

No. 46497-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EUGENE LEE KOLB,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

- A. Did the State present insufficient evidence to sustain the special verdicts which found that Kolb delivered methamphetamine within 1000 feet of a school bus stop and within 1000 feet of a school?
- B. Did the State fail to provide testimony to satisfactorily establish the chain of custody for the methamphetamine, and therefore, the methamphetamine should not have been admitted into evidence?
- C. Did Kolb receive ineffective assistance from his trial counsel?
- D. Did the trial court abuse its discretion when it allegedly categorically denied a request for a departure below the standard range after Kolb presented mitigating factors?
- E. Did the trial court error when it imposed the requirement of a substance abuse evaluation as a condition of community custody?
- F. Did the trial court error when it imposed a prohibition of consuming non-prescribed drugs as a condition of community custody?

II. STATEMENT OF THE CASE

Greg Gray found himself in trouble with the law and agreed to work as a confidential informant for Chehalis Police Detective Robin Holt for a reduction to a lesser degree drug charge. RP¹ 80-81, 84-85. Mr. Gray contacted Detective Holt and told him he could

¹ There are two volumes of continually paginated verbatim report of proceedings which include both days of the trial, the sentencing hearing and the formal entry of the judgment and sentence, which the State will refer to these as RP. Any other proceedings the State will refer to as RP and the date of the proceeding.

purchase methamphetamine from Eugene (Gene) Kolb. RP 71-72, 84. Detective Holt told Mr. Gray to set up the buy with Kolb. RP 84. Mr. Gray met Detective Holt at a prearranged location on December 13, 2013 prior to the controlled-buy with Kolb. RP 72. Once at the prearranged location Mr. Gray was strip searched and his vehicle, a truck, was searched. RP 72-73, 88-89. There was nothing of value found during the searches. RP 89. Detective Holt gave Mr. Gray \$250 in Chehalis Police Department funds for the purchase of a quarter ounce of methamphetamine. RP 72, 88.

Detective Holt had requested Sergeant Gary Wilson and Officer Jason Roberts assist him with surveillance for the controlled-buy. RP 46, 52, 89. Detective Holt provided the officers with a DOL photograph of Kolb and a description of the truck Kolb was to be driving, a blue Ford Ranger pickup. RP 46, 53, 89. Mr. Gray was followed to the Safeway parking lot in Centralia, Washington, where the controlled-buy was to take place. RP 54, 88, 90. Officer Roberts, Sgt. Wilson and Detective Holt took up separate surveillance points in the parking lot. RP 47, 55, 90.

Kolb arrived in a blue Ford Ranger pickup and pulled up next to Mr. Gray's truck. RP 55, 48, 74, 91. Kolb and his girlfriend, Lisa, exited the truck. RP 74. Kolb walked over to Mr. Gray's driver's side

window. RP 74. Mr. Gray handed Kolb \$250 and Kolb gave Mr. Gray what appeared, from Mr. Gray's previous experience with drugs, to be a quarter ounce of methamphetamine. RP 74. Kolb put the \$250 he received from Mr. Gray in his pocket. RP 75. Kolb told Mr. Gray he would be back down to Lewis County with more methamphetamine in a few weeks. RP 78.

Mr. Gray drove his truck, without making any stops, back to the prearranged location. RP 78-79, 94. Mr. Gray handed over to Detective Holt a baggie with a crystalline substance in it that was consistent with methamphetamine. RP 78, 94. Mr. Gray was subject to another strip search and his vehicle was searched a second time. RP 79, 58, 95. Detective Holt placed the bag of methamphetamine into evidence. RP 122-23. The crystalline substance in the bag was sent to the Washington State Patrol (WSP) Crime Laboratory for testing. RP 95, 117-19, 122-24. The substance tested positive for methamphetamine. RP 119.

