

62631-1

62631-1

NO. 62631-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD HODGES,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES

1. It is within the trial court's discretion to determine whether there is a doubt as to a defendant's competency. In this case, the court relied on its in-court observations and on expert opinions to conclude that Hodges was malingering symptoms of mental illness. Did the court act properly in finding that Hodges was malingering?

2. It is within the trial court's discretion to determine whether there is sufficient foundation to admit a business record. In this case, the admitted Safeway merchandise receipt satisfied the foundation requirements for a business record, per RCW 5.45.020. Did the court properly admit the receipt?

3. An offender score is calculated by adding prior felony offenses with all current felony offenses. Hodges had three prior felonies and at least one current offense for each new conviction. Did the court properly conclude that Hodges' offender score was at least four?

B. STATEMENT OF THE CASE

Defendant Richard Hodges was charged by amended information with Cocaine Possession and Theft in the Second

Degree. CP 14-15. The State alleged that on September 17, 2005, Hodges stole over \$250 in merchandise belonging to Safeway, and that he possessed cocaine when arrested. Id.

On August 16, 2006, defense raised the issue of Hodges' competency before the court and requested an out-of-custody evaluation by Western State Hospital (WSH). CP 4-7. The court ordered an out-of-custody evaluation of Hodges. Id. The trial was continued for this purpose. CP 79-81. Hodges then went on warrant status. Supp. CP __ (Sub 42, 2/05/2007 Order Directing Issuance of Bench Warrant). Returned to custody on new criminal charges, Hodges was sent to WSH for an in-custody evaluation on May 1, 2007. CP 8-11.

On May 29, through its evaluation, WSH determined that Hodges could understand the nature of the legal proceedings against him and was capable of assisting counsel. CP 107¹. The report indicated that, while he may suffer from schizophrenia or personality disorder, he exhibited rather flagrant malingering. CP 105-06. Hodges was not acutely psychotic, though he may possess some residual symptoms of a major mental disorder.

¹ The Western State Hospital Report from May 29, 2007, is duplicated in the clerk's papers at both CP 97-109 and CP 112-24.

CP 107. While such people often exhibit symptoms in various ways, some malingering symptoms of mental impairment to evade criminal responsibility. CP 104-05.

The report stated that Hodges had been malingering symptoms of mental impairment as a means for promoting his goal of outpatient treatment instead of incarceration. CP 107. The report said that Hodges, when asked to identify his defense counsel, pretended several times to confuse the male examiner with his female attorney. CP 103, 106. He claimed not to know what his charges were. CP 102-03. His test performances were so incredible as to be not believed by the examiner. CP 102. He claimed not to know who the prosecutor was, or the judge. CP 106. He would often respond with the answer, "I don't know," when asked basic questions. Id.

At one point in the evaluation, the doctor indicated that Hodges had one of two choices: either he would be found competent and proceed to trial, or he would return to the hospital for involuntary treatment and medication. CP 106-07.

At that moment, Hodges expressed a clear preference to return to jail and prepare his legal defense with his attorney. CP 107. From that point on, Hodges' thinking was "logical,

coherent, and well-organized with no evidence of a thought disorder." Id. He showed an appropriate understanding of his legal peril. Id. He particularly referenced his desire to negotiate an acceptable plea bargain. Id. In particular, Hodges indicated his desire to get into mental health court or drug court as an alternative to incarceration. Id.

Judge Halpert, the presiding court, held a competency return hearing on June 7. CP 12-13. At this time, all parties agreed that Hodges was competent to stand trial. 1RP² 3, 8. The court found Hodges competent for trial. CP 12-13. Judge Halpert then granted a motion by both parties to continue the trial to July 16 to pursue negotiations in the case. 1RP 6-7.

