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DIVISION II

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STATE OF WASHINGTON
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No. 41894-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Cheney Salazar,

Appellant.

Grays Harbor County Superior Court Cause No. 10-1-00201-7

The Honorable Judge Gordon Godfrey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial judge infringed Mr. Salazar's Sixth and Fourteenth Amendment right to conflict-free counsel.
2. The trial judge erred by refusing to appoint new counsel at a critical stage of the proceeding.
3. The trial judge applied the wrong legal standard when refusing to appoint new counsel.
4. The trial judge erred by failing to recognize the extent of the conflict of interest created by Mr. Salazar's planned motion to withdraw his guilty plea.
5. The trial judge erred by summarily denying Mr. Salazar's request to withdraw his guilty plea.
6. Mr. Salazar's guilty plea was entered in violation of his Fourteenth Amendment right to due process.
7. The trial judge applied the wrong legal standard when evaluating Mr. Salazar's request to withdraw his guilty plea.
8. The trial judge erroneously relied on his inherent contempt power without finding the statutory contempt power inadequate.
9. The trial judge violated RCW 7.21.050 by imposing contempt sanctions without following the statutory procedure.
10. The trial judge violated RCW 7.21.050 by summarily imposing a remedial contempt sanction on the day after the contempt occurred.
11. The trial judge violated RCW 7.21.050 by summarily imposing a 30-day punitive contempt sanction more than a week after the contempt occurred.
12. The trial judge erred by imposing contempt sanctions without certifying that he had observed Mr. Salazar's contumacious conduct.

13. The trial court erred by imposing contempt sanctions on Mr. Salazar without giving him an opportunity to speak in mitigation after finding him in contempt but before imposing sanctions.
14. The trial court imposed remedial and punitive contempt sanctions in excess of those authorized by the statute.
15. The trial court erred by denying Mr. Salazar credit for time served while he was allegedly in contempt.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has a constitutional right to be represented by conflict-free counsel at all critical stages of a criminal proceeding, including a presentence motion to withdraw a guilty plea. Here, Mr. Salazar and his attorney asked the court to appoint new counsel to pursue a motion to withdraw the guilty plea, based on ineffective assistance at the plea hearing. Did the trial court violate Mr. Salazar's Sixth and Fourteenth Amendment right to conflict-free counsel at all critical stages of the criminal case by refusing to appoint new counsel?
2. A guilty plea violates due process if it is entered without knowledge of the consequences. In this case, the trial judge summarily denied Mr. Salazar's request to withdraw his guilty plea despite his claim that he'd been misinformed about the consequences. Did the trial judge violate Mr. Salazar's Fourteenth Amendment right to due process?
3. A judge may not rely on the court's inherent contempt power to punish contempt without first finding the statutory contempt power inadequate. Here, the court relied on the inherent contempt power to sanction Mr. Salazar without finding the statutory power inadequate. Did the trial judge err by depriving Mr. Salazar of credit for time served and imposing 30 additional days under the court's inherent contempt power?

4. RCW 7.21.050 imposes five procedural requirements before a judge can summarily impose a sanction for direct contempt. Here, the trial judge failed to comply with three of the five requirements. Did the trial judge's contempt sanctions violate the procedural requirements of RCW 7.21.050(1)?

5. Under RCW 7.21.050(2), direct contempt may be punished by imposition of a remedial sanction or a punitive sanction of up to 30 days. Here, the court imposed a remedial sanction in addition to a 30-day punitive sanction. Did the trial judge's contempt sanctions exceed the authority granted by RCW 7.21.050(2)?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Cheney Salazar pled guilty to one count of forgery in June of 2010. Statement of Defendant on Plea of Guilty, Supp. CP. His written statement indicated that he had his G.E.D., and included language explaining that conviction of additional crimes prior to sentencing could increase the standard range and the prosecutor's recommendation. Statement of Defendant on Plea of Guilty, p. 2, Supp. CP.

A plea agreement filed on the day of the plea hearing included a recommendation that was crossed out and initialed by the prosecuting attorney; the words "7 months" were written in place of the crossed-out recommendation. Plea Agreement, p. 3, Supp. CP. This document also indicated that the state's recommendation could increase if Mr. Salazar committed additional crimes prior to sentencing. Plea Agreement, p. 4, Supp. CP. Both documents were signed by Mr. Salazar. Statement of Defendant on Plea of Guilty; Plea Agreement, Supp. CP.

