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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

AKEEM SLYE, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Judge Frank E. Cuthbertson

No. 18-1-00029-9

Amended Brief of Appellant

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A. IDENTITY OF APPELLANT

The State of Washington, represented by the Pierce County Prosecutor, is the Appellant herein.

B. INTRODUCTION

The Defendant Akeem Slye was charged with several serious sex offenses. The Defendant has a mild intellectual disability (IQ of 72). He understands that a finding of competency may result in a prison term and incompetency results in a dismissal. He asked for a competency evaluation, during which he correctly described the prosecutor's options after a hung jury and understood the prohibition against comments on silence. After a restoration attempt, the Western State Hospital expert opined that the Defendant could not be educated sufficiently within the limited time remaining by law, i.e. 15 days, so as to be considered competent, and the case was dismissed without prejudice.

The Defendant remained in civil commitment for four months where he continued to study. The prosecutor was advised the Defendant was only 1.5 credits shy of attaining his high school diploma, seeking out math assistance when needed, and playing rapid card games with other patients. She was advised that he would be released from his civil commitment many months early. His release would be without structure or monitoring despite expert prediction that this would increase his already moderate risk of

reoffense. A sex offender treatment provider contacted the prosecutor to advise that the Defendant was "wily like a fox" and "as far as he can go in understanding the issues that brought him here." The prosecutor investigated other police reports and treatment reports and consulted with other professionals. All this information led her to the opinion that the Defendant is currently competent.

The State refiled charges, requested an evaluation by an approved professional, and requested a contested competency hearing.

The superior court dismissed the case without holding a competency hearing, concluding that the prosecutor lacked a good faith basis to believe that the Defendant could be restored to competency. The court also concluded that no attempt at restoration may ever be attempted again in this case.

The superior court's order relies on a case which reached the opposite conclusion as to both points. This Court should reverse the dismissal order and hold that a restoration period is permitted upon the refiling of charges.

C. ASSIGNMENTS OF ERRORS

Assignments of Errors

The State assigns error to the following findings of fact (FF): 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, and 22.

The State assigns error to the following conclusions of law (CL): 1, 2, and 3.

Issues Pertaining to Assignments of Error

1. The State assigns error to findings of fact which are incorrect, unsupported in the record, misleading of the facts, or misleading of the law

2. Did the court abuse its discretion in finding the State lacked a good faith basis to refile?

3. Is a further restoration period available within the statute of limitations of this case?

4. Should this Court reverse the trial court's order of dismissal without prejudice?

D. STATEMENT OF THE CASE

The State appeals from the order dismissing the child rape prosecution against the Defendant Akeem Slye. CP 441-50.

The Defendant was charged in 2014 in several juvenile cases for offenses including burglary in the first degree and attempted rape in the second degree. CP 17, 342. He was referred to the Child Study and Treatment Center (CSTC) for evaluation in each matter resulting in reports dated June 20 and November 14, 2014 and March 2 and April 6, 2015. CP 16. The last evaluation resulted in a diagnosis of mild intellectual disability, language disorder, and social (pragmatic) and communication disorder. CP 16-17. Restoration in this case would mean educating the Defendant. CP 24, 258; RCW 10.77.0845(2) (training). After a restoration attempt and at

a contested competency hearing, CSTC opined that, due to his cognitive limitations, the Defendant was not likely to benefit from further efforts at competency restoration "at that time," but "it was entirely possible that he could at some point in the future be able to sufficiently learn to become competent" "with repetitious explanation of concepts." CP 18, 125; 3RP[1] 2, 6. Those cases were dismissed, and the statute of limitations has expired. CP 353; RCW 9A.04.080.

In 2016, the Defendant turned 18. CP 1. In 2017, the Defendant's nieces disclosed that he had sexually abused them between 2010 and 2015 when he would have been between the ages of 12 and 17. CP 1-4, 261, 354 (count 3 dismissed). Y.B. alleges that the Defendant held her down and tried to put his hands down her pants to touch her vagina, but she successfully resisted. CP 2. T.B. alleges that the Defendant inserted his penis in her vagina over her objection and only stopped when it appeared his mother, who was asleep on a nearby couch, would wake up. CP 2.

