

65648-1

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NO. 65648-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK HILLS,

Appellant.

REC'D  
DEC 17 2010  
King County Prosecutor  
Appellate Unit

2010 DEC 17 11:00 AM  
JR

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

The Honorable Sharon Armstrong, Judge  
The Honorable Mary Yu, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was deprived his right to counsel and due process when the court had him proceed pro se in the absence of a valid waiver of the right to counsel.

2. The sentencing court denied appellant an exceptional sentence below the standard range based on a misapplication of the law.

Issues Pertaining to Assignments of Error

1. A valid waiver of the right to counsel requires an unequivocal request to proceed pro se. There was no such request in appellant's case where appellant repeatedly indicated that he sought the replacement of his appointed attorney or, at the very least, the assistance of an attorney as standby counsel. In the absence of a valid waiver, is appellant entitled to a new trial?

2. Appellant was convicted of possessing cocaine with intent to deliver. The court's comments at sentencing indicate a desire to impose an exceptional sentence below the standard range based on the very small amount of cocaine involved. Ultimately, however, the court mistakenly believed it could not do so based on a misunderstanding of the law. Where the court likely would have

imposed an exceptional sentence had it properly recognized its discretion, is remand required for a new sentencing hearing?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Derrick Hills with one count of possessing cocaine with intent to deliver. CP 1-4. Victoria Freer, with Society of Counsel Representing Accused Persons, entered a notice of appearance on February 11, 2010. CP 54-55.

On March 8, Hills unsuccessfully moved to have Freer replaced with new counsel. 1RP<sup>1</sup> 3-5. On March 15, Hills indicated that if the court would not appoint new counsel, he wished to proceed pro se and also asked for the assistance of standby counsel. 1RP 7-8, 10. After a colloquy with Hills, Judge Sharon Armstrong found that he had knowingly and voluntarily waived his right to counsel and would represent himself. RP 8-11. Judge Armstrong did not provide standby counsel. 1RP 11-12; 2RP 6-7.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – March 8, March 15, and April 23, 2010; 2RP – May 4, 2010; 3RP – May 5, 2010; 4RP – May 6, 2010; 5RP – June 18, 2010; 6RP – June 25, 2010.

On the first day of trial, May 4, 2010, the trial judge – Judge Mary Yu – discussed with Hills the possibility of obtaining appointed counsel, but noted an appointment would require that Hills agree to a trial continuance. He declined to do so. 2RP 3-12.

A jury convicted Hills as charged. CP 15. Counsel was appointed to represent Hills for sentencing and argued for an exceptional sentence below the standard range based on the very small quantity of cocaine involved in his case. CP 57-60, 64-74. Although sympathetic to the request for a sentence below the range, Judge Yu believed the law did not provide her the discretion to grant the request and she imposed a standard range 60-month term of incarceration. 6RP 21-23; CP 67.

## 2. Substantive Facts

On the evening of February 3, 2010, Seattle Police Officer Martin Harris, a member of the Narcotics Unit, conducted surveillance using binoculars from a rooftop location in the Belltown neighborhood. 3RP 43-47, 82. From that vantage, Officer Harris saw Derrick Hills at a covered bus stop located in the 2300 block of Third Avenue. 3RP 48. Hills handed something to a Hispanic man, who placed the item in what appeared to be a glass or metal pipe and smoked it in Hills' presence. 3RP 49-50. Officer

Harris could not see the object this individual was smoking because it was too small. 3RP 65.

Hills remained at the bus stop and it appeared he was breaking an object in his hand into smaller pieces. Officer Harris wondered if it was cocaine because sometimes sellers will chip off a rock from a larger piece prior to a sale. 3RP 52. But Harris could not say Hills was in fact handling cocaine. 3RP 77. Whatever Hills was handling, he placed the items in his pocket and perhaps inside a small, white plastic container. 3RP 56.

Officer Harris watched as Hills left the bus stop, walked south, and headed west on Bell Street. Hills briefly made contact with a black female, who gave Hills some money. Hills gave her something in return, but again the item was too small for Harris to see. 3RP 56, 67. A white male then approached Hills and it appeared that Hills removed something from his pocket and placed it in his mouth. He then removed the item from his mouth and dropped it on the ground. The male picked up the item and handed Hills some cash. 3RP 60-61. As before, the item was too small for Harris to discern what it was. 3RP 70.