Kolb was charged by second amended information with Delivery of a Controlled Substance – Methamphetamine within a 1000 feet of a school bus stop or within a 1000 feet of the perimeter of the school grounds. CP 1-2. Kolb elected to try his case to a jury. See RP. Kolb was convicted as charged, including both sentencing

enhancements. CP 4-5. Kolb requested a sentence below the standard range and presented mitigating factors to the trial judge. RP 197-203; CP 45-103. The trial court declined Kolb's invitation to sentence him below the standard range but did sentence Kolb to the low end of the standard range, 12 months and a day plus the 24 months sentencing enhancement, for a total sentence of 36 months and one day. RP 204-06; CP 8-9. Kolb timely appeals his conviction. CP 16-27.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING THAT KOLB DELIVERED METHAMPHETAMINE WITHIN A 1000 FEET OF THE PERIMETER OF THE SCHOOL GROUNDS.

Kolb argues the State did not present sufficient evidence to sustain either of the sentencing enhancements found by the jury and imposed at sentencing by the trial court. Brief of Appellant 13-17. The State presented sufficient evidence to sustain the jury's finding that Kolb committed the sentencing enhancement of delivering methamphetamine within 1000 feet of the perimeter of the school grounds. The State concedes it did not present sufficient evidence that Kolb delivered methamphetamine within 1000 feet of

a school bus stop. Kolb's sentence therefore stands as only one enhancement was imposed pursuant to the law.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Is Required To Prove Each Element Of A Sentencing Enhancement Beyond A Reasonable Doubt.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). This requirement extends to sentencing enhancements. *State v. Pearson*, 180 Wn. App. 576, 321 P.3d 1285 (2014) (omitting internal citations). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d

410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

3. The Sentencing Enhancements For Delivery Of A Controlled Substance.

A person who delivers drugs within 1000 feet of a school bus stop or within a 1000 feet of the perimeter of school grounds shall receive an additional 24 months of incarceration. RCW 9.94A.533(6); RCW 69.50.435. Under the Sentencing Reform Act (SRA),

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of 69.50 RCW if the offense was also a violation of RCW 69.50.435 or **9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 9.94A.533(6). The Uniformed Controlled Substances Act states,

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:

...

(c) Within one thousand feet of a school bus route stop designated by the school district;

(d) Within one thousand feet of the perimeter of the school grounds;

....

RCW 69.50.435(1). The State alleged Kolb delivered methamphetamine within 1000 feet of a school bus stop and within 1000 feet of the perimeter of school grounds on December 13, 2013. CP 1-3. The jury submitted special verdict form to the jury in regards to the sentencing enhancements. CP 5. The jury found that

the State had proved the sentencing enhancements beyond a reasonable doubt. CP 4-5.

Kolb now argues that there was insufficient evidence to support the jury's finding that he committed the delivery of methamphetamine on December 13, 2013 within 1000 feet of either a school bus stop or the perimeter of school grounds. Brief of Appellant 13-17. Kolb does not take issue with the accuracy of distance between the buy location and that of the alleged bus stop or the school grounds. Brief of Appellant 16. The only issue presented to this Court in regards to the sufficiency of evidence to support the sentencing enhancements is whether the school bus stop and the school grounds existed on December 13, 2013. Brief of Appellant 16-17.

a. The State proved that Kolb delivered methamphetamine within 1000 feet of the perimeter of school grounds on December 13, 2013.

Exhibit 1 is the aerial photograph, which Lewis County GIS manager, Matt Hyatt, created from industry standard software, to show the distance between the alleged buy location and the school and school bus stop. RP 137, 139, 141; Ex. 1.² Mr. Hyatt testified

² The State will be submitting a supplemental designation of Clerk's papers to include Exhibit 1.

that the map was an accurate representation of the area that surrounded the Safeway in Centralia. RP 141. Mr. Hyatt points out where Centralia Middle School is on the map, which is 615 feet from the controlled-buy location. RP 142-43; Ex. 1.