The Defendant admitted to Detective Robillard that he touched both girls sexually, rubbing his "stiff" penis against one. CP 2, 353. He knew this was wrong, both because of their familial relationship and ages. CP

[1] "1RP" refers to the Verbatim Report of Proceedings prepared by Official Stenographic Court Reporter Susan Zielie for hearings on November 16, November 26, and December 4, 2018. "2RP" refers to the January 11, 2019 transcript. "3RP" refers to the January 14, 2019 transcript. "4RP" refers to the January 17, 2019 transcript.

353. The Defendant told the detective that he had been previously charged with burglary and attempted rape, but the charges were dropped because he was not competent. CP 353. He explained to the detective that incompetency meant "he couldn't help his lawyer and didn't understand the proceedings." CP 353.

Charged in January 2018 with first degree child rape and child molestation, the Defendant immediately requested a competency evaluation, and noted in the order that there had been prior CSTC evaluations. CP 1-13; 1RP 5, 8. Western State Hospital (WSH) evaluator Ray Hendrickson reviewed the historical evaluations. CP 16-19. After a single interview with the Defendant, Dr. Hendrickson adopted the same diagnosis and conclusions. CP 16, 19, 24. He concluded that the Defendant had a factual, but not a rational, understanding of court proceedings thereby impairing his ability to consult with his attorney to work on his defense. CP 24. And while conceding maturation in the three years since the previous restoration attempt, the doctor opined that restoration was unlikely to be successful. CP 24.

Pierce County prosecutors have lost confidence in the WSH staff's ability to evaluate defendant with intellectual disabilities, finding their review to be perfunctory. CP 424, ¶ 17. In a recent case, the Pierce County superior court ordered an independent evaluation where the WSH expert's

competency opinion was contradicted by the developmentally disabled defendant's history of 20 years of independent living. CP 345, 403-04, 424.

In the instant case, Dr. Hendrickson's review did not take into account allegations of serial sexual predation of three additional victims in the juvenile cases. CP 16-17. This failure led him to opine that the Defendant was not an "*imminent* risk of danger to others." CP 24. The Honorable Judge Cuthbertson disagreed, commenting that the Defendant walked away from serious charges in juvenile court while he remains a serious concern and danger to others. 2RP 21, 47.

Dr. Hendrickson's report detailed the Defendant's familiarity with the legal process. The Defendant knew the roles of the judge, attorneys, and jury. CP 20-21. Following his time in juvenile court, the Defendant understood the judge is in charge of the court and determines guilt and sentencing. CP 20. He understood that jurors may assist the judge. CP 20. He understood that he could plead guilty or go to trial. CP 22. And he understood the concept of probation. CP 22. He knew his charges, knew he was charged with more serious felonies that would be heard in superior court and could result in a prison sentence, and knew that first-degree offenses are most serious. CP 20. The Defendant knew he did not have to testify, had the right to remain silent, and that his attorney would speak for him in trial. CP 21. He understood it was improper for the prosecutor to

ask him to testify, because a comment on his right to remain silent would make "[t]he jury [ ] think you did it." CP 22. The Defendant defined a witness as a person that has evidence. CP 23. Following a hung jury, he understood the prosecutor could retry the case or dismiss it. CP 21.

The court ordered restoration treatment. CP 26-32. The Department of Social and Health Services (DSHS) did not promptly comply with the order. CP 33-39. In response to a motion for sanctions, DSHS explained that WSH was overwhelmed with referrals. CP 70-116. One of DSHS's proposed solutions to its backlog is dismissal of criminal cases. CP 110.