At the plea hearing, the court conducted a brief colloquy with Mr. Salazar before accepting his guilty plea:

THE COURT: Mr. Salazar, I've got a document here that indicates that you want to plead guilty to forgery, if I allow it to happen, and they're going to ask to have it amended; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Well, with the exception of allowing it to be amended, as far as plea bargain, do you understand we don't have to follow anything else? Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Where's your documents? There you go. Now, I've got a statement of defendant on plea of guilty. Did you go through this with your attorney, Mr. Taschner?

THE DEFENDANT: Yes, I did, Your Honor.

THE COURT: Did he read to you?

THE DEFENDANT: Yes, sir.

THE COURT: Did you understand it?

THE DEFENDANT: Yes, I did, sir.

THE COURT: Any questions?

THE DEFENDANT: No, Your Honor.

RP (6/28/10) 3-4.

Besides ensuring that Mr. Salazar understood that the judge was not bound by the plea agreement, the court did not review the substance of each document. RP (6/28/10) 1-5. Nor did the judge ascertain that Mr. Salazar was able to read. RP (6/28/10) 1-5.

Sentencing was delayed so Mr. Salazar could be released to attend inpatient drug treatment. RP (6/28/10) 5. He entered drug treatment, was furloughed to pick up his medication, and relapsed during his furlough. RP (2/14/10) 6-7. Prior to returning to court for sentencing, he was convicted of Attempting to Elude in another county. Supplemental Statement of Prosecuting Attorney, Supp. CP.

Mr. Salazar's appointed attorney filed a motion to withdraw as counsel. Motion and Declaration for an Order Allowing Withdrawal of Attorney, Supp. CP. He indicated that Mr. Salazar wished to withdraw his

guilty plea based on ineffective assistance of counsel. Motion and Declaration for an Order Allowing Withdrawal of Attorney, p. 2, Supp. CP. Defense counsel notified the court that he had a conflict of interest and asked that new counsel be appointed. Motion and Declaration for an Order Allowing Withdrawal of Attorney, p. 2, Supp. CP; RP (2/14/11) 2.

When the case was called for sentencing, defense counsel referred to his motion, told the court that Mr. Salazar's basis for seeking to withdraw his plea involved an ineffective assistance claim, and indicated that "the issue should be resolved prior to sentencing, and I don't believe that I can ethically bring that motion for him." RP (2/14/11) 2.

The court responded by asking about the merits of Mr. Salazar's yet-to-be filed motion:

Well, I'm going to have to, for the record, ascertain why you believe that we have grounds for withdrawal, because I researched the law also, and he's not entitled to an attorney on a motion to withdraw unless the Court finds there's merit to it. So let's go to the merit part. Why does he believe he should be entitled to withdraw?
RP (2/14/11) 3.

The court questioned defense counsel and Mr. Salazar, and learned that Mr. Salazar believed he'd been misinformed about two consequences of his plea. He asserted that his lawyer had not told him that new convictions pending sentencing would change his offender score and

standard range, and that he had believed the plea agreement had been for four months rather than seven. RP (2/14/11) 4-5.

The court summarily denied the motion to appoint new counsel and Mr. Salazar's planned motion to withdraw his plea:

Well, I'm going to deny your request, and I'm going to tell you what. There's an old thing about ignorance of the law is no excuse, and the fact that you didn't know that after you pled guilty to one crime and you're going to get sentenced for it, that you shouldn't go out and commit another one that might affect the first one. That's kind of what I was suspecting when I read this, and I've confirmed that. Motion to withdraw is denied. I'm ready to proceed to sentencing. Thank you.
RP (2/14/11) 5.

After hearing from the parties and Mr. Salazar, the court imposed a sentence of 14 months in prison, consecutive to the sentence on the eluding charge. RP (2/14/11) 7.

As the next case was being called, the judge summoned Mr. Salazar back and addressed him as follows:

Let's understand something so we don't have a problem here. I just watched the little walk over here and the demeanor and the rest of the gig going on. We don't do that in my courtroom. You're going to walk over there, be polite, shut up and do what you're told. If not, you're going to pick up some dead time. You're going to go over to my jail for contempt, and it's not going to count on your time, and I'll bring you back when I feel like it.

Now, let's try it again.

Over. Right now. He's in contempt with his demeanor in the courtroom. Take his over. Bring him back, and he can be printed after I have him brought back to apologize. Get him out of here now. I'm not tolerating it. Dead time. Thank you.

