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State of Washington  
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NO. 52013-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

STEVEN M. FULLERTON,

Appellant.

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. TABLE OF AUTHORITIES .....	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error .....	1
2. Issue Pertaining to Assignment of Error .....	1
C. STATEMENT OF THE CASE .....	2
D. ARGUMENT	
<b>THE TRIAL COURT ERRED WHEN IT ENFORCED A MENTAL     HEALTH COURT CONTRACT THE DEFENDANT DID NOT     KNOWINGLY ENTER .....</b>	<b>8</b>
E. CONCLUSION .....	13
F. AFFIRMATION OF SERVICE .....	14

**TABLE OF AUTHORITIES**

Page

***State Cases***

*City of Seattle v. Williams*, 101 Wn.2d 445, 690 P.2d 1051 (1984) . . . . . 9

*State v. Humphries*, 181 Wn.2d 708, 336 P.3d 1121 (2014) . . . . . 8

*State v. Kisee*, 88 Wn.App. 817, 947 P.2d 262 (1997) . . . . . 11

*State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995) . . . . . 8

*State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994) . . . . . 8

*State v. Treat*, 109 Wn.App. 419, 35 P.3d 1192 (2001) . . . . . 9

*State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001) . . . . . 10, 11

***Constitutional Provisions***

Washington Constitution, Article 1, § 3 . . . . . 8

United States Constitution, Fourteenth Amendment . . . . . 8

## **ASSIGNMENT OF ERROR**

### ***Assignment of Error***

The trial court erred when it enforced a mental health court agreement the defendant did not knowingly enter.

### ***Issues Pertaining to Assignment of Error***

Does a trial court err if it enforces a mental health court agreement that failed to inform the defendant of the standard ranges and statutory maximums for the offenses covered by the agreement?

## STATEMENT OF THE CASE

By information filed January 17, 2017, and later amended nine months later, the Lewis County Prosecutor charged the defendant Steven Matthew Fullerton with one count of third degree assault and two counts of violating a civil anti-harassment order. CP 1-3, 85-87. The defendant suffers from schizoaffective disorder and bipolar disorder. CP 15-20, 37-48, 89-99, 112-122, 158-165. During the pendency of this case he slipped in and out of competency depending usually upon how regularly he was taking his anti-psychotic medication. *Id.* In fact, the court twice ordered the defendant to Western State for Competency Restoration and three times entered orders allowing for forced medication. CP 4-8, 76-81; CP 21-23, 82-84, 152-157. On March 28, 2018, a little over 14 months after the information was filed, the court entered a Finding of Competency. CP 167.

Three days after the court entered the order of competency, the defendant, his attorney, the prosecutor and the court signed and filed a document entitled "Lewis County Mental Health Court Program Contract." CP 170-174. This contract included a short introduction, 29 numbered paragraphs, and separate individual acknowledgments signed by the defendant, his attorney, the prosecutor and the court. CP 170-174. Paragraphs 1 through 20 of the agreement set out the defendant's

promises under the contract, which included getting a mental health evaluation, complying with all treatment recommendations, taking all prescribed medications, and regularly reporting to the mental health court coordinator. CP 170-172. Paragraphs 21, 22, and 23 deal with the court's discretion should the defendant fail to comply with the requirements of the agreement. CP 172. They state:

21. It is the Judge's decision to determine when the defendant has earned the ability to complete the Program and to determine when termination from the Program will occur.
22. Failure to abide by any Program rule, any positive urinalysis/breath test, any missed treatment session or Court hearing, any new violation of the law, or any failure to abide by any other terms or conditions of this contract will subject the defendant to a sanction ordered by the Court, which may consist of work release, confinement in the Lewis County Jail, community service, an increase in treatment services, or any other sanction up to and including termination from the Program.
23. If the defendant is terminated from the Program, the defendant agrees and stipulates that the Court will determine the issue of guilt on the pending charge(s) solely upon a summary of the enforcement/investigative agency reports or declarations, witness statements, field test results, lab test results, or other expert testing or examinations such as fingerprint or handwriting comparisons, which constitute the basis for the prosecution of the pending charge(s) as stipulates the facts presented by such reports, declarations, statements, and/or expert examinations are sufficient for the Court to find the defendant guilty of the pending charge(s)

CP 172.

Paragraphs 24 and 25 of the contract set out the waivers of rights that the defendant was making in order to enter into the agreement. CP

172. They state as follows:

24. The defendant acknowledges, understands, and agrees to waive the following rights:

- a. The right to a speedy trial pursuant to CrR 3.3 (The defendant further agrees to a new commencement date of 4/1/20);
- b. The right to public trial by an impartial jury in the county where the crime is alleged to have been committed;
- c. The right to hear and question any witness testifying against the defendant;
- d. The right at trial to have witnesses testify for the defense, and for such witnesses to be made to appear at no expense to the defendant; and
- e. The right to testify at trial.