On April 18, 2018, the Defendant was admitted to WSH where his IQ was determined to be 72. CP 140, 145. Dr. Johnathan Sharrette considered the prior evaluations and, two and a half months into the 90-day restoration period, prepared his July 3rd report. CP 135-36. After meeting with the Defendant for a single interview on June 29th, Dr. Sharrette opined that the Defendant "will not likely improve in the limited amount of time offered by the law." CP 136, 149. Of the 90 days permitted by the court order, only 15 days then remained. CP 27; RCW 10.77.086(1)(a)(ii). The doctor considered the Defendant's risk for reoffending and risk of dangerous behavior to be moderate and likely to increase if exposed to significant stress or if living in an unmonitored and unstructured environment. CP 150.

The case was dismissed without prejudice on July 9, 2018 and the civil commitment process commenced. CP 153. The State did not agree to dismissal. CP 152-53.

Four months later, deputy prosecuting attorney (DPA) Kara Sanchez re-filed the case. CP 174-76. The supplemental probable cause declaration explains that the Defendant could qualify for temporary unescorted leave into the community and could be discharged well in advance of the civil commitment period, as early as November 16, 2018, because he does not have a mental health diagnosis. CP 179.

Expressing dissatisfaction with WSH's handling of intellectual disability cases, the State asked that Dr. Kenneth Muscatel, an expert frequently used by the defense and available immediately, be permitted to evaluate the Defendant. 1RP 3, 14, 39-40; CP 424 ¶ 17. Dr. Muscatel could provide a much more thorough evaluation than the 1-2 hour interviews of WSH experts so as to "put to bed … one way or the other" the competency issue. 1RP 14, 40.

Defense argued that no further evaluations were permitted. 1RP 4-5, 10-11. "They don't get a second chance at this." 1RP 11. Under the Defendant's theory, the State would "never be able to refile, because you always would have been following a restoration period and a referral for

civil commitment based upon a determination that they weren't restorable. … They'd never be able to refile." 1RP 22-23.

The Honorable Judge Arend disagreed, and ordered a new evaluation, but had insufficient information about Dr. Muscatel's qualifications to appoint him. 1RP 23, 26, 28 ("I haven't read any CVs."). Judge Arend permitted the DSHS Secretary to designate an evaluator, noting the prosecutor could object once a specific expert was assigned. 1RP 24-26 (referencing RCW 10.77.060 (the secretary's assignment "shall be approved" by the prosecutor)).

Ten days later, the prosecutor approached Judge Arend, explaining that the Secretary had failed to assign any evaluator and objecting "across the board" to the appointment of an evaluator from WSH. 1RP 35-36, 40. The prosecutor provided Dr. Muscatel's curriculum vitae for the court's review and requested his appointment. 1RP 35-36, 40. The judge denied the request, saying she had not had time to review the CV. 1RP 41-42, 45.

Dr. Sharrette was assigned without notice to the State. 4RP 11, ll. 3-9. His report is largely identical[2] to the one he wrote in July. CP 134-51, 238-52.

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[2] In the previous report, describing a June 29th interview, Dr. Sharrette had written that the Defendant "started to slump over, looking at the floor with a concerned look, almost as if he were about to break into tears." CP 143. Describing the November 29th interview, Dr. Sharrette claims that the Defendant again "began to slump closer to the table and he appeared to be close to tears at some points." CP 245.

At the prosecutor's request, Judge Arend set a contested competency hearing. CP 254; 1RP 49, 51. The State continued to request an evaluation by Dr. Muscatel. CP 353.

The Honorable Judge Cuthbertson put aside the contested competency issue in order to entertain defense motions to compel discovery and to dismiss. CP 336, 338, 434 ¶11. The Defendant argued the prosecutor lacked a good faith basis to refile charges as required by *State v. Carneh*, 149 Wn. App. 402, 203 P.3d 1073 (2009). CP 260. DPA Sanchez explained that, prior to refiling, she knew the following information:

- Since the dismissal, the Defendant had been attending and participating in classes and was 1.5 credits shy of graduating high school. CP 341-42, 392; 2RP 12. He was completing hundreds of pages of math homework and requesting assistance when needed. CP 342; 2RP 12. He was engaging socially with others on the ward. 2RP 12; Exhibit 2.
- Sex predator treatment provider Paula van Pul expressed concern for community safety if the Defendant, whom she described as "wily like a fox," were released. CP 341, 422-23; 2RP 9. She inquired whether the State would be refiling charges. CP 340-41, 389-90, 422.
- Ms. van Pul believed the Defendant had been educated "as far as he can go in understanding the issues that brought him here," and she offered to provide the results of a competency interview. CP 341, 392.
- There would be no further civil commitment or LRA, no formal discharge notice, and no structured or monitored placement. CP 342, 423.
- The Defendant's release would indicate that he was clinically stable. CP 386-87, 422-23.

- His moderate risk to reoffend and moderate risk of dangerous behavior would increase in an unmonitored and unstructured environment. CP 150.

From this record, Ms. Sanchez believes that the Defendant "understands more than it is believed he understands" and is actually competent. CP 342 ("a level of functioning suggesting the defendant could very well be found competent to stand trial if the charges in this matter were re-filed"); 423-24; 2RP 12. This would be consistent with the Defendant's statement to the detective that he knew his previous cases were dismissed for incompetency, a complicated legal concept which he ably defined. CP 353. It is also consistent with the probable cause declarations in the juvenile cases, which demonstrated "a level of sophistication, goal-directedness, and premeditation indicative of competence." CP 342, 423.

Prior to refiling, Ms. Sanchez consulted with senior DPAs and assistant attorneys general (AAGs). CP 423. The AAGs recognized the risk to the community in releasing the Defendant and were frustrated with the lack of any civil options. CP 423. The DPAs had lost confidence in the ability of WSH to evaluate and restore accused persons with intellectual disabilities. CP 423.

Ms. Sanchez provided the court with the relevant case law in which similarly situated defendants have been found competent. CP 343-49; 2RP 12 ("he actually functions on a higher level than those folks"), 31 (defendant

has a higher IQ). Over 600 pages of WSH records were entered as Plaintiff's Exhibit 2. CP 429; Exhibit 2.

Judge Cuthbertson dismissed the case without prejudice, finding the State lacked a good faith basis to refile. CP 438 ¶ 1; 2RP 41. The court found no bad faith either, noting everybody should be concerned about "him in the street without appropriate supervision or monitoring, hurting somebody. I mean, that's the State's role." CP 438 ¶ 6; 2RP 44.

E. APPLICABLE STANDARDS

At the trial level, the State had many objections to the misleading nature of the findings as drafted by defense counsel. 4RP 1-2, 4-11, 15-19. On appeal, the State assigns errors to almost all of the findings as incorrect, unsupported in the record, misleading of the facts, or misleading of the law.

Findings of fact must be supported by substantial evidence, i.e. evidence sufficient to persuade a fair-minded, rational person that the finding is true. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014); *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). The court will review *de novo* whether conclusions of law are supported by findings of fact. *State v. Tien Thuy Ho*, 8 Wn. App. 2d 132, 140, 437 P.3d 726, 731 (2019).

A determination of the State's good faith to refile charges is reviewed *de novo*. *State v. Carneh*, 149 Wn. App. 402, 411, 203 P.3d 1076 (2009).

Appellate courts review all statutes *de novo* to discern and implement the legislature's intent. *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319, 321 (2014). Interpretation must give effect to all language in the statute, considering the context in which the provision is found, related provisions, and the statutory scheme as a whole so as to render no portion meaningless or superfluous. *State v. Evans,* 177 Wn.2d 186, 192, 298 P.3d 724 (2013); *State v. J.P.,* 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

F. ARGUMENT

1. THE COURT ERRED IN FINDING NO GOOD FAITH BASIS TO REFILE.

The trial court's dismissal relied upon *State v. Carneh*, which the judge interpreted to have set "a pretty high bar for the State to refile." CP 438 (CL 1); 2RP 45. In fact, the case strongly supports the State's right to refile charges in this case.