Centralia Middle School is clearly a brick and motor building with surrounding grounds that go out to the corner of Johnson Road and Borst Avenue. Ex. 1. The map states up in the right hand corner that the "Aerial Photo taken 2008 (courtesy of WA Dept. of Natural Resources)." The school and its grounds have been at that location since at least 2008 and Mr. Hyatt testified it was an accurate representation of the area surrounding Safeway. This is sufficient evidence to sustain the sentencing enhancement for delivering the methamphetamine within 1000 feet of the perimeter of school grounds.

b. The State concedes it did not prove that Kolb delivered methamphetamine within 1000 feet of a school bus stop on December 13, 2013.

The State concedes that there was not sufficient testimony that the school bus in question was operational and in existence on December 13, 2013. While Mr. Dunham, the assistant director of transportation for the Centralia School District, testified that it was an approved school bus route, bus stop and that the bus carried

more than 10 students, the State did not inquire if the school bus stop was in existence on December 13, 2013. RP 129-32. This oversight by the State renders the evidence incomplete and not sufficient to prove every element of school bus stop enhancement beyond a reasonable doubt. See RCW 69.50.435(1). Therefore, the State must concede that the school bus stop enhancement must be vacated. Kolb's sentence will not change because the school perimeter enhancement was sufficiently proven and this Court should affirm that portion of the sentence.

B. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED EXHIBIT 2, THE METHAMPHETAMINE, AS CHAIN OF CUSTODY WAS SUFFICIENTLY ESTABLISHED.

Kolb argues that the trial court erred in admitting Exhibit 2, the methamphetamine, because the State failed to establish the chain of custody. Brief of Appellant 17-21. Kolb's argument fails because the State sufficiently established the chain of custody.

1. Standard of Review.

A determination regarding the admissibility of evidence by the trial court is reviewed under an abuse of discretion standard. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012); *State v. Finch*, 137 Wn.2d 792, 810, 795 P.2d 967 (1999), cert. denied 528 U.S. 922 (1999) (citations omitted). "A trial court abuses its

discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

2. The State Sufficiently Satisfied The Chain Of Custody Requirement And Issues In Regard To The Chain Of Custody Of The Methamphetamine Goes To The Weight Of The Evidence, Not Its Admissibility.

A party can sufficiently establish chain of custody to satisfy the foundational requirement to admit an exhibit even absent proof of an unbroken chain of custody. *State v. Picard*, 90 Wn. App. 890, 897, 921 P.2d 336 (1998). The object must be satisfactorily identified and there must be evidence that it is in substantially the same condition as it was when it was collected. *Picard*, 90 Wn. App. at 897. It is not required to have every single person who has ever laid hands on the evidence be called to establish the chain of custody. *State v. Lui*, 179 Wn.2d 457, 481, 315 P.3d 493 (2014), *citing Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 129 S. Ct. 2527, 174 L. Ed. 2d 314, 327 (2009).

As the Supreme Court stated in *State v. Campbell*:

The jury is free to disregard evidence upon its finding that the article was not properly identified or there has been a change in its character. However, minor discrepancies or uncertainty on the part of the witness

will affect only the weight of evidence, not its admissibility.

State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984).

Kolb cites to *State v. Roche*, 114 Wn. App. 424, 436 59 P.3d 682 (2002) for the proposition that drug evidence, because it is not readily identifiable, “should be identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired.” Brief of Appellant 18. This more stringent standard is not required under the facts of this case. The facts of *Roche* are distinct from facts in Kolb’s matter. *Roche* is unique as the evidence showed that WSP chemist, Michael Hoover, was diverting heroin cases to himself so he could take portions of the samples for his own consumption, he was lying to his coworkers, using heroin while at work, his work was suffering and he was possibly falsifying his results by “dry labbing.” *Roche*, 114 Wn. App. at 424-31. The Court of Appeals in its ruling stated:

We agree that the evidence shows that Hoover diverted and ingested heroin, not methamphetamine. But we do not agree that the chain of custody is thereby rendered in methamphetamine cases that Hoover handled. Hoover’s credibility has been totally devastated by his malfeasance. Not only did Hoover steal heroin from the crime lab, he also admitted that he regularly used heroin on the job. He repeatedly lied about his activities...Furthermore, Hoover’s co-workers thought that his work seemed sloppy and even suspected, with some scientific basis to support

their suspicions, that he might have been dry labbing some methamphetamine cases. These events are serious enough that a rational trier of fact could reasonably doubt Hoover's credibility regarding his testing of any alleged controlled substances, not just heroin, and regarding his preservation of the chain of custody during the relevant time period.

