

No. 356281

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COURT OF APPEALS, DIVISION III

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STATE OF WASHINGTON

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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STATE OF WASHINGTON ,

Respondent,

vs.

RUSSELL PAUL KASSNER,

Appellant.

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APPELLANT'S OPENING BRIEF

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RICHARD D. WALL, #16581  
Attorney for Appellant

Richard D. Wall, P.S.  
Attorney at Law  
1604 W. Dean  
Spokane, WA 99201  
(509) 747-5646

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## I. ASSIGNMENTS OF ERROR

1. The Trial Court Erred By Denying Appellant's Motion to Vacate his Judgment and Sentence Where Appellant was Under the Age of 12 at the Time of the Alleged Offense and the Court Failed to Conduct a Hearing to Determine Whether Appellant had Capacity to Commit the Crime or Make Any Finding Regarding Capacity as Required by RCW 9A.04.050.

### ISSUES:

1. Does RCW 9A.04.050 require a finding of capacity as a prerequisite to a conviction when the defendant was under the age of 12 at the time the alleged offense was committed, but is not charged until after the defendant reaches the age of 18?

Answer: Yes. The requirement that the court find that a person under the age of 12 had capacity to commit the crime charged depends solely on the defendant's age at the time the crime was allegedly committed, not on age of the defendant at the time he or she is charged.

2. Does the time limit for motions under CrR 7.8 apply to a motion to vacate a judgment based upon a failure to comply with the requirements of RCW 9A.04.050?

Answer: No. There is no time limit for vacating a judgment of conviction entered in the absence of a finding of capacity as required by RCW 9A.094.050 because the judgment is void.

3. Does the fact that a defendant entered a guilty plea pursuant to an agreement to dismiss other charges relieve the State of the burden of establishing capacity under RCW 9A.04.050 with respect to the offense of conviction?

Answer: No. RCW 9A.04.050 contains no exception to the presumption that a child under the age of 12 does not have the mental capacity to commit a crime. Therefore, the child's age at the time of the alleged offense determines whether a finding of capacity is required prior to entry of a judgment of conviction.

4. Does a defendant seeking to vacate a conviction for failure to comply with RCW 9A.04.050 bear the burden of proving with absolute certainty that the trial court failed to make a finding of capacity when the court failed to enter any findings of capacity and the record is completely devoid of any indication that a capacity hearing was held?

Answer: No. Under *State v. Golden*, 112 Wn.App. 68, 47 P.3d 587 (2002), the absence of any indication in the record that a

capacity hearing was held establishes a presumption that the court failed to comply with RCW 9A.04.050.

## II. STATEMENT OF THE CASE

Russell Kassner was charged by Information on November 28, 1995, with one count of First Degree Child Molestation and one count of Child Rape. CP 1. On March 15, 1996, Kassner entered a plea of guilty to the charge of first degree child molestation. Judgment and Sentence were entered on May 21, 1996. CP 2. The date of the alleged offense as stated on the Judgment and Sentence was sometime between May 24, 1987 and May 24, 1989. CP 2. Defendant's date of birth is listed on the Judgment and Sentence as September 11, 1977. CP 2. Defendant would have been 10 or 11 years old at the time the alleged offense occurred.

The record is devoid of any indication that a hearing was held to determine whether Kassner had the capacity to commit the alleged offense despite being under the age of 12. CP 30 - 34. The record is also devoid of any indication that the trial court entered any findings regarding Kassner's mental or emotional development at the time of the alleged offense and whether he was capable of forming the intent necessary to constitute the offense. CP 30 - 34.

On June 6, 2017, Kassner moved pursuant to CrR 7.8 for an order vacating his conviction and allowing him to withdraw his plea on the grounds that the court lacked authority to enter a judgment of conviction in the absence of a finding of capacity as required by RCW 9A.04.050. CP 13 - 34. The trial court denied the motion, ruling in part that Kassner could not "avail himself of the capacity defense" because he was charged as an adult in adult court. CP 49. The trial court also concluded that the motion was untimely under CrR 7.8(b) because it was not brought within a "reasonable time." CP 50. Kassner now appeals.

