

original

COURT OF APPEALS
DIVISION II

07 APR 20 PM 1:13

STATE OF WA
BY Emm
Clerk

NO. 35345-8-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

ZACHARY H. MERIDIETH,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Wm. Thomas McPhee, Judge
Cause No. 05-1-01683-7

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
PATRICIA A. PETHICK, WSBA 21324
Attorneys for Appellant

P.O. Box 510
Hansville, WA 98340-0510
(360) 638-2106

PM 4/19/07

TABLE OF CONTE

	<u>Page</u>
A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
C. STATEMENT OF THE CASE.....	1
D. ARGUMENT.....	10
01. THE TRIAL COURT ERRED IN DENYING MERIDIETH’S MOTION FOR ARREST OF JUDGMENT/NEW TRIAL BY HOLDING THAT THE THE AUTOMATIC MANDATORY DECLINE WAS VALID WHERE THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL THAT MERIDIETH COMMITTED THE CRIME OF RAPE OF A CHILD IN THE FIRST DEGREE AFTER HE TURNED 16 YEARS OLD	10
02. MERIDIETH WAS PREJUDICED AS A RESULT OF HIS COUNSEL’S FAILURE TO TIMELY OBJECT THAT THE AUTOMATIC MANDATORY DECLINE WAS INVALID	15
E. CONCLUSION.....	17

TABLE OF AUTHORITIES

Page(s)

Washington Cases

State v. Early, 70 Wn. App. 452, 4853 P.2d 964 (1993), review denied,
123 Wn.2d 1004 (1994) 15

State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969) 15

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 14

State v. Leavitt, 49 Wn. App. 348, 743 P.2d 270 (1987), aff'd,
111 Wn.2d 66, 758 P.2d 982 (1988)..... 16

State v. Lindsey, 194 Wash. 129, 77 P.2d 596 (1938)..... 12

State v. Roberts, 117 Wn.2d 576, 817 P.2d 855 (1991) 14

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994)..... 10

State v. Tarica, 59 Wn. App. 368, 798 P.2d 296 (1990)..... 16

State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) 12

State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972) 15

State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981) 10

State v. Williamson, 100 Wn. App. 248, 996 P.2d 1097 (2000)..... 11

Federal Cases

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct.
1602 (1966) 4

//

//

Statutes

RCW 9A.44.073 2

RCW 9A.44.083 2

RCW 13.04.030..... 11, 12, 13, 14

A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Meridieth's motion for arrest of judgment/new trial.
02. The trial court erred in permitting Meridieth be represented by counsel who provided ineffective assistance by failing to timely object that the automatically mandatory decline was invalid.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in denying Meridieth's motion for arrest of judgment/new trial by holding that the automatic mandatory decline was valid where there was insufficient evidence presented at trial that Meridieth committed the crime of rape of a child in the first degree after he turned 16 years old? [Assignment of Error No. 1].
02. Whether the trial court erred in permitting Meridieth be represented by counsel who provided ineffective assistance by failing to timely object that the automatically mandatory decline was invalid? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Zachary H. Meridieth (Meridieth) was charged by third amended information filed in Thurston County Superior Court on July 10, 2006, with eight counts of rape of a child in the first degree,

counts I-IV and IX-XII, and eight counts of child molestation in the first degree, counts V-VIII and XIII-XVI, contrary to RCWs 9A.44.073 and 9A.44.083. [CP 88-91]. Each count alleged the same period between August 1, 2002 and August 31, 2004, with counts I-IV and V-VIII naming B.A.C. (DOB 04/13/1994) as the victim and counts IX-XII and XIII-XVI naming A.N.S. as the victim. [CP 88-91].

The court denied Meridieth's CrR 3.5 motion to suppress and entered findings and conclusions to that effect. [RP 03/06/0651-52; CP 70-74].

Trial to a jury commenced on July 6, 2006, the Honorable Wm. Thomas McPhee presiding. Neither exceptions nor objections were taken to the jury instructions. [RP Trial Vol. 4 653].

On July 12, 2006, the jury returned verdicts of guilty as charged on counts I-III, V-VII, IX-XI, XIII-XV and not guilty on the remaining counts. [CP 123-138].