On the morning of trial, July 16, Hodges personally addressed Judge Halpert and moved to discharge his attorney, Sacha Marley. 1RP 11-12. He asked for a new attorney, saying that Marley had not gathered all necessary information in advance of trial, and that she needed more time to get this information. 1RP 12. Marley indicated that she met with Hodges the previous

² The Verbatim Report of Proceedings will be referred to in accordance with the system set out in the Brief of Appellant at p. 4, fn. 1: 1RP (06-07-07, 07-16-07, 02-28-08, 05-21-08, 06-17-08, 06-25-08, 09-25-08, and 10-02-08); 2RP (07-16-07); 3RP (07-17-07); 4RP (07-18-07); 5RP (07-19-07); 6RP (07-19-07); 7RP (09-14-07); 8RP (09-21-07); 9RP (01-30-08).

day, and he wanted to know the current offer on the case. Id.

Marley told the court she wanted a continuance to get additional evaluations or other mental health information to support treatment court options in her plea negotiations with the State. 1RP 12-14.

Judge Halpert denied Hodges' request to discharge his attorney on these grounds. 1RP 12.

Marley said she agreed with the WSH report that found Hodges competent, and she did not believe there was a basis for a diminished capacity defense. 1RP 13. She also said that though they did not always agree on things, she was able to communicate with Hodges about the case. 1RP 13. She said that she hoped to resolve his new Residential Burglary and drug cases in a global offer with the other prosecutor assigned to those two cases. 1RP 13-14. Defense counsel said she was seeking mental health or drug court but that Hodges' prior violent offense conviction made him ineligible. 1RP 14.

Judge Halpert said that Hodges had made the decision to set the matter for trial, and that the court was not going to continue the trial for further evaluations or information, because the court found that any further evaluations were really being sought by Hodges for negotiation purposes. 1RP 15.

The trial began that same morning, July 16, before Judge Hayden, and pretrial matters were heard. 2RP 2. After the noon recess, defense counsel now told the court that Hodges' recent behavior made her question his competency. 2RP 5. She asked that the court conduct a colloquy with Hodges. 2RP 6. The court did so. Id.

In response to the court's questions regarding the nature of the charges, Hodges gave nonsensical responses. 2RP 8-9. He indicated he did not know that Marley was his attorney. 2RP 9. He did not know about his charges, other than there is "this program to help me." Id. He did not know who the judge or the prosecutor was, or their role in the process. 2RP 11-13. He at first was not sure whether he was in jail, and then was not sure why he was in jail. 2RP 14. After concluding the colloquy, the court requested and reviewed a copy of Hodges' WSH evaluation. 2RP 14-15.

The court then asked Hodges his name. 2RP 15. Hodges did not reply and only pointed at himself. Id. Based on this colloquy and after reviewing the report, the trial court concluded that there was not a good basis to send him back to WSH for another evaluation. Id. The court concluded, consistent with the expert findings in the report, that Hodges engages in an intermittent

pattern of malingering and that his outward appearances should not be taken at face value. Id. The court concluded that, consistent with the report's findings, when Hodges does not like one of the choices presented to him, he will choose the other one. Id. Defense counsel maintained that, based on Hodges' colloquy, there was reason to question his competency. 2RP 16. The court disagreed. Id. A jury was then selected. Id.

The next morning of trial, on July 17, Hodges elected to wear his jail uniform to trial. 3RP 3. Hodges told the court that everybody knows that he is in jail anyway. 3RP 5. Hodges personally addressed Judge Hayden and moved for a mistrial. 3RP 4. He stated that he did not like the jury that was selected in light of the charges he was facing, and claimed his attorney was not effectively representing him. 3RP 5. The court told Hodges that he had heard enough from him and called in the jury. Id. The prosecutor and defense counsel then gave their opening statements. 3RP 13-16.

At the end of defense counsel's opening, Hodges stood up in open court, reached down, took a cup off the table, and proceeded to urinate in front of the jury. 3RP 16-18.

Judge Hayden directed the jury from the courtroom.