Id. at 437. There was no such malfeasance alleged in Kolb's case.

Mr. Gray testified that Kolb sold him a quarter ounce of methamphetamine for \$250 in the Safeway parking lot. RP 72-74. Mr. Gray handed the bag of methamphetamine he purchased to Detective Holt. RP 78, 94. Standard controlled-buy protocols had been used, Mr. Gray and his vehicle had been searched before and after the controlled-buy. RP 58, 88-89, 96. Mr. Gray did not stop at any location in between the Safeway parking lot and the predetermined location where he handed off the methamphetamine to Detective Holt. RP 94. Detective Holt explained that he took the bag into evidence. RP 94.

When initially showed Exhibit 2 Detective Holt stated, "It appears to be the bag of methamphetamine that I received from the informant." RP 95. Detective Holt said it was in the same general condition as it was when he placed the bag into evidence, with the exception of the blue evidence tape the crime lab put on it. RP 95. Detective Holt later elaborated that he received Exhibit 2 from Mr.

Gray on December 13, 2013 and Mr. Gray had received the bag from Kolb. RP 122. The following testimony was given by Detective Holt:

Q After you received that item from the informant, what did you do with it?

A When I returned to the Chehalis Police Department, I filled out the packaging, so placed it in there, filled out a evidence sheet. I filled all this out and sealed it up, put the evidence sheet and this into the evidence locker then filled out a lab request, so it would be sent to the crime lab.

Q So the markings on that bag, which did you put on there?

A Everything but this sticker, the highlighted purple writing, and then this sticker here. I filled out everything else. I sealed it here. This is where the crime lab I believe got into it, because that's not our evidence tape, so I filled out my name, Mr. Kolb's name, the State as the victim, what it was my name and the case number and all that stuff, the date.

Q The contents of that bag are what Mr. Gray gave you after the transaction?

A That's correct.

RP 123.

John Dunn, the WSP Crime Laboratory forensic scientist testified that Exhibit 2 was the piece of evidence he was asked to analyze related to a Chehalis Police Department case. RP 118. Mr.

Dunn stated the Chehalis case number was 13B6928 and the defendant's name was Eugene Kolb. RP 118.

Q So would you please examine what's marked as State's identification number 2? You previously indicated that's a substance that you tested?

A Yes.

Q Did you -- is that in the same condition it was in when you received it?

A Yes, except for two pieces of blue and white evidence tape that I put on the material, after I finished my examination, yes.

Q Where did you receive -- that item from?

A I received this from our property and evidence custodian.

Q You performed a test on that item?

A Yes.

RP 124.

This testimony was sufficient for the State "to establish the chain of custody with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with." *Roche*, 114 Wn. App. at 436 (citations, quotations and original emphasis omitted). It is not necessary for the evidence custodian of the Chehalis Police Department or the evidence custodian at the Vancouver WSP

crime laboratory come in to testify. Detective Holt identified Exhibit 2 as the item he was given by Mr. Gray, that he sealed and the only difference between when he placed it into evidence and the way it appeared at trial was the crime laboratory tape, which was easily identifiable because it was blue in color. Any issues in regards to the chain of custody goes to the weight of the evidence, not its admissibility. Therefore, the trial court did not abuse its discretion when it admitted Exhibit 2. There was no error and this Court should affirm Kolb's conviction.