On August 11, the court extended the time for filing Meridieth's motions for arrest of judgment under CrR 7.4 and for a new trial under CrR 7.5, although both motions were filed and served beyond 10 days after the verdicts were rendered. [RP 08/11/06 19]. Both motions were ultimately denied. [09/14/06 26].

Meridieth was sentenced within his standard range and timely notice of this appeal followed. [CP 209-222].

02. Substantive Facts: CrR 3.5 Hearing

On August 31, 2005, Detective Susan Bergt, accompanied by Deputy Sean Solomon, went to Meridieth's residence with the intent to place him under arrest. [RP 03/06/06 18, 27-29].

We went to the door, and everybody came to the door at the same time, and I asked to speak with Zach Meridieth, and Zach identified himself. He stepped forward, and I told him he was under arrest and asked him - - and told him why he was under arrest and asked him to step over towards Deputy Solomon.

[RP 03/06/06 30].

Bergt, who never entered the residence [RP 03/06/06 30], explained that Meridieth's father became upset when she informed him that "he could not go with me and that I was going to be taking Zach down to the Thurston County Youth Services Center." [RP 03/06/06 32].

(A)fter he demanded to go with me again, I told him again he could not. I said if he wanted to go down to the juvenile division, he could, but he could not come inside, and he walked back into the house and got a coat and then kind of pushed past all of us and got on his motorcycle and sped out of the parking area.

[RP 03/06/06 32].

Solomon transported Meridieth, who was 17 at the time, to the detention center and then left when Meridieth and Bergt went to the

interview room, where Bergt advised Meridieth of his Miranda¹ rights, including his juvenile warnings. [RP 03/06/06 21-23, 33-36]. Meridieth agreed to speak with Bergt and, after initially saying it wasn't true, informed her that

it was true and that he admitted to putting his mouth on her breasts, putting his finger in their vaginas - - his mouth on their breasts and then his penis between their legs but not inside the vagina.

[RP 03/06/06 37].

After again being advised of and waiving his Miranda rights, Meridieth agreed to give a tape-recorded statement, wherein he again admitted to sexually assaulting B.A.C. and A.N.S. [RP 03/06/06 37-39].

Then he started to cry, and he told me that his mom and his family was going to hate him and he didn't know how he was going to be able to tell them what happened. And so I offered to call his mom and talk to his mom for him.

[RP 03/06/06 40].

Meridieth thought it would be better if he called his mom, which he did.

He told his mom that he admitted to what he had done and that he had kissed the girls and that he had put his finger in their vagina and that he put his penis between their legs but not inside.

[RP 03/06/06 41].

¹ Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

Meridieth then called another person by the name of Bonnie and told her the same thing. [RP 03/06/06 41].

Bergt asserted that at no time prior to reading Meridieth his Miranda rights at the detention center had she talked to him about his case. [RP 03/06/06 41-42].

03. Substantive Facts: Trial

03.1 Counts I-III: Rape of Child in the First Degree and counts V-VII: Child Molestation in the First Degree, Relating to B.A.C.

B.A.C. (DOB 04/13/94), the cousin of Meridieth and A.N.S., testified that Meridieth had touched her vagina and breasts with his “private part, his hands (and) his mouth(,)” in addition to having her touch his private place with her hands, which caused white stuff to come out. [RP Trial Vol. 1 105-6, 108, 110, 112-13]. B.A.C. remembered that Meridieth had licked her vagina both inside and outside, had touched inside her vagina with his private place once, had touched her breasts ten or twelve times, had put his penis in her mouth, and had touched inside her vagina with his hands four or five times. [RP Trial Vol. 1 112-115, 152-53, 156]. Meridieth told her he would kill her if she told anyone. [RP Trial Vol. 1 115]. When interviewed by Meridieth’s counsel prior to trial, B.A.C. initially said Meridieth said nothing to her, but after a verbal interruption in the question by the prosecutor, B.A.C. gave the

answer that Meridieth would kill her and A.N.S. if they told anyone. [RP Trial Vol. 3 581-82].

