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MAY 29, 2014  
Court of Appeals  
Division III  
State of Washington

**NO. 32063-4-III**

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**RESPONDENT,**

**v.**

**AMEL WILLIAM DALLUGE**

**APPELLANT.**

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**BRIEF OF RESPONDENT**

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**D. ANGUS LEE  
PROSECUTING ATTORNEY**

**By: Carole L. Highland, WSBA #20504  
Deputy Prosecuting Attorney  
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I. **IDENTITY OF THE RESPONDENT**

The State of Washington, represented by the Grant County Prosecuting Attorney's Office, is the Respondent herein.

II. **RELIEF REQUESTED**

Appellant's waiver/stipulation to the *Kent* factors should be upheld, or in the alternative, the matter should be remanded to the Superior Court for a new *Dillenburg* hearing.

III. **ISSUES**

1. Whether the Appellant's waiver of the *Kent* factors was valid, and whether the declination decision in this particular matter should be upheld.
2. If this Court finds that the Appellant's waiver was insufficient, whether remand for a *Dillenburg* hearing is the appropriate remedy.

IV. **STATEMENT OF THE CASE**

It is necessary that this Court understand the background and procedural history regarding Mr. Dalluge's current case. Mr. Dalluge was born on May 22, 1980. On September 18,

1997, when Mr. Dalluge was 17 years old, the State filed against him a charge of Rape in the First Degree by forcible compulsion and kidnapping. Mr. Dalluge was then charged in January of 1998 for Burglary in the Second Degree, Theft in the Second Degree, and three counts of Vehicle Prowl in the Second Degree for an incident which had occurred on November 7-8, 1997. It is this later incident, which occurred when Mr. Dalluge was 17 years, five and ½ months old, which is the subject of this current appeal.

Mr. Dalluge, being under the jurisdiction of the adult court for the pending charge of Rape in the First Degree, was at that time also properly charged in the adult court for the Burglary in the Second Degree, Theft in the Second Degree and the three counts of Vehicle Prowl in the Second Degree which had occurred on November 7-8, 1997.

The count of Rape in the First Degree was amended to Rape in the Second Degree on March 2, 1998, and Appellant was found guilty of two counts of Rape in the Third Degree on March 30, 1998.

Mr. Dalluge was found guilty of the Burglary in the Second Degree, Theft in the Second Degree, and the three counts of Vehicle Prowl in the Second Degree on March 5, 1998.

In December of 2004, The Washington State Supreme Court ordered that a *Dillenburg* hearing be held to determine whether or not Mr. Dalluge would have been declined from juvenile court to adult court on his rape conviction once the Rape in the First Degree count was amended and automatic adult jurisdiction had been lost.

A *Dillenburg* hearing was held on June 1, 2007, and July 13, 2007. The trial court found that Mr. Dalluge would have been declined to adult court for the two counts of Rape in the Third Degree for which he had been found guilty of on March 30, 1998.

On June 8, 2011, this court in an "Order Returning Personal Restraint Petition to Superior Court and Closing Petition in Court of Appeals," found that the *Dillenburg* hearing for Mr. Dalluge's rape case related back only to March 2, 1998, the date of the amendment which had led to the loss of automatic adult court jurisdiction. (emphasis added). As this was four months after the events of November 7-8, 1997, the Court found that a

second *Dillenburg* hearing would be required for the burglary, theft, and vehicle prowl charges.

On November 7, 2011, a hearing was held on the matter with the Appellant appearing telephonically. At that hearing, the Court appointed counsel on Mr. Dalluge's behalf. RP 8.

On February 26, 2013, the Appellant appeared personally in court. Mr. Dalluge asked that he be allowed to proceed *pro se* and that the hearing be stricken so that he could return to Coyote Ridge to do research. It was noted that Mr. Dalluge had previously represented himself on a class C felony. RP 14. The Court determined that both Mr. Dalluge and defense counsel should prepare and that the court would engage in a colloquy regarding possible *pro se* status with Mr. Dalluge prior to his *Dillenburg* hearing. RP 19, 20.

