

NO. 43437-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

CLINTON PRATHER,
Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR COWLITZ COUNTY

The Honorable Richard Melnick, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENT OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT	6
1. <u>THE TRIAL COURT ERRED IN IMPOSING A COMMUNITY CUSTODY TERM THAT EXCEEDED THE STATUTORY MAXIMUM SENTENCE WHEN COMBINED WITH THE TERM OF CONFINEMENT IMPOSED</u>	6
2. <u>HERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE IMPOSITION OF FIREARM ENHANCEMENTS WHERE THE STATE FAILED O PROVE THAT MR. PRATHER WAS ARMED WITH AN OPERATIONAL</u>	11
E. CONCLUSION.....	13
F. APPENDICES A through D	

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>In re Personal Restraint of Brooks</i> , 166 Wn.2d 664, 211 P.3d 1023 (2009).....	4, 8, 11
<i>In re Pers. Restraint of Carle</i> , 93 Wn.2d 31, 604 P.2d 1293 (1980).....	7
<i>In re Pers. Restraint of Goodwin</i> , 146 Wn.2d 861, 50 P.3d 618 (2002)	7
<i>State v. Hennessey</i> , 80 Wn. App. 190, 194, 907 P.2d 331 (1995).....	11
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	13
<i>State v. Krall</i> , 125 Wn.2d 146, 881 P.2d 1040 (1994).....	9
<i>State v. Pam</i> , 98 Wn.2d 748, 659 P3d 454 (1983).....	12
<i>State v. Pierce</i> , 155 Wn. App. 701, 11, 230 P.3d 237 (2010).....	12
<i>State v. Raleigh</i> , 157 Wn.App. 728, 238 P.3d 1211 (2010).....	3
<i>State v. Recuenco</i> , 163 Wn.2d 428, 180 P3d 1276 (2008).....	12, 13
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	11, 12
<i>Dress v. Washington State Department of Corrections</i> , 168 Wn.App. 319, 279 P.3d 875 (2012).....	10
<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 9A.20.021(1)(b)	8
RCW 9A.36.021(2)(a)	8
RCW 9A.020	7
RCW 9.94A.701(9).....	7, 8
RCW 9.41.010(1)(7)	4
RCW 9.94A.505(5).....	7, 8

A. ASSIGNMENTS OF ERROR

1. The trial court exceeded its statutory authority in imposing a term of community custody that, when combined with the term of confinement imposed, will exceed the statutory maximum sentence for the offense.

2. The trial court erred by entering the Order Clarifying Judgment and Sentence of May 30, 2012.

3. The trial court erred in imposing firearm sentencing enhancements in Counts 1, 3, and 4.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A sentencing court may not impose a term of community custody that, when combined with the term of confinement imposed, exceeds the statutory maximum sentence for the crime. Did the court exceed its authority in imposing a term of community custody for the second degree assault conviction that, when combined with the term of confinement imposed, exceeded the 120 month statutory maximum sentence? [Assignments of Error No. 1 and 2].

2. Whether there was sufficient evidence to support the imposition of firearm enhancements where the State failed to prove that the appellant was armed with an operational firearm? [Assignments of Error No. 2 and 3].

C. STATEMENT OF THE CASE

A jury found appellant Clinton Prather guilty of two counts of felony harassment with firearm enhancements and malicious mischief in the second degree on November 30, 2007. Clerk's Papers [CP] 70-81. He was acquitted of two additional felony harassment charges and attempted second degree assault. The jury was unable to reach a verdict on second-degree assault with a firearm enhancement as charged in Count 1.

Mr. Prather was retried on Count 1 and was found guilty on December 13, 2007. The jury found the offense was committed with a firearm. CP 67. A Judgment and Sentence was entered on December 18, 2007. CP 70-81. Mr. Prather received a sentence of 120 months and 18 to 36 months of community custody. Report of Proceedings [RP] at 2; CP 70-81.

On appeal, this Court affirmed the convictions, but remanded for resentencing and clarification of a no contact order. *State v. Prather*, No. 37146-4-II (Slip Op. filed August 11, 2009), available at 2009 WL 2437239.

