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STATE OF WASHINGTON

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COA No. 62632-9

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

APPELLANT'S REPLY BRIEF

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A. REPLY ARGUMENT

1. The substantive issue of competence cannot be waived. The Respondent State of Washington mischaracterizes the holding of State v. Heddrick, 166 Wn.2d 898, 215 P.3d 201 (2009). That case does not state that the issue of a defendant's competence to stand trial or enter a plea of guilty may be waived; rather, it states the opposite. Heddrick, 166 Wn.2d at 905., The case only indicates that particular statutory procedures in RCW 10.77.060 for determining competence may be waived. Heddrick, 166 Wn.2d at 905-07.

Here, as Mr. Hodges argued in his Appellant's Opening Brief, the trial court failed to order a competency determination when it became apparent that the defendant was not competent at the April 15 and 16, 2008 hearing to take his plea of guilty. Mr. Hodges challenged the trial court's April 15 and 16, 2008 acceptance of his pleas of guilty, arguing that a defendant must be competent at the time such a plea is entered. Appellant's Opening Brief, at pp. 1, 5-8-14.

The State of Washington responds to this argument by contending that defense counsel invited any error and waived appellate challenge when counsel agreed Hodges was competent

on March 10, 2008, and asserted he was competent “at the time of the entry of the pleas in April.” Brief of Respondent, at pp. 8, 10-11, 16 (citing, respectively, 3/10/08RP at 11-12 and “6/15/08RP 10”¹).

However, first, any agreement by counsel that the defendant was competent on March 10, 2008, more than a month prior to the date of the taking of the challenged plea, certainly is not an invitation or waiver of the trial court’s error in accepting a plea from a defendant who was plainly not competent on April 15 and 16. This would be particularly so in a case such as the present one where the it was deemed necessary on multiple occasions, including before the plea hearing, and after the plea hearing and before sentencing, for the defendant, who was taking prescribed anti-psychotic medications on a repeatedly interrupted schedule, to be evaluated for competence. The defendant must be competent at the time the pleas of guilty are given and entered.

Defendant must be competent at the time the plea is entered.

With regard to the plea hearing of April 16, 2008, which te

¹From the context of the contention and based on the record, appellant assumes the Respondent intended to cite some portion of the verbatim report of proceedings of the April 15 and 16 plea hearing, the Respondent does not specify which.

Respondent correctly characterizes as a new plea hearing, appellant's argument is that the defendant was plainly incompetent on this date. Any prior agreements by counsel that the defendant was competent do not relieve the trial court of its duty to respond to Mr. Hodges' plain incompetence by ordering an evaluation. 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).

In a case where the defendant exhibited astonishing lack of understanding of the basic nature of a plea of guilty and its fundamental aspect and purpose of waiving his right to make arguments about the facts of the alleged criminal incident, the Respondent's contention that trial counsel's prior agreements to the defendant being competent forever waive the issue must be rejected.

Mr. Hodges' argument on appeal is that he was plainly not competent on April 16, 2008, and that this plain presentment required that no plea be taken on that date, and that instead, the defendant be referred for evaluation pursuant to RCW Title 10

Chapter 77.

What the trial court did instead was take the plea of guilty despite its obvious concerns about Mr. Hodges' incompetence. It was left to chance that a social worker would bring to the court's attention that Mr. Hodges' incompetence-causing mental difficulties deepened immediately subsequent to the plea, which led to yet another round of evaluations.

2. The trial court's interpretation of RCW 9.94A.535(1)(e) was legal error and the Mr. Hodges wishes to ask this court that his exceptional sentence request be properly considered.

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. Mr. Hodges relies on the argument advanced in his Appellant's Opening Brief in this

regard.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief,
Mr. Hodges requests that this Court reverse his convictions.

Respectfully submitted this 1 day of February, 2010.



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent)	NO. 62632-9
)	
v.)	
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RICHARD HODGES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 1ST DAY OF FEBRUARY, 2010, A COPY OF **APPELLANT'S REPLY BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

King County Prosecutors Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

SIGNED IN SEATTLE, WASHINGTON THIS 1st DAY OF FEBRUARY, 2010

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