity of a
16 timely objection.

17 In *Mora*, a 17-year-old was originally charged in adult court based on the date of birth he had given. At
arraignment, defense counsel objected to adult court jurisdiction on the basis that Mora was actually 17
18 years old. *Mora*, 138 Wn.2d at 46. On the day a hearing was scheduled to hear evidence on Mora's age,
the prosecutor moved to amend the information to add a charge that subjected Mora to the automatic
19 decline provisions of RCW 13.04.030 (1)(e)(v). The court allowed the amendment. Later, the prosecutor
filed a second amended information that reduced the charged offenses; as amended, the information did
20 not charge any offense within the automatic decline provisions of RCW 13.04.030 (1)(e)(v). *Mora*, 138
Wn.2d at 47. Mora was tried as an adult. After he was found guilty, his counsel moved for an arrest of
21 judgment, challenging the adult trial court's authority to render judgment. *Id*. The trial court denied the
motion. *Id*.

22 This court reversed. The court found that the legislature intended that only certain crimes will trigger
automatic decline, and that RCW 13.04.030 (1)(e)(v) nowhere suggests legislative intent that the
23 offender's juvenile status is forever lost based on a prosecutor's charging decision. *Mora*, 138 Wn.2d at
51 -52. However, to obtain the adult court's reexamination of whether it has authority under
24 RCW 13.04.030 (1) and transfer of the case to the juvenile court, a timely challenge is

1 required. *Mora*, 138 Wn.2d at 53. The court in *Mora* noted that "Washington case law . . . holds that
2 upon a *timely challenge*, jurisdiction may be terminated, even in the middle of the proceedings, if the trial
3 court lacks jurisdiction over the juvenile." *Mora*, 138 Wn.2d at 53. The court made it clear that the
4 defendant's right to be tried as a juvenile is subject to waiver if the right is not invoked upon a timely
5 challenge. *Mora*, 138 Wn.2d at 53, 54 n.8; *see also Sheppard*, 73 Wn.2d 734 (offender waived the right
6 to be heard in juvenile court where he deliberately misrepresented his actual age, and his counsel did not
7 raise the issue or reveal his age at trial); *Nelson*, 29 Wn. App. 7 (claim of the right to be treated as a
8 juvenile waived where the offender deliberately misrepresented her age throughout the trial and only
9 challenged adult court jurisdiction when faced with revocation of her probation).

10 Here, there was no timely objection to adult court jurisdiction, and Dalluge did not assert a right to be
11 treated as a juvenile. Accordingly, Dalluge waived any challenge to the authority of the adult criminal
12 court.

13 The majority maintains, however, that waiver can be found only in cases where the defendant has
14 deliberately misrepresented his or her age. Majority at 781-82, 782. However, in the only case where this
15 court held that intentional misrepresentation of age constitutes waiver, the court never indicated that
16 waiver cannot be found in other circumstances. *Sheppard*, 73 Wn.2d 734. The fact that waiver is found
17 in age misrepresentation cases instead demonstrates that the statutory right to be treated as a juvenile can
18 be waived, and nothing in the statute itself limits the circumstances where waiver can occur. In addition,
19 the court in *Sheppard* found waiver resulted from the defendant's own willful acts *and* from counsel's
20 failure to raise the issue. *Sheppard*, 73 Wn.2d at 739. This suggests that failure to object to trial in adult
21 court is a basis for finding waiver. Finally, as explained, *Mora* instructs that waiver can be found where
22 there is no timely challenge.

23 The majority also concludes that waiver cannot be found unless the juvenile court itself also waives
24 juvenile court jurisdiction. Majority at 780 n.3, 782-83. The majority is confusing use of the term in
RCW 13.40.110 (1), under which a decline hearing must be held unless all parties, their counsel, and the
juvenile court waives the decline hearing, and the issue here, a juvenile's waiver through the failure to
timely object to the adult court's continued jurisdiction following automatic decline. Here, juvenile court
jurisdiction had already been declined as mandated by law, and there is no question of the juvenile court
itself waiving a decline hearing. Nothing in the statute or the case law requires that the juvenile court
must agree under RCW 13.40.110 (1) to waiver in order for the juvenile to waive the right to a decline
hearing through failure to timely object once the adult court has obtained jurisdiction under the automatic
decline provisions, and the information is thereafter amended to charge a crime not coming within those
decline provisions.

I would hold that Dalluge waived his right to be treated as a juvenile.

Next, in response to the State's argument that this personal restraint petition is procedurally barred by
RCW 10.73.090, the majority concludes that Dalluge's judgment and sentence is invalid on its face, and
therefore the time bar does not apply. As explained, however, the adult court did not lack jurisdiction. The
question therefore remains whether the personal restraint petition is procedurally time barred, a question
that is beyond this dissent. I note, however, that the majority never explains why the absence of juvenile
court jurisdiction, i.e., "jurisdiction" only in a "limited sense" and "jurisdiction" that can be waived, is the
kind of jurisdictional defect that renders a judgment and sentence invalid on its face for purposes of
RCW 10.73.090.

Finally, assuming the adult court lacked authority to try this case, the majority's choice of remedy is not
justified by *Dillenburg*, 70 Wn.2d 331. In *Dillenburg* the petitioner was transferred to adult court
following a decline decision made by a probation officer without a formal hearing. *Dillenburg*, 70 Wn.2d

1 at 334 -35. The petitioner pleaded guilty. Following his conviction, he filed a petition for a writ of habeas
2 corpus claiming, among other things, that the order surrendering jurisdiction of the juvenile court was
3 void because it was not signed by a judge of the superior court. *Dillenburg*, 70 Wn.2d at 333 . This court
4 relied on *Kent v. United States* , 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), in which the
5 United States Supreme Court held that procedural due process requires, before an offender may be
6 transferred to adult court, that a judicial hearing be held to determine whether the juvenile court's
7 jurisdiction should be declined. *Dillenburg* , 70 Wn.2d at 344 -45 (quoting *Kent* , 383 U.S. at 552-54).
8 The court in *Dillenburg* determined that the juvenile probation officer lacked authority to perform the
9 function of a judge and held the transfer void because there was no valid declination
10 hearing. *Dillenburg* , 70 Wn.2d at 342 -45. On reconsideration, the court held that the due process
11 requirement is satisfied by a de novo hearing to determine the propriety of the transfer to adult
12 court. *Dillenburg* , 70 Wn.2d at 345 . Thus, the requirement of a *Dillenburg* hearing is based on
13 procedural due process requirements.

14 Here, however, there is no procedural due process defect such as occurred in *Dillenburg* . There was a
15 valid declination before Dalluge was transferred to adult criminal court, albeit pursuant to the automatic
16 declination provisions of RCW 13.04.030 (1)(e)(v). The statutory automatic declination procedure does
17 not violate a juvenile's procedural due process rights. *In re Boot* , 130 Wn.2d 553 , 570-71, 925 P.2d 964
18 (1996). For procedural due process purposes, there is no difference between a transfer following a
19 declination hearing and a transfer as a result of the automatic declination statute. The majority presents no
20 authority establishing any difference and no authority for the proposition that an automatic decline that
21 was valid when it occurred is retroactively invalid as a result of a subsequent amendment to the charging
22 instrument. Accordingly, the majority's result is not justified by its analysis.

23 CONCLUSION

24 Dalluge is not entitled to relief because he waived his right to be treated as a juvenile by failing to make a
timely objection to his trial in adult criminal court. His personal restraint petition should be dismissed.

I respectfully dissent.

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[Date]

I, Lavelle X. Mitchell, declare under the penalty of perjury for the state of Washington that the above is true and correct to the best of my knowledge and belief.

Respectfully Submitted,



Lavelle X. Mitchell, Defendant

Attorney for Defendant

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

STATE OF WASHINGTON,)
 Plaintiff,)
 vs.) 12-1-02461-4
 LAVELLE XAVIER MITCHELL,)
 Defendant.)

VERBATIM TRANSCRIPT OF PROCEEDINGS
 BEFORE THE HONORABLE
 ANDREA DRAVAS

AUGUST 29, 2014



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A P P E A R A N C E S

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I N D E X

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1 --oOo--

2
3 (BEGINNING OF TRANSCRIPTION)

4 (Proceedings begin at 11:18 a.m.)

5 MR. HERSCHKOWITZ: ...614 Seattle --

6 I'm sorry -- Kent designation. Defendant is present,
7 in custody, to my left represented by counsel Mr.
8 Mitch Harrison.

9 Your Honor, we are here today for a
10 defense motion to withdraw his guilty plea that
11 occurred a while back before Your Honor. Your Honor,
12 there's a couple issues as a threshold matter before I
13 defer to Mr. Harrison, and the State obviously wants
14 to respond.

