

62632-9

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COA No. 62632-9-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD HODGES,

Appellant.

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

The Honorable Andrea Darvas
The Honorable Monica Benton
The Honorable Michael Hayden
The Honorable Suzanne Barnett
The Honorable Helen Halpert

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in accepting pleas of guilty that were not entered knowingly, voluntarily, and intelligently.

2. The trial court erred in failing to order a competency evaluation of Mr. Hodges prior to accepting his pleas of guilty.

3. The trial court erred in declining to impose an exceptional sentence below the standard range.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in accepting pleas of guilty that were not entered knowingly, voluntarily, and intelligently?

2. Did the trial court err in failing to order a competency evaluation of Mr. Hodges prior to accepting his pleas of guilty?

3. Did the court commit legal error in concluding that RCW 9.94A.535(1)(e) may never mitigate a sentence where the defendant suffered from combined effects of mental incapacity and intoxicant-caused incapacity at the time of the offense?

4. May the defendant appeal the trial court's imposition of a standard range sentence where the court's basis for refusing to impose an exceptional sentence below the standard range was a legal error in the form of its misreading of the statutory requirements of the mitigating factor of RCW 9.94A.535(1)(e)?

5. Did the court err in finding that the testimony of Dr. Marcia Kent did not support a finding of a mitigating factor?

6. Did the court also err in rendering its decision to deny an exceptional sentence solely on the basis of the defense expert, Dr. Kent's, statements at the sentencing hearing, without reviewing the other documentation of Mr. Hodges' mental state at the time of the crime which was submitted by the defense, and which supported application of the mitigating factor of RCW 9.94A.535(1)(e) as a basis for an exceptional sentence below the standard range, a sentence the trial court plainly desired to impose?

C. STATEMENT OF THE CASE

In two King County criminal court cases resolved by Alford¹ pleas entered on the same date of April 16, 2008, and subsequently consolidated by this Court for appeal,² Richard Hodges was charged with Residential Burglary pursuant to RCW 9A.52.025, under cause number 07-1-04166-1 SEA; and Violation of the Uniform Controlled Substances Act (possession of cocaine)

¹See North Carolina v. Alford, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (allowing entry of plea by defendant acknowledging likely trial sufficiency of State's evidence on offense charged, but not admitting factual guilt).

²The residential burglary cause number, 07-1-04166-1 SEA, and the VUCSA cause number, 07-1-04263 SEA, were ordered by the Court of Appeals to be consolidated for purposes of this appeal under COA No. 62632-9-I.

pursuant to RCW 69.50.401(3), under cause number 07-1-04263 SEA. CP(B) 1-3, 16-35 (information/affidavit of probable cause, and statement of defendant on plea of guilty in burglary cause); CP(V) 60-62, 75-93 (information/affidavit of probable cause, and guilty plea in VUCSA cause).³ Mr. Hodges was sentenced for both offenses in the same sentencing hearing, held October 2, 2008. CP(B) 43-50; CP(V) 100-08.

According to the State's claims in the residential burglary case, South Seattle resident Hadi Al-Sadoon was in the kitchen of his house on April 11, 2007, when he saw that his outside-access basement door was standing open. CP 2 (affidavit of probable cause). Sadoon suspected someone was inside the building, and when he entered the basement and turned on a light, he saw the defendant just standing there. CP 2.

Sadoon's son, Dahvi, heard the sounds of a physical fight, and when he approached the basement he saw his father

³The consolidated appeal necessarily involves two Superior Court files and two sets of Clerk's Papers on appeal. The Clerk's Papers which are part of the record on appeal for purposes of the burglary cause number, 07-1-04166-1 SEA, will be identified as "CP(B)" followed by the appropriate page reference to the numbered Clerks' Papers. The Clerk's Papers which are part of the record on appeal for purposes of the VUCSA cause number, 07-1-04263 SEA, will be identified as "CP(V)" followed by the appropriate page reference to the numbered Clerks' Papers. The Verbatim Report of Proceedings will be referred to by the date of each particular dated volume of transcript, followed by "RP" and then the appropriate page reference of that volume.

physically restraining the defendant. CP 2. Seattle Police officers later learned that Sadoon had utilized a hammer against Mr. Hodges, striking him twice in the head. CP 2. After hospitalization at Harborview, Mr. Hodges was booked into the King County Jail. CP 2. He later entered a written Alford plea executed on April 16, 2008. CP 16-35; 4/16/08RP at 36-41.

On this cause, Mr. Hodges was sentenced to a standard range term of 63 months incarceration based on an offender score of 9; prior to the court's pronouncement of sentence, his trial counsel had agreed to the prosecutor's calculation of Mr. Hodges' score. 10/2/08RP at 35, 38, 46-47; CP(B) 43-50 (judgment and sentence).

Mr. Hodges' counsel did seek an exceptional sentence below the 63-84 month standard range on the burglary conviction, which the court denied on ground that the mental capacity mitigating factor of RCW 9.94A.535(1)(e) could categorically not be applied to Mr. Hodges because there was some evidence that he had been under the influence of cocaine during the burglary. 10/2/08RP at 46-47, 66.

The VUCSA charge arose when, on April 19, 2007, police recognized Mr. Hodges on Martin Luther King Way in Seattle and

approached him with knowledge of a burglary arrest warrant. During a search of Mr. Hodges' person incident to his arrest on the warrant, police located several "rocks" of a substance, which field-tested presumptively positive for cocaine, in Mr. Hodges' right front pants pocket. CP(V) 61-62. Mr. Hodges' also entered a written Alford plea to this charge, on April 16, 2008, acknowledging an offender score of 7. CP(V) 78.

At sentencing on October 2, 2008, the trial court, the Honorable Michael Hayden, imposed a standard range term of 12 months and 1 day on the VUCSA conviction. CP(V) 100-08.

1. THE DEFENDANT WAS INCOMPETENT TO ENTER HIS PLEAS OF GUILTY OR, IN THE ALTERNATIVE, THE TRIAL COURT VIOLATED MR. HODGES' DUE PROCESS RIGHTS BY TAKING HIS PLEAS WITHOUT OBSERVING ADEQUATE PROCEDURAL REQUIREMENTS TO DETERMINE HIS COMPETENCY.

a. The court must grant a motion to withdraw a plea upon a showing of manifest injustice. Under CrR 4.2(f), a trial court must allow a defendant to withdraw a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." A manifest injustice is "an injustice that is obvious, directly observable, overt, not obscure." State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996). CrR 4.2(f) provides:

(f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.