RP (2/14/11) 7-8.

Mr. Salazar was returned to the courtroom later in the afternoon.

At that time, the following exchange occurred:

THE COURT: We'll make the record here so you understand where I'm coming from. Very bluntly, you want to screw around in this courtroom and act like a jerk, be disrespectful to the Court, go for it. You did it twice this morning. Right now you're doing dead time, my man. And from that expression you just gave me, take him back, and when you can come in this courtroom and you can be polite and respectful, let me know.

THE DEFENDANT: I don't understand what it is that I did. I just agreed, I mean.

THE COURT: Your mocking facial expressions and your manner you did with the other prisoners this morning is mocking the Court. And if you can't stand there and be polite and respectful, then you can do dead time, and I don't care how much of it you do. So go ahead. Maybe I'll talk to him tomorrow. Apparently he didn't get the message a few minutes ago. Go sit down.

RP (2/14/11) 9-10.

Mr. Salazar was brought back from the jail on the following day.

At that time, the court addressed him and demanded an apology:

Up here. Let's start off by we understand each other real well. I come into your house, I'm polite, I'm respectful. I don't make demonstrative facial and other personal examples of disrespect. And after I'm polite and I'm respectful, I leave your place, and you can assume that I respected you.

Now, when you come in my house, I expect the same thing, and that's not what I got yesterday. As far as I'm concerned, you can sit in that jail over there until you can apologize and be respectful, and it's all up to you.

RP (2/15/11) 11.

Defense counsel addressed the court, referred the judge to RCW 7.21, and asked that a determinate sanction be imposed rather than a remedial sanction. RP (2/15/11) 11-12. The court refused:

Well, it goes like this. Despite any statute out there, let's go to square one. The inherent power of the Court is contempt. Period...Now, it's real simple. Your client can either get sentenced and I can sign a document. So far he's conducted himself respectably. If he wants to apologize, you go off, you owed me one day, and he's done, and we're even. If he doesn't want to, he can go back over there and wait and sit more. It's up to him.

RP (2/15/11) 12.

Mr. Salazar responded by saying "I don't believe I conducted myself in an improper manner, sir." RP (2/15/11) 13. The court then signed a contempt order, remanding Mr. Salazar to custody (without credit for time served on any case) until he apologized. RP (2/15/11) 13-14; Order Re: Contempt (2/15/11), Supp. CP.

The following week, Mr. Salazar was returned to court. After a brief discussion regarding the location of Tunisia, the court imposed an additional 30 days consecutive to Mr. Salazar's prison sentence, and ordered that he not be given credit for time served during the week he refused to apologize. RP (2/22/11) 6-8; Order Re: Contempt (2/22/11), Supp. CP.

During all of his interactions with Judge Godfrey, Mr. Salazar was verbally respectful. *See* RP (6/28/10), RP (2/14/11), RP (2/15/11), RP

(2/22/11) *generally*. The only record of any possible disrespect to the court is outlined in the judge's descriptions (quoted above) and in the first written contempt order. Order Re: Contempt (2/15/11).

Mr. Salazar appealed. CP 11.

ARGUMENT

I. THE TRIAL JUDGE APPLIED THE WRONG LEGAL STANDARD AND VIOLATED MR. SALAZAR'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL BY REFUSING TO APPOINT A NEW ATTORNEY.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

A trial court's refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wash.2d 580, 607, 132 P.3d 80 (2006). The reviewing court considers three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Id.*

A trial court abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*, 310 F.3d 1231, 1248-1250 (10th Cir, 2002); *see also State v. Lopez*,

79 Wash.App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wash.2d 629, 965 P.2d 1072 (1998).

B. Because it was based on a claim of ineffective assistance of counsel, Mr. Salazar's presentence request to withdraw his guilty plea created a conflict of interest requiring the appointment of new counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section 22.

The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995). An accused person who is unable to afford the cost of counsel has a constitutional right to have counsel appointed at public expense. *Gideon*, at 340-344.

The right to counsel includes the right to an attorney unhampered by conflicts of interest. *State v. Davis*, 141 Wash.2d 798, 860, 10 P.3d

977 (2000) (citing *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981)).

