

No. 320634

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Amel Dalluge,

Appellant.

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

The Honorable Evan Sperline

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Seventeen-year-old Amel Dalluge was convicted in adult court of second-degree burglary, second-degree theft and second-degree vehicle prowling in 1998. In 2011, this Court transferred Mr. Dalluge's personal restraint petition to the trial court for a *Dillenburg* hearing to determine whether juvenile court jurisdiction would have been declined if the proper declination hearing had been held.

At the *Dillenburg* hearing in 2013, no evidence was introduced. Mr. Dalluge indicated that he only wanted to proceed based on his legal arguments. Without hearing any facts, and without applying any facts to the factors the trial court was required to consider, the trial court rejected Mr. Dalluge's legal arguments and ordered that the juvenile court would have declined jurisdiction. But the trial court abused its discretion, because it failed to independently review the appropriate factors before declining juvenile jurisdiction, it failed to order a factual hearing, it failed to find that declination was in Mr. Dalluge's or the public's best interests, and it failed to enter findings that stated with any specificity the reasons why this relatively less-serious matter should not have remained in juvenile court. The trial court's order must now be reversed for that abuse of discretion.

Furthermore, Mr. Dalluge maintains that this Court should elect to not order another *Dillenburg* hearing, because it was only ever discretionary in this case and is not the most suitable remedy at this time. Alternatively, if another *Dillenburg* hearing is ordered, it should comport with due process, including introduction of facts, consideration of the appropriate factors, and appropriate findings by the trial court.

B. ASSIGNMENTS OF ERROR

1. The court erred by declining juvenile court jurisdiction without any supporting facts.
2. The court erred by failing to independently consider the required factors and order a hearing that would permit the court to conduct its necessary inquiry before deciding to decline jurisdiction.
3. The court erred by accepting Mr. Dalluge's supposed waiver of the factors for declining jurisdiction. Waiver is not necessarily recognized at a declination hearing, absent intentional deception of a juvenile's age. Even if waiver could be made, it must be express, voluntary, and intelligent, and the defendant must be fully informed. No such waiver existed in this case.
4. The court erred by failing to find that declination of juvenile jurisdiction was in Mr. Dalluge's or the public's best interests.
5. The court erred by failing to make findings on the requisite factors and best interest test that should have been considered below.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the court erred by failing to independently consider the *Kent* factors, failing to make the required findings for declination, and accepting Mr. Dalluge's ineffective "waiver" of the factors on whether the court should decline juvenile jurisdiction.

- a. The court failed to consider or balance the required factors and make the requisite findings before making its declination decision.
- b. Mr. Dalluge did not waive juvenile court jurisdiction; regardless, any alleged waiver would not obviate the trial court's obligation to independently review the facts and circumstances before declining juvenile jurisdiction.

Issue 2: Whether this Court should resist ordering another *Dillenburg* hearing, since it is not necessarily the most suitable remedy, and instead reverse the conviction that was obtained without proper jurisdiction.

D. STATEMENT OF THE CASE

The juvenile court never held a declination hearing before seventeen-year-old Amel Dalluge was tried and convicted in adult court in March of 1998 for second-degree burglary, second-degree theft and three counts of vehicle prowling. See COA 29256-8-III, Ruling 6/8/2011; CP 43-50. So, after Mr. Dalluge filed a personal restraint petition challenging the trial court's jurisdiction, this Court remanded for a *Dillenburg*¹ declination hearing. *Id.* Mr. Dalluge now appeals the order on remand in which the trial court declined jurisdiction in juvenile court. (CP 221)

By way of history, Mr. Dalluge was charged with a separate offense of first-degree rape in September 1997, which initially resulted in automatic decline of juvenile court jurisdiction because it was a serious violent offense. (RP 5-6; *State v. Dalluge*, 152 Wn.2d 772, 776, 100 P.3d 279 (2004)). While those charges were pending, Mr. Dalluge committed

¹ *Dillenburg v. Maxwell*, 70 Wn.2d 331, 413 P.2d 940, 422 P.2d 783 (1966).

the underlying burglary, theft and vehicle prowling,² which was charged in adult court in January 1998 because Mr. Dalluge had already been declined in juvenile court due to the prior pending rape offense. (RP 6)