15 First and foremost, it should be noted
16 that Mr. Mitchell, who is in custody, is not in
17 custody on this cause number, Your Honor. I did have
18 an opportunity to speak with counsel. Mr. Mitchell
19 was convicted of an unlawful possession of firearm, so
20 it's a unrelated matter as to why he's in custody. He
21 did his time on this matter. He's not in custody --

22 THE COURT: I didn't sentence him to
23 any additional time on this matter, so I couldn't
24 figure out how he could possibly be in custody on this
25 cause number.



1 MR. HERSCHKOWITZ: That's correct,
2 Your Honor. So I think that's good for the record to
3 be clear on why in fact Mr. Mitchell is in custody.
4 Not on this matter.

5 The second issue, Your Honor, and the
6 State was thinking about that as it was preparing its
7 argument in written briefing, which I hope Your
8 Honor's had a chance to look at, because I'm not
9 entirely sure why we're here. I believe this is more
10 suited for a personal restraint petition. So I would
11 like to defer to counsel, Your Honor, with regard to
12 that discussion, even if we should be here in the
13 first place.

14 But obviously, the State is ready to
15 respond to any of the defense arguments, but I think
16 we should start with why this isn't a PRP.

17 THE COURT: Well, that was a threshold
18 question that I had as well. So Mr. Harrison, why
19 isn't this a PRP that should have been brought to the
20 Court of Appeals rather than here?

21 MR. HARRISON: Well, Your Honor, the
22 first reason being that the trial court's the fastest
23 way to get relief for Mr. Mitchell. He is in custody
24 now, but when we filed this and set this he wasn't in
25 custody, and part of the reason why we're trying to



1 take care of this now is it affects his sentence that
2 he's currently serving.

3 This is a motion that can be brought
4 before this court and a motion that is properly before
5 this court. It can be filed as a PRP or it can be
6 filed in this court as a motion to withdraw a plead.

7 For him to be able to appeal the
8 motion and withdraw a plea, he has to bring it in the
9 trial court first. So he's exercising that right
10 before this court right now. The Court of Appeals
11 would simply send this back down for the reference
12 hearing to hear some kind of evidence as well. Mr.
13 Mitchell did submit documents with the motion to
14 withdraw a plea that shows that one of the witnesses
15 to this crime indeed gave a false name to the police.

16 THE COURT: Uh-huh.

17 MR. HARRISON: And these are issues
18 that the Court of Appeals -- I actually handle quite a
19 few PRPs myself -- will always send back down to this
20 court for a records hearing, so...

21 THE COURT: Well, the reference
22 hearing would be as to whether Mr. Mitchell's guilty
23 plea on the VUCSA was knowing, intelligent and
24 voluntary, right?

25 MR. HARRISON: That would be, that



1 would be correct, Your Honor.

2 THE COURT: Okay. Well, I'll tell you
3 what. I'm going to hear it because everyone's here.
4 This had occurred to me earlier, and in fact I had a
5 little bit of discussion with Judge Jim Rogers, who is
6 our chief criminal currently, about this exact issue,
7 and his suggestion, for what it's worth, is is that I
8 do go ahead with a hearing based on the fact that the
9 trial court is in the best position to determine the
10 knowing, voluntary, and intelligent nature or lack
11 thereof of a guilty plea.

12 I will also tell you gentlemen that
13 given that this plea occurred over a year and a half
14 ago, I did -- didn't have much of an independent
15 recollection. When I reviewed the certification
16 again, it was like, oh, yeah, that case. I remember
17 that. But I did go back on the FTR and listen to the
18 plea hearing. That's the only portion that I listened
19 to, but I have listened to the plea hearing, so that
20 part of it is fresh in my mind at this point.

21 So Mr. Harrison, it's your motion, so
22 --

23 MR. HARRISON: Thank you, Your Honor.

24 THE COURT: -- we can go ahead with
25 it.



1 I have another threshold question,
2 though. As I understand it, the motion to withdraw
3 the plea is predicated on something that the defense
4 learned of, new information, regarding the underlying
5 charge, which was robbery, and that because of this
6 new information regarding the robbery, Mr. Mitchell
7 should be permitted to withdraw his plea on the VUCSA.

8 And I'm trying to figure out exactly
9 how that works, because his plea on the VUCSA was not
10 an Alford plea, and we do have case law that says,
11 well, when a plea is based on an Alford plea and then
12 a witness recants, the court may lose the factual
13 basis for accepting the plea and it may be very
14 appropriate to allow withdraw of the plea, but this
15 wasn't an Alford plea.

16 In this case Mr. Mitchell
17 affirmatively said, because I also took a look at the
18 statement of defendant on plea of guilty, although
19 that was, of course, read during the plea colloquy,
20 and he affirmatively said that on June 3, 2012, I
21 unlawfully possessed cocaine, a controlled substance
22 and a narcotic. So he provided the factual basis.

23 MR. HARRISON: That's correct, Your
24 Honor.

25 THE COURT: And so how does the fact



1 that he now has a defense to the robbery charge permit
2 him to withdraw his plea on the VUCSA charge?

3 MR. HARRISON: Well, and Your Honor,
4 that actually is a very complicated question, because
5 it -- first of all, a little bit of factual
6 background's necessary to understand both cases,
7 because they're really related. I mean, both cases
8 should have and very well could have been filed
9 together because the whole theory was --

10 THE COURT: I'm sorry. Which both
11 cases?

12 MR. HARRISON: The VUCSA and then the
13 robbery.

14 THE COURT: Right.

15 MR. HARRISON: Factually speaking,
16 what happened was is these witnesses claim that Mr.
17 Mitchell --

18 THE COURT: And his brother.

19 MR. HARRISON: -- and his brother,
20 Darnell Brown, performed some impromptu robbery with
21 apparently no motivation whatsoever. They robbed them
22 and then a car chase ensued and then the car that they
23 were supposedly fleeing in was found, ultimately
24 searched, and then cocaine was found in the car.

25 THE COURT: Right.



1 MR. HARRISON: The car wasn't Mr.
2 Mitchell's.

3 THE COURT: Right. It was his
4 brother's car.

5 MR. HARRISON: It was -- I believe it
6 was under his brother's name. But aside from these
7 witnesses, including the one who gives the false name,
8 no one saw Mr. Mitchell in the car.

9 THE COURT: Okay.

10 MR. HARRISON: So clearly, those two
11 charges are related and they're part of the same, the
12 same theory, the fleeing, the possession. Presumably,
13 if Mr. Mitchell was in the car when --

14 THE COURT: Well, now wait a minute.

15 MR. HARRISON: -- the chase ensued and
16 --

17 THE COURT: Wait a minute. Wait a
18 minute. Wait a minute. You've got the one witness
19 who gave a false name, but then you've got the alleged
20 robbery victim, who, as I recall, did a onsite
21 identification of Mr. Mitchell and Mr. Brown and said,
22 yeah, these are the two guys that robbed me and he had
23 described them fleeing in this car too.

24 So it isn't just the witness who gave
25 a false name that places Mr. Mitchell in that car.



1 MR. HARRISON: That's true. That's
2 true. But also, procedurally, this case was on the
3 eve of trial, as I understand it, and the State was
4 having problems --

5 THE COURT: Oh, we'd started trial.

6 MR. HARRISON: Yeah.

7 THE COURT: I think we'd had some
8 motions in limine and suppression motions and things
9 like that.

10 MR. HARRISON: And the reason -- I'm
11 sure the reason that Mr. Mitchell pleaded to the VUCSA
12 charge is because out of fear that one or both of
13 these witnesses would show up.

14 THE COURT: Right.

15 MR. HARRISON: Now, had he had this
16 information, known that they'd given a false name,
17 that surely undermined both witnesses' credibility,
18 because they're both working in concert.

19 THE COURT: Uh-huh.

20 MR. HARRISON: So these cases, I think
21 it's just a real technical deficiency that they're
22 technically separate that he pleaded to. It's
23 essentially a lesser included, really, if you think
24 about it in the grand scheme of things.

25 THE COURT: I'm sorry. What's a



1 lesser included?

2 MR. HARRISON: A lesser included
3 offense. Even though it's not technically legally
4 speaking --

5 THE COURT: I'm sorry. I'm just not
6 following your argument. What is a lesser included
7 defense?

8 MR. HARRISON: Well, I guess I thought
9 we were speaking about the VUCSA charge --

10 THE COURT: Yes.

11 MR. HARRISON: -- and how it's
12 related. So I --

13 THE COURT: Oh, I understand how it's
14 factually related.

15 MR. HARRISON: Sure.

16 THE COURT: But, but, but when you say
17 lesser included, I'm listening to what I'm thinking is
18 a legal argument and that's what I wasn't following.