Denial of counsel at a critical stage of proceedings is presumptively prejudicial. *State v. Chavez*, ___ Wash.App. ___, ___, ___ P.3d ___ (2011) (citing *United States v. Cronin*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). A defendant's presentence motion to withdraw her or his guilty plea is a critical stage.¹ *Id.*; see also *State v. Pugh*, 153 Wash.App. 569, 579, 222 P.3d 821 (2009) ("A CrR 4.2(f) presentence motion to withdraw a guilty plea is a critical stage of a criminal proceeding for which a defendant has a constitutional right to be assisted by counsel"); *State v. Davis*, 125 Wash.App. 59, 64, 104 P.3d 11 (2004). This is so whether or not the motion has merit. *Chavez*, at ____.

Denial of counsel at a hearing on a presentence motion to withdraw a guilty plea requires automatic reversal, without the need for a showing of prejudice. *State v. Harell*, 80 Wash.App. 802, 805, 911 P.2d 1034 (1996).

In this case, Mr. Salazar sought to withdraw his plea prior to entry of the judgment and sentence. RP (2/14/11) 2-5; Motion and Declaration for an Order Allowing Withdrawal of Attorney, Supp. CP. Accordingly,

¹ By contrast, a defendant is not automatically entitled to counsel to pursue a post-judgment motion to withdraw a guilty plea. *State v. Forest*, 125 Wash.App. 702, 707, 105 P.3d 1045 (2005).

he was entitled to the assistance of counsel. *Chavez*, at _____. Because he alleged that his appointed attorney provided ineffective assistance at the guilty plea hearing, appointed counsel could not ethically represent him on the motion. Motion and Declaration for an Order Allowing Withdrawal of Attorney, Supp. CP. Defense counsel was in the best position to determine that he had a disabling conflict. *Chavez*, at _____ (citing *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) and *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)).

Despite the obvious conflict, the trial judge summarily denied defense counsel's request to withdraw, and refused to appoint new counsel. RP (2/14/11) 2-5. This was error under *Chavez*, *supra*.

Instead of appointing new counsel, the court apparently applied the test required under CrR 3.1 for post-judgment motions brought pursuant to CrR 7.8. RP (2/14/11) 2-5. To qualify for appointed counsel, an offender seeking to withdraw his plea *after* entry of the judgment and sentence must make an initial showing that the motion is not frivolous. *State v. Robinson*, 153 Wash.2d 689, 696, 107 P.3d 90 (2005). If the motion establishes "grounds for relief," counsel must be appointed. *Id.*

Even under this test, the trial judge erred in refusing to appoint counsel. Mr. Salazar alleged that he did not understand the consequences

of his plea (including the prosecutor's recommendation and the effect of subsequent convictions on his offender score). This allegation establishes the "grounds for relief" required under *Robinson*. See, e.g., *In re Isadore*, 151 Wash.2d 294, 88 P.3d 390 (2004).

The trial court's refusal to appoint conflict-free counsel violated Mr. Salazar's Sixth and Fourteenth Amendment right to counsel. *Chavez*, at _____. Accordingly, the judgment and sentence must be vacated and the case remanded to the superior court for appointment of counsel. *Id.*

II. THE TRIAL JUDGE APPLIED THE WRONG LEGAL STANDARD AND VIOLATED MR. SALAZAR'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY SUMMARILY DENYING HIS MOTION TO WITHDRAW HIS GUILTY PLEA.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *Schaler*, at 274.

Errors of law are reviewed *de novo*. *Hardee v. State, Dept. of Social and Health Services*, ___ Wash. 2d. ___, ___, 256 P.3d 339 (2011). Denial of a motion to withdraw a guilty plea is reviewed for an abuse of discretion. *State v. A.N.J.*, 168 Wash.2d 91, 107, 225 P.3d 956 (2010).

B. A guilty plea is involuntary if entered without an understanding of the consequences of the plea.

Due process requires an affirmative showing that a guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *Isadore*,

supra; *State v. Ross*, 129 Wash.2d 279, 916 P.2d 405 (1996). This includes knowledge of the consequences of the plea. *State v. A.N.J.*, at 113; *see also Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) (defense counsel ineffective for giving inaccurate information regarding immigration consequences of guilty plea.)

The consequences of a plea include the substance of the prosecutor's recommendation and the length of any potential sentence that might be imposed. *See, e.g., In re Bradley*, 165 Wash.2d 934, 939, 205 P.3d 123 (2009).