The opinion held (1) "competence is not a prerequisite for charging an individual with a crime;" (2) "known incompetency does not bar refiling;" and (3) prosecutors "must act in good faith" when refiling charges. *Carneh*, 149 Wn. App. at 409-10. The court reviews *de novo* whether the State acted in good faith by refiling charges. *Id.* at 411.

Affirming the refiling, the *Carneh* court noted that the prosecutor had two reasons to believe the defendant could be restored. These reasons are not described as exclusive or necessary factors. However, they are helpful in evaluating the instant case.

> First, before dismissing the case without prejudice, the trial court found "reason to believe that [Carneh's] competency will again be restored." Second, the letter from WSH stated that Carneh would be moved to a ward where he would be able to earn the privilege to move about without accompaniment on the unsecured grounds of WSH or within the community. This clearly implies that his condition is greatly improved and supported the trial court's prediction.

Id. at 411.

a. <u>The prosecutor believes the Defendant is currently, actually competent based on the experts' projection that he would likely become competent with time, his continuing education, his demonstrated understanding of the legal process, and his release into the community.</u>

In our case, the prosecutor not only had reason to believe that Defendant Slye could become competent, she believes that he is currently, actually competent. As far back as 2015, evaluators stated that it is "entirely possible that he could at some point in the future be able to sufficiently learn to become competent." 3RP 6. As recently as this year, the expert opined that restoration was possible simply through "repetitious explanation of concepts." CP 125.

In the past several years, the Defendant has studied and he has matured. The prosecutor knew that, since dismissal, the Defendant was advancing in his schooling and engaging socially. *See e.g.* Exhibit 2 at 00429 (communicates without difficulty when he wishes to do so, engages with peers appropriately, plays board games), 00549 (plays cards at a quick pace).[3]

The prosecutor learned that the Defendant's sex predator treatment counselor considers him to be "wily," which suggests that he may have been malingering or at least not performing at his full potential in interviews with doctors. CP 341. This is supported by police records, apparently not reviewed by the WSH experts, which show a level of sophistication, goal-directedness, and premeditation indicative of competence.

The Defendant confirmed in his conversation with the detective he understands the benefit of being found incompetent. He understands that if he is found competent, he faces a possible prison term. CP 121. And he understands that if he is found incompetent, the case will be dismissed. CP 353. He has gone as far as he can in understanding the issues that brought him to WSH. CP 341. Accordingly, he has little motivation to perform in

[3] The numbers referenced are the bates stamp numbers.

a way that will continue the prosecution. CP 341. The State requested a contested competency hearing in order to demonstrate this. 1RP 49.

The prosecutor also consulted with others and learned there is a consensus loss of confidence in the ability of WSH personnel to evaluate and restore patients with intellectual disabilities. The prosecutor knew that courts have found patients with far greater deficits to be competent. CP 346-47. A defendant with a markedly lower IQ of 49-59, a speech impediment, and a memory deficit was found competent in an aggravated murder case although he could not describe the shape of a ball, believed Longfellow was Jesus, and thought that there is only one day in a week. *State v. Ortiz*, 104 Wn.2d 479, 482-84, 706 P.2d 1069, 1072 (1985). A trial court was not estopped from finding another defendant (49-67 IQ) competent in a rape case although seven earlier offenses had been dismissed for incompetency due to "an incurable developmental disability." *State v. Minnix*, 63 Wn. App. 494, 497-99, 820 P.2d 956, 958-59 (1991). And a defendant with the same IQ as Defendant Slye was determined ***not*** to have any developmental disability but to have been malingering or exaggerating his symptoms such as hallucinations. *State v. Lewis*, 141 Wn. App. 367, 375-77, 381-82, 166 P.3d 786, 790-91, 793 (2007). Those experts found it significant that the defendant played cards correctly and kept score during

dominoes despite struggling to answer doctors' questions. *Lewis*, 141 Wn. App. at 375.