Based on his training and experience, Officer Harris concluded he had seen multiple drug transactions and called in an

arrest team. 3RP 62, 73, 77. An undercover SUV pulled in front of Hills as he crossed the street. 3RP 85. Officer David Peplowski exited the SUV, tackled Hills, and placed him in cuffs. 3RP 86. As Hills was taken to the ground, a tissue fell from his right jacket pocket and "out popped two small rocks" that Peplowski believed to be cocaine. 3RP 86-87, 100. Officer Andrew West, also on the arrest team, collected the suspected cocaine. He testified it was "just trace amounts," and less than .1 gram. 3RP 106, 108.

Officer Peplowski field tested the substance to determine if it contained cocaine. 3RP 89. Testing only requires a small amount and he tried to consume as little as possible during the test, but given the small amount found, he may have consumed up to half of the evidence. 3RP 90. The remainder was sent to the crime lab and weighed just .0039 grams or "much less than a tenth of a gram." 3RP 142. The lab consumed about half of that in its testing and, by the time of trial, prosecution witnesses variously described what was left as "crumbs of crack cocaine," "several white, small, rock-like crumbs," and "some little tiny chunks or specs of white material." 3RP 59, 90, 136, 140.

According to Officer Harris, it is possible to purchase small amounts of cocaine on the street for as little as \$5.00. A user can

even purchase “tiny bread crumbs” of cocaine. 3RP 53-54. But this is apparently quite rare. Over the years, Officer Harris had purchased narcotics on the streets of Seattle several hundred times. 3RP 46. Yet, out of those hundreds of purchases, he had only purchased crumbs similar to the evidence admitted at Harris’ trial two or three times. 3RP 59.

Another officer – who drove the SUV the night of Hills’ arrest – testified that although there was a market for very small amounts of cocaine that cost as little as \$2.00, he had never purchased an amount as small as that admitted at Hills’ trial, in part, because the evidence was just too difficult to manage. 4RP 28. At trial, the prosecution conceded the amount presented to jurors was “quite small” and “frankly an extremely small amount of little white dusts.” 3RP 41; 4RP 47.

C. ARGUMENT

1. HILLS WAS DEPRIVED OF HIS RIGHT TO COUNSEL AND DUE PROCESS WHEN THE COURT DISCHARGED COUNSEL IN THE ABSENCE OF AN UNEQUIVOCAL REQUEST TO PROCEED PRO SE.

A defendant in a criminal prosecution has a right to assistance of counsel. U.S. Const. Amend. VI; Wash. Const. Art. 1, § 22 (amend. 10). Indigent defendants charged with felonies, or

misdemeanors involving potential incarceration, are entitled to appointed counsel. State v. Osborne, 70 Wn. App. 640, 643, 855 P.2d 302 (1993); CrR 3.1(d)(1). Because the right to counsel is fundamental to the adversary system of criminal justice, it is part of the due process of law guaranteed by the Fourteenth Amendment. Faretta v. California, 422 U.S. 806, 818-19, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

A defendant may waive the right to counsel and proceed pro se. U.S. Const. Amend. VI; Faretta, 422 U.S. at 807, 835-36. Unlike the right to counsel, the right to proceed pro se is not an absolute right. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). "Since the right to proceed pro se exists to promote the defendant's personal autonomy, rather than to promote the convenience and efficacy of the trial (and often operates to the defendant's detriment), courts generally find that relinquishment of the right to proceed pro se is a far easier matter than waiver of the right to counsel." State v. Bebb, 108 Wn.2d 515, 525-26, 740 P.2d 829 (1987). There is therefore a strong presumption against waiver of counsel. State v. Chavis, 31 Wn. App. 784, 789, 644 P.2d 1202 (1982). In fact, courts must indulge in every reasonable presumption against waiver. State

v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010) (citing In re Det. Of Turay, 139 Wn.2d 379, 986 P.2d 790 (1999)).

In order to waive the right to counsel, the request to proceed pro se must be unequivocal. Madsen, 168 Wn.2d at 504; DeWeese, 117 Wn.2d at 376-77. The requirement of an unequivocal waiver serves two purposes.