19 MR. HARRISON: And I guess I fail to
20 see, I fail to see the distinction here. The State's
21 argument is that because -- I'm trying to understand
22 the State's argument, counterargument, that these,
23 these two aren't legally related and I guess I fail to
24 see the legal significance of the fact that he pleaded
25 to a different charge.



1 THE COURT: Well, let me ask you a
2 different question and maybe we can come at it a
3 different way and get a little more clarity.

4 Are you aware of any authority for the
5 proposition that a defendant who chooses to plea
6 guilty to something in order to escape the possibility
7 of conviction on a more serious charge should then be
8 permitted to withdraw his plea when later information
9 develops that indicates that he has a stronger defense
10 to the original charge than he was aware of at the
11 time that he entered the plea to the lesser charge?
12 Because that's really what we're dealing with here.
13 Are there any cases that actually say that?

14 MR. HARRISON: Well, I think all we
15 have to do is stay within the framework of CRR 7.8.

16 THE COURT: Yep.

17 MR. HARRISON: And if we just do that,
18 we go through each of the requirements as detailed out
19 in the motion, I think that this case falls squarely
20 within the definition of newly discovered evidence,
21 and the --

22 THE COURT: But that relates to that
23 charge. There isn't any newly discovered evidence
24 with respect to the VUCSA.

25 MR. HARRISON: Well, Your Honor --



1 THE COURT: And I'll be candid with
2 you, and I plan to ask Mr. Herschkowitz this question,
3 at the time that this case was before me for trial, I
4 had some concerns about the cocaine because there
5 weren't any facts before the court. Now, they may
6 have been developed through evidence later -- I don't
7 know -- but there weren't any facts before the court
8 or in the certification for determination of probable
9 cause that linked Mr. Mitchell to the cocaine that was
10 found in the car.

11 It wasn't his car and there wasn't any
12 evidence before the court that he knew there was
13 cocaine in the car.

14 Now, the analysis is a little
15 different with Mr. Brown because it was his car, but
16 when he pleaded guilty Mr. Mitchell said that he
17 knowingly possessed cocaine. So he provided the
18 factual basis.

19 And what you're saying now is, well, I
20 wouldn't have done that if I'd known that I had a
21 stronger defense to the robbery than I in fact had.
22 Although it kind of looked like there were some pretty
23 compelling defenses to the robbery charge in any
24 event.

25 MR. HARRISON: And that's, that's



1 certainly true. I think the most telling thing here
2 is that there simply just wasn't sufficient evidence
3 to connect him to possessing the cocaine and that's,
4 that's --

5 THE COURT: But he admitted to it, you
6 know, and we're not dealing with a corpus delicti
7 situation, because the cocaine was in fact found in
8 the car and there was evidence that Mr. Mitchell had
9 been in the car.

10 MR. HARRISON: He didn't admit to it
11 until -- the whole issue here is --

12 THE COURT: No. He admitted to it
13 during the plea hearing.

14 MR. HARRISON: -- had he had this
15 knowledge, he would not have admitted to it. That's
16 the whole issue here. So had he had this evidence to
17 begin with --

18 THE COURT: Mmm.

19 MR. HARRISON: -- then he wouldn't
20 have admitted to that. If he had known that one of
21 the star witnesses for the State's case had given a
22 false name --

23 THE COURT: Uh-huh.

24 MR. HARRISON: -- he would not have
25 admitted to it. The State was sitting on two cases,



1 the VUCSA charge and the robbery charge, that were
2 seemingly going to both fail.

3 THE COURT: But don't, don't people
4 commonly plead guilty to things that they don't
5 believe they did and they don't believe they're guilty
6 of, because they are concerned that there is a
7 possibility, even if it's a somewhat remote
8 possibility, that they run the risk of being convicted
9 on something more serious?

10 MR. HARRISON: Well, they certainly
11 do. That's why --

12 THE COURT: Doesn't that happen all
13 the time?

14 MR. HARRISON: And that's why we come
15 back to this 7.8, which specifically carves out an
16 exception for newly discovered evidence. And if we
17 just go through, if we just go through the five
18 factors --

19 THE COURT: Okay.

20 MR. HARRISON: -- Mr. Mitchell
21 certainly meets them.

22 The first one is really the most
23 important one, and that's the one that the State
24 brings up that we didn't argue as a manifest
25 injustice, but I fail to see one case where someone



1 meets these requirements and the court doesn't find
2 manifest injustice if this newly discovered evidence
3 would probably change the result of the trial.

4 THE COURT: But if this happens all
5 the time, as you said, why don't we have any authority
6 that supports your position that if newly discovered
7 evidence provides a stronger defense to the original
8 charge, then a defendant should be permitted to
9 withdraw his plea to a lesser charge for which he has
10 admitted to and pled guilty to?

11 MR. HARRISON: Well, Your Honor, I
12 don't think we need authority. When the case clearly
13 falls squarely within the rule itself, there is no
14 authority that's needed.

15 THE COURT: Uh-huh.

16 MR. HARRISON: The State hasn't
17 provided any authority to the contrary, and the courts
18 are what made these court rules.

19 THE COURT: Uh-huh.

20 MR. HARRISON: So really, the real
21 question here is whether or not this is newly
22 discovered evidence. And Mr. Mitchell fits, as argued
23 in our brief, within every single one of these
24 requirements. Probably change the result of the
25 trial. Well, he wouldn't have pleaded guilty. If he



1 had gone and he doesn't plead guilty, at this point
2 it's pretty clear that he should win both trials.

3 THE COURT: So...

4 MR. HARRISON: The State had no star
5 witnesses at all for either case.

6 THE COURT: So if I'm looking at CR
7 7.8, you're saying I should be looking at part B,
8 right?

9 MR. HARRISON: Yes.

10 THE COURT: Mistakes, inadvertence,
11 excusable, neglect, newly discovered evidence, fraud,
12 et cetera. A motion upon such terms as are just, the
13 court may relieve a party from a final judgment order
14 or proceeding for the following reasons.

15 Two, newly discovered evidence which
16 by due diligence could not have been discovered in
17 time to move for a new trial under 7.5. But again,
18 this rule would appear to relate to newly discovered
19 evidence on the charge that the person was charged
20 with.

21 MR. HARRISON: I've seen no case that
22 says that and it's not within the court rule, though.

23 THE COURT: Well, but the burden's on
24 you. So that's why I'm asking you for authority that
25 supports your argument.



1 MR. HARRISON: The authority is in the
2 rule, Your Honor. There's nothing in the -- it says
3 relieve a party from a judgment. It doesn't say
4 relieve a party from a judgment -- it doesn't, this
5 newly discovered evidence to a specific charge.
6 There's nothing in the rule that says that.

7 THE COURT: Okay. Anything else I
8 should know?

9 MR. HARRISON: Aside from what's
10 already in the brief, I don't want to simply repeat
11 and read off the brief to Your Honor. You have a copy
12 of it yourself.

13 But all I would add is that if it
14 ends up probably changing the result of the trial,
15 which here the result of the trial was only changed by
16 Mr. Mitchell's guilty plea, both still with pretty
17 much insufficient evidence to support the charges,
18 then I think that all the other requirements are met
19 and that constitutes a manifest injustice as a matter
20 of law.

21 Thank you, Your Honor.

22 THE COURT: All right. Thank you.

23 Mr. Herschkowitz, so I guess the
24 question to you, which I said I was going to ask you
25 --



1 MR. HERSCHKOWITZ: Yes, Your Honor.

2 THE COURT: -- is given that the
3 State, as far as I know, didn't actually have any
4 evidence linking Mr. Mitchell to the cocaine in the
5 car --

6 MR. HERSCHKOWITZ: We did
7 tangentially, Your Honor. We had the valid execution
8 of the search warrant of the other Mitchell's car.

9 THE COURT: Oh, no, no, no, I haven't
10 even heard an argument that, at least not by counsel,
11 that the cocaine wasn't lawfully discovered.

12 MR. HERSCHKOWITZ: Understood.

13 THE COURT: The point is, the cocaine,
14 as I understand it, was discovered in the glove
15 compartment --

16 MR. HERSCHKOWITZ: Correct.

17 THE COURT: -- of a car that belonged
18 to Mr. Mitchell's brother.

19 MR. HERSCHKOWITZ: Correct.

20 THE COURT: But there was no
21 independent evidence that linked Mr. Mitchell to that
22 cocaine. There was an inference that his, his brother
23 was in possession of the cocaine, because it was his
24 car.