Mr. Prather filed a Personal Restraint Petition PRP. This Court entered an Order Dismissing Petition on May 26, 2011.¹ Attachment A. This Court ruled that the jury was properly instructed on the definition of “firearm” and that physical evidence of operability is not required in such a case. Order Dismissing Petition, citing *State v. Raleigh*, 157 Wn.App. 728, 735-36, 238 P.3d 1211 (2010). Attachment A. This Court noted that the investigating officer’s testimony that the shotgun was operable was sufficient evidence for the jury to find that Mr. Prather was armed at the time of the offense. Attachment A. The Court also found that the sentence of 120 months and a maximum of 36 months of community custody did not exceed the statutory maximum.

Mr. Prather filed a motion for reconsideration of the Court’s ruling, which was forwarded to the Supreme Court as a motion for discretionary review. The Court Commissioner denied Mr. Prather’s petition for review on November 28, 2011.² The Court Commissioner noted that the shotgun was admitted into evidence at trial and that the officer testified that it was a working firearm, and that the evidence was sufficient on the basis of operability. Attachment B. The Court Commissioner noted that “as long as a gun is real and can readily be made to fire, it need not be presently operable

¹In re the Personal Restraint of Clinton Prather, No. 41475-9-II.

or even loaded to qualify as a firearm.” (Citations omitted) Commissioners Ruling Denying Review, November 28, 2011. Mr. Prather filed a motion to modify the Commissioner’s ruling. On March 27, 2012, the Court granted the motion to modify in part and the matter was remanded to the trial court to clarify in light of *In re Brooks*, 166 Wn.2d 664, 671-73, 211 P.3d 1023 (2009), that Mr. Prather’s sentence and term of community custody does not exceed the statutory maximum for second degree assault. Attachment C. The Supreme Court order did not address the firearm operability issue.

Resentencing occurred before the Honorable Richard Melnick on May 9, 2012. RP at 1-12. Mr. Prather moved for relief from the December 18, 2007 Judgment and Sentence pursuant to CrR 7.8(b). Supplemental Clerk’s Papers [SPC] ___. In the motion, counsel argued that the court should strike the firearm enhancements on Counts 1, 3, and 4 due to the State’s failure to prove at trial that the firearm was operable as required by RCW 9.41.010(1)(7). In the motion, counsel noted that at trial, “the State did not introduce evidence regarding the operability or inoperability of the alleged firearm even though a simple test-firing of the weapon would have been all that was necessary to resolve the issue.” SCP ___. At the resentencing hearing on May 9, defense counsel argued that there was insufficient

²*In the Matter of Prather*, 86316-4.

evidence that the weapon introduced at trial falls within the definition of a firearm. RP at 3. Counsel noted that there was no evidence the weapon was test-fired. RP at 4.

Counsel also argued that the Judgment and Sentence should be amended such that the period of incarceration is 48 months, plus an additional 36 months for the mandatory firearm enhancement, followed by the previously-imposed mandatory term of 18 to 36 months of community custody, for a maximum of 120 months. RP at 2.

The trial court found that the instruction regarding firearm operability was reviewed by the Court of Appeals and Supreme Court and was not properly before the court, and that an additional *Bashaw* challenge was time-barred. RP at 9. The court denied the motion for relief from judgment and sentence. RP at 10, 11. The court entered an order clarifying the judgment and sentence on May 30, 2012. CP 86. The order provided:

The judgment and sentence entered in court on DECEMBER 18, 2007, for Count I, Assault in the Second Degree with a Firearm Enhancement, the combination of time spent actual incarceration and time spent on community custody shall not exceed 120 months, the rest of the Judgment and Sentence shall remain in full force and effect.

The Court denies the defendant's CrR 7.8 motion, effective May 9, 2012 nunc pro tunc.

Attachment D.

Mr. Prather timely filed notice of appeal of the ruling denying motion for relief from judgment and the Order Clarifying Judgment and Sentence. This appeal follows.

D. ARGUMENT

1. **THE TRIAL COURT ERRED IN IMPOSING A COMMUNITY CUSTODY TERM THAT EXCEEDED THE STATUTORY MAXIMUM SENTENCE WHEN COMBINED WITH THE TERM OF CONFINEMENT IMPOSED**

Mr. Prather was sentenced to 84 months for Count 1, with an additional 36 month firearm enhancement, and 18 to 36 months of community custody. CP 70-81. The term of confinement when added to the term of community custody exceeded the 120-month statutory maximum sentence for the crime. The sentence is therefore in excess of the court's statutory authority.