On April 30, 2013, Mr. Dalluge reiterated his request to take over his own case. RP 44, 51. The Court allowed the Appellant to represent himself with standby counsel. As the Court noted, 1) Mr. Dalluge was not a defendant as to the *Dillenburg* hearing, but rather a moving party in a motion for relief; 2) Mr. Dalluge had demonstrated his ability to read and study; and 3) Mr. Dalluge had had a prior *Dillenburg* hearing experience and

exposure, and was well aware of the nature of the hearing, the nature of the issues, and the consequences of possible outcomes. RP 52, 53. Mr. Dalluge asked for additional time to do research and addressed the issue of law library access at the prison. RP 28. As to his intentions regarding the hearing, Mr. Dalluge stated:

So even if – And see, in my – my intention is to save us a lot of time, skip the hearing, -- And then, see I don't believe necessarily on a factual defense – I believe on a legal defense, we have legal standing so we could skip all the *Kent* factors and get into law. And this would be part of a lot of my stuff that I'd be raising is necessarily that. RP 44.

On May 6, 2013, the Court allowed Mr. Dalluge to proceed as his own lead counsel with stand-by counsel required to be ready to take over at any time. RP 58, 57.

On May 7, 2013, Mr. Dalluge informed the Court that he intended to do his own research and needed additional time to prepare. RP 63, 66. Mr. Dalluge's understanding was that stand-by counsel was for the purposes of process and procedure. RP 63. As to his intention regarding the hearing,

Mr. Dalluge stated:

....In my direction in the case is I'm going to waive the *Kent* factors, just so, you know, the State, you know, has – no basis, I guess to have the witnesses hanging any more –

she can let them go. 'Cause I'm going to write it up and waive that.

And as I was trying to tell stand-by counsel, I – I don't see any reason for a factual defense and I'd rather go on a legal defense. RP 68, 69.

Mr. Dalluge then went on to say, “ -- the first – from the first *Dillenburg* hearing I can demonstrate any constitutional errors – that I – I'm --.” RP 69.

On July 24, 2013, the Appellant was present with stand-by counsel, Robert Kentner. The State indicated that it was ready to proceed with the scheduled *Dillenburg* hearing. RP 71. Mr. Dalluge at that time waived his challenge of the *Kent* factors, and indicated that he wished to move on to challenging the constitutionality of *Dillenburg* itself. RP 75, 76. The Court then spent some time verifying Mr. Dalluge's intentions, asking him if he was aware that stipulating to the *Kent* factors would lead to declination. RP 76.

After engaging in a lengthy colloquy with Mr. Dalluge, the Court asked:

If the court allowed you to waive the *Kent* factors and not stipulate, if we then had a hearing on your legal defenses, your constitutional claims and so on, and if this court decided against you on the legal claims, where do you think you would be in regard to the finality of – of the judgment and sentence in this case?

Mr. Dalluge: It would be a matter, I guess, for the Court of Appeals.

The Court: On the legal issues.

Mr. Dalluge: Yeah. Not – not – not—going into the waiver or the stipulation; it would be merely, as I’m saying, the constitutionality of it.

The Court: Okay –

Mr. Dalluge: It would be strictly towards that.

The Court: And – And if, after full legal appeals and so on, you did not prevail on the legal defenses, and the constitutional argument, would you then expect that at some point the court would have to conduct a hearing in regard to the *Kent* factors?

Mr. Dalluge: That would not be honorable. No. RP 81.

The Court understood Mr. Dalluge to stipulate to the *Kent* factors, the State accepted that stipulation, and the Court, at the State’s request, filled in the basis of the waiver and stipulation. RP 82, 89.

## V. ARGUMENT

### A. APPELLANT’S STIPULATION TO THE *KENT* FACTORS WITHOUT AN INDEPENDENT FINDING BY THE COURT WAS SUFFICIENT FOR PURPOSES OF HIS PARTICULARLY SITUATED *DILLENBURG* HEARING.

It is arguable whether case law supports appellant’s position that his waiver of the *Kent* factors without the Court elaborating as to those factors was insufficient for the Court to

have declined jurisdiction over Mr. Dalluge. In contrast to the existing body of case law, Mr. Dalluge was a competent adult, who had represented himself in a prior criminal matter, and who, more importantly, had participated in a prior *Dillenburg* hearing, and was, as the Court noted, well aware of the nature of the hearing, the nature of the issues, and the consequences of possible outcomes. The State would assert that under these unique circumstances, Mr. Dalluge's waiver of a statutory, non-constitutional right was knowingly, intelligently, and freely made. cf. *State v. Saenz*, 175 Wn.2d 167, 283 P.3d 1094 (2012), in which Appellant was a juvenile at the time of his stipulation, the stipulation was entered in consideration of a plea agreement, the lower court failed to make written findings, and the State later sought to use Appellant's conviction as a "strike."