First, it acts as a backstop for the defendant's right to counsel, by ensuring that the defendant does not inadvertently waive that right through occasional musings on the benefits of self-representation. See, e.g., [Meeks v. Craven, 482 F.2d 465, 467 (9th Cir. 1973)] (defendant cannot waive right to counsel by once stating "I think I will [represent myself]"). Because a defendant normally gives up more than he gains when he elects self-representation, we must be reasonably certain that he in fact wishes to represent himself. . . .

The requirement that a request for self-representation be unequivocal also serves an institutional purpose: It prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation. A defendant who vacillates at trial between wishing to be represented by counsel and wishing to represent himself could place the trial court in a difficult position: If the court appoints counsel, the defendant could, on appeal, rely on his intermittent requests for self-representation in arguing that he had been denied the right to represent himself; if the court permits self-representation, the defendant could claim he had been denied the right to counsel. See Meeks, 482 F.2d at 468. The requirement of unequivocality resolves this dilemma by forcing the defendant to make an explicit choice. If he equivocates,

he is presumed to have requested the assistance of counsel.

Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989).

A reviewing court will look at the record as a whole to determine whether a waiver was unequivocal. State v. Stenson, 132 Wn.2d 668, 740-41, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). A trial court's waiver finding is reviewed for abuse of discretion. Madsen, 168 Wn.2d at 504.

The record as a whole does not establish an unequivocal waiver here. Hills initially requested an attorney to replace Ms. Freer, whom he did not believe was representing his interests diligently. 1RP 3-4. As Hills put it, "I would like to be reappointed." 1RP 3. That motion was denied. 1RP 5.

At the next court appearance, one week later, Hills indicated he desired to proceed pro se "if I can't be reappointed." 1RP 7. He added, "I don't know law or nothing. I'm not that good, but I see that I –" and then the court cut him off. 1RP 7. After being told that going pro se would not expedite his trial, Hills responded with additional requests for a new attorney or pro se status:

Okay. Like I say, it's probably in the best and for my fairness, I still will probably have to be reappointed or go pro se. I don't have a problem with that. I do want to be able to say something in my own case and

my own defense if I have to, and not being not able to. But also would like to be represented fairly to have a fair trial. And I feel that I would not receive that.

1RP 7-8.

In response, Ms. Freer informed Judge Armstrong that she had met with Hills the previous week and her supervisor, Ms. Exe, had met with him the day before and that Hills told them he wanted to go pro se. 1RP 8. Judge Armstrong did not address Hills' renewed requests for new counsel. Rather, she engaged Hills in a colloquy regarding his "decision to go pro se." 1RP 8. She informed him of the sentence he faced if convicted, that he would be required to follow the rules of evidence and procedure, and that the trial judge would not be able to assist him. 1RP 8-10.

During this discussion, Hills asked, "So can I be pro se with side counsel?" 1RP 10. Judge Armstrong responded, "Well, we appoint standby counsel, but it doesn't really – it's not the same as having your own lawyer. . . ." 1RP 10. Judge Armstrong encouraged Hills "to work with your attorney," but Hills indicated he did not feel that working with Ms. Freer was in his best interests or that he would receive a fair trial. 1RP 10. Judge Armstrong asked if it was still his desire to go pro se, and Hills responded, "I feel I'm at a bind (sic) not having a choice to go ahead with pro se." 1RP 11. Judge Armstrong

then found that Hills had knowingly waived his right to counsel and asked Freer if she objected to serving as standby counsel. When Freer noted Hills' lack of trust towards her and Ms. Exe, Judge Armstrong allowed SCRAP to withdraw from the case and did not appoint standby counsel. 1RP 11-12; Supp. CP \_\_\_\_ (sub no. 12, Order to Discharge Defense Counsel).

Hills' requests to represent himself at trial if the court would not appoint new counsel to represent him were not unequivocal. "While a request to proceed pro se as an alternative to substitution of new counsel does not necessarily make the request equivocal . . . such a request may be an indication to the trial court, in light of the whole record, that the request is not unequivocal." Stenson, 132 Wn.2d at 740-741 (citation omitted).

