

No. 38015-3-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

~ vs. ~

NICHOLAS D. HACHENEY,
Appellant.

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
BY [Signature] DEPUTY

FILED
COURT OF APPEALS
DIVISION II

On Appeal from the Kitsap County Superior Court
The Hon. Anna Laurie, Judge

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A. ASSIGNMENTS OF ERROR

1. Nicholas Hacheny assigns error to the entry of the judgment and sentence in this case.

2. The sentencing court abused its discretion by failing to consider the fact that Mr. Hacheny refused a very favourable plea deal offered as evidence of his integrity and good character, especially where most of the State's sentencing presentation was an attack on his character and where the State argued that Hacheny deserved the maximum possible sentence, in part, because he demonstrated an aggravated lack of remorse.

B. ISSUE RELATED TO ASSIGNMENTS OF ERROR

Whether the sentencing court erred by refusing to consider evidence of Mr. Hacheny's consistent claim of innocence—even in the face of an extremely favorable plea offer—when that evidence was offered to rebut an attack on Hacheny's character and claimed lack of remorse advanced by the State?

C. STATEMENT OF THE CASE

This is the second appeal in this case. Because Hacheny appeals only from his resentencing, his discussion of the facts from trial is limited.

Dawn Hacheny's deceased body was found after a fire destroyed part of the Hacheny home. Nicholas Hacheny, who has consistently maintained his innocence, was charged, tried, and convicted of her murder. Hacheny appealed, raising several issues. The Washington Supreme Court granted review and reversed Hacheny's conviction for aggravated murder based on the insufficiency of the State's proof that Dawn was murdered in the course of arson. 160 Wash.2d 503, 158 P.3d 1152. Thus, the Court remanded for "resentencing without consideration of the improper aggravating circumstance." 160 Wn.2d at 524.

Hacheny was resentenced on June 20, 2008. Mr. Hacheny has no criminal history. Therefore, his "standard range" was 240-320 months. The State argued the crime "demanded" 320 months—the top of the standard range. In support of its recommendation, the State asserted (through both the prosecutor and a witness) that

Hacheny was a cold- blooded, remorseless killer; a man whose true, evil nature was at odds with his public persona. *See* RP 6, 17-18 (characterizing Hacheny as possessing “an egregious lack of remorse”).

In response to this line of attack, defense counsel attempted to demonstrate that Hacheny was not remorseless, but instead had consistently asserted his innocence, even when presented with the option of pleading guilty to a lesser sentence—one that he would have served in its entirety. RP 20. In response, the State objected to the court’s consideration of “any plea negotiations that were conducted.” RP 20. The trial court sustained the State’s objection, refusing to consider the facts. RP 21.

The Court then sentenced Hacheny to 320 months in prison, to “be followed” by 24 to 48 months of community custody. RP 26.

Hacheny filed a timely notice of appeal from the entry of the new judgment.

D. ARGUMENT

The Trial Court Abused Its Sentencing Discretion by Failing to Consider Defense Evidence Offered to Rebut the State's Attack on his Character.

After a blistering attack on his character during the State's sentencing presentation, the defense attempted to counter this unfair portrait. One critical piece of evidence it offered in support of the defense claim that Mr. Hacheney was not remorseless, but instead had consistently acted with integrity was the fact that Mr. Hacheney maintained his innocence in the face of an extremely favorable pre-trial plea offer—7 years in prison reduced from (what was then) life. The defense further offered this information as a dramatic contrast to the position the State was now taking in court. RP 19. The State objected. RP 20. In response, the Court indicated that it would not *consider* any facts related to “plea negotiations that took place” in determining the appropriate sentence. RP 21.

The trial court erred. Because the trial court refused to consider relevant evidence, Hacheney is entitled to be resentenced. *See United States v. Mylor*, 971 F.2d 706, 707-08 (11th Cir. 1992) (resentencing required because the sentencing court precluded

defense attorney from addressing a claim advanced by probation officer that defendant should receive an increased sentence).