C. KOLB RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Kolb's attorney provided competent and effective legal counsel throughout the course of his representation. If Kolb's attorney was deficient in any way, Kolb cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Kolb's Attorney Was Not Ineffective During His Representation Of Kolb.

To prevail on an ineffective assistance of counsel claim Kolb must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Kolb claims his trial counsel was ineffective for failing to move to strike testimony of Detective Holt after a sustained objection. Brief of Appellant 21-25. Detective Holt testified that he had information that on January 15, 2014 Kolb was coming down to the Lewis County area to deliver some more methamphetamine. RP 96. Kolb's trial counsel objected to the testimony and it was sustained. RP 96. Kolb's trial counsel did not move to strike the testimony. RP 96. Kolb argues there is no reasonable trial strategy for the failing to request the testimony be stricken. The State disagrees. This information was already to the jury through Mr. Gray's testimony and it was a legitimate trial tactic to object to the hearsay but not request the testimony be stricken as it would further emphasize Mr. Gray's earlier testimony that Kolb told Mr. Gray he would be coming back down to the area in the next few weeks with a lot more methamphetamine. See RP 78.

Arguendo, if it was deficient for Kolb's attorney to fail to move to strike Detective Holt's testimony, Kolb suffered no prejudice from the error. As stated above, the information was

already to the jury that Kolb told Mr. Gray that Kolb would be back down in a few weeks with a lot of methamphetamine. RP 78. Kolb's argument that "[b]ut for the deficient conduct in failing to move to strike the inflammatory evidence, there is a reasonable probability Kolb would have been found not guilty" is ludicrous. See Brief of Appellant 24. Kolb argues this testimony left the jury with Detective Holt's opinion that Kolb was a drug dealer and that he regularly came down to Lewis County to do business. *Id.* Officer Holt did not give opinion testimony, he was testifying to hearsay information he received regarding Kolb coming down to Lewis County to deliver more methamphetamine. RP 96.

The jury heard from the confidential informant, Mr. Gray, that he received the methamphetamine from Kolb after giving Kolb the \$250 in buy money that had been provided by Detective Holt. RP 72-74. Controlled-buy protocols were followed including a strip search of Mr. Gray, a search of Mr. Gray's vehicle, surveillance to and from the buy location and subsequent strip search and search of Mr. Gray's vehicle. RP 58, 72-73, 78-79, 85-86, 88-90, 94-95. Mr. Gray was upfront that he was receiving a deal for his testimony and he had previously been convicted of stealing trees. RP 79-81. The crime laboratory tested the substance and it was

methamphetamine. RP119. Given the evidence presented, there is not a reasonable probability that but for failing to move to strike Deputy Holt's testimony the outcome of the trial would have been different. See *Horton*, 116 Wn. App. at 921-22.

Kolb was not denied effective assistance of counsel because counsel's decision was a legitimate tactical decision and because he suffered no prejudice. Trial counsel was not ineffective. This Court should affirm Kolb's conviction.

D. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BECAUSE IT CONSIDERED THE MITIGATING FACTORS KOLB SUBMITTED BEFORE DETERMINING THAT A SENTENCE BELOW THE STANDARD RANGE WAS NOT APPROPRIATE.

Kolb argues the trial judge abused its discretion when he refused to consider his argument for an exceptional sentence below the standard range. Brief of Appellant 25. While the trial judge expressed his displeasure with the Court of Appeals, Supreme Court and the Sentencing Reform Act (SRA), his tirade on those matters was superfluous to his ruling, for which he did exercise his discretion and denied the request for an exceptional downward departure from the standard range.

1. Standard Of Review.

An appellate court will review a standard range sentence if the trial court has rendered its sentence by relying on an impermissible ground for denying an exceptional sentence below the standard range or when the trial court has refused to exercise its discretion. *State v. McGill*, 112 Wn. App. 95, 99-100, 47 P.3d 173 (2002).