Hills' case is similar to Stenson. Stenson moved to proceed pro se only after the trial court denied his motion to substitute counsel. Stenson, 132 Wn.2d at 739. Moreover, even after his request to proceed pro se, Stenson continued to request the appointment of new counsel and otherwise made it apparent he felt forced into representing himself. Id. at 740, 742. The Stenson court held that where the request to proceed pro se is conditioned on denial of a new attorney, the record must establish the request is

unequivocal. And in Stenson's case, it did not. Rather, his request was both conditional and equivocal. Id. at 741-742.

Similarly, Hill moved to proceed pro se only after the trial court denied his motion to substitute counsel. See 1RP 7 (asks to go pro se "if I can't be reappointed"). Moreover, he continued to request the appointment of a new attorney. See 1RP 8 ("I still will probably have to be reappointed or go pro se"; "I do want to be able to say something in my own case and my own defense if I have to . . . [b]ut also would like to be represented fairly to have a fair trial."). And Hills made it clear he felt he was being forced into representing himself. 1RP 11 ("I feel I'm at a bind (sic) not having a choice to go ahead with pro se."). Like Stenson, Hills' requests were both conditional and equivocal.

Further evidence of Hills' equivocation is found in his request for the appointment of standby counsel. During his colloquy with Judge Armstrong regarding the responsibilities and potential consequences of going pro se, Hills asked if he could go "pro se with side counsel." 1RP 10. Of course, there is no absolute right to standby counsel or hybrid representation through which defendants serve as co-counsel with their attorneys. DeWeese, 117 Wn.2d at 379. But this underscores that what Hills actually sought – rather

than self-representation – was the assistance of an attorney other than Freer.

In United States v. Kienenberger, 13 F.3d 1354 (9th Cir. 1994), the defendant repeatedly indicated that he did not want to be represented by counsel. Rather, he simply wanted counsel to assist him with procedural matters. 13 F.3d at 1355-1356. At a hearing on appointed counsel's motion to withdraw, the defendant insisted that he wanted to represent himself but wanted "advisory" counsel to assist him on procedural issues. The trial court denied the defendant's request and counsel represented him at trial. Id. at 1356.

On appeal, the Ninth Circuit rejected Kienenberger's argument that he had made an unequivocal request to represent himself:

We have reviewed the record. While Kienenberger, on numerous occasions, requested that he be "counsel of record," his requests were always accompanied by his insistence that the court appoint "advisory" or "standby" counsel to assist him on procedural matters. Kienenberger never relinquished his right to be represented by counsel at trial. His requests to represent himself were not unequivocal. The district court did not err.

Kienenberger, 13 F.3d at 1356. Similarly, in light of Hills' request for the assistance of standby counsel, Hills never made an unequivocal request to proceed on his own, either.

Additional evidence that Hills' waiver of counsel was not unequivocal is found in his subsequent discussion with the trial judge – Judge Mary Yu – on the first day of trial, May 4, 2010. Judge Yu was concerned whether Hills properly understood the difficulties associated with self-representation. 2RP 3. While discussing the matter, Hills said:

But the whole mix up was about it was that I was trying to get relief from the lawyer I was given because counsel tried to see me at the last minute, instead of prior to, to have a strategy on me trying to have a bail reduction or a strategy to find out more about my case, you know. That was not given to me. So I was with no other choice but to ask for another counsel to be represented.

And the attorney waited for a week. No resolution for counsel and their supervisor. So I still try to get recounsel (sic). Well, they only looked at it as me going pro se. All I wanted was another counsel that I can get better represented because I told her I wasn't going to get a fair trial. That's how I felt. And then they try to give me the same person that I tried to give – another counsel from to be my side counsel. So they left me to go pro se.

2RP 4.

Judge Yu then asked Hills if he wanted an attorney now. 2RP 5. Hills asked if the appointment of an attorney would result in a continuance of his trial and Judge Yu indicated it would. Hills then said, "Then I guess I'd have to proceed with myself." 2RP 5. Judge

Yu reviewed the potential consequences of self-representation and a conviction on the charged offense and asked if Hills still wanted to proceed pro se. 2RP 6-10. Hills responded that he did. 2RP 10. Yu asked if anyone was trying to force him into this decision and Hills answered no. 2RP 12.

Hills discussion with Judge Yu confirms that all Hills ever really wanted was the assistance of an attorney he could trust. He did not wish to represent himself.

