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COURT OF APPEALS
DIVISION II

06 FEB 27 AM 11:07

STATE OF WASHINGTON

BY JW
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NO. 34131-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

GREGORY ALLEN HOWARD,

Appellant.

BRIEF OF APPELLANT

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011 2-22-06

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I. ASSIGNMENTS OF ERROR

- 1. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS A FACTUAL BASIS FOR GREGORY HOWARD'S PLEA TO MALICIOUS MISCHIEF IN THE THIRD DEGREE.**
- 2. THE TRIAL COURT ERRED WHEN IT FOUND GREGORY HOWARD GUILTY OF MALICIOUS MISCHIEF IN THE THIRD DEGREE.**
- 3. THE TRIAL COURT ERRED IN IMPOSING A 27-36 WEEK MANIFEST INJUSTICE SENTENCE WHEN THE LENGTH OF THE SENTENCE WAS NOT SUPPORTED BY THE RECORD.**

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. A GUILTY PLEA IS CONSTITUTIONALLY VALID ONLY WHEN IT IS SUPPORTED BY A FACTUAL BASIS FOR THE SPECIFIC CHARGE. A CHARGE OF MALICIOUS MISCHIEF REQUIRES THAT DAMAGE BE CAUSED KNOWINGLY AND WITH MALICE; MALICE IMPORTS AN EVIL INTENT OR DESIGN TO VEX, ANNOY, OR INJURE. WAS GREGORY HOWARD'S MALICIOUS MISCHIEF PLEA CONSTITUTIONALLY VALID WHEN THE EVIDENCE IN SUPPORT OF THE PLEA WAS THAT HOWARD ACTED UNINTENTIONALLY AND INADVERTENTLY IN DAMAGING A WALL?**
- 2. TO BE LEGALLY JUSTIFIABLE, THE LENGTH OF A MANIFEST INJUSTICE SENTENCE MUST BE SUPPORTED BY THE RECORD. THE TRIAL COURT IMPOSED A 27-36 WEEK MANIFEST INJUSTICE SENTENCE ON GREGORY HOWARD TO ADDRESS HIS ALCOHOL AND DRUG TREATMENT NEEDS WITHOUT AN ASSESSMENT AS TO WHAT TYPE OR LENGTH OF TREATMENT WOULD BEST WORK FOR HOWARD. WITHOUT SUCH AN ASSESSMENT CAN HOWARD'S 27-36 WEEK MANIFEST INJUSTICE SENTENCE STAND?**

III. STATEMENT OF THE CASE

Gregory Howard was charged in Clark County juvenile court with a single count of malicious mischief in the third degree. CP 1. The information contained the standard language for a malicious mischief charge:

That he, GREGORY ALLEN HOWARD, in the County of Clark, State of Washington, on or about October 29, 2005, did knowingly and maliciously cause physical damage in excess of \$50.00 to the property of Timothy J. Howard, in violation of RCW 9A.48.090(1) and (2), contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Washington.

CP 1.

With the assistance of counsel, Howard pled guilty at arraignment. RP¹ 11-15. In the elements section of Howard's plea form, "knowledge" is omitted as an element:

[I]n Clark County WA, on or about October 28, 2005, did maliciously cause damage in excess of \$50.00 but less than \$250.00 to the property of Tim Howard.

CP 2.

When taking the plea, the court similarly left out "knowledge" in its recitation of the elements.

¹ "RP" refers to the two volumes of verbatim prepared for this appeal. The pages of the two volumes are numbered consecutively so references to the record will be by page number only.

THE COURT: Okay. You – what the State would have to prove is that on or about October 28th in Clark County, Washington you did maliciously cause physical damage to the property owned by your father. The value of the property that was damaged is less than fifty dollar - -- I'm sorry, is more than \$50. You understand that.

RP 11-12.

In Howard's written statement of guilt, both the knowledge and the malicious intent elements are absent:

On or about October 28, 2005, in Clark County, WA, I did damage to a wall belonging to my father, Tim Howard. The damage was greater than \$50.00.

CP 7.

After reading the above statement to Howard, the court asked Howard what he had done to the wall:

THE COURT: What did you do to the wall?

THE RESPONDENT: I was throwing knives at the wall, at a cardboard box and I hit the wall, missed and hit the wall.

RP 14.

The court accepted Howard's plea as knowingly and intelligently made and that there was a factual basis to support it.

RP 15.