3RP 17. The court then directed Hodges to complete his urination in a nearby trashcan. 3RP 17-18. He complied. Id. Hodges was removed from the courtroom. 3RP 17-18.

After a recess, as the janitorial staff was mopping up, defense moved for a mistrial. 3RP 22. The State objected, arguing that Hodges was intentionally acting out and malingering in an effort to disrupt the court. 3RP 20, 22. Defense counsel maintained that Hodges' blood pressure medication caused the non-volitional "spontaneous urination." 3RP 18, 22. She asserted that his exposure of private parts to the jury when he started to pull down his pants was so prejudicial as to warrant a mistrial. Id.

The court made the following ruling regarding Hodges' conduct:

Counsel, I am going to grant the mistrial and give the defendant the benefit of the doubt. I have a lot of reasons to doubt it, that it was in fact a nonvolitional exercise, but under the circumstances I think I need to error on the side of caution and grant the mistrial. However, I will tell you, Ms Marley, I expect your client to keep his mouth shut during this trial. I do believe that he is acting out. He is, as I understand it, a trustee up in the jail. He obviously can maintain himself when he wants to. He has a history from

Western State that is replete that he acts out volitionally, and I won't have any more of it.

3RP 22-23.

Defense counsel said that she had mental health concerns with Hodges, and due to his actions, she would have a problem communicating with him. 3RP 23-24. She also said that Hodges received advice from those in the jail in making his mistrial motion.

3RP 24.

The court countered:

Fine. Yesterday I asked him if you were his lawyer, and he said "I don't know." I asked if I was the judge. He didn't know. He didn't know who he was. This morning he comes in all of a sudden citing Washington authority on effective assistance, and telling me you are his lawyer and wants you removed. It's not consistent. It is consistent with the Western State report, which is, when he wants to, he can be relatively coherent, and when he doesn't want to, he acts out. That is consistent with the fact that he is a trustee at the jail. If he was incompetent, as you suggests [sic] . . . I can't envision that he would have a position of being a trustee. He wouldn't be able to handle it.

3RP 24-25.

The court then dismissed the jurors, and after a day's recess due to defense counsel being ill, a new trial started on July 19.

3RP 25; 4RP 2.

At trial, the manager of Safeway, Elhaadji Mbecke, testified that on September 17, 2005, he saw Hodges steal over \$300 worth of merchandise, and called police. 6RP 7-17. Seattle Police Officer Carl Anderson testified that he found suspected cocaine on Hodges when he was searched incident to arrest. 6RP 26-31. Washington State Patrol Crime Lab scientist Steven Reid confirmed that the substance found on Hodges was indeed cocaine. 6RP 35-45. On July 19, the jury found Hodges guilty of the charges of Cocaine Possession and Theft in the Second Degree. CP 44-45.

Sentencing was scheduled for September 14. 7RP 2. At that time defense counsel asked the court's permission to withdraw from the case. 7RP 2-3. Hodges then personally asked the court for a low appeal bond. 7RP 3-4. After the court would not issue an appeal bond, Hodges refused to sign the waiver of speedy sentencing. 7RP 4-5. When the court indicated that Hodges would be sentenced that day with Marley, Hodges changed his mind and agreed to continue the sentencing date. 7RP 5-7. Al Kitching was substituted in as new defense counsel. 7RP 7.

After Kitching came on the case, on September 21, he continued the sentencing so he could do further psychiatric evaluation of Hodges. 8RP 2-3. Ultimately, Hodges was again

referred to WSH for further evaluation, which was completed on December 7. CP 86-96. WSH observed Hodges and was now concerned he may be actually impaired. CP 127. Thus, WSH referred Hodges for a full neuropsychological evaluation. Id. This neuropsychological evaluation concluded that Hodges was feigning his mental symptoms and that his current legal proceedings factored into his continued malingering. CP 127-28.