25 MR. HERSCHKOWITZ: Correct.



1 THE COURT: But you can't apply that
2 inference to a passenger in the car, can you?

3 MR. HERSCHKOWITZ: I mean, you have
4 constructive possession argument, but we're not before
5 a jury trying to determine beyond a reasonable doubt.
6 We're looking at a defendant who knowingly,
7 intelligently and voluntarily waived and decides to
8 plead guilty to an offense the State offered --

9 THE COURT: Right.

10 MR. HERSCHKOWITZ: -- in exchange for
11 the possibility of going out on a very serious robbery
12 in the first degree charge.

13 THE COURT: Right.

14 MR. HERSCHKOWITZ: And that is kind of
15 where we're at. And does the new found evidence
16 supersede the fact that a defendant knowingly,
17 intently, and voluntarily waives a Constitutional
18 Right to go forward with a lesser plea in exchange for
19 the negotiation that we wouldn't go for on robbery in
20 the first degree. And I think ultimately that's where
21 we stand.

22 THE COURT: Uh-huh.

23 MR. HERSCHKOWITZ: And I would defer
24 to Your Honor's review of the colloquy that was given
25 by the State in the court when Mr. Mitchell did review



1 the charges against him, i.e. VUCSA, that he did make
2 a knowing, intelligent, and voluntary waiver. There
3 were facts sufficient in the plea for him to warrant
4 finding him guilty of a violation of the informed
5 controlled substance act, because he admitted that he
6 was in possession of them.

7 The fact that there's no corpus issue
8 because the drugs were actually found in a vehicle.
9 Again, purportedly his brother's, but yet were in the
10 glovebox of a car that he was inside of. All of those
11 again rise to the level of a cost benefit analysis
12 made by any criminal defendant when they are looking
13 at possibly a more severe case and an offer given by
14 the State as Your Honor had asked counsel.

15 I think with regards to those issues,
16 the State believes that the defense's burden has not
17 been met and, thus, you should deny the defense's
18 motion to withdraw his plea.

19 Contemporaneously there are the issues
20 in both Mr. Mitchell's brief as well as counsel's
21 briefs that I'd be happy to discuss as well with Your
22 Honor if Your Honor has any questions with regards to
23 those. Otherwise, we would rest on our briefing.

24 THE COURT: So let me ask you --

25 MR. HERSCHKOWITZ: Sure.



1 THE COURT: -- a slightly different
2 question. What if this had been an Alford plea? It
3 wasn't.

4 MR. HERSCHKOWITZ: It wasn't.

5 THE COURT: But just, hypothetically
6 speaking, what if it had been not an Alford plea, but
7 what's the name of that case that says you don't need
8 a factual --

9 MR. HERSCHKOWITZ: In re Bar, Your
10 Honor.

11 THE COURT: What is it?

12 MR. HERSCHKOWITZ: In re Bar, yeah.

13 MR. HARRISON: In re Bar.

14 THE COURT: Bar?

15 MR. HERSCHKOWITZ: In re Bar, yeah.

16 THE COURT: Okay. Where as long as
17 there's a factual basis for the underlying charge, you
18 don't necessarily need a factual basis for the matter
19 to which you were pleading guilty.

20 MR. HERSCHKOWITZ: Sure. I would be
21 -- it's difficult to argue that, because I could
22 understand if placing myself back in time as to when
23 we were negotiating this, why as the prosecutor I
24 wouldn't have offered an Alford or in re Bar type
25 plea.



1 THE COURT: Uh-huh.

2 MR. HERSCHKOWITZ: Because I do
3 believe there would have been some sort of nexus
4 issue, and we would justifiably deal with a PRP later
5 that could be colorable in a defensive standpoint.

6 That's why it was a straight plea
7 offer and a straight plea offer was accepted by the
8 defendant, knowing full well that the time he was
9 looking at on a simple possession drug charge versus
10 a class A felony, when that cost benefit analysis
11 and his voluntariness, his intellectual beliefs of why
12 he should go forward with the plea were accepted by
13 him.

14 And he, again, in open court on his
15 plea forms agreed to that, we entered into a valid
16 plea. There were facts sufficient to warrant finding
17 him guilty.

18 THE COURT: Okay. Anything else, Mr.
19 Harrison?

20 MR. HARRISON: I have nothing else,
21 Your Honor.

22 THE COURT: Okay. You know, I took a
23 look at the cases that the parties cited. Manifest
24 injustice hasn't -- it's been argued by implication at
25 this hearing, but I think there was some briefing



1 regarding it, and the case that I found that sort of
2 talks about the factors most clearly, it seems to be
3 one of the more recent cases, is State versus Arnold
4 at 81 Washington appellate 379. It's not a terribly
5 recent case. It's from 1996.

6 But it says that a trial court must
7 allow a defendant to withdraw his guilty plea if
8 withdrawal is necessary to correct manifest injustice,
9 i.e., injustice that is direct, obvious and
10 observable. Because of the safeguard surrounding a
11 plea of guilty, the manifest injustice standard is a
12 demanding one. And it cites State versus Calvert at
13 79 Wash Ap 569.

14 Then it indicates that there's four
15 indicia of manifest injustice that the Supreme Court
16 has recognized. One is denial of effective counsel.
17 That wasn't present in this case. Two is a plea not
18 ratified by the defendant. That was not present in
19 this case.

20 Three is an involuntary plea. I guess
21 that's what's being argued in this case, that it was
22 involuntary. Not in the sense that anyone coerced Mr.
23 Mitchell into the plea, but it was involuntary in the
24 sense that his argument is if he had known about this
25 newly discovered evidence at the time, he would have



1 made a different decision and not pleaded guilty on
2 the cocaine charge.

3 Or for the plea agreement not kept by
4 the prosecution. That is not at issue in this case.
5 In fact, the plea agreement was that the standard
6 range that Mr. Mitchell was facing at the time was
7 zero to six months. That the State was going to
8 recommend six months, but that the defense was free to
9 make a different recommendation.

10 And I believe I sentenced Mr. Mitchell
11 to credit for time served, so he wasn't looking at any
12 more jail time and I think the amount of time he had
13 served at that point was about five days, just a few
14 days.

15 There simply isn't any authority that
16 has been brought to my attention for the proposition
17 that a person's decision to plead guilty to a lesser
18 charging is subject to withdrawal if information comes
19 to light later that he has a stronger defense than he
20 thought he had at the time to the original charge.

21 Frankly, there were a lot of defenses
22 to the original charge. As I recall from looking at
23 my notes, there was serious question whether the State
24 was going to be able to produce the witness who
25 claimed he had been robbed by Mr. Mitchell and Mr.



1 Brown, and I think there was another witness that --
2 there was a lot of question as to whether the State
3 was going to be able to produce.

4 The facts that were set forth in the
5 certification read like the script of a bad movie;
6 seemed kind of unbelievable. I mean, there were just
7 an awful lot of pretty obvious defenses at the time.
8 Throwing one more into the mix, I can't tell you for
9 sure that if there were authority for the proposition
10 that the decision to plead guilty to a lesser charge
11 could be influenced by learning new information about
12 defenses to the original charge, whether even if there
13 were such authority whether it would really cause me
14 to rule that Mr. Mitchell should be allowed to
15 withdraw his VUCSA plea, but I think it would be a
16 much closer question.

17 But in this case, in the absence of
18 any such authority, when Mr. Mitchell made the
19 decision, and it's clear from the plea colloquy that
20 that was a knowing, intelligent, and voluntary
21 decision, with advice of counsel, with knowledge of
22 the Constitutional Rights that he was foregoing and
23 with knowledge of the consequences of his plea, that
24 he affirmatively said in the plea form that he
25 knowingly possessed cocaine on the date in question



1 and that he knew it was unlawful and a narcotic
2 substance.

3 And given that, I just don't think I
4 have any authority to relieve Mr. Mitchell of his
5 guilty plea. So I'm compelled to deny the defense
6 motion.

7 MR. HERSCHKOWITZ: May I approach,
8 Your Honor?

9 THE COURT: Yes. Thank you. I'm
10 going to add in here that the court --

11 MR. HERSCHKOWITZ: (Unintelligible.)

12 THE COURT: I'm just adding in here
13 that I'm affirmatively finding that Mr. Mitchell...
14 All right. So to the language that Mr. Herschkowitz
15 drafted I just added the court affirmatively finds
16 that Mr. Mitchell's plea was made knowingly,
17 intelligently, and voluntarily. The court's remarks
18 are all incorporated into this order.