Howard's standard range was local sanctions including up to 30 days of detention and 12 months of supervision. CP 4. The prosecutor, probation officer, and defense counsel joined in a

recommendation of six months probation, 10 days in detention, and eight hours of community service. CP 7, 14. Concerned about Howard's criminal history and rapid recidivism, the court ordered an updated predisposition report and set sentencing over to November 15. RP 16-18, 22, 27.

Prior to beginning the sentencing hearing, the court reviewed the updated predisposition report. Supp. CP² 21-35; RP 27, 29-30. The court, Commissioner Scheinberg, concluded that Howard was "spinning out of control again" on drugs and alcohol. RP 40. To respond to Howard's drug and alcohol problem, the court imposed a CCDA³ disposition with a suspended manifest injustice sentence. RP 40-41.

The predisposition report, written by Howard's probation officer, suggested a 30-40 week CCDA suspended manifest injustice sentence. Supp. CP 21. The probation officer did not explain why a 30-40 week sentence was appropriate. In the predisposition report it was noted that Howard had been enrolled in a 26-week outpatient treatment program in 2004. Supp. CP 25.

² "Supp. CP" is the Supplemental Clerk's Papers

³ Chemical Dependency Disposition Alternative, 13.40.165

Howard did not complete the program because he was committed to JRA. Supp. CP 25.

In determining the length of the suspended sentence, the court engaged in the following colloquy with the prosecutor:

THE COURT: I will go ahead. On count one I'll suspend – I guess I have to write it there, don't I, for how many weeks?

MR. OLSON: Yeah, I would –

THE COURT: Right over here –

MR. OLSON: On the sentence –

THE COURT: -- 1536 or --

MR. OLSON: if they – yeah, actually –

THE COURT: For 40 or 50? I don't know.

MR. OLSON: Actually, it depends on the length of the maximum.

THE COURT: Uh huh.

MR. OLSON: Statutorily the minimum has to be for – I think it's like 75 percent of the maximum when you do a manifest. It – it's in like 13.40.030 –

THE COURT: Right.

MR. OLSON: It depends on the length, so –

THE COURT: Well, I'm thinking 15 to 36 –

MR. OLSON: Yeah, I –

THE COURT: -- (inaudible)

MR. OLSON: The minimum is too – too low to follow the statute on that.

THE COURT: Uh – huh, okay.

MR. OLSON: Because it's only 40 percent of – it's gotta be like 75 percent of the maximum, whatever the maximum is.

THE COURT: The maximum of what, the adult?

MR. OLSON: No. So if it's 36 weeks, the minimum by law would have to – on the manifest would have to be no less than like 27.

THE COURT: Okay.

MR. OLSON: To get 75 percent of the maximum. So it's – they can find the range just when you're doing the manifest.

THE COURT: Okay. (Inaudible completing paperwork.) Okay 27 to 36 weeks. Is it 80 or 75, guys?

MR. OLSON: No, it goes like 80 if it's over a year, I believe.

THE COURT: Okay. Because I haven't read that statute in a long time.

...

THE COURT: Okay, well, I did 27-36 weeks to a juvenile institution on Count One, the malicious mischief three. I'm suspending that. [remainder not included as it is not relevant to the appeal]

RP 41-44.

The court never articulated why it chose 27-36 weeks for the length of the sentence.

The court did not announce its findings in support of the manifest injustice on the record. Instead, the court later filed a Finding of Manifest Injustice enumerating its basis for the manifest:

- (1) Respondent has acknowledged that he has a serious drug problem and needs treatment.
- (2) Respondent is a risk to himself and to the community without treatment. Since returning from JRA, Respondent has not completed or participated w/any evaluation or treatment.
- (3) Respondent needs constant and regular supervision if he is to address the needs and issues of his drug usage.
- (4) Respondent is eligible for the CDDA program.
- (5) Respondent has extensive criminal history, including 5 felonies. Respondent was released from JRA on 4/27/05. Since that time, he has engaged in additional criminal activity.
- (6) Also, Respondent has completed 4 out of 5 GED tests, he has failed to complete his GED and his attendance has been marginal.
- (7) The probation department, PA and defense counsel adhere to their plea agreement. The court on its own motion requested the PDR and determined not to follow the plea agreement.

CP 16-17.