A manifest injustice occurs when (1) the defendant has been denied effective assistance of counsel; (2) the plea was not ratified by the defendant or the defendant's agent; (3) the plea was involuntary; or (4) the plea agreement was not kept by the State. State v. McCollum, 88 Wn .App. 977, 981, 947 P.2d 1235 (1997).

b. The defendant may seek to withdraw his plea initially on appeal. A criminal defendant through counsel may seek for the first time on appeal to withdraw an involuntary plea of guilty as a manifest error affecting a constitutional right. State v. Walsh, 143 Wn.2d 1, 6-7, 17 P.3d 591 (2001); RAP 2.5(a).

c. The Due Process Clause does not permit a trial court to accept a plea of guilty from a defendant who is not competent to enter a plea. The Due Process Clause of the Fourteenth Amendment prohibits the conviction of a person who is not competent to stand trial or enter a plea of guilty. U.S. Const., amend 14 (“No State shall ...deprive any person of life, liberty, or property, without due process of law....”); Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L. Ed. 2d 815 (1966); Drope v.

Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L. Ed. 2d 103 (1975);

State v. Wilks, 70 Wn.2d 626, 424 P.2d 663 (1967).

In addition, a Washington statute, RCW 10.77.050, provides that “[n]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050; see In re the Personal Restraint of Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001). A defendant's claim that he was not competent to enter his plea is equivalent to claiming the plea was not voluntary. State v. Osborne, 102 Wn.2d 87, 98, 684 P.2d 683 (1984).

The competency standard for standing trial has been said to be the same as that for entering a guilty plea. Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); State v. Osborne, 102 Wn.2d at 98; State v. Ashley, 16 Wn. App. 413, 558 P.2d 302 (1976). However, in assessing involuntariness in terms of lack of competence to enter a plea of guilty, the Osborne Court indicated the proper focus is on the trial court's observation of the conduct, appearance, and demeanor of the defendant. Osborne, 102 Wn.2d at 98.

Washington's definition of incompetency was adopted in 1973, and provides that a person is incompetent when he lacks the

capacity to understand the nature of the proceedings against him, or to “assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(14). This standard comports with federal due process caselaw, which provides that a person is competent only when he has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,” and to assist in his case with “a rational as well as factual understanding of the proceedings against him.” Dusky v. United States, 362 U.S. 402, 408, 80 S.Ct. 788, 4 L. Ed. 2d 824 (1960).

d. In addition, due process requires the court to conduct an evidentiary hearing whenever there is reason to doubt a defendant’s competency. As noted, the conviction of an accused while legally incompetent violates the constitutional right to a fair trial under the Due Process Clause. Pate v. Robinson, 383 U.S. at 378; U.S. Const. amend. 14. Importantly the failure of a trial court to observe procedures adequate to protect an accused’s right not to be convicted while incompetent is a denial of due process. Fleming, 142 Wn.2d at 863.

Consistent with the constitutional mandate, once there is “reason to doubt” the defendant’s competency pursuant to RCW 10.77.060, the court must appoint an expert and order a formal

hearing to determine competency before proceeding further, as to trial or acceptance of a guilty plea and thus conviction. State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991).

Mr. Hodges's pleas of guilty were ultimately entered on April 16, 2008. 4/16/08RP at 41-44. However, the history of the taking of that plea demonstrates that Mr. Hodges' plea was involuntary due to incompetence and may be withdrawn, or in the alternative, the taking of the plea evinced grave concerns as to competency that should have required the court to take the steps required by case law before proceeding further. Shortly prior to that date, on April 8, a hearing was held at which it was expected that the defendant would enter his pleas to the two charges, residential burglary and VUCSA possession of cocaine. 4/8/08RP at 2.

Almost immediately at that hearing, despite the case having been pending for almost a year and despite the fact of a prior May 1, 2007 order for a competency evaluation at Western State Hospital, and a June 7, 2007 finding of competency (based on a May 29, 2007 report from Western State Hospital⁴), it became clear

⁴Supp. CP ____, Sub # 16.

that Mr. Hodges was completely lacking any understanding of the nature of a guilty plea or its consequences. When the court instructed Mr. Hodges to listen to the deputy prosecutor who would be conducting the initial plea colloquy, the defendant thought that the prosecutor was assisting him in his case, and also thought that he was present in court to show why he had not committed a criminal burglary. He stated regarding his case, and of the prosecutor Ms. Weston:

Yeah. I've been having trouble understanding the res. burg. thing, how I fell through an open door. I didn't understand. She is trying to help me.

4/8/08RP at 3-4.

Mr. Hodges had to be reminded, when he tried to explain the accidental nature of his presence in the complainant's basement, that he was entering an Alford plea to that offense because he believed he would be found guilty at a trial despite the fact he claimed factual innocence. 4/8/08RP at 4-8. When the court therefore questioned the defendant's competence, defense counsel explained to the court that the paperwork had been reviewed with the defendant, and stated, "I just wanted to inform you of the struggle that we're having here. He does have dementia, but not to the level of legally being incompetent."

4/8/08RP at 8. This “struggle” continued as the hearing proceeded. At one point Mr. Hodges stated he believed that his trial counsel Mr. Al Kitching, who was not the counsel handling the plea hearing, had told him that his guilty plea would result in a mental health treatment program, which in fact was not part of any agreed sentence or recommendation as to sentence. 4/8/08RP at 13-14. The trial court quickly determined that there was no way it could accept a plea from the defendant that was knowing or intelligent. 4/8/08RP at 20-24.

On April 15, 2008, when the defendant appeared before the court with his counsel Mr. Kitching, counsel informed the court that he was “fairly confident that Mr. Hodges is aware of what he's doing and understands the nature and consequences of the plea -- change of plea.” 4/15/08RP at 4-5.

The court stated, “Fairly certain is not what the record's going to require.” 4/15/08RP at 5. When the court began questioning Mr. Hodges, the defendant immediately stated he was pleading guilty because “they promised me [sic] program.” 4/15/08RP at 5. In context, the defendant was plainly again referring to a mental health program that was not any part of his plea agreement. The court did not inquire further of the defendant

with regard to the “program” Mr. Hodges apparently thought he was going to be ‘sentenced’ to, but instead simply told the defendant, “All right.” 4/15/08RP at 5.

The court accepted an answer of “yes” when it asked the defendant if he felt his paranoid schizophrenia, as diagnosed in a previous competency report, was now being adequately controlled by his medication. 4/15/08RP at 7-9 (“It been [sic] helpful, yes. Yes.” 4/15/08RP at 8. When the court twice asked Mr. Kitching if he felt his client was competent, and whether counsel had any doubt in his mind about that, counsel responded only that the defendant “has [sic] ability to go forward.” 4/15/08RP at 10.

When the defendant appeared to struggle with the court’s continued questioning, defense counsel advised the court that “simple language works best with Mr. Hodges.” 4/15/08RP at 11. The defendant’s continued ‘colloquy’ indicated that he still heard “voices,” but he assured the court:

I was confused with the voices, but I'm not letting it bother me. I'm trying to get through this and move on.

4/15/08RP at 28. The defendant’s growing apparent confusion about the questions posed to him during the proceeding caused the court to tell counsel and the defendant that the plea hearing could

be continued the next day. 4/15/08RP at 38-40. Defense counsel noted to the court that "he [Mr. Hodges] is better in the morning, Your Honor. There's no doubt about that." 4/15/08RP at 40.

