

NO. 41130-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON LAINE,

Appellant.

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

The Honorable George Wood, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied a timely trial in violation of article I, section 22 of Washington's constitution and the Sixth Amendment.

2. The court abused its discretion in denying appellant's request for a drug offender sentencing alternative (DOSA).

3. Defense counsel was ineffective in failing to cite the correct law and remaining community custody time in arguing for a DOSA.

Issues Pertaining to Assignments of Error

1. Was appellant denied his constitutional right to a speedy trial when numerous delays, many of them over his strenuous objection, led to his spending eight months incarcerated before trial and, as a result, the court denied him a drug offender sentencing alternative because not enough time remained in his sentence?

2. A court abuses its discretion when its decision is based on an erroneous understanding of the law or an untenable factual basis. Did the court abuse its discretion when it denied appellant's request for a DOSA because it erroneously believed the maximum term under the DOSA was 12 months leaving only three to four months remaining for community custody after credit for time served?

3. Was appellant denied his constitutional right to effective assistance of counsel when his attorney requested a DOSA but then failed

to cite the statutory language and the correct amount of time that would remain for appellant to serve on community custody and treatment?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Clallam County prosecutor charged appellant Johnathon Laine with second-degree taking a motor vehicle without permission, second-degree theft, and making a false or misleading statement to a public servant. CP 160-61. The court dismissed the false statement charge and the jury found Laine not guilty of theft. CP 17, 53. The jury found him guilty only of taking a motor vehicle. CP 54. The court denied Laine's new trial motion and his request for a DOSA, imposing a standard range sentence of 26 months. CP 10, 18; 8RP 21. Notice of appeal was timely filed. CP 14.

2. Substantive Facts

a. Facts Leading Up to Arrest

Laine met his friend Kenya Montgomery at a New Year's Eve party on December 31, 2009. 5RP 72-73. Sometime the next day, they left the party after drinking and using methamphetamine. 5RP 73. Montgomery mentioned his car was at his mother's and suggested they get it so they would not have to walk. 5RP 74.

They walked to the home of Montgomery's aunt, who drove the pair to his mother's, where Montgomery's aunt handed the keys to Laine. 5RP

76-77. He testified she did not state any conditions on his use of the car. 5RP 77. Over the course of the day, the pair visited a casino and a home where Montgomery bought more methamphetamine. 5RP 79-80. Both Laine and Montgomery consumed methamphetamine, and Laine noted Montgomery was acting strangely. 5RP 81-82.

Later that day, Laine testified Montgomery sold him the 2004 Mustang automobile for \$500. 5RP¹ 88-89. Laine testified Montgomery told him the car was his, although he was not allowed to drive it because he did not have a license. 5RP 91, 124. Montgomery agreed Laine could take the car immediately in exchange for \$150 cash and a promise to pay the rest in a month or so. 5RP 89-90. It appeared the sale was prompted by Montgomery's desire to buy methamphetamine; he had already attempted to borrow money from his aunt, who refused. 5RP 86.

After the sale, Laine took Montgomery to the store, and on the way back to his aunt's, the pair ran into Laine's younger brother Shane Lewallen. 5RP 91, 93. Lewallen testified Laine announced he had just bought the car, and Montgomery did not contradict him. 5RP 135. Lewallen also testified Laine asked Montgomery for permission to take his brother home, and Montgomery consented. 5RP 136. Laine left Montgomery at the "house

¹ There are eight volumes of Verbatim Report of Proceedings, referenced as follows: 1RP – May 7, 2010; 2RP – June 14, 2010; 3RP – June 15, 2010; 4RP – July 19, 2010; 5RP – July 20, 2010; 6RP – July 21, 2010; 7RP – July 30, 2010; 8RP – Aug. 26, 2010.

between the bridges” and took his brother to the store before returning to pick up Montgomery. 5RP 94. Then, Laine and Montgomery consumed more methamphetamine before passing out at a friend’s house. 5RP 95.

The next morning, Laine and Montgomery returned to his mother’s house, where Montgomery’s mother argued with him, pointed at Laine and said, “Tell him to park your car across the street and get the hell out.” 5RP 96. Instead, Montgomery got in the car, told Laine everything was fine, and the pair returned to Montgomery’s aunt’s home. 5RP 96. Once there, they smoked methamphetamine in Montgomery’s room, and Montgomery was acting so strangely, Laine even mentioned it to his aunt. 5RP 97-98.