IV. ARGUMENT

I. THE TRIAL COURT'S ACCEPTANCE OF A GUILTY PLEA WITHOUT A FACTUAL BASIS TO SUPPORT THE MALICIOUS MISCHIEF CHARGE VIOLATED GREGORY HOWARD'S RIGHT TO DUE PROCESS UNDER

**WASHINGTON CONSTITUTION ARTICLE 1, SECTION 3,
AND UNDER UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT.**

Under due process provisions in both the Washington Constitution, Article 1, Section 3, and the United States Constitution, Fourteenth Amendment, guilty pleas must be voluntary to be valid. Wood v. Morris, 87 Wn.2d 501, 506, 554 P.2d 1032 (1976); McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L.Ed. 2d 418 (1969). One purpose of both Fed.R.Crim.P. 11 and CrR 4.2⁴ is to fulfill these constitutional imperatives. In re Matter of Keene, 95 Wn.2d 203, 206, 622 P.2d 360 (1980). While it is true that a claim under CrR 4.2 that a plea was involuntary may not be raised for the first time on appeal, the equivalent constitutional claim may be. In re Myers, 91 Wn.2d 120, 125, 587 P.2d 532 (1978).

In order for a plea to be voluntary under the due process clause, the trial court has a duty to determine that there is a factual basis for the plea. In Keene, the Washington Supreme Court states this principle as follows:

The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the

⁴ Pursuant to JuCR 7.6(b), the taking of a juvenile offender's plea is governed by CrR 4.2.

indictment or information ...” Requiring this examination protects a defendant “who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.”

Keene, 95 Wn.2d at 365 (citations omitted).

For example, in Keene, defendant Keene sought post-conviction relief from a sentence imposed after he pled guilty to three counts of forgery. In his petition, he argued that his plea was not knowing and voluntary under CrR 4.2 or under the due process requirements of Washington Constitution, Article 1, Section 3, and United State Constitution, Fourteenth Amendment. Although the court refused to address the CrR 4.2 claim for the first time on appeal, it did address the constitutional claim.

In examining Keene’s arguments, the court noted that in his statement of defendant on plea of guilty, Keene admitted that he had cashed a check his employer had endorsed and left at the business for emergencies, and that he had forged his employer’s endorsement on two other checks and cashed them. Keene kept the cash from the first check and used it for non-business purposes. The court then noted that absent any further factual allegations in the record, this statement was sufficient to establish a factual basis for the second and third counts of forgery, but not for

the first. The court clarified that Keene had permission to cash the previously-endorsed check in the first count but improperly used the money for non-business purposes. Thus, Keene's actions amounted to a theft in the third degree but not a forgery. The court vacated the conviction for the first count. Keene, 95 Wn.2d at 211-13.

Under our facts, Howard pled guilty to a single count of malicious mischief in the third degree. In his written plea statement, Howard acknowledged that,

On or about October 28, 2005, in Clark County, WA, I did damage to a wall belonging to my father, Tim Howard. The damage was greater than \$50.00.

CP 7.

The trial court asked Howard to tell the court what he had done.

THE COURT: What did you do to the wall?

THE RESPONDENT: I was throwing knives at the wall, at a cardboard box and I hit the wall, missed and hit the wall.

RP 14.

The only other factual allegation about malicious mischief is in the element section of the plea form:

[I]n Clark County WA, on or about October 28, 2005, did maliciously cause damage in excess of \$50.00 but less than \$250.00 to the property of Tim Howard.

CP 2. And the trial court also told Howard what the State would have to prove before Howard could be found guilty.

THE COURT: Okay. You – what the State would have to prove is that on or about October 28th in Clark County, Washington you did maliciously cause physical damage to the property owned by your father. The value of the property that was damaged is less than fifty dollar - -- I'm sorry, is more than \$50. You understand that.

RP 11-12.

The crime of malicious mischief in the third degree is defined at RCW 9A.48.090:

(1) A person is guilty of malicious mischief in the third degree if he or she:

(a) Knowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree.

....

(2)(a) Malicious mischief in the third degree under subsection (1)(a) of this section is a gross misdemeanor if the damage to the property is in an amount exceeding fifty dollars.

“Malice” and maliciously” are defined at 9A.04.110(12):

“Malice” and “maliciously” shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or

excuse, or an act or omission of duty betraying a willful disregard of social duty.

Under these definitions and the facts provided in support of the plea, Howard's conduct in throwing a knife at a box and inadvertently hitting the wall and damaging it does not satisfy the requirement that Howard's action be knowing and malicious. The only evidence before the court was that the damage to the wall was inadvertent. Nothing in the plea process established otherwise.