### III. STANDARD OF REVIEW

The trial court's denial of a motion to vacate judgment under CrR 7.8 is reviewed for an abuse of discretion. *State v. Ellis*, 76 Wn.App. 391, 394, 884 P.2d 1360 (1994). The trial court abuses its discretion when its decision is based on an erroneous view of the law. *State v. Rohrich*, 149 Wn.App. 647, 654, 71 P.3d 638 (2003).

### IV. ARGUMENT

RCW 9A.04.050 establishes a legal presumption that children under the age of 12, but at least 8 years of age, are presumed to lack the capacity to commit crimes. Children under the age of 8 are incapable as a

matter of law of committing any crime whatsoever. The statute in its entirety reads as follows:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong. Whenever in legal proceedings it becomes necessary to determine the age of a child, he or she may be produced for inspection, to enable the court or jury to determine the age thereby; and the court may also direct his or her examination by one or more physicians, whose opinion shall be competent evidence upon the question of his or her age.

By its plain language, RCW 9A.04.050 provides only one means by which the presumption that a child older than 7 years but younger than 12 lacks capacity to commit a crime can be removed; i.e., "by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong." As discussed below, removal of the statutory presumption of incapacity of a 7 - 11 year old be removed by proof before a child can be convicted of a crime is a prerequisite to conviction. Absent the presentation of sufficient proof to overcome the presumption, the court lacks authority to take any action other than dismissal of the charges.

The trial court in this case misconstrued the meaning of "capacity" as used in RCW 9A.04.050 as depending upon the age of the child at the time charges are filed, not the age of the child at the time the offense is committed. The trial court also interpreted RCW 9A.04.050 as allowing

the presumption of incapacity to be removed through plea bargaining between the child and the State, rather than by the presentation of evidence sufficient to prove the child had the capacity to understand the nature of the act and to know that it was wrong. The trial court's interpretation of RCW 9A.04.050 is contrary to the plain language of the statute, this Court's decision in *State v. Golden*, 112 Wn.App. 68, 47 P.3d 587 (2002), and a common sense understanding what it means to have or not have the capacity to commit a crime.

1. RCW 9A.04.050 Requires a Finding of Capacity Before a Court Can Enter a Judgment of Conviction if the Defendant was Under the Age of 12 at the Time of the Alleged Offense, Regardless of the Defendant's Age at the Time Charges are Filed.

The relevant facts of this case are identical to those in *State v. Golden*, 112 Wn.App. 68, 47 P.3d 587 (2002), in which this Court held that the Superior Court lacks jurisdiction to enter a judgment of conviction for a child under the age of 12 without first making a finding of capacity pursuant to RCW 9A.04.050. See also, *State v. J.B.*, 91 Wn.App. 659, 662, 958 P.2d 368 (1998)(Affirming guilty verdict entered without a finding of capacity under RCW 9A.04.050 where juvenile court stayed entry of order of disposition until after a finding of capacity was made by different

judge). Here, Kassner pled guilty to an offense that was alleged to have been committed between the May 24, 1987 and May 24, 1989. He was born on September 9, 1977, and would have been either 10 or 11 years old at the time of the alleged offense. The Superior Court record is devoid of any indication that a hearing was held to determine whether Kassner had capacity to commit the alleged offense. The State does not claim that such a hearing was held or that any finding of capacity was made either before or after judgment was entered.

The presumption that a child under the age of 12 lacks capacity to commit a crime may be overcome only by clear, cogent, and convincing evidence. *State v. Q.D.*, 102 Wn.2d 19, 25, 685 (1984). The failure to comply with the requirements of RCW 9A.04.050 does not deprive the court of jurisdiction over the person or the subject matter. However, it does deprive the court of authority to act. *State v. Golden*, 112 Wn.App. at 77. Prior to entering a finding of capacity under RCW 9A.04.050, the Superior Court has no authority to do anything other than dismiss the charges. *Id.*

Here the trial court refused to follow the rule announced in *Golden*, and instead held that RCW 9A.04.050 does not apply because Kassner had been charged as an adult in adult court, whereas the defendant in *Golden* had been charged as a juvenile in juvenile court.