The prosecutor's belief that the Defendant is actually competent and the State's request for a contested competency hearing are incontrovertible proof of good faith. "[T]he bar against trying incompetent defendants lasts only 'so long as such incapacity continues.'" *Carneh*, 149 Wn. App. at 410 (quoting RCW 10.77.050). The prosecutor had reason to believe the Defendant was restored based on his release from civil commitment.

The second reason the *Carneh* prosecutor believed restoration was possible was the patient's transfer to a less restrictive ward. *Id.* at 411.

In our case, the Defendant was more than moving between wards. He was being discharged into the community without monitoring or structure. CP 179. The Defendant had been civilly committed. RCW 71.09.030(1)(c). His release would indicate that he was communicating with a treatment provider at a level that the provider had sufficient confidence he could be safely released. RCW 71.09.092.

Judge Cuthbertson found that this latter fact demonstrated that the prosecution did not act in bad faith. 2RP 44.

b. The record does not support a finding that the Defendant would never be competent.

The court found that the Defendant was not likely to regain competency. CP 437 (FF 21-22). This finding is not supported by substantial evidence.

The Defendant is a young man with a low IQ (mild disability) and a quiet personality. Currently, he is able to grasp complex legal concepts like the prohibition against comments on silence and solutions to a hung jury. He is capable of learning and maturation. CP 24. And he continues to study and learn. The treatment for the Defendant's particular issue is "an individual habilitation plan" to educate him about court proceedings and working with his attorney. CP 24, 258; Laws of 1989, Ch. 420, § 1; RCW 10.77.010(12).

While the Defendant was not likely to satisfy the WSH experts with his progress in the "limited amount of time offered by the law," that being 15 days, it was "entirely possible that he could at some point in the future be able to sufficiently learn to become competent." 3RP 6; CP 125, 149. The State's refiling was "some point in the future," in fact it was several years after this expert opinion and after a period 8x longer than the 15 days permitted by law for restoration. After the dismissal of his case, the Defendant remained at WSH for several months under a civil commitment and continued to study.

c. The court relied on incorrect or irrelevant information.

In reaching its conclusions, it is apparent the court misunderstood some information and relied on some improper or irrelevant information.

The court was under the misimpression that there had been two or three restoration attempts "in the last year in this case." 2RP 26. There had been a single attempt.

The court mistakenly believed that a dismissal would result in civil commitment. CP 438 ¶3; 2RP 27-29, 41, 47. In fact, the Attorney General's Office had advised that the Defendant would be released as soon as a residence could be found. CP 426, ¶¶ 10, 17.

The court seemed to believe the question before it was not whether the prosecutor acted in good faith, but whether the court reached the same conclusions about restorability and competency. The court's findings focus on the past evaluations, perseverating on allegations that the State failed to object to the appointment of specific evaluators or restoration orders or agreed to the dismissal order. CP 431-37 (FF 2, 3, 4, 6, 12). In fact, the State did not agree to dismissal. CP 152-53. And the law does not require the State to object. It requires the Secretary's appointments to be approved by the State. RCW 10.77.060(1)(a). They were not.

In fact, the prosecutor strenuously objected to the appointment of any expert from WSH. 1RP 40, ll. 13-16. Despite this objection, the court

relied on Dr. Sharrette's December 2018 reports. CP 434-35 (FF 12-13). Where the reports were produced over the prosecutor's objection in violation of the law, the superior court's reliance was improper.

This Court must find, based on the record and authority, that the prosecutor refiled with a good faith basis, believing that the Defendant has become competent. This Court should find Conclusions of Law 1 and 3 are error and should reverse and remand for reinstatement of the prosecution and appointment of an expert approved by the prosecuting attorney as required by RCW 10.77.060(1)(a).