Accordingly, on January 25, 2008, WSH again found that Hodges could understand the nature of the legal proceedings against him and assist counsel. CP 129. Defense counsel continued sentencing for purposes of doing his own independent evaluations and observations. 9RP 2; 1RP 22. On May 21, 2008, the defense psychiatrist evaluation indicated the need for further examination. 1RP 22; CP 138. Hodges was again reviewed by WSH while in the jail. 1RP 22-25. Ultimately, after further evaluation there and at the hospital, WSH again found that Hodges could understand the nature of the legal proceedings against him and assist counsel. 1RP 50-52. The court again formally found Hodges competent on September 25, 2008. 1RP 51-53. On this date, defense and the State signed an agreed order to this effect. CP 56-57.

Hodges was sentenced on October 2, 2008, with an offender score of four, to a low-end sentence within the ranges of 6+ to 18 months on the Cocaine Possession, and 3 to 8 months on the Theft in the Second Degree. CP 58-64. As to each conviction, Hodges was found to have three prior felonies and one current felony. CP 58, 59, 64. Hodges now appeals his conviction and sentence. CP 67-76.

C. ARGUMENT

1. THE TRIAL COURT ACTED PROPERLY IN FINDING THAT HODGES WAS MALINGERING

Hodges claims that the trial court violated his right to due process when Judge Hayden did not doubt his competency after his colloquy with the court. Because Judge Hayden properly relied on the findings of a current WSH Report and in-court observations in making the determination that Hodges was malingering his symptoms before the start of the trial, his claim fails.

A trial court's decision whether to order a competency examination is generally a matter of discretion. In re Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). In reaching its decision the court may consider the defendant's appearance, demeanor,

conduct, personal and family history, past behavior, medical and psychiatric reports, and the statements of counsel. Id. If after considering these factors, the court doubts the competency of the defendant, it must order an evaluation. RCW 10.77.060.

In this case, after considering the WSH report that analyzed these relevant factors, the trial court found that Hodges' conduct in court and his presentation through his colloquy remained consistent with the report. CP 97-103; 3RP 24-25. The report found that Hodges was malingering his symptoms. CP 97-103. The trial court never indicated any doubt as to Hodges' competency. 3RP 24-25.

To the contrary, the trial court concluded that Hodges was acting out consistent with his WSH report. 3RP 22-25. This current report found that Hodges malingered his symptoms when it served his interests. CP 104-07. WSH determined that Hodges would present symptoms of mental impairment to evade criminal incarceration. CP 105, 107. In fact, the malingering that the court found Hodges was doing during the colloquy mirrored Hodges' conduct as set out in the report. 2RP 8-15; CP 104-08.

For example, the court specifically cited how in his colloquy Hodges claimed not to know who his attorney was, who he was, who the prosecutor was, who the judge was, what his charges

were, or what anyone's role was in the process.³ 2RP 8-15; 3RP 24-25. These were the exact same nonsensical answers that he gave the examiner in the WSH report six weeks earlier. CP 103-07. During that examination -- once he was informed that the alternative to being found incompetent was civil commitment -- he went from not knowing who these people were to expressing an immediate desire to get back with his lawyer to negotiate a plea bargain on his charges. CP 106-07. From that point on, the report indicated, Hodges' thinking was "logical, coherent, and well-organized with no evidence of a thought disorder." Id.

Likewise, once the trial court did not continue the trial for further evaluation after Hodges' feigned mental illness, Hodges came the next morning with a motion to discharge his attorney. 3RP 3-6. He also moved for a mistrial because he did not believe his jury was fair given the drug charges he was facing. 3RP 4-5. The court later that morning would find the following:

³ Hodges' nonsensical colloquy with Judge Hayden on July 16 follows his personal motion that same morning before Judge Halpert to discharge his attorney because she failed to obtain timely information necessary to negotiate a deal with prosecutors. 1RP 11-13. In the colloquy with Judge Hayden, he said he did not know his charges or what a prosecutor was. 2RP 11. Indeed, a few hours before claiming to Judge Hayden that he did not know what a judge was, he clarified with Judge Halpert if it would be more appropriate to refer to her as Ms. Halpert or Judge Halpert before making his motion. 1RP 11; 2RP 12.