The State may argue that even if Hills' requests to proceed pro se before Judge Armstrong were not unequivocal, in light of the subsequent colloquy with Judge Yu, Hills' request *at that point* became unequivocal. Any such argument should be rejected. The error in this case occurred months earlier when Judge Armstrong left Hills without the assistance of counsel in the absence of a valid waiver. By the time of trial – in order to obtain the benefits of representation – a continuance would have been necessary. This would have required that Hills spend additional time in jail waiting for a new trial date and that he waive his right to a speedy trial. Supp. CP \_\_\_\_ (sub no. 19, Order on Omnibus Hearing) (speedy trial expiration date 5/14/10). A defendant should not be required to

waive certain guaranteed rights to obtain others. Hills was required to maintain his pro se status in order to obtain a timely trial.

Because Hills did not validly waive his right to the assistance of counsel, his conviction must be reversed. State v. Silva, 108 Wn. App. 536, 542, 31 P.2d 729 (2001) (deprivation of right to counsel is never harmless).

2. THE SENTENCING COURT FAILED TO RECOGNIZE IT HAD THE DISCRETION TO IMPOSE AN EXCEPTIONAL SENTENCE.

“The court may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. . . .” RCW 9.94A.535. “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. . . .” RCW 9.94A.535(1).

In State v. Alexander, 125 Wn.2d 717, 723, 726-728, 888 P.2d 1169 (1995), the Supreme Court of Washington held that for controlled substance offenses, cases involving extraordinarily small amounts present a substantial and compelling reason for a downward departure from the standard sentencing range. In Alexander, the State did not contest the amount involved – .03

grams – was extraordinarily small. Id. at 719, 723. Because the amount of a controlled substance is not an element of the State’s proof and not considered when computing the offender score, the small amount in Alexander’s case distinguished it from other cases and was a proper basis for the sentencing court’s decision to impose a sentence below the standard range. Id. at 726-727.

Citing Alexander, defense counsel asked Judge Yu to impose an exceptional sentence below Hills’ standard range of 60 to 120 months. CP 57-60; 6RP 5-10. The State opposed the request, arguing that even if Hills possessed an extraordinarily small amount of cocaine (a point it did not concede), Alexander was distinguishable because (1) Alexander had a minor role in the transaction leading to his arrest, whereas Hills was the primary actor in several transactions prior to his arrest (2) Hills’ possession of crumbs was typical of street sales and therefore did not distinguish his case from most others, and (3) Hills engaged in several transactions prior to his arrest and should not be given an exceptional sentence merely because he “was a successful drug dealer and nearly sold out of crack cocaine.” Supp. CP \_\_\_\_ (sub no. 53A, Sentencing Memorandum of King County Prosecuting Attorney, at 3-6); 6RP 10-14.

Judge Yu struggled with what to do. 6RP 20-21. She indicated that although it was frustrating, she had taken an oath to follow the law and not make the law. 6RP 21-22. She then ruled:

The case that your attorney raised and that I read does seem to stand for some exception, but the facts of that case are not like this, which is why I'm struggling. The sad reality when I look at the context of this, I'm going to acknowledge that the amount that was introduced into evidence was small, but the evidence by the officers indicated that they observed three transactions before there was a decision to arrest you. That was the testimony that went unrebutted. And the State chose to charge you in the way that they did.

And the evidence that was ultimately produced again I agree is small, but it's in that context that I have to step back and say what do I do. I have to say, Mr. Hills, I searched my heart and I cannot find myself going outside of the definition of the law here. I simply can't, given again that there were three prior transactions and what the decision was. Ultimately at that point then it was to proceed to arrest you.

I absolutely feel that I can't and I don't have the power to do anything else but stay within the standard range, so the sentence I'm imposing today is the low end of the standard range. I will not accept the prosecutor's recommendation and impose 65. I will impose the very lowest range that I can and impose a sentence of 60 months for this particular crime.

6RP 22-23.

It is apparent from Judge Yu's comments that this was not a situation where she felt she had the authority to impose an

exceptional sentence but chose not to exercise that authority. Rather, she believed the law prohibited her from imposing an exceptional sentence because of the “three transactions” preceding Hills’ arrest. Unfortunately, less apparent, is why Judge Yu believed these transactions precluded an exceptional sentence as a matter of law. Based on arguments by the prosecutor, there are a few possibilities.