April 16, 2009. On this date, the trial court accepted Mr. Hodges' Alford pleas of guilty to both charges. 4/16/08RP at 41-44. The court at the start of the hearing asked the defendant if he remembered signing the plea documents "yesterday," to which Mr. Hodges responded in the affirmative. 4/16/08RP at 7. This signature was made well before the court determined that Mr. Hodges had any idea what he was doing by pleading guilty, a state of minimum understanding that the continued colloquy and the remainder of this final hearing indicates the defendant never reached.⁵ The court's questioning continued:

THE COURT: All right. Now, do you recall having signed these documents yesterday?

THE DEFENDANT: Yes, I do. Write on, I did.

(A discussion was had between defense counsel and his client.)

MR. KITCHING: Do you remember signing the documents and things in places that don't apply to you?

THE DEFENDANT: I signed something. I don't know what it was, but I did sign something -- something here,

⁵The two written documents entitled "Statement of Defendant on Plea of Guilty" are signed by the defendant, and bear hand-dating of April 16, 2008, with the date appearing directly above the court's signature, and appearing, entirely properly, to have been the date that the court signed the plea statements. CP(V) 78-93; CP(B) 16-35.

but some of these I did.
MR. KITCHING: She has the original that you signed, the original form. Do you understand that?
THE DEFENDANT: I did sign something, yes.
THE COURT: All right.
THE DEFENDANT: Yes, I did.
THE COURT: I'm asking you today do you remember what you signed.
THE DEFENDANT: No. I told them I want to go ahead and do this.
THE COURT: Now, you said you want to go ahead. Go ahead with what?
THE DEFENDANT: To talk to them again yesterday. They was mad, and that sort of put me in a different -- I don't know.
THE COURT: Do you know why you're in court today, Mr. Hodges?
THE DEFENDANT: Just to go with this paperwork.
THE COURT: All right. Well, dealing with paperwork and entering a plea of guilt are perhaps different things. I need to understand if you know why you're here.
THE DEFENDANT: To -- wait a minute.
(A discussion was had between defense counsel and his client.)
THE DEFENDANT: To plead guilty.

4/16/08RP at 7-8. At this point, the court stated it would go through the plea colloquy again, and the court inquired of Mr. Hodges about his information such as his age and whether he had read the plea documents. 4/1608RP at 8-12. The defendant stated that he had "problems with that" when he was read some of the rights he was foregoing, but also said that he wanted to move forward.

4/16/08RP at 10. When asked by the court whether he remembered what he had read in the plea paperwork, Mr. Hodges

stated that he only remembered some of it, then said that he “wouldn’t know what – what you’re [the court] talking about, but I want to move forward.” 4/16/08RP at 11.

The court became concerned that the defendant was simply trying to say whatever he believed would please the court, particularly when the defendant stated that he had “problems understanding maybe because I don’t have somebody to help me go through this[.]” 4/16/08RP at 12. When the court asked Mr. Hodges if he had taken his medication yesterday, the defendant responded that he had, and then responded affirmatively to the court’s question whether he had experienced any “hallucinations or fears this morning,” but stated that he did not want to talk about it. 4/16/08RP at 12. The court asked the defendant if these hallucinations or fears had to do with the charges, at which point Mr. Hodges’ comments became very strange:

I see he's relaxed today, and I thought he'd beat me up and stuff, and I was feeling sort of hurt that -- you know, I try to apologize if I make something -- did something wrong, and I'm so sorry.

4/16/08RP at 12. It was unclear who Mr. Hodges was referring to.

When the court again attempted to review both the basis for the burglary and the VUCSA charges, Mr. Hodges began

discussing his belief of what really happened, which was that he had fallen through the burglary complainant's door, and that he had merely been holding drugs in his hand (apparently referring to the VUCSA charge). 4/16/08RP at 14-15. When counsel asked the defendant if he understood what the State would have to prove at a trial, the defendant asked him, "If we'd lose – do you think we'd lose?" 4/16/08RP at 16.

At this point in the hearing, the court held a sidebar conference with counsel, which was not recorded, but defense counsel appeared to ask the court to ask Mr. Hodges the various questions in a certain way. 4/16/08RP at 16-17. In a flurry of questions at the tail end of these proceedings, the court asked Mr. Hodges if he understood the standard ranges for the crimes, which Mr. Hodges stated that he did. 4/16/08RP at 19. Mr. Hodges was asked if he understood that there were no guarantees as to any programs he would get as part of his sentence, and he said that he did. 4/16/08RP at 20. The defendant answered several questions correctly regarding the trial rights he would be giving up by pleading guilty, but then, when asked if he understood he would have a right to appeal a trial verdict, which might result in a new trial, he asked the court, "Should I do that?" 4/16/08RP at 24. After a discussion

with Mr. Kitching, he appeared to understand he would be giving up these rights. 4/16/08RP at 25. After several more questions about other sentencing consequences, the court accepted the pleas, and entered convictions on the two charges. 4/16/08RP at 41-44. The written plea statements, that the defendant had signed the previous day, were filed. CP(B) 16-35; CP(V) 75-93.

e. Mr. Hodges' written plea statements are not irrefutable and the defendant was not competent to enter pleas of guilty. Appellant concedes that the below is an oft-repeated statement in Washington case law regarding the legal effect of typed and signed CrR 4.2(g) plea statements on the appellate question of the voluntariness of pleas of guilty:

When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.

State v. Branch, 129 Wn.2d 635, 642 n. 2, 919 P.2d 1228 (1996) (quoting State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982)). But written plea documents signed before the plea

colloquy has concluded, and signed in the middle of a plea-taking process that required three hearings to complete because two had to be abandoned for the defendant's clear incompetence, and where the third should have been similarly terminated, are not presumptively indicative of anything reliable, much less a knowing and intelligent plea of guilty.

Here, Mr. Hodges was asked if he "knew what's written on those papers" and he knew they were guilty pleas. 4/16/08RP at 6. When asked by the court if he remembered signing them on April 15th, he replied, "Yes I do. Write on, I did." 4/16/08RP at 7. This is significantly less than the court's ensuring that the defendant truly understood the legal effect of what he was signing, and that he embraced the truth of the statements therein. The above reasoning from the Branch and Perez cases loses all force when the plea judge reveals that the defendant's signature was placed on the plea documents sometime during the second (of three) attempted plea hearings, the first two of which (including the second) had to be abandoned because of a patently obvious lack of understanding by the defendant of the nature of a guilty plea and the consequences of entering pleas to the offenses charged.

The defense in appellate cases often has reason to cite, in

cases where a defendant's trial attorney believed his defendant to not be competent, the cases of State v. Hicks, 41 Wn. App. 303, 307, 704 P.2d 1206 (1985), State v. Swain, 93 Wn. App. 1, 10, 968 P.2d 412 (1998), and State v. Crenshaw, 27 Wn. App. 326, 331, 617 P.2d 1041 (1980), for the proposition that a defendant's lawyer's "opinion as to his client's competency and ability to assist in his own defense is a factor to which the trial court must give considerable weight in determining a defendant's competency to stand trial." Hicks, at 307. The Courts of Appeal have legitimately and properly in appropriate cases responded that while a trial court must give considerable weight to defense counsel's opinion regarding a defendant's competence, such an opinion is not determinative. See, e.g., State v. Woods, 143 Wn.2d 561, 605, 23 P.3d 1046 (2001) and State v. Swain, 93 Wn. App. at 10.