During cross-examination, B.A.C. acknowledged that she had previously indicated that the sexual occasions with Meridieth had occurred as many as 25 times: "I was just guessing because I don't quite remember exactly." [RP Trial Vol. 1 121-22]. B.A.C. added that there were approximately 10 encounters in her bedroom and "(a)t least six" in A.N.S.'s bedroom. [RP Trial Vol. 1 123]. She also claimed that Meridieth had put his penis in her mouth but not in her butt, and had no memory of stating otherwise to Detectives Bergt or Casebolt. [RP Trial Vol. 1 122]. B.A.C. also had no memory of telling her friend Jennifer that the contact with Meridieth had happened about five years previous. [RP Trial Vol. 1 151].

During redirect, B.A.C. admitted that it was hard to remember how many times Meridieth had touched her but it was "(p)robably" more than she could count. [RP Trial Vol. 1 157-58]. She also acknowledged that the events occurred about three years ago. [RP Trial Vol. 1 158]. The medical examination of B.A.C. was normal. [RP Trial Vol. 2 243].

Michelle Meridieth, Meridieth's mother, received a telephone call from her son from the juvenile facility after he had been taken into custody. [RP Trial Vol. 2 310]. He was crying and saying that everyone

was going to hate him and admitted to touching B.A.C. [RP Trial Vol. 2 311-313].

Bonnie Meridieth, Meridieth's aunt, also received a telephone call from her nephew on August 31, 2005. [RP Trial Vol. 2 316]. He said he had done something with B.A.C., something of a sexual nature. [RP Trial Vol. 2 316-18].

03.2 Counts IX-XI: Rape of Child in the First Degree and counts XIII-XV: Child Molestation in the First Degree, Relating to A.N.S.

A.N.S. (DOB 09/13/93) testified that Meridieth had touched her vagina and breasts with his hands and mouth and penis, in addition to having her touch his penis with her hands, which caused white stuff to come out. [RP Trial Vol. 1 187, 191]. A.N.S. also remembered that Meridieth had licked her vagina three times inside and three times outside, had put his penis in her mouth once and in her vagina twice and had touched her vagina mostly inside with his hands more than three times. [RP Trial Vol. 1 188-191]. These events started when she was going into the fourth grade while she was living at the Prine Villa Apartments, where she had moved to in April 2004. [RP Trial Vol. 1 164, 175, 193, 197]. Meridieth stopped abusing her "(a)t the end of the fourth grade." [RP Trial Vol. 1 197]. Meridieth also threatened to kill her and

B.A.C. "if we told anybody." [RP Trial Vol. 1 195]. The medical examination of A.N.S. was normal. [RP Trial Vol. 2 252].

Michelle Meridieth, Meridieth's mother, received a telephone call from her son from the juvenile facility after he had been taken into custody. [RP Trial Vol. 2 310]. He was crying and saying that everyone was going to hate him and admitted to touching A.N.S. [RP Trial Vol. 2 311-313].

Bonnie Meridieth, Meridieth's aunt, also received a telephone call from her nephew on August 31, 2005. [RP Trial Vol. 2 316]. He said he had done something with A.N.S., something of a sexual nature. [RP Trial Vol. 2 316-18].

Detective Susan Bergt testified consistent with her CrR 3.5 testimony and the tape-recorded statement she took from Meridieth was played to the jury. [RP Trial Vol. 2 336-362; State's Exhibits 7 and 10; CP 37-43].

A.N.S. told Tami Baker, a neighbor, that Meridieth "didn't really do anything, but she had to keep it going for her mom and her - - and (B.A.C.)." [RP Trial Vol. 3 477, 483].

//

//

//

03.3 Testimony of Zachary Meridieth Relating to All Counts

Eighteen-year-old Zachary Meridieth (DOB 05/25/88) explained that he had never been alone in any room or bedroom with B.A.C. and A.N.S. [RP Trial Vol. 4 601, 610]. On the day of his arrest, August 31, 2005, he claimed that he “had two football practices, and (had) just got home.” [RP Trial Vol. 4 613]. Before he was contacted by the police, he received a telephone call from B.A.C.’s father asking him if he had “ever did anything to these girls, and I denied it, said no, nothing had ever happened.” [RP Trial Vol. 4 616]. It was hot and he had not eaten at the time Detective Bergt arrived at his house. [RP Trial Vol. 4 613].