Thus, in the same manner that a factual record did not support the first conviction in Keene, so as under our facts, the factual record does not support the malicious mischief in the third degree conviction. Consequently, this court should vacate Howard's conviction.

II. THE MANIFEST INJUSTICE SENTENCE MUST BE REVERSED AS IT IS EXCESSIVE AND ITS LENGTH CAME FROM "THIN AIR."

Pursuant to the statute, a juvenile court may impose a sentence outside the standard range if it determines that a sentence within the standard range would "effectuate a manifest injustice." RCW 13.40.160(2); see also State v. P.B.T., 67 Wn. App. 292, 300, 834 P.2d 1051 (1992). The trial court's finding of manifest injustice must be supported by clear and convincing

evidence and the resulting sentence must not be clearly excessive. RCW 13.40.160(2). In reviewing a trial court's finding of manifest injustice, the appellate court engages in a three-part inquiry: (1) are the reasons given by the trial court supported by substantial evidence; (2) do those reasons support the determination of a manifest injustice sentence beyond a reasonable doubt; and (3) is the sentence either clearly excessive or clearly too lenient? RCW 13.40.230(2); State v. Rhodes, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979).

Howard does not challenge the first two requirements of the manifest injustice test. Under the third requirement, however, Howard's manifest injustice sentence is clearly excessive and must be reversed. The third requirement of RCW 13.40.230 demands "that the sentence imposed was neither clearly excessive nor clearly too lenient." RCW 13.40.230(2)(b). Once a trial court concludes that a sentence within the standard range would effectuate a manifest injustice, the trial court is vested "with broad discretion" in determining the appropriate sentence to impose. State v. Tauala, 54 Wn. App. 81, 86, 771 P.2d 1188 (1989). Although the length of a manifest injustice sentence is reviewed for abuse of discretion, "the length of a sentence beyond the standard

range must find support in the record ... [and] 'cannot come out of thin air.'" State v. B.E.W., 65 Wn. App. 370, 375, 828 P.2d 87 (1992) (emphasis added) (quoting State v. Wood, 42 Wn. App. 78, 84, 709 P.2d 1209 (1985)). The court must have a tenable basis for its determination. State v. S.S., 67 Wn. App., 800, 819, 840 P.2d 891 (1992).

Here, Commissioner Scheinberg sentenced Howard to a minimum and maximum term of 27 and 36 weeks, respectively, for an offense with a standard range of 0-30 days. At a minimum, this amounts to a sentence more than six times greater than the standard range for the offense. Moreover, the basis for the length of this sentence is not discernable from the record.

The 27-36 week sentence does not correspond with any proposed time for treatment or educational needs. In 2004, Howard was directed to a 26-week out-patient drug program. But there was no mention at sentencing how a 26-week outpatient program would compare to what a JRA facility had to offer.

The probation officer, in her predisposition report, recommended 30-40 weeks of incarceration. She did not, however, explain why she chose that number or explain how 30-40 weeks of incarceration would benefit Howard's need for drug treatment. And,

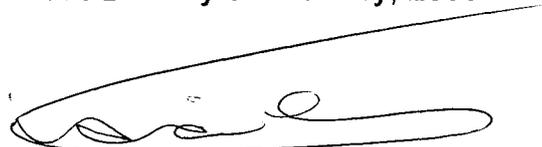
even the court disagreed with the probation officer's recommendation. The court originally wanted to impose a 15-36 week sentence until the prosecutors reminded it that there were statutorily permissible ranges of confinement.

The record must reveal the basis for the sentence. See Wood, 42 Wn. App. at 84 ("The record must support a course of treatment or duration of confinement in excess of the standard range.") Here, there is no discernable basis for the manifest injustice sentence. As such, reversal is required.

V. CONCLUSION

Gregory Howard's plea to malicious mischief in the third degree is not legally sufficient to support a conviction. Because it is constitutionally invalid it is subject to review for the first time on appeal. Howard's conviction should be vacated. Moreover, the length of Howard's manifest injustice sentence is not supported by the record. It's reversal is required.

Respectfully submitted this 21st day of February, 2006



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APPENDIX OF CONSTITUTIONAL PROVISIONS, COURT RULES, AND STATUTES

WASHINGTON STATE CONSTITUTION

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to

support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

COURT RULES

CrR 4.2 - PLEAS

(d) Voluntariness. The court shall not accept a plea of guilty, without it first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

STATUTES

RCW 9A.04.110 - Definitions.