In the present case, defense counsel's opinion should be given the least weight possible, according to its context. Defense counsel seemed to guide Mr. Hodges through the three plea hearings in lack of regard of his client's insistence on believing he had been promised a mental health treatment program as part of his sentence, until the court eventually elicited an answer to the contrary out of him, despite the defendant's lack of comprehension

of the court's plenary sentencing power and the absence of any guarantee of some special treatment-based sentence. Counsel had so little confidence in Mr. Hodges' actual understanding of the nature and consequences of his guilty pleas that counsel, when asked by the court if he really and truly believed the defendant knew what he was doing, could only bring himself to repeat, "I think the's [sic] competent to proceed with his plea, Your Honor." 4/15/08RP at 10. Counsel's opinion that the defendant was competent to enter pleas of guilty should be assigned such weight as is appropriate given that he commenced the final plea hearing by telling the court that he was "hoping that we can make it through the rest of the plea." 4/16/08RP at 5. This defendant was not competent to enter his pleas of guilty.

f. The defendant's plea hearings should have been terminated and the court's acceptance of the plea documents should have been declined in favor of an additional competency hearing or order for evaluation, based on the colloquy that plainly showed these were not knowing and intelligent pleas. The issue to which further error is assigned is that the trial court's sense of due process should have been troubled and its understanding of the requirements of CrR 4.2

should have been disturbed, at some point during this effectively 3-day plea hearing, to grave concerns about Mr. Hodges' mental competency to plead guilty. See City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). In determining whether there is a reason to doubt competency, the court should be alert to the defendant's actual understanding of the charges and consequences of conviction. Gordon, 39 Wn. App. at 442. The court should also consider the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." Fleming, 142 Wn.2d at 863 (citing State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)).

In these circumstances, the trial court abused its discretion when it failed to appoint an expert and order a formal hearing to determine Mr. Hodges' competency prior to accepting his plea. Mr. Hodges did not demonstrate an understanding of the charges against him and had a lengthy and complicated history of mental health issues. Once the court had a reason to doubt Mr. Hodges' competence, the court had a constitutional and statutory duty to appoint an expert and order a hearing to determine competency before proceeding to conviction by plea. RCW 10.77.070.

Reversal is the appropriate remedy because the court's failure to adhere to adequate procedural safeguards in determining competency violated Mr. Hodges' right to a fair trial. Pate v. Robinson, 383 U.S. at 377.

2. THE TRIAL COURT ERRED IN DECLINING TO IMPOSE AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE.

The trial court erred as a matter of law in concluding that the mere fact of Mr. Hodges' alleged use of drugs or state of having ingested drugs around the time of the commission of the offense per se precluded application of the impaired mental incapacity mitigating factor at RCW 9.94A.535(1)(e) as a basis for an exceptional sentence below the standard range.

Had the court interpreted the statute correctly, it would have found that the sentencing hearing statements made by Dr. Kent fully supported a finding of an independent mitigating mental factor unconnected with any effects of drug use.

Finally, even if Dr. Kent's statements did not support a finding of an independent mitigating mental factor, the court erred in rendering its decision solely on the basis of these statements, without reviewing the other, additional documentation of Mr. Hodges' mental state at the time of the crime, and which would

have supported a finding of an independent mitigating mental factor unconnected with any effects of drug use, and thus application of RCW 9.9A.535(1)(e), correctly read, as a basis for an exceptional sentence below the standard range.

a. Mr. Hodges sought an exceptional sentence below the standard range on the residential burglary conviction. On September 25, 2008, the parties appeared before the trial court post-plea to set a sentencing date, and the defendant was found competent to be sentenced. 10/2/08RP at 32. The court granted Mr. Hodges' counsel's request that the various experts' medical and competency evaluations filed throughout the pendency of the case should now be considered for the purpose of the court's decision as to sentence. 9/25/08RP at 31.

At sentencing on October 2, 2008, both parties calculated the defendant's offender score on the residential burglary conviction as 9 points and an accordant standard range of 63 to 84 months. 10/2/08RP at 35, 38.

Mr. Hodges' counsel then sought an exceptional sentence below the standard range on the burglary count, arguing that mitigating mental factors merited such a sentence, despite the co-presence of drug use by the defendant at or around the time of the

crime. Specifically, the defense argued that Mr. Hodges'

capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired by his mental disease or defect. And that's even taking into consideration that the voluntary use of drugs or alcohol is excluded.

10/2/08RP at 46-47. The defense arguments relied on RCW

9.94A.535(1)(e), which addresses the defendant's mental capacity

to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded."

RCW 9.94A.535(1)(e).

The trial court inquired of Dr. Marcia Kent, the defense expert who was present, as to how the defendant's reported condition met this impaired capacity criteria. 10/2/08RP at 63. Dr. Kent explained that, to a reasonable medical certainty, the defendant's capacity was impaired

due to a number of factors, including uncontrolled hypertension exacerbated by the cocaine. That would have caused headache, confusion and problems in his thinking.

10/2/08RP at 64.

Upon hearing this initial mention of use of cocaine, the trial court stated that the defendant being under the effects of cocaine

at the time of the crime categorically precluded imposition of an exceptional sentence under the cited statutory mitigating factor. 10/2/08RP at 64. The court stated, "the statute specifically says that you cannot, if you're taking drugs, you cannot use that as the excuse for your mental condition." 10/2/08RP at 66. Following a lengthy discussion that ensued regarding Dr. Kent's assessment of the defendant, the trial court concluded that it could not impose an exceptional term in Mr. Hodges' case because his mental capacity was in part affected by drug factors. Id.

b. The defendant may appeal because the trial court's basis for believing it was prohibited from imposing an exceptional sentence was a legal error of misapprehension of the requirements of a statutory mitigating factor. As a general rule, under the rule of RCW 9.94A.585, when the sentence imposed on a convicted defendant is within the standard range (correctly calculated based on the defendant's criminal history), there is no right to appeal the sentence in order to argue that an exceptional sentence below that range should have been imposed instead. State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719, 718 P.2d 796 (1986); see RCW 9.94A.585. Thus if a trial court has contemplated, but declined to impose an exceptional sentence,

and the court has concluded correctly that there is no legally applicable basis for an exceptional term, or that there is no factual basis adequate to satisfy the mitigating factor(s) required for the exceptional sentence sought, such court has exercised its discretion, and the defendant may not appeal that ruling. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

However, review of the imposition of a standard range sentence may be granted where the sentencing judge has refused to exercise discretion (i.e., has refused to review proffered factual grounds). State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

In addition, RCW 9.94A.585's prohibition will not preclude an appellate challenge to a standard range sentence where the party takes issue with the procedure by which a court determines not to impose an exceptional sentence; i.e., where the court has relied on an impermissible or incorrect legal basis for refusing to impose an exceptional sentence. State v. Schloredt, 97 Wn. App. 789, 801-02, 987 P.2d 647 (1999); Garcia-Martinez, 88 Wn. App. at 330; State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); Ammons, 105 Wn.2d at 183.