In this case, Mr. Salazar alleged that he was misinformed as to two consequences of his plea. RP (2/14/11) 4-5. First, he told the judge that he did not understand that his offender score and standard range would increase if he were convicted of new felonies prior to sentencing. RP (2/14/11) 4-5. Second, he told the judge that he believed the prosecutor had agreed to recommend four months, rather than the seven months written in the plea agreement.² RP (2/14/11) 4-5.

Although both of these matters were addressed by the plea documents, Mr. Salazar told the judge (at his plea hearing) that defense

² The prosecutor crossed out and initialed his original recommendation in the written plea agreement. Plea Agreement, p. 3, Supp. CP. The change was not initialed by defense counsel or by Mr. Salazar.

counsel had read the written materials to him; he did not say that he had read them himself. RP (6/ 28/10) 4; *see* Statement of Defendant on Plea of Guilty; Plea Agreement, Supp. CP. Mr. Salazar's Statement on Plea of Guilty indicates that he obtained a G.E.D. rather than graduating from high school, and nothing in the record indicates his reading proficiency. RP (6/28/10); Statement of Defendant on Plea of Guilty, p. 1, Supp. CP.

If established, Mr. Salazar's allegations prove that he was denied the effective assistance of counsel when he pled guilty. *A.N.J., supra*. Accordingly, the judge should have held a hearing to determine whether or not Mr. Salazar's guilty plea was involuntary because he was misinformed of the consequences. Instead, the judge announced that "ignorance of the law is no excuse." and summarily denied the motion.³ RP (2/14/11) 5.

This is not the correct standard for evaluating the voluntariness of a guilty plea.⁴ *A.N.J., supra; Padilla, supra*.

The trial judge's refusal to consider Mr. Salazar's request to withdraw his guilty plea (and his request for the appointment of new counsel) violated his Fourteenth Amendment right to due process. *A.N.J.,*

³ In fact, Mr. Salazar had not yet had an opportunity to bring his motion, because he was waiting for the court to appoint new counsel.

⁴ Indeed, because a guilty plea is invalid unless made with a full understanding of the consequences, ignorance of the law can be grounds for withdrawing a guilty plea. *A.N.J., supra; Padilla, supra*.

supra. Accordingly, the judgment and sentence must be vacated and the case remanded for appointment of counsel and an evidentiary hearing to determine whether or not Mr. Salazar should be allowed to withdraw his plea. *Id.*

III. JUDGE GODFREY’S CONTEMPT SANCTIONS VIOLATED RCW 7.21.050 AND MR. SALAZAR’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. The trial judge should not have relied on his inherent contempt power without finding the statutory procedures and remedies inadequate.

Judges have both inherent and statutory contempt powers. *In re Dependency of A.K.*, 162 Wash.2d 632, 645, 174 P.3d 11 (2007); RCW 7.21.010 *et seq.* A judge may not exercise the inherent contempt power without specifically finding the statutory procedures and remedies inadequate. *A.K.*, *at* 647. In this case, Judge Godfrey did not make a specific finding that the statutory procedures and remedies were inadequate. RP (2/14/11) 7-9; RP (2/15/11) 11-15; RP (2/22/11) 6-8. Accordingly, he was limited to imposition of contempt sanctions under the statutory framework. *A.K.*, *supra*.

Instead, however, he seemed to assert that he was relying on the court’s inherent contempt power: “Despite any statute out there, let’s go to

square one. The inherent power of the Court is contempt. Period.” RP (2/15/11) 11.

If this statement was intended to convey Judge Godfrey’s reliance on the inherent contempt power rather than on RCW 7.21, it was made in error. Absent a finding that the statutory contempt power was inadequate, the judge was not permitted to rely on his inherent power to punish contempt. Accordingly, the contempt orders must be vacated and Mr. Salazar must be credited with the time he served in jail. *A.K., supra.*

B. Judge Godfrey failed to follow the procedural requirements set forth in RCW 7.21.050(1).

The contempt statute permits a trial judge to impose a contempt sanction for contempt occurring in the judge’s presence (also known as “direct contempt.”)⁵ RCW 7.21.050. The statute imposes five procedural requirements.