2. Kolb May Appeal The Trial Judge's Ruling Denying The Imposition Of An Exceptional Sentence Below The Standard Range.

A sentence within the standard range is generally not appealable. RCW 9.94A.585(1). Although a defendant is entitled to request at sentencing that the trial judge consider a sentence below the standard range, the defendant is not entitled to have such a sentence implemented. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Remand for resentencing is appropriate if the reviewing court is not "confident that the trial court would impose the same sentence when it considers only valid factors." *McGill*, 112 Wn. App. at 100. Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (citations omitted). The remedy for an erroneous sentence is remand for resentencing. *Id.*

In *McGill* the trial court erroneously believed it did not have the discretion to give an exceptional sentence below the standard range. *McGill*, 112 Wn. App. at 98-99. The trial court stated the sentence did not seem justified and that McGill had made tremendous efforts while in custody and had the support of his friends and family, all which could have been considered in an exceptional sentence below the standard range. Because of the trial court's comments the appellate court held that it could not "say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option." *Id.* at 100-01.

3. The Trial Judge Did Consider The Alleged Mitigating Factors And Used His Discretion To Impose A Low End Sentence.

The trial judge considered the materials presented by Kolb's attorney in support of a mitigated sentence below the standard range. RP 198. Included in these materials was partial medical records, Lisa Balkwell's declaration, letters from Kolb's family and friends, and Kolb's service records. RP 197-99; CP 50-103. Kolb mischaracterizes the trial judge's tirade over his frustration with the current state of sentencing laws as not understanding he had the ability to do a downward departure from the standard range. Brief of Appellant 27-30.

The trial judge was using his position on the bench as a bully pulpit, an opportunity to express his dissatisfaction with the lack of widespread discretion given sentencing courts in Washington. RP 204-205. The trial judge's tirade expressed displeasure with the SRA as a whole, this Court and the Washington State Supreme Court. *Id.* The trial judge stated:

Well, when the SRA was originally passed by the legislature, it was modeled on what they had at that time in the State of Minnesota and Minnesota has a comprehensive scheme that allows the trial judge to go either above the standard range or below the standard range.

Of course, since that time we've had a number of case law refinements, including some decisions by the U.S. Supreme Court that have somewhat hamstrung the Court, with respect to exceptional sentences, because we now have the specter of all the aggravating factors have to be determined by a jury, not by a trial judge. But the problem in the State of Washington is that from day one the Supreme Court and the Court of Appeals following their lead and have never been willing to give the trial judges discretion to go below the standard range and sustain it.

Almost without exception every case that's come out, where a trial judge has gone below the standard range for whatever reason, the Supreme Court and the Court of Appeals have reversed the trial judge finding there was no basis whatsoever in the record for the Court to do that, and even if there is a basis in the record, they still haven't sustained it.

I have never understood the basis for that distinction. A lot of commentators have also commented on it and

pointed out that the intent of the legislature initially passing the SRA, which I think has been discredited over the years, because it took away all the discretion from the trial judges, such as myself and gave it basically to the prosecutor in what they charge, but nobody has ever been able to explain at least to the satisfaction of most of the trial judges how it is that if we go above the standard range, they say that's fine provided there's a reason for it, but if we go below, it doesn't matter what the reason what it is. Whether it is in the record or not, they don't sustain it. I've never understood it.

RP 204-05. After this expert, which Kolb cites to in his briefing, the trial judge goes on to expound on his frustration of how Kolb's case was handled and that it was taken to trial. RP 205. The trial judge said, "It seems to me in this incident it might have been a better use of discretion to try to do something with the case and get rid of the enhancement, the mandatory 24 months, but I can't do anything about that." RP 205-06. The trial judge correctly states that he must impose the enhancement once it is found by the jury. RP 206; RCW 9.94A.533(6).

Finally, when the trial judge imposes his sentence he states,

Having said that, I also agree with Mr. Greene. I don't think this case warrants mid-range. I think at the very least that Mr. Kolb deserves nothing more than the bottom of the standard range, so that will be the order: 12 months and a day, credit for time served, plus the 24 months enhancement that I'm required by the law to impose.