The latter circumstance is presented in Mr. Hodges' appeal,

because the trial court, though recognizing the defendant's psychological incapacity, erroneously believed that the mitigating factor of RCW 9.94A.535(1)(e) categorically could not be satisfied where drugs or alcohol had an effect of causing impairment of Mr. Hodges' "capacity" to appreciate the wrongfulness of his conduct or "conform" his conduct to the law, irrespective of whether an effect on his capacity resulting from purely mental disorder was independently present.⁶

Because this was the reason for the court's refusal to impose an exceptional sentence, in favor of imposition of a standard range term, Mr. Hodges may appeal his sentence despite RCW 9.94A.585. See Herzog, at 423; Ammons, at 183; Schloretdt, at 802; Garcia-Martinez, at 330.

c. The trial court erred in ruling that the mitigating factor at RCW 9.94A.535 categorically could never apply where the defendant was affected by drugs or alcohol at the time of the offense. The trial court's understanding of RCW 9.94A.585 was legal error because the court misapprehended, and ultimately under-assessed, its statutory authority when it concluded that the

⁶For brevity's sake, appellant will use the phrase 'appreciate or conform' as shorthand for the alternative impairments identified by RCW 9.94A.535(1)(e), the presence of either of which satisfies the mitigating factor.

exceptional mitigating factor of RCW 9.94A.585 could not apply to Mr. Hodges as a matter of law. That mitigating factor provides:

(1) Mitigating Circumstances--Court to Consider.
The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences. . . .

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(Emphasis added.) RCW 9.94A.535(1)(e). This mitigating factor is understood to refer to the presence of a mental disorder or infirmity which in turn impairs the capacity referred to:

While mental conditions not amounting to insanity or diminished capacity may constitute mitigating factors supporting an exceptional sentence below the standard range, the record must establish not only the existence of the mental condition, but also the requisite connection between the condition and significant impairment of the defendant's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law.

(Emphasis added.) State v. Schloredt, 97 Wn. App. 789, 802, 987 P.2d 647 (1999).

Two noted Washington criminal law commentators have stated the following with regard to this mitigating factor and its

stringent requirements:

This factor imposes a “stringent test.” Impaired judgment and irrational thinking are not sufficient to justify application of this factor, since these are inherent in most crimes. Evidence that the defendant suffered from a mental disorder does not, by itself, justify an exceptional sentence. Neither does evidence that the defendant suffered from emotional and psychological stress, lacked self-control, or had a limited education. Rather, there must be evidence that these factors led to significant impairment in the defendant's ability to appreciate the wrongfulness of his or her conduct and to conform to the law.

(Emphasis added.) (Citations omitted.) Ende, Douglas and Fine, Seth, 13B Washington Practice § 4006 (“Statutory Mitigating Factors – Impaired Capacity”) (2009).

Importantly, Ende and Fine also state the following with regard to associated alcohol or drug usage, addressed in the last sentence of the factor, which establishes a caveat:

Impairment resulting from voluntary use of drugs or alcohol is not covered by this factor. This includes impairment that results from a combination of intoxication and a mental disorder.

13B Washington Practice, § 4006. For this proposition, which subtly but significantly misunderstands our Supreme Court's case law interpreting this mitigating factor and its drug/alcohol caveat, Ende and Fine cite State v. Allert, 117 Wn.2d 156, 166–67, 815 P.2d 752, 757–58 (1991) and State v. Fowler, 145 Wn.2d 400,

410–11, 38 P.3d 335, 340–41 (2002).⁷

The case of State v. Allert, when examined, does not stand for the all-or-nothing proposition, advanced by Ende and Fine and utilized by the sentencing court below. The commentators' language disqualifying "impairment that results from a combination of intoxication and a mental disorder" erroneously asserts that the presence of impairment caused by mental disorder, if accompanied by a presence of impairment caused by drug or alcohol intoxication, results in an automatic inapplicability of the mitigating factor of subsection .535(1)(e).

Rather, it is the circumstance of a single impairment caused by an indistinguishable combination of mental and intoxicant-caused incapacity, where expert opinion is unable to say that mental impairment was present independent of intoxication, that results in drug use disqualifying the convicted defendant from the possibility of a downward departure under this mitigating factor.

⁷State v. Fowler involved an initial trial court determination that an exceptional term below the standard range was warranted, inter alia, because of the defendant's sleep deprivation at the time of the crime; however, because the uncontroverted evidence showed that this condition was solely caused by drugs and/or alcohol, the Supreme Court ultimately affirmed the Court of Appeals' reversal of the sentence. State v. Fowler, 145 Wn.2d at 410–11. The Fowler case is not relevant to Mr. Hodges' specific facts because it does not present the complex question of multiple, but independent causes of mental incapacity, at issue in Allert and in the present appeal.

When the separate affects of a mental disorder independently cause incapacity, and that incapacity is an actual impairment in the ability to 'appreciate or conform' within the provision's meaning, subsection .535(1)(e) applies and the facts warrant a sentence below the standard range, even in the presence of associated intoxication. This is what counsel below meant by his argument that subsection .535(1)(e) applies to Mr. Hodges' case even in the presence of any alleged drug intoxication. See 10/20/08RP at 47.

In Allert, the defendant was convicted by plea on two counts of first-degree robbery and was given an exceptional sentence below the standard range of 12 months in work release and 24 months of community supervision. The Court of Appeals, upon the State's appeal, held that the sentence was justified by the defendant's inability to appreciate the wrongfulness of his conduct resulting from the combined effects of depression, severe compulsive personality, and alcohol use and intoxication at the time of the offenses, stemming from alcoholism. State v. Allert, 58 Wn. App. 200, 791 P.2d 932 (1990).

The Supreme Court then specifically held: (1) that the voluntary use of alcohol, regardless of whether the defendant was

alcoholic, was not sufficient to justify an exceptional sentence; and (2) that the combination of depression, severe compulsive personality and alcoholism could not constitute a compelling and substantial reason to support an exceptional sentence “absent [a] finding that disorders unrelated to alcohol abuse would, either alone or together, result in such impairment[.]” (Emphasis added.) State v. Allert, 117 Wn.2d at 156–57.

In imposing the defendant’s sentence below the standard range, the trial court in Allert entered findings of fact including, inter alia, these findings:

1.1 Defendant, at the time of the commission of these offenses, suffered from three medically recognized mental disorders, i.e., depression, severe compulsive personality, and alcoholism.

1.2 Because of the separate and combined effects of each mental disorder, the defendant’s capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law was significantly impaired.