25. The defendant waives the right to challenge the legality of any investigative or custodial detention, or the legality of any search or seizure, or the sufficiency or Miranda warnings or voluntariness of any statement made, pertaining to any evidence, which forms part of the basis for the prosecution of the pending charge(s).

CP 172.

Paragraphs 26 and 27 set out the parties' agreement concerning the use of the defendant's post contract statements. CP 173. In paragraph 28 the prosecutor agreed to move to dismiss the pending charges upon the defendant's successful completion of the contract, and paragraph 29 dealt with the issuance of warrants based upon claims of non-compliance. *Id.*

The acknowledgment preceding the defendant's signature had the following language:

My attorney has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all and wish to enter in this Mental Health Court Program Contract. I have no further questions to ask the judge.

CP 173.

The acknowledgment preceding the defense attorney's signature states as follows:

I have read and discussed this Mental Health Court Program Contract with the defendant and believe the defendant is competent and fully understands the contract terms.

CP 173.

The court's acknowledgment stated as follows:

The foregoing Mental Health Court Program Contract was signed by the defendant in open Court in the presence of the Defendant's attorney and the undersigned Judge. The Defendant asserted that . . . The defendant's attorney had previously read to him . . .

CP 174.

At no point did the agreement set out the names of the offenses that were part of the agreement, the elements of those offenses, what the standard ranges were for those crimes, or what the statutory maximums were. CP 170-174.

**BRIEF OF APPELLANT - 5**

Just prior to signing this agreement the court entered into a short colloquy with the defendant. RP 3/30/18 1-10. Although the court did have the defendant acknowledge that by entering the agreement he was giving up his right to speedy trial, the court did not explain any of the other rights the defendant was giving up by going into drug court. *Id.* Neither did the court review the charges that were the subject of the agreement, the elements of those offenses, their standard ranges, or their statutory maximums. *Id.*

A little over two and one-half months after the defendant signed the agreement the prosecutor filed a petition to terminate the contract. CP 192-193. Although the defendant contested the factual allegations in the petition to terminate, the court found him in violation and terminated him from the mental health court program. RP 6/5/18 1-13. The court then put the matter over two days for the stipulated facts trial. *Id.*

The court subsequently held a stipulated facts trial during which it reviewed the probable cause statement and police reports, after which it found the defendant guilty beyond a reasonable doubt of all three charges. RP 6/7 20. The court then imposed an exceptional sentence downward of 24 months with credit for time served on Count I on a standard range of 33 to 43 months. RP 6/7 21-28; CP 205-211. The court also imposed a \$500.00

crime victim compensation fund assessment but no other legal financial obligations. CP 208. The defendant thereafter filed a timely notice of appeal. RP 214-215.

## ARGUMENT

### THE TRIAL COURT ERRED WHEN IT ENFORCED A MENTAL HEALTH COURT CONTRACT THE DEFENDANT DID NOT KNOWINGLY ENTER.

Deferred prosecutions, drug court programs, and inferentially mental health court programs are not the equivalent of guilty pleas and to be valid need not meet the strict requirements of due process for guilty pleas under Washington Constitution, Article 1, § 3, United States Constitution, Fourteenth Amendment, and CrR 4.2. *State v. Mierz*, 127 Wn.2d 460, 468–69, 901 P.2d 286 (1995) (citing *State v. Johnson*, 104 Wn.2d 338, 705 P.2d 773 (1985) and *State v. Drum*, 168 Wn. 2d 23, 39, 225 P.3d 237, 245 (2010)). Nevertheless, entry into a drug court or mental health court program does include the waiver of important constitutional rights, such as the right to jury trial, the right to present evidence, the right to testify, and the right to cross-examine witnesses, which waivers are still invalid if not knowingly made. *State v. Humphries*, 181 Wn.2d 708, 336 P.3d 1121 (2014).

For example, independent of the decision to go to trial or plead guilty, a defendant may waive his right to jury trial as long as the defendant acts knowingly, intelligently, voluntarily, and free from improper influences. *State v. Stegall*, 124 Wn.2d 719, 724–25, 881 P.2d 979 (1994). “The waiver

must either be in writing, or done orally on the record.” *State v. Treat*, 109 Wn.App. 419, 427, 35 P.3d 1192 (2001). Indeed, the courts indulge in “every reasonable presumption . . . against the waiver of such a right, absent an adequate record to the contrary.” *City of Seattle v. Williams*, 101 Wn.2d 445, 451, 690 P.2d 1051 (1984) (quoting *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979)). In addition, as a fundamental constitutional right, courts on appeal review arguments against the waiver of the right to trial by jury de novo. *State v. Treat*, 109 Wn.App. at 427.