But then, the first-degree rape charge was amended downward to two counts of second-degree rape, resulting in the adult court losing its automatic exclusive jurisdiction in both this and the rape case unless the juvenile court declined jurisdiction after a *Dillenburg* hearing. (*Dalluge*, 152 Wn.2d at 776, 781; COA No. 29256-8-III, Ruling 6/8/2011). Without any declination hearing, Mr. Dalluge was convicted in adult court of the underlying burglary, theft and vehicle prowling counts on March 5, 1998. (CP 44) And he was convicted of the separate, lesser-included third-degree rape offenses on March 30, 1998. (CP 44)

Following Mr. Dalluge's personal restraint petition, the rape case was remanded by our Supreme Court for a *Dillenburg* hearing due to a lack of jurisdiction by the adult court to sustain that conviction once the charge was amended down from a serious violent offense. (RP 5; *State v. Dalluge*, 152 Wn.2d 772 (2004)). A *Dillenburg* hearing was then held by

² In November 1997, Mr. Dalluge and/or an accomplice broke into several vehicles, took personal belongings from within three of the vehicles, entered a nearby garage and took tools from therein. The next day, Mr. Dalluge learned from the son of one of the victims, Brent Langshaw, that Mr. Langshaw's family members and neighbors were the victims. Mr. Dalluge helped Mr. Langshaw locate and return some of the items that had been taken. He was thereafter charged with and convicted of second-degree burglary, second-degree theft and three counts of vehicle prowling. (COA No. 17449-2-III, Ruling Affirming 8/10/1999; CP 20-21; CP 1-14)

the trial court, with the court deciding that juvenile jurisdiction would have been declined under the particular facts and circumstances of that case. (RP 6) Mr. Dalluge appealed the trial court's *Dillenburg* decision, but it was affirmed by unpublished opinion. (COA Ruling No. 26485-8-III, *State v. Dalluge*, 148 Wn. App. 1004, *review denied*, 166 Wn.2d 1026 (2009)). Mr. Dalluge then filed a personal restraint petition, arguing that the trial court's approximately 10-year-late *Dillenburg* hearing amounted to an improper nunc pro tunc action, but this petition was dismissed in 2010. (See COA No. 29255-0-III)

In June 2011, following a separate personal restraint petition filed by Mr. Dalluge, this Court remanded this underlying burglary case for a *Dillenburg* hearing.³ (Ruling 6/8/2011 COA No. 29256-8-III; CP 43-50) This Court acknowledged that the juvenile court had eventually declined jurisdiction in the rape case after the *Dillenburg* hearing on remand, but this Court ordered that the facts and circumstances of "those particular crimes" in this burglary case should be considered in a separate *Dillenburg* hearing to determine whether these offenses (which were tried before the rape case) would have been declined from juvenile court. (*Id.*; RP 7)

³ Interestingly, this *Dillenburg* issue was raised in Mr. Dalluge's direct appeal from conviction, but the issue was rejected for lack of sufficient record regarding the rape case to determine if Mr. Dalluge had previously been properly declined from juvenile court. (COA No. 17449-2-III, Ruling 9/23/1999; CP 24-25)

In the spring of 2013, this case came before the trial court for the ordered *Dillenburg* hearing. The matter was continued several times because the court allowed the defendant to represent himself with stand-by counsel, and the defendant was having difficulty dealing with counsel and accessing his institution's law library. (RP 14-15, 17, 20, 22, 29-34, 51-53, 63; CP 75-76, 82, 89, 92-93, 101, 103-09, 133-34) The State was likewise preparing for the *Dillenburg* hearing, noting that it intended to call Mr. Dalluge's community correction and probation officers to testify at the *Dillenburg* hearing. (CP 90)