Once at the juvenile center, he initially “denied everything” when confronted with the allegations. [RP Trial Vol. 4 619]. He explained the reason for his subsequent admissions in this manner:

Because I was scared - - I wanted to go home - - and hungry. I hadn’t had anything to eat. And I stunk, because I hadn’t taken a shower. That’s about it.

[RP Trial Vol. 4 621].

If I admitted these things, I thought that, since before I had another case and the cops came to my house, asked me questions and everything, and I told them, and they left. They let me stay at the house. So I thought if I told her what she wanted to hear, I could call my parents and have them come pick me up.

[RP Trial Vol. 4 622]

When Meridieth called his mother, he told her he had done something “because Detective Berg was standing in the room, and I didn’t want to mess any of the stories up.” [RP Trial Vol. 4 623]. “Because (Detective Bergt) was in the room, and I told her this thing. I didn’t want to tell my parents something else.” [RP Trial Vol. 4 623].

Meridieth denied he had ever done anything of a sexual nature with either B.A.C. or A.N.S. [RP Trial Vol. 4 623-24].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN DENYING MERIDIETH’S MOTION FOR ARREST OF JUDGMENT/NEW TRIAL BY HOLDING THAT THE THE AUTOMATIC MANDATORY DECLINE WAS VALID WHERE THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL THAT MERIDIETH COMMITTED THE CRIME OF RAPE OF A CHILD IN THE FIRST DEGREE AFTER HE TURNED 16 YEARS OLD.

A trial court’s decision on a motion for arrest of judgment/new trial is reviewed under the abuse of discretion standard. State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981); State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). An abuse of discretion

occurs when a trial court makes a decision not supported by law. State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000).

On September 1, 2005, Meridieth, who was 17 years old at the time, was automatically declined to Thurston County Superior Court for trial as an adult under RCW 13.04.030(1)(e)(v)(C) for offenses of rape of a child in the first degree, allegedly committed sometime between August 1, 2003 and August 31, 2004. [CP 180, 187-88]. As Meridieth had turned 16 years of age on May 25, 2004, the charging period encompassed 98 days after which he had attained this age.

RCW 13.04.030(1)(e)(v)(C) provides that mandatory decline is proper for the charge of rape of a child in the first degree when “(t)he juvenile is sixteen or seventeen years old on the date the alleged offense is committed...” Under former RCW 13.04.030(1)(e)(v), however, which was effective until July 24, 2005, mandatory decline was proper solely on the fact that the 16 or 17 year old juvenile was charged with the requisite crime, without proof of the amended requirement “on the date the alleged crime was committed.”

Given that Meridieth was not automatically declined until September 1, 2005, some 38 days after the July 24 amendment to the above statute, he was subject to the amended statute and the additional requirement of proof that he was 16 or 17 years of age when the offense

was committed. See State v. Lindsey, 194 Wash. 129, 77 P.2d 596 (1938); State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Yet, as acknowledged by the trial court, Meridieth was automatically declined under the former version of RCW 13.04.030(1)(e)(v) and the “old form of the order was used [RP 09/14/06 19](,)” solely on the basis of age, with no thought given as to whether the alleged offense was in fact committed when he was 16 or 17 years old.

Meridieth was charged, in part, with eight counts of rape of a child in the first degree, which were equally divided between B.A.C. and A.N.S. [CP 88-91]. He was acquitted of one count for each victim and found guilty on the remaining six counts. [CP 123-26, 131-34].

The cornerstone of Meridieth’s motion for arrest of judgment/new trial was that the court lacked jurisdiction since the automatic mandatory decline was faulty because there was insufficient evidence presented at trial that Meridieth committed the crime of rape of a child in the first degree after he turned 16 years old on May 25, 2004, a period covering the last 98 days of the charging period of some 761 days from August 1, 2002 to August 31, 2004. The testimony at trial was essentially silent as to when the crimes were committed, other than sometime within the charging period.