State v. Allert, 117 Wn.2d at 161-62. On discretionary review, the Supreme Court analyzed the trial court’s exceptional sentence decision according to established case law, which requires the court to determine (1) whether the factual reasons given were supported by evidence in the record, under the “clearly erroneous” standard of review; and (2) whether the reasons found were

substantial and compelling so as to justify a departure from the standard range under the SRA as a “matter of law.” State v. Allert, 117 Wn.2d at 162 (citing State v. Nordby, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986)).⁸

With regard to Finding of Fact 1.1, that the defendant suffered from depression, severe compulsive personality and alcoholism, the Court ruled that this finding was supported in the evidence by the reports and testimony of two doctors, Wetzler and Jorgensen. Allert, 117 Wn.2d at 164. “However,” the Court ruled, “this finding alone is not a substantial and compelling reason to deviate from the standard range [because] [a]lcoholism is not in and of itself a reason justifying imposition of an exceptional sentence.” Allert, at 164.

Then, with regard to Finding of Fact 1.2, the Court found that this finding was partly supported by the record, and partly not, in that there was evidence that the combined effects of the mental disorders and alcohol impaired Mr. Allert’s ability to ‘appreciate and conform,’ but there was not the necessary competent evidence that each of these conditions separately had or would have the effect of

⁸Pursuant to this case law a reviewing court also asks whether the sentence imposed was “clearly too lenient.” Allert, at 162 (citing State v. Pascal, 108 Wn.2d 125, 138, 736 P.2d 1065 (1987)).

impairing this capacity:

Finding 1.2 is only partially supported by the record. The finding declares: "Because of the separate and combined effects of each mental disorder [depression, compulsive personality and alcoholism] the defendant's capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law was significantly impaired." The commissioner in the Court of Appeals decided that this finding was not supported by the record and the Court of Appeals found it was so supported. In fact, the testimony of Drs. Wetzler and Jorgensen upholds the finding that the combined effect of these three conditions was to impair the defendant's appreciation of wrongfulness and ability to conform his conduct; there is, however, no evidence in the record that any one of these conditions alone had such an effect.

(Emphasis added.) Allert, at 164-65. After further careful dissecting of the evidentiary record, the Supreme Court concluded that, in the particular case before it, there was no support for any factual finding of a separate and independent affect of a mental disorder that impaired the defendant's capacity to 'appreciate or conform:'

[W]e conclude that the portion of finding 1.2 which holds the combined effects of the three disorders caused the defendant to have impaired ability to recognize wrongfulness and conform his conduct is supported by the record, but that the portion of the finding which holds that the separate effects of these disorders caused this result is not supported by the record.

(Emphasis added.) Allert, at 166. The Allert case does not stand

for the proposition that the presence of the affects of the use of alcohol or drugs on capacity at the time of the offense per se disqualifies the defendant from utilizing the mitigating factor of RCW 9.94A.535(1)(e). The Allert court concluded that because the record in that particular case did not show that "absent alcohol abuse the defendant would have been impaired in appreciating the wrongfulness of his conduct," the trial court had erred in employing the mental capacity mitigating factor. Allert, at 167.

Thus, in fact, the Allert decision supports the argument that this mitigating factor in RCW 9.94A.535 may be applied to Mr. Hodges' case, because when its legal requirements are correctly understood, there was evidence of an independent affect on his capacity to appreciate or conform, caused by mental factors aside from any intoxication, and this evidence warranted an exceptional term below the standard range.

d. The facts warranted application of RCW 9.94A.535(1)(e), when the legal requirements of that mitigating factor are correctly understood. The trial court noted that the question placed before the court by the defense was whether, given the wide range of mental history evidence reviewed for competency purposes during the entirety of the case and now

being asked to be reviewed for sentencing, the defendant should receive an exceptional sentence below the standard range based on the considerations of a failed mental defense, his mental capacity, and his ability to appreciate the wrongfulness of his acts. 10/2/08RP at 41-42. The court stated:

So the question is does his condition, does all the history call for a standard range sentence, or is there a reason, a statutory available reason for an exceptional sentence in this case. I think that's what we get down to.

(Emphasis added.) 10/2/08RP at 41. Defense counsel noted that Dr. Gregg Gagliardi of Western State Hospital, despite having found the defendant competent to stand trial or to enter a plea of guilty, nonetheless believed that the defendant was seriously mentally disabled in a manner that affected his behavior. The doctor, as quoted by counsel, stated,

“Regardless of his diagnosis, it is my opinion that Mr. Hodges would meet criteria for civil commitment under RCW 71.05 as gravely disabled[.]”

10/2/08RP at 48; Supp. CP ____, Sub # 64D (Medical Report) (Western State Hospital forensic psychological competency evaluation of December 7, 2007, at p. 2). Dr. Kent, the defense expert, specifically related Mr. Hodges' mental defects to the April 11 date of the burglary, and noted that Mr. Hodges, on that date,

was not properly medicated and was suffering from hypertension and asthma. 10/2/08RP at 49-50. Mr. Hodges had recently been to the hospital, did not have his inhaler, was unable to breathe during the incident, and was in such distress that he had apparently simply gone looking for someone to help him when he was found in the complainant's basement, resulting in the burglary arrest. 10/2/08RP at 50. Critically, the doctor stated that Mr. Hodges "still has the same problems, even since he's been in jail. The same problems." 10/2/08RP at 65.

The prosecutor responded that Mr. Hodges' reported use of drugs at or prior to the time of the offense categorically precluded application of any of these considerations under the statutory mitigating factor. 10/2/08RP at 41-42.

However, the trial court's further inquiries of Dr. Kent and defense counsel (Mr. Kitching) regarding the nature and cause or causes of the defendant's incapacity at the time of the crime demonstrated its mental nature. The doctor's answers ultimately showed that the facts merited application of RCW 9.94A.535(1)(e).

THE COURT: I asked [Dr.Kent], is it her opinion that had he not been taking cocaine that day, he would have committed the residential burglary and he still would have been unable to appreciate the wrongfulness of his conduct. And I don't know that

she's able to answer that. I didn't know that he was under the effect of cocaine of the day of the residential burglary. And that puts a very different light on it statutorily.

MR. KITCHING: I understand that, Your Honor, but I do think that Dr. Kent can give an opinion that independent of cocaine, Mr. Hodges has a significant mental deficit that affected his behavior.

COURT: I am not saying she can't say that. But unless she can say that the cocaine did not contribute to his confusion, did not contribute to his lack of capacity to understand and appreciate the wrongfulness of his conduct and that he would have been in the same state without the cocaine, then in my judgment, the legislature has said he doesn't qualify for an exceptional sentence.

DR. KENT: What I can say, Judge, is that the cocaine contributed to underlying preexisting conditions, including psychosis, including cognitive confusion, including hypertension and his shortness of breath. So there are a number of factors that are separate from the cocaine, and the cocaine certainly contributed to it. And I can't say, I don't think that I can say that--because I don't know, I don't what his, I don't have the collaterals to tell me exactly what his mental state was around that time, with the exception of he'd been taken to the hospital--

COURT: You mean I guess his premorbid condition prior to taking the cocaine?