Laine told Montgomery and his aunt that he would be leaving in the morning to look for work. 5RP 99, 101. The aunt agreed Laine could stay the night and offered him food, and asked him to move his car in case she needed to leave. 5RP 101.

The next morning, Laine awoke before anyone else and left town by the main highway. 5RP 102. Montgomery had Laine’s phone number, but did not call him. 5RP 104. Laine first went to the Bremerton-Silverdale area to look for work, then slept in his car and the next day drove to help out a friend in Forks. 5RP 102, 104. As a favor, he drove his friend’s girlfriend to the store in Forks. 5RP 106. He noticed a state trooper three times, but

parked the car in front of the store, right on the highway, rather than in the more secluded spots around back. 5RP 106-07.

Trooper Eric Tilton recognized the Mustang parked in front of the store in Forks as one that had been reported stolen. 4RP 89. The registered owner of the car was Teresa Crane, Montgomery's mother. 4RP 97. Tilton arrested Laine and testified Laine told him he bought the car from a friend named Kanye or something, he could not recall the last name. 4RP 92.

Laine did not attempt to flee, waived his rights, spoke freely to Tilton and complied with his directions. 4RP 105. The car was clean, but damaged; Laine told the trooper he took a corner too fast and hit a guardrail earlier that day. 4RP 92, 109. A search of the car revealed no documentation whatsoever regarding the sale, ownership, or registration. 4RP 99.

Crane testified the car was hers and she gave no one permission to drive it between January 1 and January 6, 2010. 5RP 38-39. She testified she made the payments and paid the insurance on the car, which was in mint condition with low mileage. 5RP 39, 41. She testified her son has hallucinations and delusions. 5RP 50. She bought the car so that someone she trusted, such as Montgomery's former girlfriend, could drive him around. 5RP 55. She testified she saw Laine driving the car the day before

she reported it stolen and merely waved at him because he was driving Montgomery, the use for which she intended the car. 5RP 42.

Montgomery's aunt testified that the night before Laine left with the car, she told both Laine and Montgomery they were not to take the car anywhere. 4RP 56-57. She asked Laine for the keys, he gave them to her, and she put them on the table by her chair. 4RP 56. The next morning she called the police when she and Montgomery awoke to find both Laine and the car gone. 4RP 60.

b. Trial Continuances and Sentencing

Laine was arrested January 7, 2010. CP 183. He initially waived his speedy trial rights consenting to a trial date of March 22, 2010. CP 179. Three days before trial was to begin, the court contacted Laine's attorney and informed her the trial could not proceed on the 22nd due to court congestion, and that the hearing on March 22 would be to set a new trial date. CP 169, 172.

The hearing on March 22 was very brief. The court asked for suggested dates. CP 202. Defense counsel had none. CP 202. The court proposed May 17. CP 202. Defense counsel stated, "Looks fine." CP 202. Laine signed an agreed continuance to that date. CP 209. However, the court did not engage in a colloquy with Laine or determine if he was knowingly, intelligently, and voluntarily waiving his right to a speedy trial.

CP 159. Laine did not understand what he was signing, and immediately wrote an objection to case setting dates, which he filed with the court the following day. CP 207-08.

On April 19, 2010, Laine filed a pro se motion to dismiss based on violation of his speedy trial rights. CP 175. However, he neglected to note the motion for a hearing. No action was taken on his motion.

On April 29, the State requested another continuance because a State's witness would not be available on May 17. CP 206. The court heard the motion to continue on May 7. 1RP 2. Laine personally objected. 1RP 2. The court found good cause to continue, but stated its concern that Laine's speedy trial rights may have been violated. 1RP 3, 4. The court urged Laine to talk with his attorney about noting the motion to dismiss for a hearing. 1RP 4. That same day, Laine wrote a letter to Judge Wood, asking him to hear the motion to dismiss. CP 173-74. A notice of issue was filed May 21, and the motion to dismiss was heard May 28, 2010.

Laine, through his attorney, also filed a motion to either continue the trial date or alternatively, to dismiss for violation of speedy trial rules. CP 200. After verifying that Laine understood, the court granted the continuance as agreed. CP 197-99.

In July 2010, the court entered findings of fact and conclusions of law on Laine's motion to dismiss. The court found Laine waived his

objection to the trial date by failing to note his motion for a hearing as required by CrR 3.3(d)(3). CP 157. The court also found Laine's constitutional speedy trial rights were not violated and he was not prejudiced by the delay. CP 157.

