

69120-1

69120-1

NO. 69120-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES O. WIGGIN,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Was defendant's resentencing on remand conducted in a fair and evenhanded manner consistent with Sentencing Reform Act sentencing procedures?

2. Does the trial court's imposition of 12 months community custody comply with the appellate court mandate and the Sentencing Reform Act?

3. Did the trial court abuse its discretion in denying defendant's motion for recusal?

## **II. STATEMENT OF THE CASE**

### **A. TRIAL.**

The facts of the case are set forth in the Court of Appeals decision, No. 65215-0-I. CP 379-380. Briefly, James O. Wiggin, defendant, was convicted of failure to register as a sex offender and sentenced to 30 days confinement and 36 months of community custody. CP 380; 410-422.

### **B. FIRST APPEAL.**

In defendant's first appeal, No. 65215-0-I, this court affirmed defendant's conviction and remanded for resentencing to correct the period of community custody from 36 months to not more than

12 months. CP 385. The mandate issued October 26, 2011.<sup>1</sup> CP 378.

**C. ON REMAND.**

On November 21, 2011, the trial court entered an order modifying the judgment and sentence.<sup>2</sup> The prosecutor, defense counsel, and defendant were not present on November 21, 2011. CP 374-376.

**1. Second Appeal.**

On January 6, 2012, defendant filed a notice of appeal challenging the November 21, 2011 order. CP 373. (Defendant's second appeal, No. 68229-6-I. CP (sub# 86 at 2)). Defendant also noted a Motion to Appeal at Public Expense on the January 27, 2012, criminal motions calendar. CP (sub# 74).

On January 27, 2012, the court transferred the matter to the trial judge to be heard on February 17, 2012, and ordered defendant to be transferred from Coyote Ridge Correction Center on a temporary release order for the hearing. CP 371-372; 1RP 2.

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<sup>1</sup> In the interim, Judge Knight, who presided over defendant's trial, retired and Judge Okrent was appointed in his place.

<sup>2</sup> When the remand hearing was noted the State sent a proposed order to the court, with a copy sent to defense counsel, under the local rules. Snohomish County Superior Court Local Court Rule (SCLCR) provides that each party shall have a proposed order prepared at the time the motion is called for hearing. SCLCR 7(b)(2)(D)(11).

## 2. Resentencing On Remand.

On February 17, 2012, defendant was present with counsel when the trial court rescinded the November 21, 2011 order. CP 366<sup>3</sup>, 367; 2RP 2-3. The court then heard argument on resentencing. Defense counsel asked the court to impose no community custody. 2RP 3-4. Defendant addressed the court, asserted that he was not prepared to proceed and asked the court to impose no community custody. 2RP 4-7.<sup>4</sup> The court inquired about continuing the hearing, but no motion to continue was made. 2RP 8-9. The prosecutor asked the court to impose 12 months community custody. 2RP 9.<sup>5</sup> Both counsels and defendant addressed the court regarding the effect of running community custody concurrent with defendant's other case. 2RP 9-12.<sup>6</sup>

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<sup>3</sup> The Order Rescinding Prior Agreed Order Modifying Judgment and Sentence was incorrectly dated the 16<sup>th</sup>. See Minute Entry, CP 367.

<sup>4</sup> While defendant may have misspoken at 2RP 7, line 8, in the context it is clear that defendant was arguing that he was "not" given ample notice of the hearing.

<sup>5</sup> Defendant states that the prosecutor's summary of conditions was only partly correct. Appellant's Brief 6 n.4, 26 n. 20. The trial court originally imposed two conditions—defendant shall register as a sex offender as required by law, and defendant shall obey the law—in addition to the standard conditions of community custody contained in the uniform judgment and sentence proscribed by the Administrator for the Courts in conjunction with the Supreme Court Pattern Forms Committee. CP 415. See WPF CR 84.0400; RCW 9.94A.703, .704. Defendant does not assert that the standard conditions in the present case differ from the standard conditions in his other case.

<sup>6</sup> While defendant may have misspoken or garbled his words at 2RP 10, line 23, in the context it is clear that defendant was arguing that he was vigorously pursuing his "appeals" in both cases.

Having heard argument from the parties and reviewing the file in its entirety, the court entered an order modifying the judgment and sentence imposing 12 months community custody to run concurrent with all other community custody served by defendant. CP 364-365, 367; 2RP 12-14.

### **3. Amended Second Appeal.**

On March 15, 2012, defendant filed a notice of appeal challenging the February 17, 2012 order. CP 362-363. This court considered the March 15, 2012 notice of appeal as an amended notice of appeal in defendant's second appeal, No. 68229-6-I. CP (sub# 86 at 3).