MR. KENT: Premorbid. He had been taken to the hospital several times with confusion, with high blood pressure before, without having cocaine in his system. He had been observed to be psychotic and to be interacting in more of a confused manner by Mr. Takanaga, who has been compassionate with him in the community. But--and since then, completely off medications, he has had times where he has been confused enough that he would try to find help, stumble in somewhere and get lost. Can I tell you with absolute certainty that without the cocaine that day--I can't tell you with certainty. But given

everything that's happened, it's possible. And the cocaine certainly did not help the situation. I also think that he--what he tells me about that time is that he was hearing a lot of voices at that time. And I believe that some of the drug use was probably a self medication; it was a way of coping with all of his underlying problems, so that there was some factors other than just addiction promoting the use of the drug.

(Emphasis added.) 10/2/08RP at 67-69. But instead of the trial court asking Dr. Kent if cocaine use "contributed to" the defendant's incapacity, the court should have been asking, pursuant to Allert, if the doctor could determine whether there were identifiable, separate affects on the defendant's capacity as a result of mental causes, as distinguished from the affects of drug intoxication.

The court's statements of law, taken as a whole, did not precisely reflect the proper consideration of the legal import of drug or alcohol use on Mr. Hodges' impairment at the time of the offense as required under Allert and RCW 9.94A.535(1)(e). The court did not understand that alcohol or drug use can indeed be present at the time of the offense, without categorically disqualifying the defendant from this particular aggravating factor. For these reasons, the court therefore believed itself constrained by RCW 9.94A.535(1)(e) to impose a standard range term of incarceration, of 63 months. 10/2/08RP at 69. The court stated as follows:

In my judgment, when you use the drugs that make your mental condition worse and under that additionally impaired mental condition you commit a crime, in my judgment, the legislature has said you do not qualify for an exceptional sentence.

(Emphasis added.) 10/2/08RP at 69-70. As argued, this was plainly a legal ruling, and therefore appealable, rather than a decision following weighing of facts as to which the defendant is simply disappointed with the outcome. See State v. Herzog, at 423; State v. Ammons, at 183; State v. Schloredt, at 802; State v. Garcia-Martinez, at 330. Mr. Hodges may seek review of his standard range sentence because a trial court's erroneous belief that it lacks the legal authority to exercise its discretion to depart downward from the standard sentencing range is itself an abuse of discretion. See also State v. Bunker, 144 Wn. App. 407, 411-13, 183 P.3d 1086 (2008) (sentencing court necessarily abuses discretion if it refuses to consider mitigating factor based on erroneous belief it has no authority to do so).⁹

⁹During a later colloquy prompted by the prosecutor regarding the possibilities of appeal and an appeal bond, the trial court used language that the Respondent will likely urge upon this Court of Appeals as demonstrating that the court's refusal to impose an exceptional sentence was a routine, non-appealable decision made following a factual finding of an absence of compelling reasons to do so:

And I'll tell counsel that as much as I would like to have done something differently here, that – and I understand that sending him away to DOC is certainly not the best thing in his interest

Where expert opinion did clearly state that the defendant's mental disorder and incapacity existed over time completely independently of any affect of drugs, the court's apparent misapprehension of the statute should compel this court to remand.

In addition, this Court should be concerned that the trial court did not appear to completely understand that there are two different ways pursuant to RCW 9.94A.535(1)(e) in which the defendant's capacity could be impaired mentally; rather, the court seemed to not be aware that impairment could present itself solely in the defendant's ability to conform his conduct to the law, in addition to impairment in the ability to appreciate the wrongfulness of his conduct. 10/2/08RP at 67-69.¹⁰

psychologically, in order to do an exceptional sentence, I have to find clear and compelling reasons. And clear is the issue. And it's anything but clear concerning his mental state and why on the day of the burglary. And it is clear now that he was under the influence of cocaine. And I think that makes it sufficiently unclear that I'm unable to find clear and compelling reasons to depart from the statutory range.

10/2/08RP at 73. However, the entire analysis engaged in by the trial court which shows its miscomprehension of the legal requirements of RCW 9.94A.535(1)(e) plainly shows that the court committed an error of law. Its decision cannot now be characterized by the State as a routine discretionary. This comment by the court, seemingly urged by the prosecutor in an effort to insulate the case from successful appellate challenge, is not, in context, accurately reflective of the actual framework of the trial court's sentencing decision.

¹⁰The commentators Ende and Fine erroneously state that the statute requires evidence that mental factors led to impairment in the defendant's ability to appreciate the wrongfulness of his or her conduct and to conform to the law; the statute is satisfied by evidence of mental impairment of either capacity, and

e. Alternatively, the court erred in failing to look to the other documentation of Mr. Hodges' mental state at the time of the crime – submitted by counsel as relevant to the exceptional sentence motion – for evidence supporting application of the mitigating factor.

i. Argument offered in the alternative.

This argument applies to Mr. Hodges' challenge to the court's denial of his sentencing motion if the statements of Dr. Kent at the sentencing hearing were properly deemed inadequate to satisfy the 'appreciate or conform' mitigating factor of subsection .535(1)(e), correctly understood. The trial court denied Mr. Hodges' motion for a downward departure, solely on the basis of its assessment of Dr. Kent's statements at the sentencing hearing, without reviewing the other submitted documentation of the various competency and mental evaluations performed during the pendency of the case, which contained expert medical opinion as to Mr. Hodges' mental state at the time of the burglary.

These additional reports, which have been unsealed for purposes of appellate review, would have supported application of

does not require evidence that both capacities were diminished. RCW 9.94A535(1)(e).

RCW 9.9A.535(1)(e) as a basis for the exceptional sentence that the defendant sought and that the court plainly desired to impose.

ii. The trial court was plainly inclined to grant Mr. Hodges' motion for a downward departure and its inadvertent failure to review the significant additional documentation of mental capacity qualifies as a failure to exercise discretion that permits appellate review.

The record is clear that the trial court was inclined to grant an exceptional term below the standard range in Mr. Hodges' case, based on the court's perception of his mental capacity, as reflected in many statements the court made as it spent a significant amount of time exploring options for imposing psychological treatment as a part of Mr. Hodges' anticipated exceptional term. See 10/2/08RP at 48-63. The court specifically stated that it believed a downward departure in the sentence for burglary was warranted if the facts met the law. 10/2/08RP at 70 (later stating, "So as much as I don't like the notion of sending Mr. Hodges off for 63 months, in my judgment, I really don't have any choice.").

The court likely inadvertently failed to review the various portions of the record that were material to this question, because of their numerousness, and, although the prior medical and competency evaluations of Mr. Hodges were brought to the court's

attention as important for sentencing, they do not appear to have been assembled again as a group and presented anew at sentencing in a separate filing.

