

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

VICHAI SALY,

Petitioner.

NO. 50884-2-II

STATE'S RESPONSE TO
PETITIONER'S SUPPLEMENTAL
BRIEF

I. SUPPLEMENTAL ARGUMENT:

A. THE SUPERIOR COURT HAD JURISDICTION TO TAKE
PETITIONER'S PLEA OF GUILTY AND SENTENCE HIM.

In one paragraph, petitioner acknowledges that he "is not arguing that the superior court lacked jurisdiction over his proceedings." Supp. PRP at 8. That concession is compelled by *State v. Posey*, 174 Wn.2d 131, 139, 272 P.3d 840 (2012) (*Posey II*).

However, in the next paragraph, petitioner argues:

Thus, the adult court no longer had automatic jurisdiction over his proceedings. Absent the juvenile court's waiver of its exclusive jurisdiction the adult criminal court did not have the power or authority to render a judgment in these proceedings.

(emphasis added) *Id.* Petitioner invokes the absence of the trial court's "power or authority" to render judgment after charges were amended to non-mandatory adult

1 jurisdiction charges. Supp. PRP at 8-9. That argument is wrong. Jurisdiction means “the
2 power to hear and determine.” *State v. Barnes*, 146 Wn.2d 74, 85, 43 P.3d 490, 495
3 (2002); *Posey II*, 174 Wn.2d at 136-140. Clearly, the superior court had jurisdiction to act
4 in this case. The bottom line is that the superior court judge had the power to act in this
5 case, but the superior court judge, long ago, made a mistake.

6
7 B. PETITIONER’S INEFFECTIVE ASSISTANCE OF COUNSEL
8 CLAIM IS UNAVAILING.

9 1. Petitioner has failed to demonstrate deficient performance.

10 *Dalluge* addressed a claim of deficient performance of appellate counsel. The
11 appellate posture of the claim mattered:

12 In *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000),
13 the United States Supreme Court reiterated that the proper standard for
14 evaluating claims of ineffective assistance of appellate counsel derives from
15 the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.
16 2052, 80 L.Ed.2d 674 (1984). *Smith*, 528 U.S. at 285, 120 S.Ct. 746. The
17 Court held that *Robbins* was required to demonstrate prejudice, “[t]hat is, he
18 must show a reasonable probability that, but for his counsel's unreasonable
19 failure to file a merits brief, he would have prevailed *on his appeal*.” *Smith*,
20 528 U.S. at 285–86, 120 (emphasis added) (the Supreme Court's requirement
21 that the defendant must show ““a reasonable probability that, but for counsel's
22 unprofessional errors, the result of *the proceeding* would have been
23 different.’ ”) (emphasis added) (quoting *Strickland*, 466 U.S. at 694).

24 *In re Dalluge*, 152 Wn.2d at 788. The outcome of the proceeding (the appeal) in *Dalluge*
25 would clearly have been different if the appellant had raised his *Mora* claim on appeal.

The Supreme Court relied upon the fact that the appellate lawyer missed a clear winning
argument:

In this case, it is important to note that [*State v. Mora*, 138 Wn.2d 43, 977
P.2d 564, was decided in June 1999, before the decision in *Dalluge*'s first
appeal was filed in November 1999. *Dalluge*, 98 Wn.App. 1016.
Mora firmly established that after an amended charge destroys the automatic
jurisdiction of adult criminal court, the case should be remanded to the
juvenile court for a decline hearing. Had *Dalluge*'s appellate counsel raised

1 this argument, his case would have been remanded to the appropriate division
2 of the superior court. Thus, Dalluge has established that his appellate counsel
failed to raise a meritorious issue.

3 *In re Dalluge*, 152 Wn.2d at 787–88.

4 In this case, petitioner demonstrates only that a decline hearing should have been
5 inserted into the course of the superior court proceedings. Petitioner does not establish, as
6 *Dalluge* requires, that the outcome of his proceedings would have been changed had a
7 decline hearing been held. *In re Dalluge*, 152 Wn.2d at 788. Petitioner, has the burden of
8 proving deficient performance and resulting prejudice. *Strickland v. Washington*, 466
9 U.S. 668, 687–88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Petitioner has not
10 demonstrated that the amended information would have been in effect had defendant
11 sought decline to juvenile court. It is entirely possible on the record presented in this case,
12 that petitioner and his trial counsel made a conscious and knowing decision to forego a
13 possible declination hearing argument because petitioner wanted take advantage of the
14 substantial charge reduction by the State.