Trial was held in July 2010, and the court held a hearing on Laine's motion for new trial as well as sentencing on August 26, 2010. 4RP 50; 8RP 2-9, 10-25. After trial, the court denied Laine's request to be screened for a DOSA. CP 191-93. The court explained it was "not enthusiastic" about a local DOSA, but would consider a prison-based DOSA. 7RP 4. However, at sentencing, the court denied the DOSA, finding it not appropriate based on the timing. 8RP 21. The prison DOSA requires confinement for half the mid-point of the standard range followed by community custody for half the mid-point of the standard range. RCW 9.94A.662. Laine's standard range was 22-29 months. With a mid-point of 25.5 months, a prison DOSA would require 12.75 months confinement (less 8 months of time served awaiting trial and sentencing) and another 12.75 months of community custody. However, the court reasoned that there would only be three or four months left for community custody and denied the DOSA. 8RP 21.

C. ARGUMENT

1. LAINE WAS DENIED A TIMELY TRIAL IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL SPEEDY TRIAL RIGHTS.

Speedy trial analysis under the Washington Constitution is substantially the same as under the Sixth Amendment. State v. Iniguez, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). Article I, section 22 of the Washington Constitution provides, “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial.” The Sixth Amendment guarantees, “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” The speedy trial right is no less fundamental than any other Sixth Amendment trial right. Iniguez, 167 Wn.2d at 289-90 (citing Barker v. Wingo, 407 U.S. 514, 516 n.2, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). The primary burden is on the court and the prosecutor to ensure that a case is brought to trial. Barker, 407 U.S. at 529. If the constitutional speedy trial right is violated, the court must dismiss the charges with prejudice. Barker, 407 U.S. at 522; Iniguez, 167 Wn.2d at 290.

a. The More than Six-Month Delay Was Presumptively Prejudicial Because This Was Not a Complex Case.

Before determining whether the speedy trial right was violated, the court considers whether the length of the delay crossed a threshold “from ordinary to presumptively prejudicial.” Iniguez, 167 Wn.2d at 283 (citing Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed.

2d 520 (1992)). This determination depends on the circumstances of each case, including the length of the delay, the complexity of the case, and the reliance on eyewitness testimony. Iniguez, 167 Wn.2d at 283, 292. The presumption of prejudice intensifies over time. Doggett, 505 U.S. at 652. “Complex” charges include, for example, conspiracy. Iniguez, 167 Wn.2d at 283; Barker, 407 U.S. at 531. “Ordinary street crime” such as robbery is not a complex charge. Iniguez, 167 Wn.2d at 283, 292 (quoting Barker, 407 U.S. at 531).

The delay here was presumptively prejudicial. Laine was incarcerated for six months before trial and seven-and-a-half months before sentencing. CP 182; 4RP 3. As in Iniguez, this was a substantial delay and Laine spent all of it incarcerated. 167 Wn.2d at 292. Nothing about the case was complex. The State’s witnesses testified Laine was told not to take the car. 4RP 56; 5RP 14. Laine testified his friend sold it to him. 5RP 88-90. The case came down to credibility. This was more akin to an “ordinary street crime” and the level of complexity does not justify substantial delay. Barker, 407 U.S. at 531. The delay of more than six months in this ordinary street crime was presumptively prejudicial.

b. Laine's Constitutional Speedy Trial Rights Were Violated Because He Was Prejudiced When the Court Denied Him a DOSA Based on the Delays.

Once the delay is established as presumptively prejudicial, the court considers the remaining non-exclusive Barker factors to determine whether the delay violated the constitution in this particular case. Iniguez, 167 Wn.2d at 283 (citing Doggett, 505 U.S. at 651)). These factors include the reason for the delay, whether the defendant asserted his right to speedy trial, and the ways the delay caused prejudice. Iniguez, 167 Wn.2d at 283 (citing Barker, 407 U.S. at 530)).

In this case, the first delay, of less than two weeks, was sought by the defense. CP 210. However, the second, of nearly two months, was due to court congestion. CP 156. The third, another two weeks, was granted at the State's request because a law enforcement witness was on leave and unavailable to testify. CP 205-06. At the hearing on this continuance, Laine objected. 1RP 2. The court noted there might be a valid argument that Laine's constitutional speedy trial rights were violated. 1RP 3-4. The court stated, "I'm worried that we're approaching a constitutional violation of speedy trial in this case." 1RP 4. At that point, trial was set for June 1, 2010. CP 205.