Yesterday I asked him if you were his lawyer, and he said "I don't know." I asked if I was the judge. He didn't know. He didn't know who he was. This morning he comes in all of a sudden citing Washington authority on effective assistance, and telling me you are his lawyer and wants you removed. It's not consistent. It is consistent with the Western State report, which is, when he wants to, he can be relatively coherent, and when he doesn't want to, he acts out . . .

3RP 24-25.

The court did not grant Hodges' motion for a mistrial and had the attorneys begin their opening statements. 3RP 5-6. After opening statements, Hodges stood up in open court, reached down, took a cup off the table, began to pull down his pants, and proceeded to urinate into it, in front of the jury. 3RP 16-18, 22. Defense claimed that this was "spontaneous urination" caused by Hodges' blood pressure medication. 3RP 22-23. The court stated that Hodges can maintain himself when he wants to, and his history from WSH is replete with volitional acts. 3RP 22-23. However, in the outmost of caution that perhaps Hodges' blood pressure medication caused the "spontaneous urination," the court granted a mistrial. Id.

At the start of the second trial on July 19, Hodges apologized to the court for his actions, claiming it was due to his blood

pressure medication. 5RP 2-3. A jury was selected and witnesses testified. 6RP 7-45. The trial concluded that same day with guilty verdicts as charged. CP 44-45.

The trial court exercised proper discretion in not staying the trial for further evaluation. There was no need. After defense counsel raised the issue, the court properly reviewed the factors of competency, including Hodges' presentation in court, conduct, personal history, past behavior, and psychiatric reports, which all indicated that he was competent.

Since the trial court found Hodges' in-court conduct was consistent with his prior malingering conduct in WSH's report, which found Hodges was competent⁴, there was no reason to doubt competency. The trial court properly concluded that any behavior in the courtroom that might otherwise appear irrational was malingered by Hodges for his personal benefit. Accordingly, the trial court's discretion here should not be disturbed. The court acted properly in finding that Hodges was competent and malingering his symptoms.

⁴ WSH determines competency by concluding that one is capable of understanding the nature of the legal proceedings and assisting counsel. CP 105-07.

2. THE TRIAL COURT PROPERLY ADMITTED THE
MERCHANDISE RECEIPT FROM SAFEWAY

Hodges claims that there is insufficient evidence that the value of the goods he stole exceeded \$250. He asserts that the trial court improperly admitted a Safeway receipt, which showed the value of the merchandise to be over \$300. Accordingly, he argues, the case should be dismissed for insufficient evidence. However, because the trial court properly admitted the receipt as a business record, there is sufficient evidence of value, and Hodges' claim fails.

The decision whether to admit evidence lies within the sound discretion of the trial court, and this Court will not overturn such decisions absent an abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). An abuse of discretion occurs only when a trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

The trial court admitted the evidence under the business records exception to the hearsay rule. This exception is codified in RCW 5.45.020, which provides:

Business records as evidence. A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

If the statutory requisites are met, computerized records are treated the same as any other business records. State v. Ben-Neth, 34 Wn. App. 600, 603, 663 P.2d 156 (1983).

Safeway manager Elhaadji Mbecke testified at trial. He had been employed with Safeway going on nine years, and was manager for the last three. 6 RP 7. He managed the grocery store on the night he saw Hodges stealing the merchandise. 6RP 8-9. He saw Hodges enter the store and then contacted Hodges after he left with a full cart of unpaid merchandise. 6RP 10-11.