**B. IF APPELLANT'S WAIVER IS FOUND TO BE INVALID, REMAND FOR THE PURPOSES OF EITHER A FULL *DILLENBURG* HEARING, OR IN THE ALTERNATIVE, A STIPULATION BY THE PARTIES INDEPENDENTLY CONSIDERED AND RULED UPON BY THE SUPERIOR COURT IS THE PROPER REMEDY RATHER THAN REVERSAL OF THE APPELLANT'S CONVICTION.**

Appellant is in error when he asserts that the State was not prepared to go forward with the *Dillenburg* hearing on July 24, 2013. Appellant is also in error when he asserts without authority that the probation officer and corrections officer could not have addressed the applicable *Kent* factors as they related to Mr. Dalluge in November of 2007. The probation officer and corrections officer had testified in Mr. Dalluge's initial *Dillenburg* hearing which the Court of Appeals ruled related back to March of 1998. Furthermore, while the Court of Appeals did question whether or not a declination hearing would have been sought in this matter; it did not rule that an additional *Dillenburg* hearing was necessary due to the nature of these crimes, but rather was necessary because Mr. Dalluge's prior *Dillenburg* hearing related back only to March of 1998, some four months after the commission of these crimes. Appellant argues that these crimes do not merit decline, stating that the Court should not consider facts which came to light after Mr. Dalluge was convicted of the burglary, theft, vehicle prowls. The State assumes that Appellant is referring to his rape conviction which occurred subsequently to the convictions in this matter. This

argument ignores the fact that Mr. Dalluge committed the burglary, theft, and vehicle prowls after having been charged with Rape in the First Degree, and not only prior to any amendment of that charge, but also while evading apprehension on that charge. In any case, Appellant's arguments regarding decline in this matter are more appropriately addressed in the trial court forum.

In this case, the waiver/stipulation of the *Kent* factors was a result of the adamant requests of the Appellant himself. Having specifically and repeatedly requested waiver in order to put forth his legal arguments, Mr. Dalluge cannot now ask to benefit from his prior actions. Declination over this particular matter is an issue for the Superior Court to resolve after either a full *Dillenburg* hearing or upon consideration of the necessary factors and the filing of the requisite findings upon a second submission of a waiver and/or stipulation on the part of the Appellant.

Although the State does not suggest that the Appellant was aware of the inadequacy of his waiver/stipulation, and foresaw or predicted this current situation, it was upon his insistence that a *Dillenburg* hearing on the *Kent* factors was not held. The

State would argue that Mr. Dalluge's insistence was somewhat tantamount to invited error, in that but for the Appellant's position, the hearing would have gone forward. The doctrine of invited error holds that a party cannot set up an error and then complain about it on appeal. *State v. Momah*, 167 Wn.2d 140, 153-154, 217 P.3d 321 (2009); *State v. Aho*, 137 Wn.2d 736, 744-745, 975 P.2d 512 (1999); *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. Schaler*, 169 Wn.2d 274, 302-303, 236 P.3d 858 (2010). Equity would dictate against the remedy of dismissal sought by Appellant and brought about by his own acts.

As to Appellant's Statement of Additional Grounds for Review, R.A.P. 10.10(c) requires that while reference to the record and citation to authority are not required, an appellant must inform the court of the nature and occurrence of any alleged errors. The State is unable to discern the nature of the errors raised by Mr. Dalluge in his statement, and is thus unable to respond to it in any meaningful manner.

**VI. CONCLUSION**

The State would ask that this Court find that Appellant's waiver/stipulation of the *Kent* factors leading to declination in this matter was made voluntarily, knowingly, and intelligently, and so uphold the declination decision made in Mr. Dalluge's case. In the alternative, the State would ask that this Court remand the matter to the Superior Court for further proceedings.

DATED THIS 29<sup>th</sup> day of May, 2014.

Respectfully submitted:

D. ANGUS LEE, WSBA #36473  
Grant County Prosecuting Attorney



By: Carole L. Highland, WSBA #20504  
(Deputy) Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 320634
	)	
vs.	)	
	)	
AMEL WILLIAM DALLUGE,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

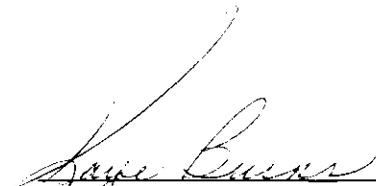
That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kristina M. Nichols  
Wa.Appeals@gmail.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Amel William Dalluge - #779283  
Coyote Ridge Corrections Center  
PO Box 769  
Connell WA 99326

Dated: May 29, 2104.

  
\_\_\_\_\_  
Kaye Burns