These portions of the record were, however, fully referenced as a part of the existing record for purposes of the sentencing hearing. When the sentencing date was set, the parties and the court acknowledged that Mr. Hodges' counsel desired to have the various experts' medical competency evaluations filed throughout the pendency of the case to be considered by the court for the additional purpose of the court's decision as to sentence.

9/25/08RP at 31. At sentencing on October 2, 2008, the court accordingly acknowledged the numerous reports that had been prepared by medical experts who had evaluated the defendant over the long-pending Superior Court case. 10/2/08RP at 36-37.¹¹

The court understandably became enmeshed on the sentencing date in a discussion of Dr. Kent's assessment of the defendant, that witness being present in court, and it was on that basis that the trial court concluded that it could not impose an

¹¹Later at the hearing the trial court again acknowledged the relevance, for sentencing purposes, of the numerous and various mental health and competency reports prepared on Mr. Hodges throughout the pendency of Mr. Hodges' case. 10/2/08 at 47.

exceptional term in Mr. Hodges' case because it believed his mental capacity was also affected by drug factors. Id.

All of this indicates that the trial court would have conducted an on-the-record examination of additional parts of the record submitted for sentencing which supported a downward departure sentence for reasons of Mr. Hodges' mental capacity at the time of the offense, and would likely have credited such evidence. Given the court's inclination to impose an exceptional term, it would be unreasonable simply to conclude, without any ground to support the determination, that the court must have examined these other portions of the record and found them not credible or persuasive. Given these facts, review of the imposition of the standard range sentence in Mr. Hodges' case may be granted where the sentencing judge has failed to review the proffered factual grounds. State v. Garcia-Martinez, supra, 88 Wn. App. at 330.

iii. The additional documentation of mental capacity submitted by the defendant supported application of RCW 9.9A.535(1)(e).

The additional competency and medical reports contained expert opinion evidence of the mitigating mental factor appearing at RCW 9.9A.535(1)(e), unconnected with any effect of drug use. Dr.

Gregg Gagliardi's competency evaluation for Western State Hospital, conducted May 29, 2007, indicated that Mr. Hodges "likely could suffer from chronic paranoid schizophrenia, a severe personality disorder with antisocial personality traits and malingering." See Supp. CP ____, Sub # 64D (Western State Hospital forensic psychological competency evaluation of May 29, 2007, at pp. 1-2). Although he noted Mr. Hodges' "combination of problems" made it difficult to evaluate him, he notably stated that the defendant's mental conditions were "not presently so severe that he would meet the criteria for civil commitment under RCW 10.05." Supp. CP ____, Sub # 64D (May 29 report, at p. 2). This was hardly an encouraging assessment in terms of the defendant's competence to enter his ultimate plea of guilty.

With regard to the defendant's mental state in the preceding months and years back to and beyond the date of the offense, Gagliardi noted that "Mr. Hodges' mental health history is almost as long as his criminal history." Supp. CP ____, Sub # 64D (May 29 report, at p. 4). Mr. Hodges first forensic psychological evaluation was in 1998 following criminal charges of assault; at that time Dr. Phyllis Knopp found him incompetent and he was admitted to Western State Hospital for inpatient competency restoration which

was ultimately called successful. Supp. CP ____, Sub # 64D (May 29 report, at pp. 4-5).

As to Mr. Hodges' mental state at or around the time of the crime, Dr. Gagliardi's May 29 report noted that

it is the policy of the Center for Forensic Services to withhold an opinion concerning the defendant's mental state at the time of an alleged offense until the defendant states that he intends to use a mental state defense.

Supp. CP ____, Sub # 64D (May 29 report, at p. 11).

With regard to possible drug use, Dr. Gagliardi states:

Several past evaluators have suspected that Mr. Hodges abuses drugs and alcohol. However, he has generally denied pathological use of either alcohol or drugs during clinical interviews.

Supp. CP ____, Sub # 64D (May 29 report, at p. 9). There is, in fact, nothing in the May 29 report that indicates drug use at the time of the burglary in the case sub judice of the sort Dr. Kent appeared to assume.

On both the question of drugs and the question of malingering, the May 29 report is materially helpful because Dr. Gagliardi took pains to explain his hypothesis for the reason some clinicians expressed suspicions that Mr. Hodges was a malingerer or used drugs:

It is significant to note that Mr. Hodges most often presents as psychotic in outpatient settings or in jail, or upon initial admission to the state hospital. In time his symptoms, if indeed he has been experiencing symptoms, appear to resolve without intervention, causing evaluators to conclude that he has not been suffering from a major mental disorder, or that he has possibly recovered from an episode of drug-induced psychosis.

Supp. CP ____, Sub # 64D (May 29 report, at p. 5). However, Galgliardi also noted that it was “evaluators [for purposes of disability funding who] have been skeptical about his symptom presentation.” Supp. CP ____, Sub # 64D (May 29 report, at p. 2).

The subsequent evaluation of Mr. Hodges, there was evidence that the present trial court could have relied upon to apply RCW 9.94A.535(1)(e). In the December, 2007 psychological evaluation, again at Western State Hospital, Dr. Gagliardi reported that the defendant had been returned by the court for re-assessment, at the recommendation of Ds. Kent and Dr. Judith Kirkeby, the experts for the defense and the State. Supp. CP ____, Sub # 64D (Western State Hospital forensic psychological competency evaluation of December 7, 2007, at p. 1).

Notably, Dr. Gagliardi emphasized that although his first competency evaluation indicated concerns of malingering, the doctor stated:

Even so, it was apparent that Mr. Hodges suffered from a serious mental disorder, which at the time appeared to most likely be schizophrenia.

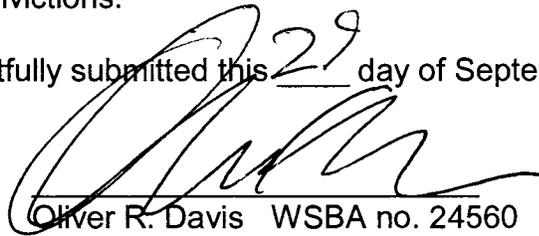
Supp. CP ____, Sub # 64D (December 7 report, at p. 2). In addition, at the December evaluation, Mr. Hodges successfully passed screening examinations designed to detect any malingering. Supp. CP ____, Sub # 64D (December 7 report, at p. 2). It is important to realize that at this point, the defendant had been in custody for a significant number of months. Id.

Had the court reviewed all the evidence described above, it would have been for the court to determine whether that evidence should be credited. Thus the trial court, which was inclined to grant the downward departure, could have found statutorily sufficient grounds for the exceptional sentence in other aspects of the documentation and evidence presented for purposes of sentencing. Because the court failed to consider relevant evidence, this is not an unappealable case in which the court considered all the evidence, weighed it, and found the evidence to not support a downward departure.

E. CONCLUSION

Based on the foregoing, Mr. Hodges requests that this Court reverse his convictions.

Respectfully submitted this 29 day of September, 2009.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)

Respondent,)

v.)

RICHARD HODGES,)

Appellant.)

NO. 62632-9-I

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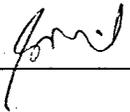
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