In July 2013, Mr. Dalluge informed the court that he wanted to waive the *Kent*⁴ factors that the court was to consider at the *Dillenburg* hearing. (RP 69, 82) Mr. Dalluge said that he instead intended to maintain the same constitutional, statute of limitations, juvenile competency, mens rea, nunc pro tunc, and/or jurisdictional arguments that he had raised before the trial court, Court of Appeals and Supreme Court. (RP 43, 69, 82, 84; CP 110-30, 129-32, 138-57, 161-214) The trial court noted that the arguments had already been rejected or deemed frivolous (RP 39, 43, 50; CP 159, *see* COA Nos. 29256-8-III and 29255-0-III; *also see State v. Dalluge*, 152 Wn.2d 772). The trial court then accepted Mr. Dalluge's "waiver" of the *Kent* factors (despite stand-by counsel noting

⁴ *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

that there was merit to arguing against adult jurisdiction under the facts of this case, RP 39). (CP 131-32, 159-60) The court rejected Mr. Dalluge’s legal arguments, accepted his “stipulation” to the *Kent* factors, and ordered that juvenile jurisdiction would have been declined. (CP 131-32, 159-60)⁵

This appeal timely followed. (CP 221)

E. ARGUMENT

Introduction

“[T]he legislature intended the adult criminal court to have jurisdiction over a juvenile proceeding only by means of automatic decline based on the nature of the crime or as a result of an actual decline hearing where the juvenile court waives its own exclusive jurisdiction.” *Dalluge*, 152 Wn.2d at 781 (citing *State v. Mora*, 138 Wn.2d 43, 49, 977 P.2d 564 (1999)); RCW 13.04.030(1).

If a 16- or 17 -year-old juvenile commits a serious violent offense, such as the initially charged first-degree rape in Mr. Dalluge’s prior matter, the adult criminal court shall automatically have “exclusive original jurisdiction” over the matter. RCW 13.04.030(1)(e)(v)(A);

⁵ In its order and memorandum opinion, the trial court stated that the parties entered a “written stipulation” that consideration of the *Kent* factors would result in decline of juvenile court jurisdiction. (CP 131-32, 159) There is some discussion of such stipulation (RP 69, 82), but no written stipulation was ever entered in the record and there was no further discussion of the facts that were being considered for purposes of the *Dillenburg* hearing. The undersigned counsel confirmed with superior court clerk supervisor Kara Knutson that there is no missing record for purposes of this appeal; no separate stipulation was entered in the court file as a document or exhibit apart from the reference at CP 131-32. The prosecutor’s office confirmed as well that they do not possess any separate written stipulation.

Dalluge, 152 Wn.2d at 780. Once a juvenile becomes subject to adult court jurisdiction, adult jurisdiction automatically extends to any later committed offenses, which would have included the underlying burglary, theft and vehicle prowling in this case. *State v. Oreiro*, 73 Wn. App. 868, 871, 871 P.2d 666 (1994); *State v. Sharon*, 100 Wn.2d 230, 231, 668 P.2d 584 (1983); *State v. Mitchell*, 32 Wn. App. 499, 500, 648 P.2d 456 (1982). In these circumstances, a juvenile court need not conduct a hearing to decide whether to decline jurisdiction; declination is automatic. *Id.*

However, the adult court loses its automatic jurisdiction over a juvenile if he or she is acquitted of the serious violent offense, or if that charge was amended down from a serious violent offense. *Dalluge*, 152 Wn.2d at 781, 785; *Mora*, 138 Wn.2d at 47; RCW 13.40.020(14). Jurisdiction then vests in the juvenile court for the pending matters unless and until it is properly transferred back to adult court following a declination hearing. *Id.*

If the new charge alleges a class A felony against a 15-, 16- or 17-year-old, such as the second-degree rape that Mr. Dalluge faced after his initial charge was amended, the juvenile court must hold a declination hearing unless waived by the juvenile court, the parties and their counsel. *Dalluge*, 152 Wn.2d at 780; RCW 13.40.110(1)(a); RCW 9A.44.050. For other offenses, the juvenile court may conduct a decline hearing upon the

request of a party or on its own motion. *Dalluge*, 152 Wn.2d at 780 (emphasis added); RCW 13.04.030(1)(e)(i); RCW 13.40.110(1).