### **4. Reconsideration Of Resentencing.**

On April 26, 2012, in the interest of reaching an efficient resolution of defendant's second appeal, No. 68229-6-I, the State agreed to defendant's proposal: In exchange for defendant's agreement to dismiss his appeal, the State scheduled a hearing in the trial court for June 5, 2012. CP 356.

On June 5, 2012, by agreement of the parties, the hearing to reconsider the sentence modification was continued to June 8, 2012, to allow defendant time to consult with counsel. CP 357-359; 2RP 15-19.

## **5. Motion For Recusal.**

On June 8, 2012, defendant filed 290 pages of mental and medical health reports for the court to consider and made a motion for the judge to recuse himself. CP 58-352; 2RP 20-21. The court continued the hearing to June 12, 2012, to review the material provided by defendant and took the motion for recusal under advisement. CP 55-57; 2RP 22-23.

## **6. Reconsideration And Recusal Denied.**

On June 12, 2012, defendant's motion for recusal was denied. 2RP 25. The prosecutor maintained the recommendation for 12 months community custody. 2RP 24. The court heard argument from defense counsel and defendant regarding defendant's mental health history<sup>7</sup> and the length of community custody that should be impose. 2RP 25-35. Additionally, the court reviewed the file,<sup>8</sup> the record from the court of appeals, defendant's memorandum in support of reconsideration, the documents submitted by defendant regarding defendant's mental and medical

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<sup>7</sup> At defendant's original sentencing following the bench trial, the trial court had considered defendant's mental health assessment. CP 423-425.

<sup>8</sup> Defendant asserts that the judge's reference to a "92 day gap" casts doubt on the judge's claim to have reviewed the record. Appellant's Brief 13 n. 8. On the contrary, the Affidavit of Probable Cause states: "On July 2, 2009, Wiggin registered a new address with the Snohomish County Sheriff's Office. His whereabouts were unknown for 92 days." CP (sub#2 at 1).

health history, and the State's memorandum for sentence modification. 2RP 30, 35. The court denied defendant's motion to reconsider the prior imposition of 12 months community custody. The February 17, 2012 order remained the order of the court. CP 6-7, 54; 2RP 35-36.

#### **7. Second Appeal Dismissed.**

On July 9, 2012, this court granted a joint/agreed motion to permit the entry of the trial court's June 12, 2012 order under RAP 7.2(e) and to dismiss defendant's second appeal, No. 68229-6-I, as moot. The mandate issued on October 19, 2012. CP (sub# 109).

#### **D. THIRD APPEAL.**

On July 12, 2012, defendant filed a notice of appeal challenging the June 12, 2012 order. CP 1-5. This is defendant's current appeal.

### **III. ARGUMENT**

#### **A. THE RESENTENCING HEARING WAS CONDUCTED IN A FAIR AND EVENHANDED MANNER CONSISTENT WITH SRA SENTENCING PROCEDURES.**

The record shows that the Court of Appeals remanded the present case for resentencing to modify the term of community custody from 36 months to not more than one year. CP 385. On remand, the trial court imposed 12 month community custody. CP

6-7, 364-365. While cloaking his arguments in “procedure”, defendant’s ultimate object in seeking a new resentencing hearing is to receive a lower term of community custody.<sup>9</sup> Such an outcome can only be allowed to correct egregious errors in procedure. State v. Mail, 121 Wn.2d 707, 714, 854 P.2d 1042 (1993). Or 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). As a matter of law, a trial court’s decision regarding the length of a sentence within the standard range is not an abuse of discretion. Mail, 121 Wn.2d at 710; State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719 amended, 105 Wn.2d 175, 718 P.2d 796 (1986).

The Sentencing Reform Act of 1981 (SRA) is the sole statutory source of sentencing authority. Mail, 121 Wn.2d at 711. Procedural challenges to sentencing under the SRA must show that the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so. Mail, 121 Wn.2d at 712. The SRA mandates that the court “shall ... allow arguments from the prosecutor, the defense counsel, [and] the

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<sup>9</sup> “‘Community custody’ means that portion of an offender’s sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender’s movement and activities by the department.” RCW 9.94A.030(5).

offender ... as to the sentence to be imposed.” RCW 9.94A.500(1). Here, the court allowed for arguments from the prosecutor, the defense counsel and defendant as to the sentence to be imposed. The sentencing court also must consider other information presented pursuant to RCW 9.94A.500. Mail, 121 Wn.2d at 711. Here, the court considered the information presented by defendant at the resentencing hearing. Since there was no objection to the information, it is considered acknowledged. RCW 9.94A.530(2). “The sentencing judge is always free to rely on acknowledged information.” Mail, 121 Wn.2d at 712.