In this title unless a different meaning plainly is required:

....

(12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another,

or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty;

RCW 9A.48.090 - Malicious mischief in the third degree.

(1) A person is guilty of malicious mischief in the third degree if he or she:

(a) Knowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree.

(b) Writes, paints, or draws any inscription, figure, or mark of any type on any public or private building or other structure or any real or personal property owned by any other person unless the person has obtained the express permission of the owner or operator of the property, under circumstances not amounting to malicious mischief in the first or second degree.

(2)(a) Malicious mischief in the third degree under subsection (1)(a) of this section is a gross misdemeanor if the damage to the property is in an amount exceeding fifty dollars.

(b) Malicious mischief in the third degree under subsection (1)(a) of this section is a misdemeanor if the damage to the property is fifty dollars or less.

(c) Malicious mischief in the third degree under subsection (1)(b) of this section is a gross misdemeanor.

RCW 13.40.160 - Disposition order — Court's action prescribed — Disposition outside standard range — Right of appeal — Special sex offender disposition alternative.

(2) If the court concludes, and enters reasons for its conclusion, that disposition within the standard range would effectuate a manifest injustice the court shall impose a disposition outside the standard range, as indicated in option D of RCW 13.40.0357. The

court's finding of manifest injustice shall be supported by clear and convincing evidence.

A disposition outside the standard range shall be determinate and shall be comprised of confinement or community supervision, or a combination thereof. When a judge finds a manifest injustice and imposes a sentence of confinement exceeding thirty days, the court shall sentence the juvenile to a maximum term, and the provisions of RCW 13.40.030(2) shall be used to determine the range. A disposition outside the standard range is appealable under RCW 13.40.230 by the state or the respondent. A disposition within the standard range is not appealable under RCW 13.40.230.

RCW 13.40.165 - Chemical dependency disposition alternative.

(1) The purpose of this disposition alternative is to ensure that successful treatment options to reduce recidivism are available to eligible youth, pursuant to RCW 70.96A.520. The court must consider eligibility for the chemical dependency disposition alternative when a juvenile offender is subject to a standard range disposition of local sanctions or 15 to 36 weeks of confinement and has not committed an A- or B+ offense, other than a first time B+ offense under chapter 69.50 RCW. The court, on its own motion or the motion of the state or the respondent if the evidence shows that the offender may be chemically dependent or substance abusing, may order an examination by a chemical dependency counselor from a chemical dependency treatment facility approved under chapter 70.96A RCW to determine if the youth is chemically dependent or substance abusing. The offender shall pay the cost of any examination ordered under this subsection unless the court finds that the offender is indigent and no third party insurance coverage is available, in which case the state shall pay the cost.

(2) The report of the examination shall include at a minimum the following: The respondent's version of the facts and the official version of the facts, the respondent's offense history, an assessment of drug-alcohol problems and previous treatment attempts, the respondent's social, educational, and employment situation, and other evaluation measures used. The report shall set forth the sources of the examiner's information.

(3) The examiner shall assess and report regarding the respondent's relative risk to the community. A proposed treatment plan shall be provided and shall include, at a minimum:

(a) Whether inpatient and/or outpatient treatment is recommended;

(b) Availability of appropriate treatment;

(c) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members, legal guardians, or others;

(d) Anticipated length of treatment; and

(e) Recommended crime-related prohibitions.

(4) The court on its own motion may order, or on a motion by the state or the respondent shall order, a second examination. The evaluator shall be selected by the party making the motion. The requesting party shall pay the cost of any examination ordered under this subsection unless the requesting party is the offender and the court finds that the offender is indigent and no third party insurance coverage is available, in which case the state shall pay the cost.

(5)(a) After receipt of reports of the examination, the court shall then consider whether the offender and the community will benefit from use of this chemical dependency disposition alternative and consider the victim's opinion whether the offender should receive a treatment disposition under this section.

(b) If the court determines that this chemical dependency disposition alternative is appropriate, then the court shall impose the standard range for the offense, or if the court concludes, and enters reasons for its conclusion, that such disposition would effectuate a manifest injustice, the court shall impose a disposition above the standard range as indicated in option D of RCW 13.40.0357 if the disposition is an increase from the standard range and the confinement of the offender does not exceed a maximum of

fifty-two weeks, suspend execution of the disposition, and place the offender on community supervision for up to one year. As a condition of the suspended disposition, the court shall require the offender to undergo available outpatient drug/alcohol treatment and/or inpatient drug/alcohol treatment. For purposes of this section, inpatient treatment may not exceed ninety days. As a condition of the suspended disposition, the court may impose conditions of community supervision and other sanctions, including up to thirty days of confinement, one hundred fifty hours of community restitution, and payment of legal financial obligations and restitution.