Generally, if a required declination hearing was not held before the matter was transferred to adult court, a substitute *Dillenburg* hearing is ordered after-the-fact. *Dalluge*, 152 Wn.2d at 784, 786 (“the proper remedy is a de novo hearing in superior court on whether declination of juvenile jurisdiction would have been appropriate.”) “If declination would have been appropriate, then the conviction stands. Otherwise, the conviction is set aside and a new trial must occur in adult criminal court if the defendant has since turned 18.” *Id.* at 786 (internal citations omitted). *Dillenburg*, 70 Wn.2d at 355-56; *State v. Mendoza-Lopez*, 105 Wn. App. 382, 390-91, 19 P.3d 1123 (2001).

This Court reviews the decision to decline juvenile court jurisdiction for abuse of discretion. *State v. Stevenson*, 55 Wn. App. 725, 735-36, 780 P.2d 873 (1989); *State v. H.O.*, 119 Wn. App. 549, 556, 81 P.3d 883 (2003). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). On review, this Court examines the entire record, including the court’s oral decision, to determine the sufficiency of the court’s reasons for declination. *State v. Holland*, 98 Wn.2d 507, 518, 656 P.2d 1056 (1983). Factual findings are

not disturbed if they are supported by substantial evidence. *H.O.*, 119 Wn. App. at 556. Decisions on issues of law are reviewed de novo. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 556, 852 P.2d 295 (1993).

Issue 1: Whether the court erred by failing to independently consider the *Kent* factors, failing to make the required findings for declination, and accepting Mr. Dalluge’s ineffective “waiver” of the factors on whether the court should decline juvenile jurisdiction.

Mr. Dalluge did not waive juvenile court jurisdiction. Even if he agreed that consideration of the *Kent* factors would result in declination, the trial court was still obligated to independently review the facts and circumstances of the case and determine whether declination of juvenile court jurisdiction was in Mr. Dalluge’s or the public’s best interest. The trial court did not fulfill these duties. Moreover, the trial court was required to make specific findings and specifically state why declination was appropriate under the facts and circumstances of this case, and it was required to order a hearing if such facts had not yet been introduced. But no such factual hearing occurred, and the court did not make the required findings. Remand for a *Dillenburg* hearing that comports with due process, including consideration by the trial court of the appropriate factors and requisite findings, is required at this time.

a. The court failed to consider or balance the required factors and make the requisite findings before making its declination decision.

The requirements are the same at a declination hearing, whether it be initially held or held de novo to remedy a missing or ineffective declination hearing. The court must “follow the dictates of RCW 13.40.110 and determine whether it is in the best interests of the juvenile or public for the juvenile courts to decline jurisdiction.” *Mendoza-Lopez*, 105 Wn. App. at 390. “In determining whether juvenile court should decline jurisdiction, the court must consider the *Kent* factors:

- (1) The seriousness of the alleged offense to the community and whether the protection of the community requires [declination];
- (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- (3) Whether the alleged offense was against persons or against property;
- (4) The prosecutive merit of the complaint;
- (5) The desirability of trial and disposition of the entire case in one court when the juvenile’s [accomplices] in the alleged offense are adults;
- (6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living;
- (7) The record and previous history of the juvenile...; [and]
- (8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the

use of procedures, services and facilities currently available [in] the Juvenile Court.”

H.O., 119 Wn. App. at 556-57 (citing *Kent*, 383 U.S. at 566-67) (emphasis added). *See also State v. Bonds*, 98 Wn.2d 1, 19, 653 P.2d 1024 (1982) (due process requires consideration of the *Kent* factors and that the court to “give reasons for its decisions.”)

The court considering declination must at least consider and balance all of the above factors, even if each factor is not actually established; failure to properly consider these eight factors before making a declination decision constitutes an abuse of discretion. *State v. Massey*, 60 Wn. App. 131, 137, 803 P.2d 340 (1990); *H.O.*, 119 Wn. App. at 557. *Holland*, 30 Wn. App. at 374 (“All eight criteria need not exist in every case, but evidence must be presented and findings entered which demonstrate that those factors were considered.”) In making the declination decision, “[t]he court should consider only facts that were known at the time [the juvenile] pleaded guilty⁶ – not any of the facts that have later come to light.” *Mendoza-Lopez*, 105 Wn. App. at 391n.6.