First, the judge must “certif[y] that he or she saw or heard the contempt.” RCW 7.21.050(1). Second, the judge must impose the sanctions immediately after the contempt, or at the end of the proceeding. RCW 7.21.050(1). Third, the judge may impose contempt sanctions “only

⁵ Contempt is defined to include intentional “[d]isorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings; [or] [d]isobedience of any lawful judgment, decree, order, or process of the court.” RCW 7.21.010(1).

for the purpose of preserving order in the court and protecting the authority and dignity of the court.” RCW 7.21.050(1). Fourth, the contemnor must be “given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise.” RCW 7.21.050(1). The opportunity to speak in mitigation of the contempt must be given after the court makes the finding of contempt but prior to the imposition of sanctions. *State v. Jordan*, 146 Wash. App. 395, 403 n.6, 190 P.3d 516 (2008). Fifth, “the order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.” RCW 7.21.050(1). Failure to comply with the statute requires reversal of any contempt sanction imposed. *Jordan*, at 395, 398.

In this case, the trial judge did not comply with the procedures set forth in RCW 7.21.050(1). Even assuming the contempt orders had a proper basis and was for a proper purpose, the sanctions were not imposed immediately after the contempt or at the end of the proceeding. *See* RP (2/14/11) 7-9; RP (2/15/11) 11-15; Order Re: Contempt (2/15/11); Order Re: Contempt (2/22/11), Supp. CP. Instead, a remedial sanction was imposed on the following day, and 30 days of confinement were imposed as a punitive sanction the following week. *See* RP (2/14/11) 7-9; RP (2/15/11) 11-15; Order Re: Contempt (2/15/11); Order Re: Contempt (2/22/11). Supp. CP.

Nor did Judge Godfrey *certify* that he saw or heard the contempt, either orally or in either written order.⁶ RP (2/14/11) 7-9; Order Re: Contempt (2/15/11); Order Re: Contempt (2/22/11), Supp. CP. Nor did he give Mr. Salazar an opportunity to speak in mitigation after finding him in contempt. RP (2/14/11) 7-9; RP (2/15/11) 11-15; RP (2/22/11) 6-8.

Because the judge failed to follow the statutory procedure, the Order on Contempt cannot be sustained as a proper exercise of the statutory contempt authority outlined in RCW 7.21.050. The contempt orders must be vacated, and Mr. Salazar should not be deprived of any credit for time served. *Jordan, supra*.

C. Judge Godfrey imposed a sanction in excess of that authorized under RCW 7.21.050.

Upon a finding of contempt, the court may impose either a punitive sanction⁷ or a remedial sanction under the statute. RCW 7.21.050(2). The statute does not authorize the court to impose both a remedial and a contempt sanction for a single instance of contempt. RCW 7.21.050(2).

Here, Judge Godfrey imposed a sanction that exceeded that authorized by RCW 7.21.050(2). First, he imposed a remedial sanction,

⁶ Presumably the legislature's use of the word "certify" means something more than implying or stating on the record.

⁷The sanction may include up to 30 days confinement. RCW 7.21.050(2).

imprisoning Mr. Salazar (and stripping him of credit for time served toward any of his offenses) until he returned to court to apologize. RP (2/14/11) 7-9; RP (2/15/11) 11-15; Order Re: Contempt (2/15/11). Second, after Mr. Salazar continued to insist that he'd done nothing wrong, Judge Godfrey imposed 30 days, to be served consecutive to all other sentences, and reaffirmed that he was to get no credit for time served during the remedial sanction. RP (2/22/11) 6-8; Order Re: Contempt (2/22/11). Supp. CP.

The imposition of a remedial sanction *and* a 30-day punitive sanction violated RCW 7.21.050. Accordingly, the contempt orders must be vacated and Mr. Salazar must be credited with the time he spent in custody. *Jordan, supra*; RCW 7.21.050(2).

CONCLUSION

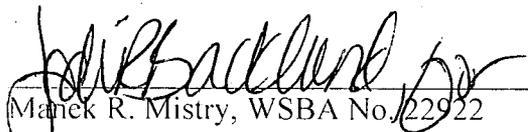
For the foregoing reasons, Mr. Salazar's judgment and sentence must be vacated and the case remanded for appointment of new counsel and a hearing to determine whether or not he should be allowed to withdraw his plea. In addition, Judge Godfrey's contempt orders must be vacated, and Mr. Salazar must be credited with the time he spent in custody.

Respectfully submitted on August 29, 2011.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to: BY _____

Cheney Salazar, DOC #302484
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

and to:

Grays Harbor Co Pros Ofc
102 W Broadway Ave Rm 102
Montesano WA 98563-3621

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 29, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 29, 2011.



Jodi R. Backlund, WSBA No. 22917
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