The trial court's reasoning is clearly flawed and constitutes an erroneous view of the law. Nothing in RCW 9A.04.050 or *State v. Golden* remotely suggests that the age of the defendant at the time he or she is charged is in any way relevant to the issue of capacity.

RCW 9A.04.050 states in part:

Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

The relevant inquiry in determining capacity under RCW 9A.04.050 is whether the child is able to appreciate the wrongfulness of his or her conduct at the time the act was committed. *State v. K.R.L.*, 67 Wn.App. 721, 725, 840 P.2d 210 (1992). Whether the child is able to appreciate the wrongfulness of his or her conduct some years after the act constituting the alleged offense is irrelevant. Thus, it makes no difference whether the child has been charged as a juvenile or as an adult or whether the charges are brought in juvenile court or adult court. The presumption of incapacity established by RCW 9A.04.050 remains unless and until it is overcome by proof. Absent such proof, the court has no authority take any action other than dismissal of the charges.

The Judgment and Sentence itself establishes that Kassner was under the age of 12 at the time of the alleged offense to which he pled guilty. As in *Golden*, the record here is devoid of any indication that a capacity hearing was held or that the court made any inquiry regarding Kassner's ability to understand the acts he was alleged to have committed or the wrongfulness of those acts at the time of the alleged offense. Absent a finding that Kassner had sufficient capacity as a child under the age of 12 to commit the alleged offense, the trial court was without authority to accept his guilty plea and enter a judgment of conviction. The judgment is void.

2. Dismissal of a Separate Charge Allegedly Committed When Appellant Was an Adult Does Not Relieve the State of Proving Defendant had Capacity to Commit the Offense to Which he Pled Guilty.

As part of its reasons for denying the motion to vacate, the trial court concluded that Appellant had been charged as an adult, was represented by counsel at his plea, and "negotiated a beneficial plea agreement that conveyed a clear benefit to him." CP 49. The trial court also concluded that it would "work an injustice against the State" to allow Appellant to withdraw his plea at this time. CP 49.

The trial court's conclusion that Appellant received "a clear benefit" from the dismissal of other charges and that it would be unjust to allow Appellant to vacate his conviction is flawed in several respects. More importantly, however, even if that reasoning is sound, it provides no legal basis for denying the motion to vacate.

Kassner did not plead guilty to the dismissed rape charge, nor did he admit to any facts to support that charge. Thus, he is presumed innocent as a matter of law, and that presumption continues even to this day. Whether Kassner received any benefit from dismissal of that charge depends on whether there was sufficient evidence to put him at risk of conviction if the case had gone to trial. The record simply does not contain sufficient information concerning the quantity or quality of evidence that would have been presented at trial to determine what benefit, if any, Kassner received from dismissal of the rape charge. Therefore, the trial court's conclusion that Kassner obtained a "clear benefit" from dismissal of the rape charge is pure speculation.

Even if Kassner obtained a benefit from the plea agreement, that fact has no bearing whatsoever on the merits of the motion to vacate his conviction. Nothing in the language of RCW 9A.04.050 remotely suggests that the presumption that a child under the age of 12 lacks

incapacity to commit a crime disappears whenever a defendant is charged with other crimes to which the presumption does not apply or that the presumption can somehow be bargained away by the defendant in the context of a plea agreement. There are no exceptions. The presumption applies any time the State alleges that a child under the age of 12 committed a crime.

Similarly, there is no unfairness to the State in vacating a conviction that has been obtained in violation of applicable law. Prosecutors have an obligation to do more than simply obtain convictions. Their obligation is at all times to follow the law and to do justice. *State v. Walker*, 182 Wn.2d 463, 476. 341 P.3d 976 (2015). Convicting a 10 or 11 year old child of a serious crime that will require the child to register as a sex offender and will remain on their record for the rest of their lives without first proving that the child had the mental capacity to understand what they were doing and to know that it was wrong is not justice. Nor does it conform to the law.