Additionally, juvenile court jurisdiction may only be declined based on a finding that “declination would be in the best interest of the juvenile or the public.” RCW 13.40.110(3); RCW 13.04.030(1)(e)(i);

⁶ Presumably, this would mean that the court should not consider facts that came to light after the jury found Mr. Dalluge guilty of the underlying burglary, theft and vehicle prowling offenses.

Dalluge, 152 Wn.2d at 780; *State v. Knippling*, 166 Wn.2d 93, 100, 206 P.3d 332 (2009). The court must “set forth in writing its finding which shall be supported by relevant facts and opinions produced at the hearing.” *Knippling*, 166 Wn.2d at 100 (citing Former RCW 13.40.110(3), now codified at RCW 13.40.110(4)) (emphasizing the importance of findings that “disclose how or why the case was before the superior court instead of the juvenile court.”) *Accord Holland*, 30 Wn. App. at 373-74 (“findings of fact must be of sufficient specificity to permit meaningful review... [even in non-adversarial decline proceedings, the defendant] is entitled to...a statement of reasons supporting the court’s decisions before juvenile court jurisdiction is declined.”)

Failure to enter written findings on the best interest of the juvenile or the public, after considering the appropriate factors in a declination hearing, is a fatal defect to the declination. *State v. Saenz*, 175 Wn.2d 167, 175-81, 283 P.3d 1094 (2012); RCW 13.40.110(2) (requires finding that declination would be in the best interest of the juvenile or public after considering relevant reports, facts, opinions and arguments); RCW 13.40.110(3) (when declining juvenile jurisdiction, “the court shall set forth in writing its finding which shall be supported by relevant facts and opinions produced at the hearing.”) Our Supreme Court emphasized this critical requirement of entering appropriate findings:

“These requirements are mandatory. A transfer of juvenile jurisdiction to adult court is not valid until the juvenile court has fulfilled its solemn responsibility to independently determine that a decline of jurisdiction is in the best interest of the juvenile or the public and entered written findings to that effect before transferring the case.”

Saenz, 175 Wn.2d at 179 (citing Former RCW 13.40.110(2), (3)).

Particularly on point here, *State v. Saenz* explained that the trial court is required to consider the above *Kent* factors and make the necessary best interest findings before a case is declined from juvenile court, even where the parties purport to some stipulation regarding juvenile court jurisdiction. *Saenz*, 175 Wn.2d at 179. Our Supreme Court’s recent opinion resolves this appeal:

“Even where the parties stipulate to decline juvenile jurisdiction, the statute still requires the court to enter findings, and the court cannot transfer a case to adult court until it has done so. If transfer is not in the best interest of the juvenile or the public, the juvenile cannot be transferred, despite any agreement among the parties... Juvenile court judges are not simply potted palms adorning the courtroom and sitting idly by while parties stipulate to critically important facts... [Instead,] juvenile court judges [are required to] independently decide whether declining juvenile court jurisdiction is in the best interest of either the juvenile or the public and to set forth written findings supporting their decisions. These legislatively mandated requirements are not erased the moment the parties stipulate to a waiver...

“... [U]nder RCW 13.40.110, a judge must carefully weigh whether declining jurisdiction is in the best interest of the juvenile or the public and enter findings to that effect, even where the parties waive the decline hearing and stipulate to transfer to adult court. If the judge is unable to enter findings without a hearing, the judge should order a hearing. These are important decisions. The ramifications of waiving juvenile court jurisdiction are as

numbered as they are drastic. In order to maintain a ‘system capable of... responding to the needs of youthful offenders,’ (RCW 13.40.010(2), our courts must independently weigh a minor’s critical decision to waive juvenile jurisdiction.”

Saenz, 175 Wn.2d at 179, 180-81 (emphases added). In *Saenz*, the Supreme Court reversed where the juvenile court “failed to enter findings before transferring Saenz’s case to adult court.” *Id.* at 181. The Court noted that the order declining jurisdiction only included the parties’ stipulation itself and a brief statement by the court ordering the transfer from juvenile court. *Id.* This made the transfer to adult court defective. *Id.* See also *Dalluge*, 152 Wn.2d at 780n.4 (noting, the State presented “no authority that suggests that parties may independently agree to adult court jurisdiction without the approval from the juvenile court.”)