19 MR. HERSCHKOWITZ: Thank you, Your
20 Honor.

21 THE COURT: Maybe we'll get some
22 authority if this goes up on appeal. It'll be
23 interesting to see. Thank you very much, gentlemen.

24 MR. HERSCHKOWITZ: Thank you, Your
25 Honor.



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MR. HARRISON: Thank you, Your Honor.

FEMALE VOICE: All please rise.

(End of proceedings at 11:45 a.m.)

(END OF TRANSCRIPTION)



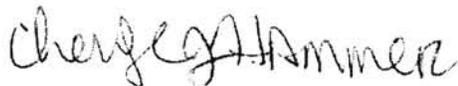
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TRANSCRIPTION CERTIFICATE

I, CHERYL J. HAMMER, the undersigned
Certified Court Reporter in and for the state of
Washington, do hereby certify:

That the foregoing transcript was
transcribed under my direction; that the transcript is
true and accurate to the best of my knowledge and
ability to hear the audio; that I am not a relative or
employee of any attorney or counsel employed by the
parties hereto; nor am I financially interested in the
event of the cause.

WITNESS MY HAND this 18th day of September
2014.



CHERYL J. HAMMER
Certified Court Reporter
CCR No. 2512
chammer@yomreporting.com



FILED

14 JUL 09 PM 3:32

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 12-1-02461-4 KNT

KING COUNTY SUPERIOR COURT
IN THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LAVELLE MITCHELL,

Appellant.

NO. 12-1-02461-4

SUPPLEMENTAL BRIEF FOR
MOTION TO WITHDRAW PLEA

TO: The Clerk of the King County Superior Court
AND TO: The King County Prosecutor's Office

I. INTRODUCTION

COMES NOW, Defendant Lavelle Mitchell, by and through his attorney of record, Mitch Harrison, respectfully moves the Court to permit Mr. Mitchell to withdraw his plea in the above-captioned case. Mr. Mitchell files this supplemental brief for his motion to withdraw plea, which was originally filed on June 19, 2013.

II. FACTS

On June 3, 2012, Carlos Pace alleged that he was robbed near a Subway restaurant at S. 160th St. and International Blvd. S. in Tukwila. Pace stated that both Lavelle Mitchell and his identical twin brother, Darnell Brown, jumped into the backseat of Pace's car, brandished guns, and ordered Pace to "skin down," which Pace interpreted to mean to hand over all his stuff.

SUPPLEMENTAL BRIEF FOR MOTION TO
WITHDRAW PLEA - 1

Mitch Harrison

Attorney at Law
101 Warren Avenue North
Seattle, Washington 98109
Tel (253) 335-2965 ♦ Fax (888) 598-1715

1 Pace said he gave the men some jewelry and one of the men removed \$60 from Pace's pocket.
2 After the men left, Pace told police he saw them get into a white Cadillac.

3 Pace's story was corroborated by Dessaria Darrett. Darrett claimed that she saw the
4 entire incident from the nearby Subway restaurant. Her story also included seeing the alleged
5 robbers drive away. Darrett even told police that after the robbery, she jumped into Pace's car
6 and a car chase ensued. This car chase allegedly continued through Seatac and Burien, and, at
7 some point, gunshots may have been fired.

8 Charm Banks also was present during the alleged robbery. Despite being in the car
9 during the entire incident, she was unable to offer any kind of identification.

10 The car chase ended when the car stopped and the two men exited the car. A Des
11 Moines police officer, Deputy Abbott, arrived and saw Pace yell to him that the two men had
12 recently jumped a nearby fence. Other responding deputies set up a perimeter.

13 A car belonging to Darnell Brown was found parked in an apartment complex parking
14 lot. The K9 unit was unable to pick up the scent of anyone who had recently exited the car. No
15 one was able to provide a description of the driver or passenger. The police eventually found
16 Mitchell and Brown. Pace identified both as the robbers.

17 Two days later, the police searched Darnell Brown's Cadillac. Although the police did
18 not find any firearms, they did find 3.2 grams of rock cocaine. The record is void of any
19 indication that Mr. Mitchell ever possessed or even had any remote connection to the drugs.

20 The State initially charged Robbery in the First Degree.¹ Later, as the result of a plea
21 bargain, the State amended the charges to a single VUCSA violation.² Mr. Mitchell pleaded
22 guilty to the VUCSA violation despite no evidence connecting Mr. Mitchell to the drugs found

23 ¹ Information.

² Amended Information.

1 in his brother's car. Although he strongly maintained his innocence regarding both the robbery
2 and the VUCSA violations, Mr. Mitchell was compelled to accept the plea deal because the
3 State had a witness to the alleged robbery, Dessaria Darrett, who all parties involved believed
4 to be credible.

5 Recently, a Facebook conversation involving Dessaria Darrett was uncovered by Mr.
6 Mitchell. *See Appendix A.* Despite his best efforts, Mr. Mitchell was unable to obtain this
7 evidence because it was not linked to his own Facebook account. In this conversation,
8 someone posts a copy of the Statement of Probable Cause and accuses Pace of being a
9 snitch. Dessaria Darrett joined the conversation in the middle, stating "This is funny because
10 as I recall I wasn't there . . ." Someone named Barbie Pace responded, "u wasn't I used your
11 name cousin FOR THE RECORD!!!!!!!"

12 III. ARGUMNET AND AUTHORITY

13 Mr. Mitchell is entitled to withdraw his plea because new evidence was discovered. CrR
14 7.(b)(2) allows the court to relieve a party from final judgment upon newly discovered
15 evidence. The rule only applies to evidence that could not have been discovered with due
16 diligence in time to request a new trial.

17 A. One-Year Time Bar

18 Mr. Mitchell is not subject to the time bar in RCW 10.73.090 because he filed a motion
19 to withdraw his plea less than four months after his Judgment and Sentence. *See Appendix B.*
20 Mr. Mitchell's Judgment and Sentence was filed on March 8, 2013, and his original motion to
21 withdraw was filed on June 19, 2013. This document is a supplement to Mr. Mitchell's original
22 motion.
23

1 Even if this motion was Mr. Mitchell's first motion to withdraw his plea, it would not
2 be subject to the one-year time bar.³ Newly discovered evidence does not trigger the one-year
3 time bar so long as the defendant acted with reasonable diligence.⁴ ✓

4 **B. Mr. Mitchell is Entitled to a New Trial Because the Newly Discovered Evidence**
5 **in this Case Satisfies the Five Factors.**

6 CrR 7.8(b)(2) allows the court to relieve a party from a final judgment for newly
7 discovered evidence. To prevail, the moving party must demonstrate that the evidence "(1) will
8 probably change the result of the trial; (2) was discovered since the trial; (3) could not have
9 been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not
10 merely cumulative or impeaching."⁵

11 First, the evidence that the State's key witness was not present to observe the robbery
12 would have changed the outcome of the trial. Mr. Mitchell strongly maintained his innocence
13 throughout the entire process. Dessaria Darrett's potential testimony was the State's strongest
14 evidence because it was the only credible verification that a robbery even occurred at all.
15 Without this testimony, the State's case would have rested solely on the alleged victim's bare
16 allegations.

17 Second, this evidence satisfies the second factor because it was only recently
18 discovered—much later than Mr. Mitchell's scheduled trial date.

19 Third, the newly discovered evidence could not have been discovered even with due
20 diligence. The Facebook conversation was instigated by someone unrelated to the case. Mr.
21 Mitchell was not part of the conversation and there is no evidence that he knew any of the

22 ³ RCW 10.73.090(2).

⁴ RCW 10.73.100(1).

⁵ *State v. D.T.M.*, 78 Wn. App. 216, 220, 896 P.2d 108 (1995); see also *In re Pers. Restraint of Faircloth*, 177
Wn. App. 161 (2013).

1 people involved in the conversation. Discovering this evidence would have taken an intensive
2 investigation into the massive amount of information on Facebook. Such a search would far
3 exceed reasonable standards of due diligence.

4 Moreover, during the time leading up to trial, Mr. Mitchell had no way to know that the
5 real Dessaria Darrett did not witness anything related to either the robbery or the VUCSA
6 charge. The person claiming to be Dessaria Darrett was inside the Subway restaurant at the
7 time of the alleged robbery, so Mr. Mitchell could not have observed her at the scene.
8 Furthermore, there is no evidence indicating that Mr. Mitchell knows Dessaria Darrett or
9 knows what she looks like. Thus, there was no way for Mr. Mitchell to know that the person
10 who "witnessed" this crime was an imposter.