RP 206. The trial judge clearly uses his discretion in determining that the appropriate sentence was low end of the standard range, not a mitigated exceptional sentence below the standard range. Kolb's sentence should be affirmed.

E. THE STATE AGREES THE TRIAL COURT DID NOT HAVE SUFFICIENT FACTS IN THE RECORD TO SUPPORT THE IMPOSITION OF A SUBSTANCE ABUSE EVALUATION.

Kolb alleges the trial court improperly ordered substance abuse treatment as a condition of his sentence because there was no evidence or finding that it was crime-related. The State agrees with Kolb's argument. The sentence condition should be stricken.

The trial court below ordered Kolb to engage in substance abuse evaluation and treatment. CP 11. The trial court has the authority to impose "crime-related" treatment or counseling services. RCW 9.94A.703(3)(c). In *State v. Warnock*, 174 Wn. App. 608, 299 P.3d 1173 (2013), Division 3 of this Court found that a trial court lacks authority to impose a condition of community custody absent any evidence or finding that substance abuse contributed to the offense. *Warnock*, 174 Wn. App. at 612. At Kolb's trial and subsequent sentencing there was no evidence presented of his drug use. At sentencing, neither the prosecutor nor defense offered any argument or evidence that Kolb suffered from drug

dependence or abuse, or that any such issue was related to his commission of the crime of Delivery of Controlled Substance, Methamphetamine. RP 193-208. Accordingly, the trial court lacked authority to order Kolb to engage in substance abuse evaluation and treatment. This case should be remanded for this condition to be stricken from the judgment and sentence

F. THE STATE AGREES THE TRIAL COURT DID NOT HAVE THE STATUTORY AUTHORITY TO IMPOSE AN ADDITIONAL CONDITION PREVENTING KOLB FROM POSSESSING NON-PRESCRIBED DRUGS.

Kolb alleges the trial court improperly ordered, as a condition of community custody, he be prohibited from possessing “non-prescribed drugs”. CP 10. The State agrees with Kolb’s argument regarding the condition, but submits the trial court was required pursuant to RCW 9.94A.703(2)(c) to impose the condition that Kolb not consume or possess “controlled substances” without a lawful prescription. While the condition may be waived by the trial court it was not waived in this case which made it a mandatory condition.

Accordingly, the trial court lacked authority to prevent Kolb from possessing non-prescribed “drugs.” However, since the trial court did not waive the condition it became mandatory to order Kolb not possess or consume controlled substances “except pursuant to lawfully issued prescriptions.” RCW 9.94A.703(2)(c). This condition

was properly included in the judgment and sentence under Paragraph 4.2(B)(4) and (5). CP 10. The inclusion of the handwritten “drugs” prohibition was superfluous and should be removed.

IV. CONCLUSION

The State sufficiently proved beyond a reasonable doubt that Kolb delivered methamphetamine within 1000 feet of the perimeter of the grounds of Centralia Middle School. The State sufficiently established the chain of custody for the bag of methamphetamine Mr. Gray purchased from Kolb and therefore the trial court did not abuse its discretion when it admitted the methamphetamine as Exhibit 2. Kolb received effective assistance from his trial counsel. The trial judge appropriately considered Kolb’s request for a sentence below the standard range and did not abuse his discretion when he sentenced to the low end of the standard range. Finally, The State concedes it did not sufficiently prove the school bus stop enhancement, that the trial court should not have included the requirement of a substance abuse evaluation and the trial court did not have the statutory authority to impose an additional condition preventing Kolb from possessing non-prescribed drugs.

This Court should remand the case back to the trial court to vacate the sentencing enhancement and strike the two improper conditions from Kolb's judgment and sentence. The conviction and length of sentence imposed by the trial court should be affirmed.

RESPECTFULLY submitted this 9th day of April, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'JLM', written over a horizontal line.

by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

April 09, 2015 - 3:33 PM

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