

71264-1

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No. 71264-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DEVIN LANE FORD,

Appellant.

2014 OCT -7 AM 11:57
COURT OF APPEALS DIV. I
STATE OF WASHINGTON

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Because the trial court improperly relied upon prohibited information in imposing the sentence, Mr. Ford should be resentenced before a different judge

The State concedes that the trial court improperly relied upon disputed facts at sentencing without holding an evidentiary hearing, and that Mr. Ford must be resentenced. SRB at 4. But the State argues that Mr. Ford should not be resentenced before a different judge because “[t]here is nothing in the record to indicate the sentencing judge could not be fair and open minded upon remand.” SRB at 5. To the contrary, the fact that the judge was exposed to and relied upon prohibited information in imposing the sentence warrants resentencing before a different judge.

The State contrasts this case with State v. Talley, 83 Wn. App. 750, 763, 923 P.2d 721 (1996), where “reassignment was appropriate because that judge’s statement at the sentencing hearing suggests she had prejudged the matter.” SRB at 5. In Talley, as in this case, the sentencing judge improperly relied upon disputed, unproven facts in imposing the sentence, without holding an evidentiary hearing. Talley, 83 Wn. App. at 757. The court had offered to hold an evidentiary hearing but stated she had already decided to impose an exceptional

sentence anyway. Id. at 755. This Court held resentencing by a different judge was appropriate because the judge's statements at sentencing indicated "she had already decided to give [Talley] an exceptional sentence even though there had been no evidentiary hearing," which suggested "she may have prejudged the matter." Id. at 763.

But the record need not show the sentencing judge had already prejudged the matter before considering forbidden facts in order for an appellant to be entitled to resentencing before a different judge. Reassignment to a different judge on remand may also be appropriate where the judge "has already been exposed to prohibited information." State v. McEnroe, __ Wn.2d __, 333 P.3d 402, 407 (2014) (citing State v. Harrison, 148 Wn.2d 550, 559, 61 P.3d 1104 (2003); In re Ellis, 356 F.3d 1198, 1211 (9th Cir. 2004); State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). In that situation, reassignment to a different judge is an available remedy if the appellate court's decision does not limit the trial court's discretion on remand. Id. at 408.

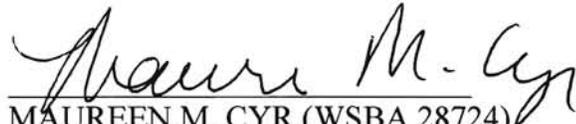
Here, reassignment to a different judge on remand is warranted because the trial judge was exposed to prohibited, highly inflammatory information and relied heavily upon it in imposing the sentence. See

11/13/13RP 19-21. If this Court accepts the State's concession and reverses the sentence, the trial court will have wide discretion on remand to decide what sentence to impose. Therefore, the case should be remanded for resentencing by a different judge. McEnroe, 333 P.3d at 407-08.

B. CONCLUSION

For the reasons given above and in the opening brief, Mr. Ford should be resentenced before a different judge.

Respectfully submitted this 6th day of October, 2014.


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DIVISION I**

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Respondent,)	
)	NO. 71264-1-I
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DEVIN FORD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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