Here, the court did not consider the above *Kent* factors before finding that juvenile court jurisdiction would have been declined. This, in and of itself, constituted an abuse of discretion. Admittedly, there were no actual facts introduced at the *Dillenburg* to which the court could apply the *Kent* factors. But the law requires the trial court to order that such a factual hearing take place so that the necessary inquiry can be made. Even if Mr. Dalluge indicated that he would waive those factors, this did not remove the trial court’s obligation to independently review the facts and circumstances to determine if declining juvenile jurisdiction was in Mr. Dalluge’s or the public’s best interest. The court’s error requires reversal.

It is difficult (and actually unnecessary) to have any meaningful review on the substance of the declination decision given the lack of evidence at the *Dillenburg* hearing and lack of factual findings. But, it is worth noting that, had the trial court performed its independent review, juvenile jurisdiction should not have been declined. Indeed, the facts as set forth in Mr. Dalluge's Ruling from his direct appeal indicated that he went with another person on a single day and broke into several vehicles and a garage in order to take personal items from within. But these crimes were not necessarily malicious, violent or aggressive; they were committed against property rather than any persons; Mr. Dalluge demonstrated accountability or remorse when he helped Mr. Langshaw recover some of his family's and neighbor's property before he was ever charged; and the offenses were not necessarily any more serious than other typical matters heard in juvenile court. Additionally, although the State indicated that it intended to call the probation and correction officers to testify at the *Dillenburg* hearing in this case, evidence of matters after Mr. Dalluge was tried and convicted would not be properly before the court. *Mendoza-Lopez*, 105 Wn. App. at 391n.6. As such, it does not appear that there would have been facts to justify transferring this case to adult court.

Regardless, the court's findings in this case do not permit meaningful review of the substance of the declination decision. Even

considering the record as a whole, including the court’s comments at the *Dillenburg* hearing, there is no indication as to any of the factors the court would have relied on in deciding to decline jurisdiction. Indeed, the trial court appears to have relied solely on the defendant’s “waiver” of the factors. But this supposed waiver is not enough to decline juvenile court jurisdiction. The trial court was obligated to independently review the *Kent* factors and make appropriate findings, which it never did in this case.

The lack of written findings here only serves to highlight the greater problem addressed above— that the trial court did not ever independently consider or balance the *Kent* factors before deciding that juvenile court jurisdiction would have been declined. The court abused its discretion, and the case should be remanded for a *Dillenburg* hearing and related findings from which meaningful review can be made.

b. Mr. Dalluge did not waive juvenile court jurisdiction; regardless, any alleged waiver would not obviate the trial court’s obligation to independently review the facts and circumstances before declining juvenile jurisdiction.

Thus far, this State has only found a valid waiver of “RCW 13.04.030(1)(e)’s decline hearing requirement” by way of the juvenile’s “intentional deception” about his or her age. *Dalluge*, 152 Wn.2d at 783-84 (citing *In re Sheppard v. Rhay*, 73 Wn.2d 734, 739, 440 P.2d 422 (1968); *Mendoza-Lopez*, 105 Wn. App. at 388-89; *State v. Anderson*, 83 Wn. App. 515, 519, 922 P.2d 163 (1996), *review denied*, 131 Wn.2d 1009

(1997); *Nelson v. Seattle Munic. Court*, 29 Wn. App. 7, 10, 627 P.2d 157, review denied, 96 Wn.2d 1001 (1981)).

Our Supreme Court has expressed doubt as to whether it is otherwise possible for parties to “waive” a juvenile declination hearing. *Saenz*, 175 Wn.2d at 176n.5. Without necessarily reaching that issue, the Supreme Court noted generally that “[a] waiver of any right in juvenile court must be an ‘express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived.’” *Id.* at 176-77 (citing RCW 13.40.140(9)). The Court held, “[w]ithout proof that Saenz had some inkling of the numerous protections he was surrendering by waiving juvenile jurisdiction and a decline hearing, his waiver cannot be considered to have been made intelligently.” *Id.* at 178. There was “no evidence in the record that Saenz received any information about the rights he was waiving, let alone the potentially critical legal effect of the waiver... we cannot say that Saenz was ‘fully informed’ or that his waiver was ‘intelligently made.’” *Id.*

Here, Mr. Dalluge did not become enmeshed in the adult criminal court system through his own intentional deception about his age. This is the only circumstance in which our State has found a valid waiver of juvenile court jurisdiction, and there is no evidence of any such waiver by deception in this case.