Moreover, Appellant has had to live with the consequences of his conviction for more than 21 years, including serving a prison sentence of 51 months and being required to register as a sex offender. Vacating Appellant's conviction will not give him back the time he has lost, nor will

it allow him to simply move on with his life without any further consequences. The State will be free to pursue both the molestation charge and the rape charge against him if it chooses to do so.

3. Kassner's Motion to Vacate the Judgment and Sentence is Not Subject to the Time Limits Imposed by CrR 7.8 because the Judgment is Void.

Courts have a mandatory, non-discretionary duty to vacate a judgment that is void. *Dobbins v. Mendoza*, 88 Wn.App. 862, 871, 947 P.2d 1229 (1997). A judgment in a criminal case that exceeds the statutory authority of the court is void. See, *Doe v. Fife Municipal Court*, 74 Wn.App. 444, 450, 874 P.2d 182 (1994)(Part of judgment imposing court costs in the absence of statutory authority held void); *State v. Dooly*, 14 Wn.2d 459, 465, 128 P.2d 486 (1942)(Judgment sentencing defendant to penitentiary for petit larceny held void where statute provided only for incarceration in local jail).

A judgment of conviction for an offense alleged to have been committed by a child under the age of 12 is void in the absence of a finding of capacity pursuant to RCW 9A.04.050 because the court lacks statutory authority to enter the judgment. See, *State v. Golden*, 112 Wn.App at 79. Thus, a motion to vacate a judgment entered without the

finds required by RCW 9A.04.050 is not subject to the time limits imposed by CrR 7.8. See, *Id.*, (Affirming trial court's order granting defendant's motion to vacate conviction brought 8 1/2 years after entry of judgment where court failed to conduct capacity hearing and defendant was 10 years old at time of alleged offense.)

Here, the Judgment and Sentence was entered in the absence of a capacity hearing or finding of capacity as required by RCW 9A.04.050. Thus, the trial court lacked authority to enter the Judgment and the Judgment is void. Because the Judgment is void, the time limits imposed by CrR 7.8 do not apply. In fact, there is no time limit applicable to Kassner's motion, and the trial court was under a duty to vacate the Judgment once it became apparent that the Judgment was entered without lawful authority.

4. The Record Establishes a Presumption that a Finding of Capacity as Required By RCW 9A.40.050 Was Not Made.

In denying the motion to vacate Appellant's conviction, the trial court entered the following Finding of Fact:

6. Because the defendant had turned eighteen during the course of the police investigation, the State filed charges in adult

court. The provided record is insufficient to determine whether the original court conducted a capacity hearing regarding the oldest charge and defense counsel represented to this Court that the transcripts are no longer available.

CP 48.

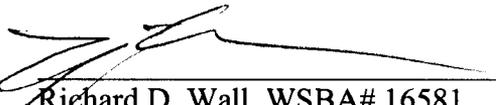
The court's purpose in making the above finding is unclear, since the finding does not appear to be related to any of the Conclusions of Law. In fact, Conclusions of Law 3, 4, 5, 6, 7, and 8 either implicitly recognize that no finding of capacity was ever made or are wholly independent of whether such a finding had been made.

This Court has previously held that where the record is devoid of any indication that a capacity hearing was conducted or a finding of capacity made, the court may presume the proceeding did not take place. *State v. Golden*, 112 Wn.App. at 80. Here, the Superior Court Case Summary submitted by Appellant in support of his motion contains no entry indicating that any capacity hearing was conducted and the written record contains no findings by the court regarding capacity. Thus, it should be presumed that the trial court did not conduct a capacity hearing or make a finding of capacity. It is simply not within the realm of reasonable possibilities that the trial court conducted a capacity hearing pursuant to RCW 9A.04.050 and made the required findings, but failed to document the results of that hearing in the written record.

CONCLUSION

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

Respectfully submitted this 21<sup>st</sup> day of December, 2017.

  
Richard D. Wall, WSBA# 16581  
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the \_\_\_\_ day of December, 2017, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was sent via legal messenger to the following:

Brian C. O'Brien, DPA  
Spokane County Prosecuting Attorney's Office  
1100 W. Mallon  
Spokane, WA 99260

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