

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

STATE OF WASHINGTON,
Respondent,

v.

NICHOLAS HACHENEY,
Appellant.

09/10/09 09:11:25
BY: [Signature]
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

REPLY BRIEF

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Cases:

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Other Authority:

RCW 9.94A.110	4
RCW 9.94A.370	4

A. INTRODUCTION

This appeal concerns the scope of admissible evidence at a sentencing hearing held before a judge.

During sentencing, the judge refused to consider evidence that Hacheney had consistently maintained his innocence, offered in response to aspersions on Hacheney's character and claimed lack of remorse by the State. In his opening brief, Hacheney argued that the trial court's absolute refusal to consider this evidence was error and justifies a new sentencing hearing.

In response, the State argues that the evidence was irrelevant and therefore, inadmissible. In addition, the State argues that because Hacheney received a standard range sentence, he cannot appeal the trial court's exclusion and refusal to consider his proffered evidence. Finally, the State argues that any error was harmless.

To the contrary, Hacheney is entitled to a sentencing hearing where his sentencing judge considers all relevant evidence and then decides how much weight, if any, to accord that evidence. Because

that did not happen in this case, Hachenev is entitled to be resentenced.

D. ARGUMENT

1. Hachenev is Entitled to Appeal the Trial Court's Refusal to Consider Evidence Relevant to His Sentence.

As a general rule, the trial judge's decision to impose a sentence at the bottom, top, or at any other point within the standard range is not subject to appeal. However, an offender may always challenge the *procedure* by which a sentence was imposed. *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) (quoting *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986)).

The Supreme Court explained many years ago that a trial court's decision regarding the length of a sentence within the standard range is not appealable because as a matter of law there can be no abuse of discretion. *Ammons*, 105 Wash.2d at 183. In contrast, "it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies." *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). And a party may "challenge the underlying

legal conclusions and determinations by which a court comes to apply a particular sentencing provision.” *Id.* at 146-47.

In this case, Hachenev does not challenge his actual sentence. Indeed, he admits he could be properly resentenced to the same sentence. Instead, he argues that he has a right to present and then have his judge consider all relevant proffered evidence *before* imposing a sentence.

In this case, the State argued strenuously for the maximum permissible sentence, based in large part on an attack on Hachenev’s character and integrity. Hachenev attempted to counter this evidence with his own proof—that he has always claimed his innocence and even refused a very favorable plea offer. Although the trial judge noted it would consider Hachenev’s asserted claim of innocence, it would not admit and would not consider any information about plea bargaining, even as it related to Hachenev’s consistent claim of innocence.¹

¹ The trial court imposed an impossible condition on the consideration of Hachenev’s innocence claim. The trial court state it would consider the rejected 7-year plea offer only if Hachenev was seeking a 7 year sentence. RP 21. Given that Hachenev was sentenced on a conviction of first-degree murder, the mandatory minimum was 20 years.

Thus, Hacheney is entitled to challenge on appeal the trial court's decision to exclude evidence he offered in support of his sentence recommendation.

2. The Trial Court Abused Its Sentencing Discretion by Failing to Consider Defense Evidence Offered to Rebut the State's Attack on his Character.

In *State v. Mail*, 121 Wn.2d 707, 854 P.2d 1042 (1993), the Washington Supreme Court held:

The SRA mandates that the court "shall consider the presentence reports...and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed." RCW 9.94A.110. This section of the statute forms a baseline—a minimum amount of information which, if available and offered, *must* be considered in sentencing.

(emphasis in original). The Supreme Court further emphasized the point: "Hence, the sentencing court must consider information presented pursuant to RCW 9.94A.110, but may also consider other sources of information in arriving at a sentence within the standard range." *Id.*²

² The SRA also provides that if a defendant "disputes material facts [used in sentencing], the court must either not consider the fact or grant an evidentiary hearing on the point." RCW 9.94A.370(2). The present case does not appear to involve a dispute over the truth

The Washington Supreme Court further approved the broad consideration of evidence proffered in support of a sentence in *State v. Grayson*, 154 Wn.2d 333, 339-40, 111 P.3d 1183 (2005):

We do not believe the legislature intended that judges leave their knowledge and understanding of the world behind and enter the courtroom with blank minds. Judges are not expected to leave their common sense behind. Nor do we believe the legislature expected judges to hold hearings on whether fire is hot or water is wet. We prize judges for their knowledge, most of which is obtained outside of the courtroom. Within the statutory and constitutional guidelines, judges may exercise their discretion to give a fair and just sentence.

These statutory guidelines do not require judges to hold hearings on the laws of the universe, but only on adjudicative facts. “Adjudicative facts are usually those facts that are in issue in a particular case.” *Korematsu v. United States*, 584 F.Supp. 1406, 1414 (N.D.Cal.1984). In a criminal case, adjudicative facts generally relate to the facts of the crime and the defendant, but could also include social science and other research that directly affects the litigants before the court and are properly placed in contest by the parties.

Here, not only was the evidence proffered by Hachenev relevant and adjudicative, it was offered to rebut evidence advanced by the State—evidence which it suggested justified the maximum

or falsity of a fact. Instead, the State simply argued (successfully) that the fact should not be considered by the Court.

possible sentence. It was evidence that *Mail* holds “must” be considered by the sentencing court.

3. Remand for a New Sentencing Hearing is Required

Here, it is readily apparent that the sentencing court refused to consider relevant information. However, it is also clear that the sentencing court refused to *consider* the evidence. RP 21 (“I don’t feel it is relevant....”). Because the trial court refused to consider relevant information in determining what sentence to impose, the trial court necessarily abused its discretion.

It is impossible to know what sentence the judge would have imposed, if she had considered Hacheney’s proffered evidence. Certainly, the trial court indicated why it was exercising its discretion based on the admitted and considered facts. Instead, the sentencing court exercised her discretion without all of the relevant facts in mind. Thus, a new hearing is mandated.

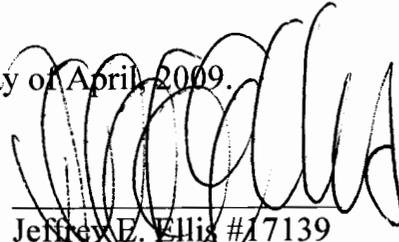
E. CONCLUSION

Based on the above, this Court should reverse and remand this case to Kitsap County Superior Court for a new sentencing hearing. Further, sentencing should be held before a different judge.

See generally State v. Aguilar-Rivera, 83 Wn. App. 199, 203, 920

P.2d 623 (1996).

DATED this 28th day of April, 2009.

A handwritten signature in black ink, appearing to read "Jeffrey E. Ellis", written over a horizontal line.

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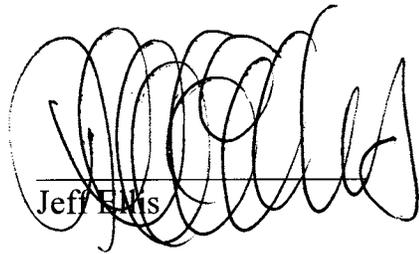
CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on April 28, 2009, I served the party and Appellant with a copy of the attached *Reply Brief* by mailing it, postage pre-paid to:

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