Defendant was present and represented by counsel at both the February 17, 2012 and June 12, 2012 hearings. CP 54, 367; 2RP 2-14, 24-36. The prosecutor recommended 12 months community custody at both hearings. 2RP 9, 24. Defense counsel made arguments for leniency at both hearings. 2RP 3-4, 25-29. Defendant also made arguments for leniency during both hearings. 2RP 4-7, 10-12, 30-35. The statutory right of allocution under RCW 9.94A.110 is satisfied when defendant’s argument is made in the sentencing hearing at some time prior to imposition of sentence. In re Echeverria, 141 Wn.2d 323, 336, 6 P.3d 573 (2000). The court reviewed the file, the information presented by defendant, and

considered the arguments of both counsel and defendant. 2RP 12-13, 35.

The sole purpose of the remand was to modify the term of community custody from 36 months to not more than 12 months. The court imposed 12 month community custody to run concurrent with any other term of community custody. CP 6-7, 364-365; 2RP 12-14, 35-36. Review of the transcripts establishes the court conducted the resentencing hearings in a fair and evenhanded manner consistent with SRA sentencing procedures.

**B. IMPOSITION OF 12 MONTHS COMMUNITY CUSTODY COMPLIES WITH THE MANDATE AND THE SRA.**

Defendant was convicted of Failure to Register, an unranked offense, and sentenced to 30 days confinement. CP 410-422. Under RCW 9.94A.505(2)(b)<sup>10</sup> for an offender sentenced to not more than one year of confinement, the term of community custody shall not exceed one year. On defendant's first appeal this court remanded for resentencing to a term of community custody of not more than 12 months. CP 385. The trial court's order on remand modified defendant's judgment and sentence imposing 12 months

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<sup>10</sup> RCW 9.94A.505 was amended by Washington Laws 2009 c 389 § 1, and 2009 c 28 § 6, effective July 26, 2009; and 2010 c 224 § 4, effective June 10, 2010. Subsection (2)(b) was not altered.

community custody. CP 6-7, 364-365. This complies with the SRA and the Court of Appeals mandate.

**C. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT’S MOTION FOR RECUSAL.**

Defendant claims that the trial court erred in refusing his request for recusal. Appellant’s Brief 15-17. Decisions on recusal are reviewed for an abuse of discretion. State v. Leon, 133 Wn. App. 810, 812, 138 P.3d 159 (2006); In re Marriage of Farr, 87 Wn. App. 177, 188, 940 P.2d 679 (1997). An abuse of discretion will only be found when the court’s “decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons.” Leon, 133 Wn. App. at 812-813, quoting Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wn. App. 836, 840, 14 P.3d 877 (2000). A request for recusal can be brought under either RCW 4.12.050 or CrR 8.9.

**1. RCW 4.12.050 – Affidavit Of Prejudice.**

Under RCW 4.12.050 a party is entitled to one change of judge as a matter of right. When the trial court is reversed or remanded on appeal, defendant is not entitled to disqualify the judge without cause under RCW 4.12.050. State v. Belgarde, 119 Wn.2d 711, 715, 837 P.2d 599 (1992) (a party may not disqualify the original trial judge from presiding over the retrial without cause).

Additionally, a motion for change of judge brought after the judge has made a discretionary ruling in the case is untimely. State v. Espinoza, 112 Wn.2d 819, 823, 774 P.2d 1177 (1989); State v. Maxfield, 46 Wn.2d 822, 829, 285 P.2d 887 (1955); State v. French, 78 Wash. 260, 262, 138 P. 869 (1914). Defendant concedes that he did not file an affidavit of prejudice. Appellant's Brief 17.

## **2. CrR 8.9 – Change Of Judge.**

Any right under RCW 4.12.050 to seek disqualification of a judge will be deemed waived unless, in addition to the limitations in the statute, the motion and affidavit is filed with the court no later than thirty days prior to trial before a pre-assigned judge. If a case is reassigned to a different judge less than forty days prior to trial, a party may then move for a change of judge within ten days of such reassignment, unless the moving party has previously made such a motion.

CrR 8.9. Defendant did not seek recusal of the judge until June 8, 2012, 153 days after defendant filed his notice of appeal on January 6, 2012 trial, and 111 days after the court's February 17, 2012 order.<sup>11</sup> Because defendant failed to timely seek disqualification of the judge, he waived his ability to seek a change of judge under CrR 8.9.

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<sup>11</sup> Defendant did not request recusal or change of judge at the resentencing on February 17, 2012.