On May 26, 2010, four days before the June 1 trial date, the defense received new discovery from the State. CP 200. This necessitated additional

preparation including a subpoena duces tecum on the part of the defense, and time to review the additional records that would be provided. CP 200. Defense counsel therefore requested that either the charges be dismissed for violation of Laine's right to a speedy trial or grant a continuance for additional preparation. CP 200. The court granted a two-week continuance until June 14, 2010. CP 199. On June 14, the trial was again delayed for two weeks due to court congestion, until June 28. CP 195-96; 2RP 2-4. On June 15, Laine agreed to push back the trial another three weeks to deal with redacting his statement to law enforcement officers for trial. CP 194; 3RP 2-6. Trial began July 19, 2010. 4RP 1.

Because the government, not the defendant, is ultimately responsible for court congestion, overcrowded courts receive more leeway than deliberate delay but cannot be discounted. Barker, 407 U.S. at 531. In this case, two and a half months of delay was caused by court congestion. Another two weeks were due to the State's witness being on leave. The trooper was on leave, but there was no showing he could not have been located and served with a subpoena to testify. Cf. State v. Wake, 56 Wn. App 472, 475, 783 P.2d 1131 (1989) (issuance of subpoena is critical factor in granting continuance based on witness unavailability). A full three months of the delay had nothing to do with the defense and weighs in favor of a speedy trial violation.

The prejudice to Laine when the court denied his DOSA request also shows a speedy trial violation. Barker analyzes prejudice in light of the defense interests the speedy trial right is designed to secure. The predominate interests are 1) preventing oppressive pre-trial incarceration, 2) minimizing the accused's anxiety and concern, and 3) limiting the possibility the defense could be impaired. Barker, 407 U.S. at 532. In this case, the impairment to the defense occurred because the delay resulted in denial of Laine's request for a drug offender sentencing alternative that would have provided him with much-needed substance abuse treatment for his devastating addiction.

A speedy trial violation also occurred in this case because Laine strenuously objected to the delays. He filed a written objection to the May 17, 2010 trial date and a motion to dismiss on speedy trial grounds. CP 207-08, CP 175. At the hearing on the continuance on May 7, 2010, Laine stated, "I want to make sure I object." IRP 2.

The many delays in this case resulted in a trial that occurred more than six months after Laine was arrested. Fully half the delays were unrelated to Laine's defense. Laine objected to these delays, which the court found were necessitated by court congestion and availability of a State witness. By the time of sentencing, Laine had spent nearly eight months incarcerated. CP 15, 182. The court then used this timing to deny Laine a

sentence alternative that would have both shortened his incarceration time and allowed him to access much-needed substance abuse treatment. 8RP 21. Under the circumstances, Laine was prejudiced and his constitutional speedy trial rights were violated. The court should vacate the judgment and sentence and remand with instructions to dismiss with prejudice.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING LAINE'S REQUEST FOR A DOSA BASED ON A MISUNDERSTANDING OF THE REMAINING TIME FOR CONFINEMENT AND SUPERVISION UNDER THE DOSA STATUTE.

A trial court "abuses its discretion . . . if it denies a sentencing request on an impermissible basis." State v. Osman, 157 Wn.2d 474, 486, 139 P.3d 334 (2006). A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law or facts unsupported by the evidence. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006); Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)). The trial court here abused its discretion in denying Laine's DOSA request because the decision was based in part on an erroneous understanding of the law. See State v. Badger, 64 Wn. App. 904, 827 P.2d 318 (1992) (reversing SSOSA revocation because court erroneously believed it did not have discretion to impose sanctions in lieu of revocation).

The court explained its reasoning in denying the DOSA:

He's already been in prison 8 months. The most I could give him is 12 under the prison-based DOSA and then he's only on supervision for another 3 or 4 months according to that scheme because you take half the standard range, you split it. So it's not really going to accomplish -- you know, if it were early in the process here, you know, that might be a consideration. But it's not going to work here. So it's really not in my -- well I guess it's in my ability to do but I don't think it's the proper thing to do here.

8RP 21. This reasoning contains two different legal/factual errors.

First, 12 months is not the maximum time that can be imposed under the DOSA. The statute provides for, "A period of total confinement in a state facility for one-half the midpoint of the standard sentence range or twelve months, whichever is greater." RCW 9.94A.662(1)(a). Laine's offender score was 13 and second-degree taking a motor vehicle without permission has a seriousness level of 1. CP 17; RCW 9.94A.515. Therefore, the mid-point of Laine's standard range is 25.5 months. CP 17; RCW 9.94A.510. Under a prison DOSA, he would be incarcerated for half that time, 12.75 months, not a maximum of 12 months. RCW 9.94A.662(1)(a). Since Laine already served nearly eight months awaiting trial, 4.75 months of confinement would remain for confinement.