Mbecke established that the items indicated on the itemized receipt represented what Hodges had stolen in his cart. 6RP 14. Mbecke took a photograph of these stolen groceries. Ex. 2, 4. He rang the stolen merchandise through his electronic scanner machine to determine the price and create a receipt for the value of

the stolen merchandise. 6RP 13-18⁵. He took each item and swiped its bar code on the cashier scanner to indicate each price. 6RP 17.

Mbecke, as store manager, calculated and created this receipt consistent with his standard practice when he contacts suspected shoplifters. 6RP 15. The receipt was date-stamped at the time he calculated the value of the merchandise. 6RP 14-15. There were 29 items on the receipt and it represented a total value of \$310.12. Ex. 5, 6. This receipt was calculated that same night, around the time Mbecke reported Hodges' theft to police. 6RP 16-17, 27.

Hodges now claims that the trial court abused its discretion in determining that there was enough foundation to admit the receipt as a business record. The evidence shows the opposite. All the necessary foundation to establish a business record was provided, consistent with RCW 5.45.020.

That is, Mbecke was the manager of the store and thus custodian of the receipt. 6 RP 7-9. He identified the receipt and the manner in which he created it. 6RP 6-10. He testified how he

⁵ The court admitted the receipt at 6RP 15. Additional foundation for the receipt followed after this page in the transcript through additional testimony.

created it as a part of his standard practice when he contacts suspected shoplifters. 6RP 15. In this case, Mbecke created the receipt that same night of the theft, around the time police responded to his shoplifting call. 6RP 14-17, 27. Accordingly, all of the necessary elements to establish a business record have been shown.

Hodges cites various cases where appellate courts have declined to disturb a trial court's discretion in admitting price documents as business records or proof of value. He claims that the foundational facts in this case are not the same as in any of those previous cases. While it is true the facts of this case do not exactly match the unique cases referenced, like those cases, this case does satisfy the foundational requirements of RCW 5.45.020. Indeed, these cases simply show how the courts have deferred to a trial court's sound discretion as technologies have changed.

In Kleist, a case from about 15 years ago, the Supreme Court reviewed whether a Loss Prevention Officer (LPO) was qualified to testify to the value of price tags. State v. Kleist, 126 Wn.2d 432, 436, 895 P.2d 398 (1995). This Court had previously found in Coleman, over 30 years ago, that admitting price tags alone, without qualified testimony to explain them, did not

provide appropriate foundation as to value. State v. Coleman, 19 Wn. App. 549, 552-54, 576 P.2d 925 (1978). The Court in Coleman, citing an out-of-state case from nearly 70 years ago, was concerned that a store's price tag may not indicate market value, due to sale prices not reflected on the tag. Id. at 553 (citing People v. Fognini, 374 Ill. 161, 28 N.E.2d 95 (1940)). In Kleist, the Supreme Court found, that even in light of Coleman, an LPO is a qualified witness for purposes of establishing that a store's price matches actual value. Kleist, 126 Wn.2d at 436.

In Rainwater, this Court expressly rejected Coleman and held that a store's pricing is sufficient to establish value, since the realities of the market place were changing. State v. Rainwater, 75 Wn. App. 256, 261-63, 876 P.2d 979 (1994). The Court reasoned that, when items are stolen from a retail store, the price at which the items are sold *at that store* provides substantial evidence of their market value. Id. at 262 (citing State v. Farrer 57 Wn. App. 207, 210, 787 P.2d 935 (1990) (where summary of price tags was accompanied by testimony from store manager who was familiar with pricing and merchandising, summary was admissible to show value of stolen items)).

Most recently, in Quincy, this Court examined whether a person who did not create the computerized price record could serve as a custodian. Quincy, 122 Wn. App. 395, 399-401, 95 P.3d 353 (2004). In that case, a Fred Meyer LPO provided foundation testimony for a computer receipt of the stolen merchandise, even though he could not testify to the accuracy of the prices. Id. at 400-401. Since this process was "done by scanning 'the UPC code just like you would when you go through checkouts,'" and the LPO knew how it worked and relied on it, he was a custodian of the records. Id. at 400. This Court held that the term "custodian" and "other qualified witness" is broadly interpreted and does not need to be the person who actually made the record. Id. at 399-400. In our case, that is not at issue, because Mbecke as store manager created the record in question. He is the custodian of the record.