### **3. Defendant Has Not Shown Prejudice.**

When the statutory right to an affidavit of prejudice is not applicable, the party must show actual prejudice. State v. Detrick, 90 Wn. App. 939, 943, 954 P.2d 949 (1998). A party claiming bias or prejudice must support the claim; prejudice is not presumed as it is under RCW 4.12.050. State v. Dominguez, 81 Wn. App. 325, 328-329, 914 P.2d 141 (1996). A judge is presumed to perform his functions regularly and properly, without bias or prejudice. State v. Leon, 133 Wn. App. 810, 813, 138 P.3d 159 (2006); Jones v. Halvorson-Berg, 69 Wn. App. 117, 127, 847 P.2d 945, review denied, 122 Wn.2d 1019, 863 P.2d 1353 (1993).

Due process, appearance of fairness and the Code of Judicial Conduct Rule 2.11 require a judge to recuse himself where there is bias against a party or where impartiality can be questioned. Leon, 133 Wn. App. at 812. The test for whether a judge should disqualify himself where his impartiality might reasonably be questioned is an objective test that assumes that “a reasonable person knows and understands all the relevant facts.” Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995); Leon, 133 Wn. App. at 812-813. “Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent

and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.” In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056, review denied, 167 Wn.2d 1002, 220 P.3d 207 (2009). “Evidence of a judge's actual or potential bias is required before the appearance of fairness doctrine will be applied.” Meredith, 148 Wn. App. at 903; State v. Dominguez, 81 Wn. App. 325, 328-329, 914 P.2d 141 (1996); Skagit County. v. Waldal, 163 Wn. App. 284, 287, 261 P.3d 164 (2011). “A party asserting a violation of the [appearance of fairness] doctrine must produce sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of the decision maker; mere speculation is not enough.” Tatham v. Rogers, 170 Wn. App. 76, 96, 283 P.3d 583 (2012), quoting In re Haynes, 100 Wn. App. 366, 377 n. 23, 996 P.2d 637 (2000).

In the present case, defendant based his request for recusal on the fact that “the court has ruled on this matter twice, once through the original ex-parte order and once through [sic] at the last hearing, and [defendant] feels that you are predisposed towards – both times you’ve come to the conclusion of 12 months probation.” 2RP 21. Motions that are predicated on some asserted error, abuse of discretion, or other misconduct by a trial judge are

properly heard by the trial judge. Tatham v. Rogers, 170 Wn. App. at 89.

The June 12, 2012 hearing, on reconsideration of the court's February 17, 2012 order, was set to allow defendant the opportunity to present additional information and argument to the court. Defendant dissatisfaction with the court's prior order was not sufficient to disqualify the judge from presiding over the reconsideration of the prior order. The trial court had discretion to rule on the recusal motion based upon defendant's claim concerning the existence of alleged prejudice. State v. Palmer, 5 Wn. App. 405, 412, 487 P.2d 627 (1971). Defendant has not shown the required prejudice. State v. Hawkins, 164 Wn. App. 705, 714, 265 P.3d 185 (2011) review denied, 173 Wn.2d 1025, 272 P.3d 851 (2012). The trial court's denial of defendant's motion for recusal was not an abuse of discretion.

#### **4. The Record Does Not Support Defendant's Claim Of Ex-Parte Communication.**

The record shows that the Court of Appeals remanded the present case for resentencing to modify the term of community custody. CP 385. The mandate directed the sentencing court to place the matter on the next available motion calendar. CP 378.

The Superior Court set the matter for resentencing on November 21, 2011. Neither party appeared for the hearing. CP 376. The State's sent a proposed order to the court under the local rules. SCLCR 7(b)(2)(D)(11). The proposed order was erroneously titled an agreed order; it had been signed by a deputy prosecutor, but was not signed by defendant or defense counsel. Nevertheless, the court signed the order on November 21, 2011. CP 374-375.

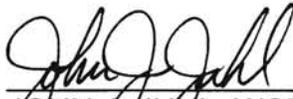
On January 6, 2012, defendant filed a notice of appeal challenging the November 21, 2011 order, and noted a motion for January 27, 2012. CP 373, (sub# 74 1-2). On January 27, 2012, at the motion noted by defendant, the error in the November 21, 2011 order was brought to the court's attention. CP 371; 1RP 2. The matter was set for February 17, 2012, before the sentencing judge. CP 372. On February 17, 2012, the court rescinded the November 21, 2011 order. CP 366, 367; 2RP 2-3. The record does not support defendant's claim of ex-parte communication. It was not an abuse of discretion for the court to deny defendant's motion for recusal.

**IV. CONCLUSION**

For the reasons stated above the appeal should be denied.

Respectfully submitted on May 9, 2013.

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