During redirect, B.A.C. confirmed that the events occurred about three years ago. [RP Trial Vol. 1 158]. Seeing as she testified on July 6, 2006, this would fix the date of the offenses sometime around July 2003, well short of the cutoff date of May 25, 2004, Meridieth's sixteenth birthday. Similarly, the best A.N.S. could offer was that the abuse stopped "(a)t the end of the fourth grade." [RP Trial Vol. 1 197]. As she had sometime during the last year completed the sixth grade before also testifying on July 6 [RP Trial Vol. 1 180], this would fix the date of the offenses relating to her at sometime in 2004, which is further muddied by the fact that Meridieth was acquitted of one count of rape involving A.N.S. [CP 134] and the lack of any evidence that the last act of abuse was the qualifying act of rape.² At "the end of the fourth grade" does not mean she had completed the grade. In this context, A.N.S.'s testimony was vague. There was no evidence presented that the last act, whatever it was, occurred on the last day of school, whenever that was, or the last week of school or anything like that. No proof was offered on this.

Under RCW 13.04.030(1)(e)(v)(C), the State had the burden to prove that the alleged offenses of rape were "committed" when Meridieth was "sixteen or seventeen years old(,)" which, again, in this case translates

² Meridieth was also convicted of six counts of child molestation in the first degree, an offense not subject to automatic mandatory decline under RCW 13.04.030(1)(e)(v). The convictions were equally divided between the two victims [CP 127-29, 135-37].

to after May 25, 2004. In denying Meridieth's motion for arrest of judgment/new trial, the trial court ruled that proof that a rape was committed after Meridieth's sixteenth birthday "need not be persuasive evidence. It need not be evidence beyond a reasonable doubt." [RP 09/14/06 22]. That seems dubious, given that in reviewing the sufficiency of the evidence in a criminal case, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). No less pertinent to this point is the language of RCW 13.04.030(1)(e)(v), which dictates that automatic mandatory decline is proper only when the juvenile is at least sixteen years old on the date the "offense is committed." [Emphasis added]. And the rule of lenity applies here, requiring this court to construe the statute strictly against the State and in Meridieth's favor. See State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991).

The trial court erred in denying Meridieth's motion for arrest of judgment/new trial, holding that the automatic mandatory decline was valid. In so doing, the court offered a "final conclusion" that to rule otherwise "would almost certainly preclude retrial of any of the counts because of double jeopardy(,)" before adding that he "need not decide

that, because we don't get to that issue today." [RP 09/14/06 26].

Accordingly, this court should remand to give the trial court the opportunity to so rule.

02. MERIDIETH WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO TIMELY OBJECT THAT THE AUTOMATIC MANDATORY DECLINE WAS INVALID.³

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

³ While it has been argued in the preceding section of this brief that this issue was properly raised, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court determine that counsel for Meridieth failed to timely object that the automatic mandatory decline was invalid and thus waived the issue, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to the validity of the automatic mandatory decline, and had counsel done so, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to timely object, Meridieth would not have been tried and convicted in superior court.

Counsel's performance was deficient for the reasons previously argued herein, which was highly prejudicial to Meridieth, with the result

that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions and remand.

E. CONCLUSION

Based on the above, Meridieth respectfully requests this court to reverse his conviction and remand consistent with the arguments presented herein.

DATED this 19th day of April 2007.

Respectfully submitted,

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

COURT OF APPEALS
WASH. STATE

07 APR 20 PM 1:49

CERTIFICATE

STATE OF WASHINGTON
DEPUTY

I certify that I mailed a copy of the above brief by depositing it in
the United States Mail, first class postage pre-paid, to the following people
at the addresses indicated:

Jim Powers	Zachary Meridieth #896450
Senior Deputy Pros Atty	Clallam Bay Corrections Center
2000 Lakeridge Drive S.W.	1830 Eagle Crest Way
Olympia, WA 98502	Clallam Bay, WA 98326

DATED this 19th day of April 2007.

Thomas E. Doyle
Thomas E. Doyle
Attorney for Appellant
WSBA No. 10634