2. THE COURT ERRED IN RULING THAT NO FURTHER RESTORATION PERIOD IS AVAILABLE.

When a defendant is found incompetent, the court may order competency restoration treatment. RCW 10.77.084(1)(b). More than one period of restoration may be ordered. RCW 10.77.084(1)(c). Judge Cuthbertson's order indicates that "no further restoration period is available," citing RCW 10.77.086(3). CP 438 (CL 2). In the context of the defense motion to dismiss, where the question was not raised, this conclusion of law is gratuitous. However, it is an issue that is likely to arise if the prosecution is reinstated at any time within the statute of limitations. RCW 9A.04.080(1)(c) (may be prosecuted up to the victim's thirtieth

birthday). This Court must find Conclusion of Law 2 is error and reverse it.

a. The superior court misinterpreted and misapplied RCW 10.77.086(3).

Under RCW 10.77.086(3)-(4), the court may order up to three restoration attempts of 90, 90, and 180 days. The permitted periods of restoration are not limited per case but per finding of incompetency. This is how the matter was interpreted in *Carneh* where the defendant received 90 days of restoration treatment followed by competency, decompensation, a new finding of incompetency, a further 360 days of restoration attempts (90 + 90 + 180) before dismissal, followed by a refiling, and the recommencement of more restoration attempts (90 + 90 ...). *Carneh*, 149 Wn. App. at 405-08. If there is a refiling and the court finds the defendant is incompetent, the same original number of restoration attempts are available anew.

Where the patient's incompetency is "solely the result of a developmental disability" and "competence is not reasonably likely to be regained during an extension," only a single 90-day attempt (rather than the 90 + 90 + 180) is available before a dismissal. RCW 10.77.086(3).

In this case, after the State refiled, the court filed a new order of incompetency (CP 180-86) which triggered a new basis to order a period of restoration.

The State contends that the Conclusion of Law 2 is error because the permitted periods of restoration are not limited per case but per finding of incompetency. The State may attempt to restore a developmentally disabled patient multiple times in the same case, but only for 90 days before a dismissal without prejudice.

Multiple restoration attempts are allowed because competency is fluid. Where the issue is mental disease, medication may restore a person temporarily. In the same way, where the issue is mental defect, education may restore a person – again temporarily. Information that is learned can be unlearned or forgotten and then re-taught. Consider, for example, how one's dexterity with a foreign language or musical instrument can wane from disuse or neglect and rebound with new learning or practice.

And this is necessarily what the legislature intended when it instructed that a dismissal for incompetency is "without prejudice."

> For persons charged with a felony, at the hearing [...] at the end of the first restoration period in the case of a defendant with a developmental disability, if the jury or court finds that the defendant is incompetent [...], the charges shall be dismissed without prejudice.

RCW 10.77.086(4). *See also Carneh*, 149 Wn. App. at 410 (by requiring a dismissal be without prejudice, the legislature "reserved the prosecutor's ability to refile charges"). Dismissal is without prejudice, permitting refiling, because competency is not foreclosed.

The limitation on restoration time for persons with developmental disabilities is not premised on a belief that these persons cannot learn so as to become competent. Rather the provision recognizes the limitations of our facilities. DSHS is poorly prepared to treat the rare person with developmental disabilities that is accused of crimes. Laws of 1989, Ch. 420, § 1 ("not typical of the vast majority"). "[T]he services provided in mental institutions are oriented to persons with mental illness, a condition not necessarily associated with developmental disabilities." *Id.*

The trial court's interpretation of RCW 10.77.086(3) to foreclose more than one 90-day period of restoration per case, rather than per incompetency, renders the "without prejudice" portion of the statute superfluous and is inconsistent with legislative intent which limited institutionalization based on services and not the ability of persons with developmental disabilities to learn.

This Court should reverse the dismissal, finding that Findings of Fact 21 and 22 are not supported by substantial evidence and that Conclusion of Law 2 is error.

b. <u>The order was not the appropriate subject of the motion before the court.</u>

When the court first mentioned its reliance on RCW 10.77.086, it came as a surprise to the prosecutor. 2RP 41-42. The question of subsequent restoration periods was not before the court. Conclusion of Law

2 is not responsive to the defense motion to dismiss for refiling without a good faith basis.