The more relevant question would be whether, in creating this receipt of value, the manager made it in the regular course of business. In Quincy, this Court found that the creation of a price list record after a shoplift appeared consistent with standard procedure. Id. at 400-401. In our case, Mbecke testified that his creation of a receipt after a shoplift is indeed standard practice. 6RP 15. Thus, this final foundational element is satisfied. The trial court properly

admitted the receipt. Since the receipt indicated the value of merchandise to exceed \$250, there is sufficient evidence to convict Hodges.

3. THE TRIAL COURT PROPERLY DETERMINED HODGES' OFFENDER SCORE

Hodges claims that the trial court improperly concluded that his offender score on each of his two felonies is four. He asserts that it should be three, because the court determined that he has three prior felonies. Because Hodges misses the fact that on each felony he would have an additional current offense, making his score at least four, his claim is without merit.

It is uncontested that the trial court properly found Hodges had at least three valid prior felony convictions.⁶ RCW 9.94A.525; CP 74; Appellant's Brief at 26-28. At the time of sentencing, Hodges was sentenced on the same day, under this cause number, on two current felony offenses: Cocaine Possession and Theft in the Second Degree. CP 58; RCW 69.50.4013(2), 9.94A.525(7). Each sentenced felony would count as an additional "current

⁶ Residential Burglary (sentencing date 07/23/2002); Assault in the Second Degree (sentencing date 03/30/1999); and Assault in the Third Degree (sentencing date 06/07/1996).

offense" in calculating the offender score for the other sentenced felony. RCW 9.94A.525(1), 9.94A.589. Thus, for each of the two current convictions, his offender score would be at least four.⁷ RCW 9.94A.525. Thus, Hodges' claim that his offender score is less than four is without merit. His sentence should be affirmed.

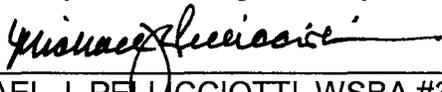
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hodges' conviction and sentence.

DATED this 9th day of November, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

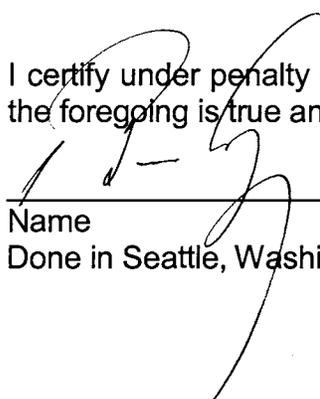
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⁷ The State is asking this Court to affirm Hodges' sentence and not remand to correct his sentence. However, Hodges was sentenced to two more current felony offenses (Residential Burglary and VUCSA: Possession of Cocaine) under different cause numbers (07-1-04263-2 SEA and 07-1-04166-1 SEA) at the time of sentencing. 1RP 54, 90. These would constitute two more current offenses. RCW 9.94A.525(1), 9.94A.589. Thus, his offender score should actually be at least two points higher, at six. This offender score of six would actually increase his standard sentencing range on the Cocaine Possession conviction from 6+ to 18 months to 12+ to 24 months. RCW 69.50.4013(2), 9.94A.525(7). At six points, his Theft in the Second Degree conviction would increase from 3 to 8 months to 12+ to 14 months. RCW 9A.56.040, 9.94A.525(7). Thus, Hodges' total time imposed at sentencing of 6+ months was actually below the appropriate total sentencing range of 12+ to 24 months.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Heather McKimmie, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE V. RICHARD HODGES, Cause No. 62631-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

11-10-09

Date