15
16 Petitioner pled guilty in this case on January 13, 1995.¹ *State v. Mora* was still four
17 years and ten months in the future. *State v. Mora*, 138 Wn.2d at 43. Petitioner’s trial
18 lawyer had no clear argument that his case needed to be sent back to juvenile court and he
19 had a prosecutor willing to amend three counts of assault in the first degree down to three
20 counts of assault in the second degree. Petitioner had an offender score of seven for each
21 of his three assault convictions. Appendix A. at 3-4.² Charged with assault in the first
22

23 _____
¹ The State’s initial responsive brief wrongly states that petitioner pled in 1994. He pled in 1995.

24 ² Petitioner had four juvenile adjudications in his criminal history. Appendix a at 4. Each of those
25 convictions counted for one half point. Former RCW 9.94A.360(9). Petitioner had a nonviolent other
current offense (Taking a Motor Vehicle Without Permission) which counted as one point. Former RCW
9.94A.360(1) and 9.94A.360(9). Each assault conviction was accompanied by two other current offense
assault convictions which each counted for two points. Former RCW 9.94A.360(9). The offender score is
the same for assault in the first degree as it is for assault in the second degree. *Id.*

1 degree, petitioner was facing a standard range sentence of 364-482 months.³ After the
2 prosecutor reduced the assault charges from assault in the first degree to assault in the
3 second degree, petitioner received a 43 month sentence.⁴ Appendix A at 8. Had petitioner
4 been declined he could have faced a 50 month manifest injustice dispositional hearing until
5 his 21st birthday. It would be reasonably sensible for a criminal defendant not to
6 jeopardize the deal that he had in the face of an uncertain future. Petitioner has not
7 demonstrated otherwise.

8
9 Alternatively, even if petitioner had received a decline hearing, petitioner has made
10 no attempt to prove that he would have prevailed in that decline hearing. At the time of
11 sentencing, petitioner was nineteen days away from his eighteenth birthday, charged with
12 very serious crimes, and had four prior juvenile offenses, each sentenced on different days.
13 Appendix A at 1, 4. If there had been a decline hearing, and if petitioner was not declined,
14 then the outcome of this case would be identical to the outcome now presented to this
15 Court. That argument also fails the *Dalluge* test.

16 Petitioner presents the unpublished case of *In re LaForge*, 195 Wn. App. 1058
17 (2016) as a proper application of *In re Dalluge*. The State disagrees for the reasons stated
18 above, but there are also two salient vital distinguishing factors. First, *LaForge* addressed
19 a petitioner who was still subject to an adult criminal sentence (community custody). It
20 was, unlike this case, a case where meaningful relief could still be granted. *Id.* Second,
21 the petitioner in *LaForge* had *State v. Mora* available as an argument—and the availability
22

23 ³ Assault in the first degree is a serious violent offense. Former RCW 9.94A.030(29). Serious violent
24 offenses were scored pursuant to Former RCW 9.94A.400(1)(b).

25 ⁴ Had petitioner received a manifest injustice disposition in the juvenile court on three counts of assault in the
second degree and one count of taking a motor vehicle without permission, petitioner could have faced
detention until age 21. Former RCW 13.40.160(1). Four years and nineteen days elapsed from defendant's
sentencing until his 21st birthday. That time, plus the 42 days credit for time served before sentencing
petitioner received (Appendix A at 9) amounts to a potential juvenile sentence of 50 months.

1 of *State v. Mora* was a significant factor in *In re Dalluge*. *Id.*; *In re Dalluge*, 152 Wn.2d
2 787-88.

3 II. CONCLUSION

4 This Court cannot provide adequate relief in this case. After all the time that has
5 passed from petitioner's guilty plea and judgment and sentence, only four artifacts
6 remain—the findings of guilt. Those findings were secured with the full panoply of adult
7 due process by a superior court of competent jurisdiction. Petitioner has not demonstrated
8 that he was actually prejudiced by the process which established those guilty findings.

9 Petitioner has not demonstrated deficient performance by his trial counsel. *State v.*
10 *Mora* was unavailable to his trial counsel, and petitioner has failed to demonstrate that his
11 trial counsel's performance was objectively unreasonable.

12 The personal restraint petition should be denied.

13 DATED: February 5, 2019.

14 MARK LINDQUIST
15 Pierce County
16 Prosecuting Attorney

17 

18 MARK von WAHLDE
19 Deputy Prosecuting Attorney
WSB #18373

20 Certificate of Service:

21 The undersigned certifies that on this day she delivered by ^{*efele*} U.S. mail or
ABC-LMI delivery to the petitioner true and correct copies of the document to
22 which this certificate is attached. This statement is certified to be true and
correct under penalty of perjury of the laws of the State of Washington. Signed
at Tacoma, Washington, on the date below.

23 2/5/19 *Johnson*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

February 05, 2019 - 11:01 AM

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