

FILED

JUL 05 2018

No. 356281

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON ,

Respondent,

vs.

RUSSELL PAUL KASSNER,

Appellant.

APPELLANT'S REPLY BRIEF

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1. The Judgment and Sentence on its Face Establishes the Age of the Defendant at the Time of the Charged Offense.

The Judgment and Sentence states the date of the charged offense as being between 5/24/1987 and 5/24/1989. CP 2. The Judgment and Sentence also identifies the Defendant by name and date of birth, 09/11/77. Thus, the record establishes that the Defendant was between 10 and 11 years old at the time of the charged offense. The State's argument that the record fails to establish the Defendant was under the age of twelve when the charged offense was allegedly committed is without merit.

2. The Record Establishes the Failure of the Trial Court to Make a Finding of Capacity as Required by RCW 9A.04.050.

Where the record is devoid of any indication that a capacity hearing was conducted or a finding of capacity was made, the court may presume the proceeding did not take place. *State v. Golden*, 112 Wn.App. 68, 80, 47 P.3d 587 (2002). That presumption is clearly warranted in this case.

The Judgment and Sentence includes no reference of any kind to RCW 9A.04.050 or to any finding of capacity. The court docket contains no indication that a capacity hearing was ever held or that the issue of

capacity was ever raised by the court or by any party. CVP 30-34. The superior court record is completely devoid of any mention of the statute or the question of defendant's capacity to commit the crime charged.

The trial court issued its ruling before a transcript of the sentencing hearing could be produced. However, it is beyond reason to suggest that a capacity hearing was held or that any finding was made pursuant to RCW 9A.04.050, yet no written record was made. Had the trial been aware of the capacity issue and the need to comply with RCW 9A.04.050 prior to accepting Defendant's guilty plea and imposing sentence, the court would also have ensured that a written record of that hearing and any findings with respect to capacity would have been made part of the record. The State's argument that Appellant failed to establish the absence of a finding of capacity prior to the entry of the guilty plea is also without merit.

3. *State v. Golden* Has Not Been Overruled and Remains Good Law.

Regardless of whether the issue decided in *State v. Golden* is characterized as one of subject matter jurisdiction or the inherent authority of the superior court, the ruling remains good law in the State of Washington.

In *Golden*, this Court was faced with the question of whether a person accused of having committed a crime as a child under the age of 12 can be found guilty of that crime without first being found to have had the capacity to commit the crime as required by RCW 9A.04.050. This Court squarely answered that question in the negative. It is simply beyond the power of any court to find a child under the age of 12 guilty of a crime of any kind without first determining that the child was over the age of 7 at the time of the offense and had the mental capacity to form the intent necessary to commit the crime.

A child who is under the age of 8 is incapable of committing a crime of any kind under any circumstances. Thus, an act that would otherwise constitute a crime under Washington's criminal code is not a crime if committed by a child under the age of 8. The same act may be a crime if the child was at least 8 years old and a court of competent jurisdiction finds that the child had capacity to commit the crime. Absent such a finding, however, the child is legally presumed to lack capacity and the act is not a crime. See, RCW 9A.04.050.

In *Golden*, this Court held that under RCW 9A.04.030(1), criminal jurisdiction of the superior courts extends only to persons who commit crimes within the state. *State v. Golden*, 112 Wn.App. at 77. Thus, when a prosecutor files an information alleging facts that if proved would

constitute a felony under Washington law, the court acquires jurisdiction over the subject matter of the case. If the information does not allege facts sufficient to establish that a felony was committed, the court does not acquire subject matter jurisdiction.

Under RCW 9A.04.050, a child under the age of 12 but over the age of 7 is presumptively incapable of committing a crime. An information alleging a child under the age of 12 committed an act that would otherwise constitute a felony offense under Washington law does not establish subject matter jurisdiction of the superior courts, since those facts, even if true, do not establish that a crime was committed. Subject matter jurisdiction is acquired only upon a finding that the child had capacity to commit the charged offense. Therefore, the court has authority to act in the case only after making a finding of capacity pursuant to RCW 9A.04.050.

Although this court in *Golden* used language indicating that the trial court lacked inherent authority to act separate from the question of subject matter jurisdiction, that language is not critical to the court's analysis. Another way of reading the *Golden* opinion is that the superior court has only limited jurisdiction in cases involving children under the age of 12 prior to making a finding of capacity. Because all courts have the power to decide their own jurisdiction, the superior court has the

power to determine whether the facts stated in the information, if true, constitute a felony offense; i.e., whether the court has criminal jurisdiction over the case. See, *Crawford v. Gordon*, 88 Wash. 553, 559, 153 P. 362 (1915)(court has jurisdiction to determine its own jurisdiction). Absent a finding of capacity, the court has no power to act because the information fails to establish that any crime was committed in the State of Washington.

The State argues that this Court's reasoning in *Golden* has been overruled *sub silentio* by *State v. Posey*, 174 Wn.2d 131, 272, P.3d 840 (2012). The State's reliance on *Posey* is misplaced.

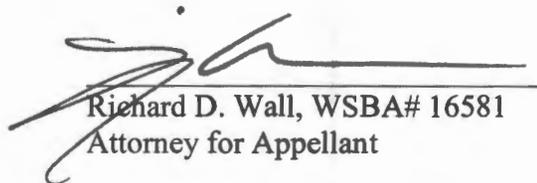
In *Posey*, the Washington Supreme Court was faced with the question whether the Superior Court retained jurisdiction to sentence a juvenile offender after the offender turned 21. The court held that, although the Juvenile Court had lost jurisdiction due to the defendant having reached the age of 21, the Superior Court retained jurisdiction over the case under art. 4, § 6, of the Washington Constitution, which grants the superior courts jurisdiction "in all cases amounting to a felony." *Posey*, 174 Wn.2d at 141-42, citing, *State v. Werner*, 129 Wn.2d 485, 918 P.2d 916 (1996), the court reasoned that Title 13, which gives original jurisdiction over juvenile cases to the juvenile courts, does not deprive the superior courts of the jurisdiction granted by the art. 4, § 6. Therefore, the superior court retained residual jurisdiction over the case. *Posey*, at 142.

To the extent the *Posey* opinion discusses the concept of jurisdiction as set out in the *Werner* opinion, that discussion is dicta that was unnecessary to the court's decision, which relied on the interpretation and application of the state constitution and Title 13. Nothing in *Posey* overrules this court's decision in *Golden*, expressly or otherwise. *Golden* remains good law.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's decision, vacate the Judgment and Sentence, and direct the court below to allow Appellant to withdraw his plea.

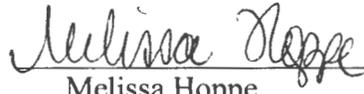
Respectfully submitted this 5th day of July, 2018.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of July, 2018, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was sent via legal messenger to the following:

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Melissa Hoppe