11 Fourth, the Facebook conversation is highly material. The conversation reveals that the
12 State's lone disinterested witness did not witness the alleged robbery. Instead, an imposter
13 using her name claimed to see the incident. At best, it shows that person who provided
14 statements to the police seriously misled the authorities. *
(LIED)

15 Fifth, this evidence is not cumulative or merely impeachment evidence. This evidence
16 cuts out the strength of the State's case. There was scant evidence that a crime even occurred. *
17 Without a disinterested witness, the State would not have been able to use the robbery charges
18 as a negotiating chip. * VUCSA

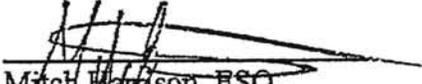
19 Mr. Mitchell only accepted a plea deal for the VUCSA charge because the State
20 threatened to charge him with First Degree Robbery. The only credible evidence to support the
21 robbery charge was the potential testimony of Dessaria Darrett, who claimed to witness the
22 entire incident from inside the nearby Subway restaurant. If Mr. Mitchell had been aware that
23 the "witness" to the robbery had misled the police through the use of a false name, he never

1 would have considered accepting a plea deal. Without the witness testimony, there was not
2 enough evidence to convict Mr. Mitchell of robbery. The State's bargaining position was
3 strengthened through deceit and grossly unreliable evidence.

4 **IV. CONCLUSION**

5 Mr. Mitchell brings a timely motion to withdraw his plea due to newly discovered
6 evidence under CrR 7.8(b)(2). Mr. Mitchell, using reasonable diligence, could not have
7 discovered this exonerating evidence before trial. Therefore, Mr. Mitchell respectfully requests
8 this court to allow him to withdraw his plea.

9 DATED July 9, 2014.

10
11 
12 Mitch Harrison, ESQ.,
13 WSBA# 43040
14 Counsel for the Appellant
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1
2 **PROOF OF SERVICE**

3 I, Kaitlyn Jackson, declare under penalty of perjury under the laws of the State of
4 Washington that the following is true and correct:

5 I am employed by the law firm of Harrison Law.

6 At all times hereinafter mentioned, I was and am a citizen of the United States of
7 America, a resident of the State of Washington, over the age of eighteen (18) years, not a
8 party to the above-entitled action, and competent to be a witness herein.

9 1. On the same day, I electronically filed with the King County Superior Court via E-filing
10 a copy of this document and proof of service.

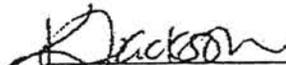
11 2. On that same day, I deposited into USPS a copy of this document and proof of service to
12 the King County Prosecuting Attorney's Office at

13 King County Prosecuting Attorney
14 Appellate Unit at Room W554,
15 516 Third Avenue
16 Seattle, WA 98104-2362

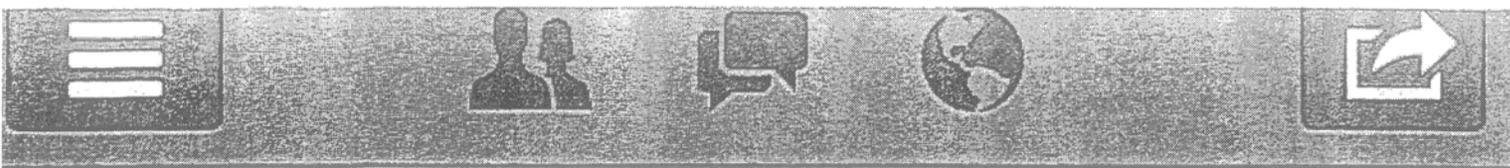
17 3. Finally, on the same day, I mailed a copy of this document and proof of service to the
18 Defendant,

19 Lavelle Mitchell

20 DATED June 9, 2014

21 
22 Kaitlyn Jackson
23

**EXHIBIT
A**



Markeisha Brown Doinme

Friday at 11:26am · 🌐

SNITCHIN ASS YEA THIS IS HIM U SEE THE NAME — with Desseria Darrett and 3 others.

indicated on the following facts and circumstances:

This investigation occurred in the City of Seattle, King County Washington. Carlos Pace is the owner of a Chevy Camaro. Darrell Brown and Lavelle Mitchell are identical twins. Brown is the new owner of a 1991 Cadillac Washington license 971WCU.

On 06/03/2012 at about 1320, Carlos Pace reported the following: He was parked at the Subway located at S 140th / International Blvd S. Chanté Blythe had just come out of the Subway and asked Carlos if he had a cigarette. While she was bending into the car she got pushed from the back into the car by a black male wearing a grey hoodie. This suspect was later identified as Lavelle Mitchell. Mitchell then sat in the passenger seat of the vehicle. Another black male wearing a blue/red/white jacket opened up the driver door and leaned inside the vehicle. This male was later identified as Darrell Brown. Carlos said that both suspects produced handguns, which they pulled out of either their pocket or waistband. Pace stated the passenger (Mitchell) had a chrome handgun and the suspect at the driver door (Brown) had a black handgun. Carlos said that he believed that both guns were real and he may be shot if he didn't do what he was told. The suspects said "Skin down" which Carlos believed it meant to give them all of his stuff. Carlos gave the suspects several pieces of jewelry from his body. One of suspects removed \$69.00 from Carlos' right pocket and they started to go through the car and a purse was later discovered missing from the back of the vehicle. Carlos said that he didn't know who it was taken from his vehicle.

Like · Comment

👍 3 💬 18



and he may be...
 skin down which Carlos believed it meant to...
 Carlos gave the suspects several pieces of jewelry from his body. One of...
 suspects... Carlos right... and they started to...
 through the... and a... was later discovered missing from the back of...
 Carlos said that he didn't know who it... from his vehicle

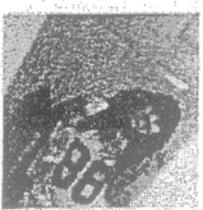
Like · Comment

👍 3 people like this.



Kidus IsPatiently Waitin
 whos that

Friday at 11:27am · Like



Markeisha Brown Doinme
 C rat Carlos

Friday at 11:29am · Like · 👍 1

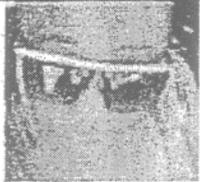
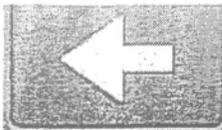


French Isa Spitta
 Awwwwwwwww shit cuzz

Friday at 11:35am · Like · 👍 1



Markeisha Brown Doinme
 ITA real im makin copys



Erica Stayready Turner

wat about the other names are they snitchin too....but this is too real now and days everyone is runnin their mouth.....thats why you do your shit by yourself that way you cant tell on yourself....real ish

Friday at 3:59pm · Like · 1



Barbie Pace

who ever got something to say or wanna go head up can see me **RIGHT NOW!!!!!!!!!!!!!!!**

Friday at 4:40pm · Like · 1



Barbie Pace

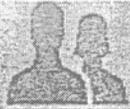
206-420-9143

Friday at 4:40pm · Like · 2



Desseria Darrett

This is funny because as I recall I



Barbie Pace

who ever got something to say or
wanna go head up can see me
RIGHT NOW!!!!!!!!!!!!!!

Friday at 4:40pm · Like · 1



Barbie Pace

206-420-9143

Friday at 4:40pm · Like · 2



Desseria Darrett

This is funny because as I recall I
wasn't there... This is cute ahahaha
smh **FAMILY**

Friday at 4:53pm · Like · 1



Barbie Pace

^^^^ u wasnt i used your name
cousin **FOR THE RECORD!!!!!!**

Friday at 4:54pm · Like · 1



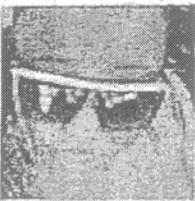
Aryanna Barquet
Dammmmmmmm

Friday at 5:09pm · Like



Killakay Bishget'offme
Kushington
its REAL ! SMFH

Friday at 5:25pm · Like · 👍 2



Erica Stayready Turner

i apologize if you feel i said it in a bad way i was just say if you are gunna do something do it by yourself and goin head up im not about that life

Friday at 6:24pm · Like



Julia Bishop

CHECK SOME RECORDS B4 U
FUCK WITH MINES REAL TALK.....

Friday at 6:25pm · Like · 👍 3

RECEIVED

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SUPERIOR COURT

FILED
KING COUNTY, WASHINGTON

JUN 19 2013

SUPERIOR COURT CLERK
BY BRENDA SMITH
DEPUTY

ORIGINAL

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

State of Washington, Plaintiff,

vs.

LAVELLE X. MITCHELL,
Defendant.