(6) The drug/alcohol treatment provider shall submit monthly reports on the respondent's progress in treatment to the court and the parties. The reports shall reference the treatment plan and include at a minimum the following: Dates of attendance, respondent's compliance with requirements, treatment activities, the respondent's relative progress in treatment, and any other material specified by the court at the time of the disposition.

At the time of the disposition, the court may set treatment review hearings as the court considers appropriate.

If the offender violates any condition of the disposition or the court finds that the respondent is failing to make satisfactory progress in treatment, the court may impose sanctions pursuant to RCW 13.40.200 or revoke the suspension and order execution of the disposition. The court shall give credit for any confinement time previously served if that confinement was for the offense for which the suspension is being revoked.

(7) For purposes of this section, "victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the offense charged. "Victim" may also include a known parent or guardian of a victim who is a minor child or is not a minor child but is incapacitated, incompetent, disabled, or deceased.

(8) Whenever a juvenile offender is entitled to credit for time spent in detention prior to a dispositional order, the dispositional

order shall specifically state the number of days of credit for time served.

(9) In no case shall the term of confinement imposed by the court at disposition exceed that to which an adult could be subjected for the same offense.

(10) A disposition under this section is not appealable under RCW 13.40.230.

RCW 13.40.230 - Appeal from order of disposition — Jurisdiction — Procedure — Scope — Release pending appeal.

(1) Dispositions reviewed pursuant to RCW 13.40.160 shall be reviewed in the appropriate division of the court of appeals.

An appeal under this section shall be heard solely upon the record that was before the disposition court. No written briefs may be required, and the appeal shall be heard within thirty days following the date of sentencing and a decision rendered within fifteen days following the argument. The supreme court shall promulgate any necessary rules to effectuate the purposes of this section.

(2) To uphold a disposition outside the standard range, the court of appeals must find (a) that the reasons supplied by the disposition judge are supported by the record which was before the judge and that those reasons clearly and convincingly support the conclusion that a disposition within the range would constitute a manifest injustice, and (b) that the sentence imposed was neither clearly excessive nor clearly too lenient.

(3) If the court does not find subsection (2)(a) of this section it shall remand the case for disposition within the standard range.

(4) If the court finds subsection (2)(a) but not subsection (2)(b) of this section it shall remand the case with instructions for further proceedings consistent with the provisions of this chapter.

(5) The disposition court may impose conditions on release pending appeal as provided in RCW *13.40.040(4) and 13.40.050(6).

(6) Appeal of a disposition under this section does not affect the finality or appeal of the underlying adjudication of guilt.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

vs.

GREGORY ALLEN HOWARD,

Appellant.

) Clark County No. 05-8-01142-0
) Court of Appeals No. 34131-0-II

) AFFIDAVIT OF MAILING

LISA E. TABBUT, being sworn on oath, states that on the 22nd day of February
2006, affiant deposited in the mails of the United States of America, a properly stamped
envelope directed to:

Ricky W. Olson
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

And

Gregory Allen Howard
Clark County Juvenile Detention Center
500 W. 11th
Vancouver, WA 98666-5000

AFFIDAVIT OF MAILING - 1 -

LISA E. TABBUT
ATTORNEY AT LAW

1402 Broadway • Longview, WA 98632
Phone: (360) 425-8155 • Fax: (360) 423-7499

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and that said envelope contained the following:

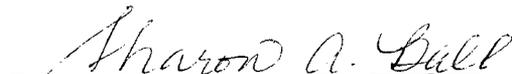
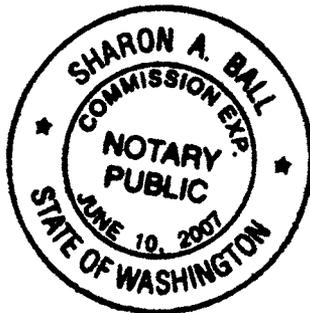
- (1) APPELLANT'S BRIEF
- (2) AFFIDAVIT OF MAILING

Dated this 22nd day of February 2006.



LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 22nd day of February 2006.



Sharon A. Ball
Notary Public in and for the
State of Washington
Residing at Longview, WA 98632
My commission expires 06/10/07