The second error the court made was in calculating the time remaining for community supervision and treatment. The second provision of the DOSA statute is for "One-half the midpoint of the

standard sentence range as a term of community custody.” RCW 9.94A.662(1)(b). Therefore, under a DOSA, Laine would have spent 12.75 months on community supervision, not a mere three or four months.

This incorrect understanding of the law and its application to the facts of Laine’s case appears to have played a significant role in the court’s decision because the court also acknowledged that “if it were early in the process here, you know, that might be a consideration,” indicating if more time were remaining, it would have more seriously considered granting the DOSA. The court was likely to grant the DOSA, given a proper understanding of the law and its application to the timing of this case because the role of Laine’s methamphetamine addiction in this offense was beyond obvious. See, e.g., 5RP 73, 81-82, 95.

In Fisons, the lower court denied discovery sanctions based in part on four incorrect legal rationales. 122 Wn.2d at 344-45. The appellate court also found many of the factual bases for the trial court’s decision were unsupported by the record. Id. at 345. After elucidating the proper legal standard, the court reversed the denial of sanctions and remanded to determine the appropriate amount. Id. at 356. The court should reverse in this case as well because the trial court’s decision was similarly based on its incorrect understanding of the law and the facts.

“[I]t is well established that appellate review is still available for the corrections of legal errors or abuses of discretion in the determination of what sentence applies.” State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003) (State may appeal imposition of drug offender sentencing alternative). A party may “challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision.” State v. Kinneman, 155 Wn.2d 272, 283, 119 P.3d 350 (2005) (quoting Williams, 149 Wn.2d at 146-47).

Here, Laine may appeal his sentence because the trial court abused its discretion by basing its decision on a misunderstanding of the law. Under the DOSA statute, he could have served nearly five months confined followed by more than 12 months of supervision. The court denied the DOSA because it wrongly believed Laine would only have three to four months of supervision. Therefore, Laine may appeal his standard range sentence.

3. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO CORRECT THE COURT'S MISUNDERSTANDING OF THE DOSA STATUTE AND THE TIMING.

The federal and state constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show (1) defense counsel's representation was deficient, and (2) counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Counsel's performance is objectively deficient when counsel fails to alert the court that, under controlling law, the court has discretion to impose a sentence below the standard range. McGill, 112 Wn. App. at 101. In McGill, counsel merely failed to alert the court to two cases approving an exceptional sentence below the standard range based on the multiple offense policy. Id. The court held the failure to advise the lower court it had discretion to consider an exceptional sentence was ineffective and vacated McGill's sentence. Id.

Here, counsel failed to advise the court that, under the DOSA statute, Laine would still serve more than 12 months on supervision.

Given counsel's otherwise diligent efforts to obtain a DOSA, this cannot be perceived as a tactical choice.

To show prejudice, Laine need only show a reasonable probability the outcome would have been different but for the mistake, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." Fleming, 142 Wn.2d at 866 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The court indicated it would have more strongly considered a DOSA if the timing were different. 8RP 21. This is reasonable, due to the obvious effect of substance abuse and addiction in this case. Similarly to McGill, if the court it had understood the actual effect of the DOSA under the law, it is reasonably probable the court would have granted the DOSA. McGill, 112 Wn. App. at 101-02. Defense counsel unreasonably failed to inform the court of controlling law and its effect on the DOSA, thereby causing significant harm to Laine.

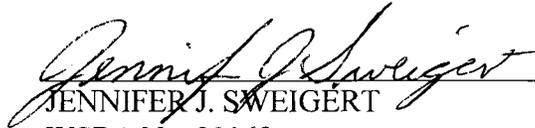
D. CONCLUSION

For the foregoing reasons, Laine requests this Court reverse his conviction and dismiss for violation of his constitutional rights to a speedy trial or, alternatively, to remand for resentencing with consideration of a prison-based DOSA.

DATED this 2nd day of May, 2011.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 41130-0-II
)	
JOHNATHON LAINE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 2ND DAY OF MAY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRIAN WENDT
CLALLAM COUNTY PROSECUTOR'S OFFICE
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[X] JOHNATHAN LAINE
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Kw

SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF MAY, 2011.

x *Patrick Mayovsky*