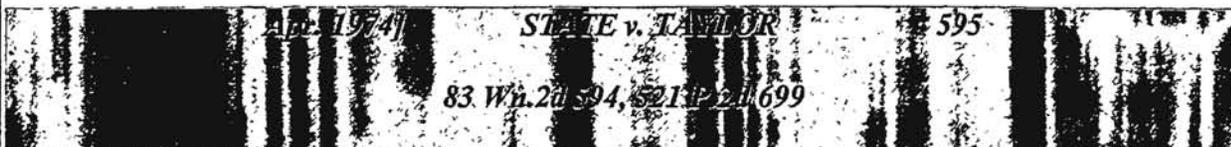
No. 12-1-02461-4 ~~KBA~~

Motion, Declaration and Notice of Intent
for an Order Allowing Defendant to
Withdraw Plea of Guilty and Plea
Agreement

I, Lavelle X. Mitchell ask the court to be:

[X] relieved from the plea agreement and guilty plea entered in the above matter as a right under CrR 4.2, and within the meaning of the holdings in State V. Taylor, 83 Wn. 2d 594, which states, in pertinent part, that *“On July 11, 1973, as a result of negotiations between defense counsel and the prosecuting attorney, defendant pleaded guilty to a reduced charge of second-degree assault. On August 7, 1973, prior to sentencing, defendant moved to withdraw his guilty plea and enter a plea of not guilty. The motion was granted August 9. The state has petitioned this court for a writ of certiorari to review the trial court's order authorizing defendant to withdraw his plea of guilty. The state's petition requires us*

1 [See Ann. 20 A.L.R. 1445, 66 A.L.R. 628; 21 Am. Jur. 2d, Criminal Law §§ 504, 505.]



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5 to interpret CrR 4.2(f), adopted as part of the new criminal rules effective July 1, 1973. 82
6 Wn.2d 1114, 1131 (1973). CrR 4.2(f) reads: The court shall allow a defendant to withdraw his
7 plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest
8 injustice. Petitioner argues that CrR 4.2(f) supersedes RCW 10.40.175 «1» and establishes a
9 singular standard against which to measure motions for the withdrawal of guilty pleas. We
10 agree.” [Stare Dices] and where justice so demands is at the point of illegal actions prior to and
11 incident to an arrest, search and subsequent seizure (in search of a weapon) of a small quantity of
12 an illegal substance when governments case for weapons possession failed to meet statutory
13 mustard, yet counsel for defendant did not attempt suppression hearing or challenge
14 governmental authority to act without “search, seizure or arrest warrant”, without the authority of
15 law within the meaning of both constitution, where the US Constitution is “supreme law” upon
16 which ultimate control rest and binds the “judges of every State” regardless of the additional
17 protection to be afforded citizens. Moreover, court must fail the “justice so demands” standard
18 because it is obvious the state was more interested in getting a plea for anything because the
19 charges originally filed, weapons and assault charges. See, Information in the record.

20
21 It is obvious that the State sought to grab at straws and did not have any
22 legal right or rights to pursue in this matter in terms of any articulable facts that would have
23 lead a reasonable person to believe that “state’s” aim was show and prove that defendant was
24 in possession of illegal substances. Moreover, such an argument by the state would also fail

1 on the specious “state’s right” rulings of court that justify illegal actions of the police based
2 upon what they find, as in this matter. However, the Court has long held, and such holdings
3 still control, that “*the fruits of a search cannot form the basis for the arrest*”, (*citation*
4 *omitted, BLACK LETTER LAW*) and subsequently entitles such a person, as this defendant,
5 charged with a crime based on what government has found incident to an unwarranted arrest,
6 search and seizure and prior to lawful arrest, search incident to that arrest or plain view
7 exception or consensual search to a suppression of such evidence and to do otherwise is
8 clearly an unlawful act within the meaning of the above and following argument and rulings
9 thereon by the Court in holding of Delaware v. Prouse, and Brown v. Texas, such that “The
10 Court held in Delaware v. Prouse that, in the absence of reasonable suspicion, it is an
11 unreasonable seizure under the Fourth Amendment for police to stop a car [or citizen] for the
12 purpose of checking the motorist's driving credentials.

13 In Brown v. Texas, the Court similarly ruled that police may not stop a person
14 without reasonable suspicion for the purpose of requiring the individual to identify him or
15 herself. These cases are grounded in the principle that in this country we enjoy the right to go
16 about our business free from government interference unless or until the police have just cause to
17 detain us. Petitioner's motion to suppress alleged that the police acted exactly as they did in
18 Prouse and Brown. They stopped the car without justification, . . .” however, in this matter we do
19 not know if the arrest, search and seizure of the alleged “controlled substance” would have been
20 suppressed as counsel did not timely make such a motion as requested to by the defendant and
21 the law. RCW 69.50 is a statute that intends to give authority to law enforcement and other law
22 agencies to act without regard for the protections of citizens’ constitutional rights under Article I,
23 Section 7 of the Washington State Constitution and under the 4th Amendment of the Constitution
24 for the United States Of America.

1 Defendant further relies upon those protections to have assistance of counsel,
2 which necessarily means "effective" assistance, in showing that citizen had a challenge to the
3 acts of government to bring about the arrest, search, seizure and prosecution all without authority
4 of law. Defendant's counsel should have made timely motion to suppress made on his behalf, his
5 client or in the alternative, at least advised the defendant that such a challenge is well within the
6 rights of every person accused under the Uniformed control substance act. Had counsel been
7 mindful of his duty owed to the defendant in a criminal case the result would have been that
8 there were no lawful charges for defendant to plea. But the very fact that the record does show
9 that defendant plead to a totally unrelated charge as just cause to grant defendant's motion to be
10 relieved of the "plea agreement" entered into in the above entitled matter, see information filed
11 in this matter which is a part of the record before the court.

12 Even if the court found that searches conducted by government for the reasons that they
13 state is sound, such reasoning cannot be after the government was on a witch hunt to find
14 something on a defendant where what he was arrested for turned out not to have been with
15 authority of law. It is a most odious position to place a defendant in when the government has
16 charged you with one offense, attempts to prosecute for the offense, only to ultimately gain a
17 "plea" of guilty of a charge that bears no resemblance to the original charge and arrest, for which
18 defendant had a right to "effective" "assistance of counsel" in informing him prior to suggesting
19 that his client simply plead guilty to some other charge and counsel did not making the
20 representation a violation of 6th Amendment of the Constitution for the United States of America
21 and is entitled to withdraw his plea of guilty if for no other reason than to present the lawful
22 manner of challenge to the government's action based upon warrantless and unauthorized
23 conduct.

1 This motion is based upon the record, the laws of Washington State, its Constitution, the
2 laws of the United States, Constitution for the United States of America and the following
3 declaration of counsel pro se Lavelle Xavier Mitchell:

- 4 1. I am the defendant in this case. I was represented by counsel but the representation was
5 not effective and resulted in me making an unknown decision about a charge that was
6 made for the first time on the day of my supposed trial for the original information, see
7 record of the case, and I am therefore appearing here pro se.
- 8 2. I did not authorize any search nor give consent at anytime before, during or after I was
9 arrested and searched without a warrant.
- 10 3. There has not been a valid challenge to the possession charge once the original gun
11 charges were dropped.
- 12 4. My counsel did not do what was in my best interest or the best interest of our due process
13 and legal standards when he refused to challenge the seizure and search with an
14 evidentiary hearing and motion to suppress prior to insisting that I take the deal being
15 offered, out of the blue.
- 16 5. I was never presented with any warrant nor did my counsel concern themselves with my
17 defense or enforcing the rights protections expressed in all criminal law cases where
18 counsel's duty is to the law or the law of the case to, at least, motion for suppression
19 where the evidence obtained was done without a warrant nor could one have issued as no
20 probable cause existed for the belief that police would find controlled substance in
21 defendant's automobile which would have allowed a court of competent jurisdiction to
22 issue a warrant for the same. Clearly, all the standard laid out for obtaining a search
23
24

1 warrant were not met and not argument can be made now, ex post facto, that it would
2 have been requested.

3 6. For all the reasons of the law, record and declaration espouse I, Lavelle X. Mitchell,
4 defendant am entitled to the relief requested as a matter of right and so that justice made
5 be shored up and cheapened with "other than the truth" reasons for allowing government
6 to violate the laws of this state and country without punishment or scrutiny.

7 I, Lavelle Mitchell, declare under the penalty of perjury for the State of Washington that the
8 above and following is true and correct. This motion is made in good faith belief that justice
9 demands the same and to assure that every citizen rights is protectable in the Superior Court of
10 Washington in and for King County, including young Black male citizens.