By ruling on this matter *sua sponte*, the court denied the State notice of the issue and notice and opportunity to respond either in briefing or oral argument. The State has a right to fundamental fairness which is akin to procedural due process. *Snyder v. Massachusetts*, 291 U.S. 97, 137, 54 S. Ct. 330, 340, 78 L. Ed. 674 (1934)) (due process dictates that fundamental rules of fairness be observed); CJC Canon 2, Comment 1 to Rule 2.6(A) (right to be heard). The opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Matter of Deming*, 108 Wn.2d 82, 96-97, 736 P.2d 639 (1987); *1488, Inc. v. Philsec Inv. Corp.*, 939 F.2d 1281, 1292 (5th Cir. 1991) (providing a party with an opportunity to mount a defense "on the spot" does not comport with due process).

By ruling in a vacuum, the court lacked both factual and legal assistance from the parties. This is a recipe for error.

Judge Arend ruled on a substantially similar question with the benefit of some argument and arrived at a different conclusion. When the defense argued that no further evaluations would ever be permitted again in this prosecution for child rape, Judge Arend noted that this "novel" argument would benefit from some briefing. 1RP 4-5, 10-11, 22.

Ultimately, she found this was inconsistent with the legislative directive that dismissal be without prejudice. 1RP 22; RCW 10.77.084(1)(d).

Judge Arend found that, after a dismissal and refiling, the competency question begins anew procedurally. 1RP 23. Having reached the conclusion that the new evaluation order was available as an "initial evaluation under RCW 10.77.060," she entered the order. CP 180-86; 1RP 22-23.

If it is an initial evaluation, as Judge Arend found, then there has been no attendant restoration period. Therefore, in effect, Judge Cuthbertson's Conclusion of Law 2 reverses or reconsiders Judge Arend's decision. Reconsideration of another judge's ruling is discouraged. *People v. Riva*, 112 Cal. App. 4th 981, 991-93, 5 Cal. Rptr. 3d 649, 658-59 (2003) (absent a highly persuasive reason more than mere disagreement with the result); *In Re Alberto*, 102 Cal. App. 4th 421, 427-28, 125 Cal. Rptr.2d 526, 530 (2002) (reversal of a peer places the second judge in the role of a one-judge appellate court). Reconsideration is only appropriate with the emergence of new dispositive facts or a controlling decision of law. *Gutierrez v. Ashcroft*, 289 F. Supp. 2d 555, 561 (D.N.J. 2003), *aff'd on other grounds sub nom. Gutierrez v. Gonzales*, 125 F. App'x 406 (3d Cir. 2005). There was no change of circumstances between the time of Judge Arend's

decision and Judge Cuthbertson's. PCLR[4] 7(c)(5) (prohibiting a party from rearguing the same motion before a different judge without an affidavit demonstrating new facts or circumstances). The procedural posture was the same: a refiling following a dismissal. The prosecutor had no reason to believe this resolved matter was available for reconsideration.

In an appellate opinion, we would call the substance of Conclusion of Law 2 dictum. In findings and conclusions, however, it becomes the law of the case, superseding the previous law of the case that was Judge Arend's ruling. This Court should strike this conclusion as procedurally improper. Alternatively, the Court should reverse the conclusion for the benefit of the parties in this case and for the guidance of future parties.

[4] https://www.co.pierce.wa.us/DocumentCenter/View/3148/Local-Court-Rules?bidId=

G. CONCLUSION

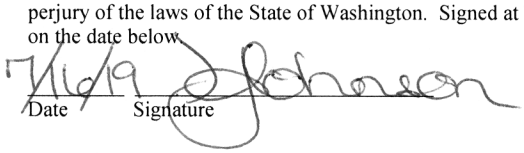
Based upon the foregoing, the State respectfully requests this Court reverse the dismissal order in its entirety, holding that there was a good faith basis to refile, that a restoration period is permitted upon the refiling of charges, and that any appointment of an expert must be with the approval of the prosecutor as required by RCW 10.77.060(1)(a).

DATED: July 16, 2019

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ efile or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to 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.

7/16/19 
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PIERCE COUNTY PROSECUTING ATTORNEY

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