Furthermore, waiver should not be extended to the circumstances of this case, because Mr. Dalluge did not expressly, intelligently and voluntarily waive any rights during the declination hearing after being properly informed. First, when the court asked him directly whether he would agree that the *Kent* factors would result in declination, Mr. Dalluge refused to accede:

“...with the waiver, I’m – I guess I’m trying to stay away from that... if I do that I guess I’d be admitting defeat, and – I mean, it could go either way...”

RP 76. Despite the court’s order and memorandum opinion suggesting otherwise (CP 131-32, 159-60), this colloquy shows that Mr. Dalluge did not expressly waive the *Kent* factors or juvenile court jurisdiction.

Moreover, when Mr. Dalluge indicated he wanted to waive any factual presentation and argument at the declination hearing, the trial court merely responded that that was “admirable” and encouraged him to draw up a stipulation with the aid of stand-by counsel. RP 69. There was no colloquy as to whether Mr. Dalluge understood the potential issues he was forfeiting or the rights he was sacrificing. Any alleged waiver under these circumstances was not intelligent, voluntary or made after being “fully informed.”

Finally, “even where Washington courts have found the juvenile waived his or her right to proceed in juvenile court, adult criminal court

jurisdiction was not proper until either the juvenile court also waived its jurisdiction or the adult criminal court confirmed that the juvenile court would have waived its jurisdiction in that case.” *Dalluge*, 152 Wn.2d at 782. “[J]uvenile courts have an independent responsibility to decide whether to decline jurisdiction regardless of any stipulation by the parties.” *Saenz*, 175 Wn.2d at 180 (Washington aligned itself with the many other states that require courts to independently determine whether juvenile court jurisdiction should be declined regardless of the parties’ stipulation).

As set forth above, any alleged waiver by Mr. Dalluge did not eliminate the court’s duty to independently review the *Kent* factors against the facts and circumstances of this particular burglary, theft and vehicle prowling case. The court did not independently balance the requisite factors or make the requisite findings, so any alleged waiver is of no moment.

Issue 2: Whether this Court should resist ordering another *Dillenburg* hearing, since it is not necessarily the most suitable remedy, and instead reverse the conviction that was obtained without proper jurisdiction.

This Court previously ordered in this case that a *Dillenburg* hearing would occur because Mr. Dalluge was tried in adult court without having had a juvenile court declination hearing. CP 43-50. This remedy was fashioned after the decision in Mr. Dalluge’s separate rape case,

where the Supreme Court found that an after-the-fact *Dillenburg* hearing must occur because it had been required before and never took place. CP 45-48; *Dalluge*, 152 Wn.2d at 782.

But this same remedy is not necessarily required in this case. Unlike with class A felonies that generally require a declination hearing by the juvenile court (RCW 13.40.110(2)), a declination hearing was not initially required for these class B and C felonies of second-degree burglary, second-degree theft and second-degree vehicle prowling (RCW 13.40.110(1); RCW 9A.52.030, RCW 9A.56.040, RCW 9A.52.100). *State v. Ramos*, 152 Wn. App. 684, 691-92, 217 P.3d 384 (2009), *remanded on other grounds*, 168 Wn.2d 1025 (2010) (“The first sentence of [RCW 13.40.110] permits declination of juvenile court jurisdiction by motion and the second sentence mandates, regardless of the desire of the parties, when the juvenile court must consider declination because of the nature of the crime and the age of the offender.”) (Emphasis added)

“[W]here adult criminal jurisdiction is deemed to have been improper, the appellate court can remand to the adult or juvenile court (depending on the defendant’s current age) to determine whether transfer to adult criminal court would have been proper in that case.” *Dalluge*, 152 Wn.2d at 782n.6 (emphasis added). “[A]n after-the-fact *Dillenburg* hearing in adult court can serve as a substitute for a decline hearing in

juvenile court.” *Id.* An “after-the-fact” *Dillenburg* hearing was ordered in *State v. Dalluge* where the charge was second-degree rape, a class A felony, which should have resulted in an automatic *Dillenburg* hearing. *Dalluge*, 152 Wn.2d at 780; RCW 13.40.110(1)(a); RCW 9A.44.050. There, the Court ordered that a *Dillenburg* hearing, which had originally been automatically required, must be conducted after-the-fact to determine whether juvenile court jurisdiction would have been declined.