11 June 11, 2013

12 _____
(Date)

13 
(Signature)

14 Lavelle Mitchell

Name (Print)

15 Address: 1602 12th Avenue NW

16 Puyallup, WA 98371

17 Telephone No 206-747-0516

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CERTIFICATE OF SERVICE
(Motion to Withdraw Guilty Plea)

I certify under penalty of perjury under the laws of the State of Washington that, on the date(s) stated below, I did the following:

On the 11th day of June, 2013, I hand-delivered a copy of the foregoing **Motion to Withdraw Guilty Plea** to State of Washington, C/O King County Prosecutin Attorney, Attorney for Plaintiff, at the following address:
516 3rd Avenue S., W-554, Seattle, Washington 98104

AND/OR

On the _____ day of _____, 20____, I mailed a true copy of the foregoing **Motion to Withdraw Guilty Plea pursuant to CrR 4.2 et seq.** to _____ (Name of Plaintiff or Plaintiff's attorney), by regular U.S. mail, postage prepaid.

Dated this 11th day of June, 2013, in Seattle (City), Washington (State).


(Signature)

12-C-02460-6 KNT

CAUSE NO.

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

That Jeanne Schneider is a(n) Detective with the King County Sheriff's Office and has reviewed the investigation conducted in the King County Sheriff's case number(s) 12-128693;

There is probable cause to believe that Darnell D. Brown (10/08/1991) and Lavelle X. Mitchell (aka Lavelle Brown) (10/08/1991) committed the crime(s) of Assault 2nd degree (three counts) and Robbery 1st degree. This belief is predicated on the following facts and circumstances:

This investigation occurred in the City of Seatac, King County Washington. Carlos Pace is the owner of a Chevy Camaro. Darnell Brown and Lavelle Mitchell are identical twins. Brown is the new owner of a 1993 Cadillac, Washington license 973WJU.

On 06/03/2012 at about 1320, Carlos Pace reported the following: He was parked at the Subway located at S 160th / International Blvd S. Charm Banks had just come out of the Subway and asked Carlos if he had a cigarette. While she was bending into the car she got pushed from the back into the car by a black male wearing a grey hoodie, this suspect was later identified as Lavelle Mitchell. Mitchell then sat in the passenger seat of the vehicle. Another black male wearing a blue/red/white jacket opened up the driver door and leaned inside the vehicle. This male was later identified as Darnell Brown. Carlos said that both suspects produced handguns, which they pulled out of either their pocket or waistband. Pace stated the passenger (Mitchell) had a chrome handgun and the suspect at the driver door (Brown) had a black handgun. Carlos said that he believed that both guns were real and he may be shot if he didn't do what he was told. The suspects said, "Skin down" which Carlos believed it meant to give them all of his stuff. Carlos gave the suspects several pieces of jewelry from his body. One of the suspects removed \$60.00 from Carlos' right pocket and they started to go through the car and a purse was later discovered missing from the back driver side passenger of the vehicle. Carlos said that he didn't know who it belonged to. Carlos also had his two cell phones stolen from his vehicle.

Carlos stated that the suspects got into a white Cadillac license 973WJU. It was later learned that the Cadillac had a report of sale and King County data advised the new owner was Darnell Brown.

Another female, witness Dessaria Darrett stated that she had witnessed everything from the Subway. She witnessed the robbery and then jumped in Carlos' vehicle to help. Carlos then chased the suspects in his vehicle, calling 911 to report where he was chasing them. The chase went through Seatac, Burien, and onto the 509 freeway. During the chase, the back seat passenger in the Cadillac pointed a black handgun out of the window and

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1 started shooting several times towards Carlos' vehicle. Darrett identified
2 the shooter as either Brown or Mitchell (keeping in mind that they are
3 identical twins). Carlos said that he was afraid that he was going to be
4 shot so he ducked down, but kept following the Cadillac. Carlos said that
5 when they got to S 216/ International Blvd S, the Cadillac was in the left
6 turn lane. The back passenger door opened up and Mitchell and Brown began
7 running eastbound. Carlos followed them and was able to point the suspect's
8 general direction to the Seatac Police.

9 Charm reported that she was bending into the passenger seat of Carlos's
10 vehicle asking for a cigarette and as she was doing so she got pushed into
11 the back and somebody sits into the passenger seat and closes the door and
12 another guy came to the driver side of the car and they both had guns. Charm
13 said that the suspect's told Carlos to "come out of everything" Charm said
14 both suspects had on hoods but she couldn't remember what they were wearing.
15 The suspects took his jewelry and as they left, another girl came up to the
16 car and asked if they were ok. The other female got into the passenger seat
17 and called 911 as they were driving. Charm said that they chased the suspect
18 vehicle everywhere passed some schools, over a bridge and on the freeway.
19 Charm said that she heard a gunshot but she didn't remember exactly where
20 they were at. Charm said that she didn't see the gun but heard the pop and
21 ducked her head down in the car. At a light across from 7-11, Charm saw the
22 two suspects jump out of the car and ran towards the 7-11. Charm said that
23 Carlos was now chasing the suspects that were on foot. Charm said that she
24 never got a look at the driver or passenger of the vehicle. Charm said that
25 she had heard 3-4 shots and that most of them happened while they were
driving.

Deputy Abbott and a Des Moines PD Officer arrived in the area of 21700 BLK of
29 AVE S. Deputy Abbott was flagged down by Carlos who was pointing wildly
to the west at a fence. Carlos yelled out, "they just jumped the fence; they
are twins". Deputy Abbott advised radio that two suspects had jumped the
fence and were westbound. Numerous other Deputies arrived in the area and
set up a containment perimeter.

Deputies found Brown's vehicle parked unoccupied in the area of 3059 S 224th
Street, in a small apartment complex. K9 arrived a short time later but was
unable to pick up a scent of where the other occupants had fled too. No one
could provide a description driver and front passenger, who are still
outstanding and unidentified at this time. Deputies did find and detain
identical twins Mitchell and Brown.

Deputy Abbott transported Carlos to where the Mitchell and Brown were each
separately detained. Carlos positively identified both of them saying, "Yep,
that's him too they both had the guns."

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1 Mitchell was arrested with the grey hoodie and Brown was arrested with the
2 blue/red/white jacket.

3 Sgt McCurdy read Brown Miranda Warnings which he said he understood. Brown
4 admitted that he had a gun on his lap but that it probably fell somewhere by
5 the car. An evidence search was conducted by K9 and officers but no guns
6 were recovered. Darnell Brown and Lavelle Mitchell were later transported to
7 SeaTac City Hall and refused further statements.

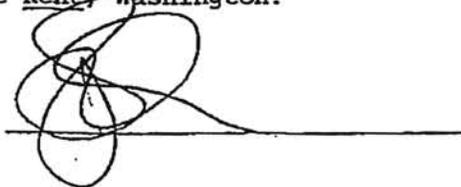
8 On 6/4/12, I obtained a search warrant to search the Brown's white Cadillac.
9 Inside of the glove box, I found a white nylon Uncle Mike's gun holster. I
10 found Lavelle Mitchell's wallet with his ID inside of a pair of jeans in the
11 trunk. I found a handwritten report of sale stating the Darnell Brown bought
12 the vehicle. I also found 3.2 grams of suspect rock cocaine. Each rock was
13 individually packaged in individual plastic bindles. I tested the cocaine
14 with Narcokit 7613 and it tested positive for cocaine. I did not find any
15 firearms or casings in the vehicle.

16 On 6/5/12, I interviewed witness L Dashiell. She said that she was the
17 passenger with her husband on highway 509 driving north. She first noticed
18 two vehicles driving erratically on the shoulder lane ahead of them. She
19 thought that they were perhaps racing and that a Camero appeared to be
20 pursuing a white Cadillac. The Cadillac was breaking hard. She estimated
21 their speeds were at first 100 mph. At the S 128th exit on 509, both cars
22 were on the shoulder. A black male wearing a white t shirt was hanging out
23 of the left rear car window. Dashiell said that the male appeared to be
24 holding a silver colored gun and that he was pointing it at the Camero.
25 Dashiell said that her husband drove past the cars and that she continued to
watch. She said that the way the male was waving the gun made her think that
he was firing, but she wasn't sure if he fired or not. Dashiell noticed a
female driver and got a sense there was a front passenger in the Cadillac as
well. The Camero had tinted windows and Dashiell did not see the occupants
very well. She said that she thought that there was a male driver and a
female passenger in the Camero.

Mitchell is documented as a 31 (trey-one) Black Gangster Disciple with
Federal Way P.D. as of December 2008.

Under penalty of perjury under the laws of the State of Washington,
I certify that the foregoing is true and correct. Signed and dated
By me this 5th day of June, 2012, at Kent, Washington.

LODI
JUN 05 2012
RJC



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