In the case at bar the defendant waived a number of important constitutional rights when he entered the drug court contract. These rights waived included (1) the right to public trial by an impartial jury in the county where the crime is alleged to have been committed, (2) the right to hear and question any witness testifying against the defendant, (3) the right at trial to have witnesses testify for the defense, and for such witnesses to be made to appear at no expense to the defendant, and (4) the right to testify at trial. CP 172. The record of this case reflects that the defendant waived these rights without any statement, explanation, or acknowledgment as to what the standard range sentences were for his offenses or what the statutory maximum was for any of these offenses. While the waiver of these rights in the context of entering a mental health court contract is not

judged with the same strictness as the waiver of these constitutional rights as part of a guilty plea, still the due process rights found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, do apply. Thus, those cases involving entry of a guilty plea upon a misunderstanding of the standard range and statutory maximum for the offense do provide a basis for consideration.

For example, in *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), the state originally charged a defendant with First Degree Kidnapping, First Degree Rape, and Second Degree Assault. The defendant later agreed to plead guilty to a single charge of Second Degree Rape upon the state's agreement to recommend a low end sentence upon a range that both the state and the defense miscalculated at 86 to 114 months. In fact, at sentencing, the court and the attorneys determined that the defendant's correct standard range was from 95 to 125 months. Although the state recommended the low end of the standard range, the court imposed an exceptional sentence of 136 months based upon a finding of intentional cruelty. The defendant thereafter appealed, arguing that his plea was not voluntarily, knowingly, and intelligently made, based upon the error in calculating his standard range.

On appeal, the Court of Appeals affirmed, finding that since the

defendant did not move to withdraw his guilty plea at the time of sentencing when the correct standard range was determined, he waived his right to object to the acceptance of his plea. On further review, the Washington Supreme Court reversed, finding that (1) a claim that a plea was not voluntarily made constituted a claim of constitutional magnitude that could be raised for the first time on appeal, (2) that the record did not support a conclusion that the defendant waived his right to claim his plea was involuntary, and (3) a plea entered upon a mistaken calculation of the standard range is not knowingly and voluntarily made. The court stated the following on the final two holdings:

Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence. Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. The defendant's choice of remedy does not control, however, if there are compelling reasons not to allow that remedy. Walsh has chosen to withdraw his plea. The State has not argued it would be prejudiced by withdrawal of the plea.

The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range. The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.

*State v. Walsh*, 143 Wn.2d at 8-9. See also, *State v. Kisse*, 88 Wn.App. 817,

947 P.2d 262 (1997) (Mistaken belief that the defendant qualifies for a SOSSA sentence is a basis upon which to withdraw a guilty plea).

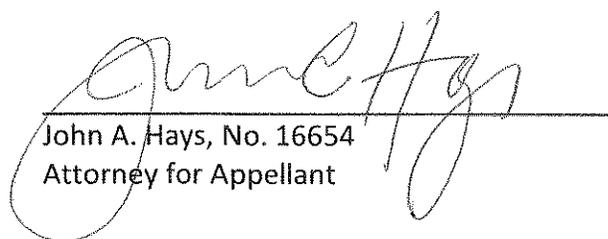
Once again, the argument in the case at bar does not rely upon the same strict due process analysis as was applied to the guilty plea in *Walsh*. Thus, in the case at bar, had the contract misstated the statutory maximums for the offense or misstated the standard ranges in the same way the standard range was misstated in *Walsh*, one might well find that this was not misinformation sufficient to find that the defendant did not knowingly enter the drug court contract. However, in the case at bar there is nothing with the record either in the mental health court agreement or the colloquy between the court and the defendant to indicate that the defendant even knew exactly what the charges were, let alone what the standard ranges were or what the statutory maximums were. Even under a relaxed standard of review the failure to inform the defendant of this critical information supports the conclusion that he did not knowingly waive the constitutional rights necessary to enter the mental health court agreement.

**CONCLUSION**

The trial court erred when it found the defendant guilty pursuant to his stipulation to facts under the mental health court agreement that the defendant did not knowingly enter. As a result, this court should vacate the defendant's convictions and remand for trial.

DATED this 25<sup>th</sup> day of October, 2018.

Respectfully submitted,



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Attorney for Appellant

COURT OF APPEALS OF WASHINGTON, DIVISION II

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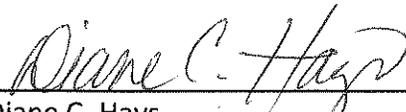
NO. 52013-3-II

AFFIRMATION  
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 25<sup>th</sup> day of October, 2018, at Longview, WA.

  
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**JOHN A. HAYS, ATTORNEY AT LAW**

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**Comments:**

re-filed brief with corrected pages 4 & 9

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