First, Judge Yu may have agreed that because Hills was the primary actor in the transactions leading to his arrest, she could not base an exceptional sentence on the small amount of cocaine involved. If this is the case, Judge Yu confused the two bases for an exceptional sentence discussed in Alexander: (1) extraordinarily small amount of a controlled substance, and (2) minor involvement. The Alexander court addressed both. Alexander, 125 Wn.2d at 726-728 (small amount), 728-730 (minor involvement). The Court held that these reasons “may each be properly advanced by a trial court as a substantial and compelling reason for departure[.]” Id. at 723 (emphasis added). Therefore, even if Hills was not a minor participant based on his conduct prior to his arrest, this did not preclude Judge Yu from relying on the small amount of cocaine involved.

Second, Judge Yu may have agreed with the State that she should consider cocaine allegedly delivered in the transactions prior to Hills' arrest in assessing how much cocaine was actually involved. This, too, would be error. Under RCW 9.94A.530(2), when determining whether to impose a sentence below the standard range, "the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing[.]" The State never obtained, much less tested, the substances it believed Hills delivered prior to his arrest. In fact, whatever Hills was handling, it was too small for Officer Harris to see and identify as cocaine. 3RP 56, 65, 70, 77. In short, the State never proved Hills possessed cocaine beyond that found on him at arrest.

But even if the State had proved that Hills possessed a larger quantity of cocaine before his arrest, that cocaine would not prevent an exceptional sentence for conviction on a subsequent possession with intent to deliver. Evidence of prior suspected sales can be relevant to whether a defendant intended to deliver cocaine found in his possession. See, e.g., State v. Thomas, 68 Wn. App. 268, 273-274, 843 P.2d 268 (1992), review denied, 123 Wn.2d 1028 (1994); State v. Hubbard, 27 Wn. App. 61, 64, 615 P.2d 1325

(1980). The charge itself, however, is based on possession at the time of arrest and intent to deliver that cocaine presently or in the future. State v. Vike, 125 Wn.2d 407, 411-412, 885 P.2d 824 (1994); see also State v. Garcia, 65 Wn. App. 681, 690, 829 P.2d 241 (delivery and subsequent possession with intent to deliver based on remaining substance are two separate crimes for double jeopardy purposes), review denied, 120 Wn.2d 1003 (1992). To the extent Judge Yu was led to believe the law prevented her from imposing an exceptional sentence based on cocaine Hills' allegedly possessed sometime before the charged crime, she was mistaken. There is no such prohibition.

The State's evidence established that Hills possessed an extraordinarily small amount of cocaine – .0039 grams. This is approximately ten times less cocaine than that in Alexander.<sup>2</sup> Judge Yu was inclined to impose an exceptional sentence below the standard range but erroneously believed the law prevented her from doing so based on Hills' actions prior to his arrest for the crime charged.

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<sup>2</sup> Even if one assumes half of the original amount was consumed during the field test conducted by Officer Peplowski, Hills would have possessed only .0078 grams when arrested (approximately five times less cocaine than Alexander possessed).

Every defendant has the right to have the trial court exercise its discretion to actually consider available sentence alternatives. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005). A sentencing court's reliance on an improper basis for refusing to impose an exceptional sentence below the standard range is reviewable on appeal. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002); State v. Garcia-Martinez, 88 Wn. App. 322, 329-330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998). Where, as here, it is apparent the sentencing judge would have imposed a lesser sentence had she known she was authorized to do so, the appropriate remedy is remand for resentencing. McGill, 112 Wn. App. at 100-101.

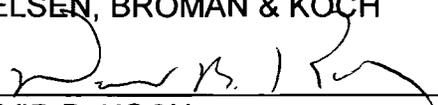
D. CONCLUSION

Hills' conviction should be reversed and his case remanded for a new trial because he never waived his right to the assistance of counsel. At the very least, the case should be remanded for resentencing so that Judge Yu can exercise her discretion to impose an exceptional sentence based on the extraordinarily small amount of cocaine involved in this case.

DATED this 17<sup>th</sup> day of December, 2010.

Respectfully submitted,

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