In contrast to the sentencing court's refusal to consider relevant information about Hacheney in determining his sentence, RCW 9.94A.500(1) provides:

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

Thus, the legislative mandate is extremely broad, and is similar to the Eighth Amendment requirement in capital cases to consider any information about the person about to be sentenced, his background, and the circumstances that led up to conviction. *See e.g., State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984) (Eighth and Fourteenth Amendments require presentation and consideration of any aspect of a defendant's character offered in support of requested sentence).

Here, not only was the evidence proffered by Hacheney relevant and admissible, it was offered to rebut evidence advanced

by the State—evidence which it suggested justified the maximum possible sentence. Silence in the face of the State’s accusations could easily have been misinterpreted as acquiescence. *See State v. Blunt*, 118 Wn. App. 1, 10, n. 13, 71 P.2d 657 (2003) (citing cases where defendant’s silence at sentencing was used as evidence of lack of remorse). Hacheney offered this evidence to rebut a claim advanced by the State. There is no question that, under these circumstances and for the purpose it was offered, that the evidence was relevant.

However, it is also clear that the sentencing court refused to *consider* the evidence. RP 21 (“I don’t feel it is relevant....”). Thus, while Hacheney was precluded from offering additional facts or arguments on this subject, his focus here is on the sentencing court’s refusal to consider the evidence at all. *See e.g., Tennard v. Dretke*, 542 U.S. 274, 285, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (holding that, in Eighth Amendment context, sentencing authority must not hear evidence, but must also be permitted to *consider* and give it effect). And, although Hacheney received a standard range sentence, he is entitled to challenge the procedure (*i.e.*, the refusal of the

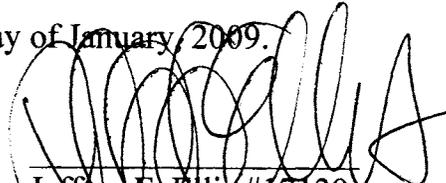
sentencing court to consider relevant information), even though his sentence is within the court's discretion. *State v. Mail*, 121 Wn.2d 707, 854 P.2d 1042 (1993).

RCW 9.94A.530(2) further provides that on remand from an appeal, the parties shall have the opportunity to present *and* "the court to consider" any relevant evidence. Here, it is readily apparent that the sentencing court refused to consider relevant information. Because the trial court refused to consider relevant information in determining what sentence to impose, Hacheney is entitled to be resentenced without any additional showing of prejudice. This is a structural error. *See e.g., Nelson v. Quarterman*, 472 F.3d 287, 337 (5th Cir. 2006) (Dennis, J. concurring) (explaining that the failure to consider evidence relevant to a sentencing determination constitutes a structural error and is not susceptible to harmless error analysis).

E. CONCLUSION

Based on the above, this Court should reverse and remand this case to Kitsap County Superior Court for a new sentencing hearing

DATED this 5th day of January, 2009.



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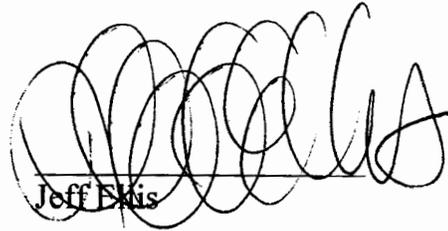
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CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on January 2, 2009, I served the party listed below with a copy of the attached *Opening Brief* by mailing it, postage pre-paid to:

Randall Avery Sutton
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Port Orchard, WA 98366

1/2/09 Seattle, WA
Date and Place



Jeff Ellis

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AMENDED CERTIFICATE OF SERVICE

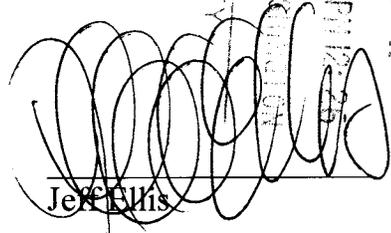
I, Jeff Ellis, certify that on January 5, 2009, I served the party listed below with a copy of the attached *Opening Brief* by mailing it, postage pre-paid to:

Randall Sutton
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I further certify that on that same day, I also served the Appellant with a copy of the brief by mailing it to:

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1/5/09 Seattle, WA
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Jeff Ellis