This remedy of an after-the-fact *Dillenburg* hearing is not necessarily required or appropriate where, as here, a class A felony is not involved and no one ever requested the hearing. Unlike in *Dalluge*, 152 Wn.2d 772, a decline hearing was discretionary in this case and would only have occurred upon motion of a party or the court. RCW 13.40.110(1). *C.f.*, *Dalluge*, 152 Wn.2d at 786-87 (Court rejected Mr. Dalluge’s argument that outright dismissal was appropriate where a *Dillenburg* hearing was required for a 17-year-old charged with a class A felony). Mr. Dalluge maintains that the remedy in *Dalluge*, 152 Wn.2d at 786-87, should not be extended to this case, because a *Dillenburg* hearing was only ever discretionary and was never requested by a party or the court.

Furthermore, while it appears that this Court may remand for another *Dillenburg* hearing if it extends *Dalluge*, 152 Wn.2d at 786-87, to

cases involving only class B felonies, this result is not necessarily required nor the one most suitable to this case. Instead, remand for retrial (given that the conviction would be reversed for lack of jurisdiction) is the other available and more suitable remedy under the circumstances of this case. Indeed, Mr. Dalluge pointed out that the witnesses who would need to be called at a new *Dillenburg* had forgotten the issues to be addressed. (RP 76) And the juvenile record may not have been completely preserved. (*Id.*) Even the State was not prepared to call the appropriate witnesses who could testify to circumstances before Mr. Dalluge's conviction of this burglary, theft and vehicle prowling. It had only listed the probation and correction officers as witnesses, who would presumably address facts and circumstances after the conviction that were not relevant for the *Dillenburg* hearing.

It is doubtful whether a 16-year-late *Dillenburg* hearing to address the defendant's circumstances and these underlying crimes from when he was 17-years-old would fairly reveal the information the court would need in making a proper declination decision. For these reasons, Mr. Dalluge encourages this Court to order its other optional remedy for a conviction that was obtained without proper jurisdiction – reversal and retrial if pursued by the State.

F. CONCLUSION

Mr. Dalluge maintains that a *Dillenburg* hearing should not now be ordered and that reversal is more appropriate under the circumstances of this case. But, if this Court decides that an after-the-fact *Dillenburg* hearing is appropriate, remand for a procedurally sound *Dillenburg* should occur. On remand, Mr. Dalluge is entitled to all process due to him, including aid of appointed counsel⁷, a factual hearing where the court independently reviews the *Kent* factors, and findings of fact that state with specificity the trial court's reasons if declination is ordered. *Bonds*, 98 Wn.2d at 19.

Respectfully submitted this 6th day of March, 2014.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

⁷ Because the issue may arise on remand but was not dispositive in this appeal, the Appellant, through counsel, asks this Court to remind the trial court to conduct a thorough colloquy with the defendant before allowing him to represent himself in any future *Dillenburg* hearing. *See e.g. State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991); *State v. Chavis*, 31 Wn.App. 784, 789, 644 P.2d 1202 (1982).

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 32063-4-III
vs.) No. 98-1-00030-1
)
AMEL DALLUGE) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 6, 2014, I deposited for mail by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Amel Dalluge, DOC #779283
Coyote Ridge Corrections Center
1301 N Ephrata Ave
PO Box 769
Connell, WA 99326

Having obtained prior permission from Grant County Prosecutor's Office, I also served D Angus Lee by email at kburns@co.grant.wa.us using Division III's e-service feature.

Dated this 6th day of March, 2014.

/s/ Kristina M. Nichols
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