The court imposed 18 to 36 months community custody for the assault conviction. The court also imposed a term of confinement for 120 months. The court's May 30, 2012 order does not address the calculation of time, but merely states the truism that the combination of time spent in actual incarceration and time spent on community custody shall not exceed 120 months, thus effectively deferring the calculation and decision to the

Department of Corrections. SCP __. Attachment D. The ruling appears to throw the matter to the Department of Corrections. Under the order, Mr. Prather will serve the entire 120-month sentence, thus leaving the State without the authority to impose community custody. This runs afoul of the Judgment and Sentence, which explicitly mandates a term of community custody.

The term of confinement when added to the term of community custody exceeds the 120-month statutory maximum sentence for the crime. The sentence is therefore in excess of the court's statutory authority. "A trial court only possesses the power to impose sentences provided by law." *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). A sentence in excess of statutory authority is subject to challenge, and the person is entitled to be resentenced. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 869, 50 P.3d 618 (2002). Because the court exceeded its statutory authority in imposing an 18- to 36-month term of community custody in addition to 120 months, the sentence must be reversed and remanded for resentencing. RCW 9.94A.505(5) provides that "a court may not impose a sentence providing for a term of confinement or community custody that exceeds the

statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW

9.94A.701(9) provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

The statutory maximum sentence for Count 1, second degree assault, is 120 months. RCW 9A.20.021(1)(b); RCW 9A.36.021(2)(a). The trial court imposed a term of confinement of 120 months for the charge, which is equal to the statutory maximum sentence. CP 35. Therefore, the court was not authorized to impose any term of community custody. RCW 9.94A.505(5); RCW 9.94A.701(9).

The facts in *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009), are similar to the facts here. Brooks was convicted of three counts of attempted first degree robbery and one count of residential burglary. *Brooks*, 166 Wn.2d at 666. At sentencing the trial court imposed a standard-range sentence of 120 months confinement, which equaled the statutory maximum, and a term of community custody of either 18 to 36 months, or the period of earned early release awarded, whichever was longer. *Id.* at 666-67. The Supreme Court upheld the sentence, holding it did not

exceed the statutory maximum because the trial court stated on the judgment and sentence that the period of total confinement and community custody together could not exceed the 120-month statutory maximum. *Id.* at 673.

Here, on resentencing, the court stated that the "combination of time spent actual incarceration and time spent on community custody shall not exceed 120 month." SCP __. Attachment D. However, RCW 9.94A.701(9) renders this language ineffective. The statute provides the term of community custody "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime." RCW 9.94A.701(9). The word "shall" in the statute is a mandatory directive to the trial court. See *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

The court did not reduce the term of confinement nor community custody at the time of resentencing, to the extent the term of community custody, when combined with the term of confinement, exceeded 120 months. When the Legislature created RCW 9.94A.701, its intent was "to simplify the supervision provisions" of the SRA and "increase the uniformity of its application." Laws 2009, ch. 375, § 10. To this end, RCW 9.94A.701 requires trial courts to sentence offenders to a fixed term of community

custody. And subsection (9) of the statute provides that the fixed term of community custody be reduced to another fixed term when, in combination with the imposed term of confinement, the statutory maximum is exceeded. Therefore, the language in the May 30 order does not satisfy the legislative directive that the court impose a fixed term of community custody that, when combined with the term of confinement, not exceed the statutory maximum.

In addition, the court's ruling is also potentially untenable under *Dress v. Washington State Department of Corrections*,, 168 Wn.App. 319, 279 P.3d 875 (2012). In *Dress*, Division 1 held that the Department of Corrections (DOC) does not have the authority to "correct" or disregard provisions of a Judgment and Sentence. *Dress*, 168 Wn.App. at 325. In *Dress*, the Court ruled that the DOC cannot simply ignore the provision that he serve 18 to 36 months on community supervision. *Id.* at 328. In Mr. Prather's case, the sentence will have the potential effect of having Mr. Prather serve his entire sentence in custody without community supervision, thus placing the DOC in the position of "waiving" or ignoring community custody, in violation of *Dress*.

Because the term of confinement in combination with the term of community custody exceeded the 120 month statutory maximum sentence, Mr. Prather's sentence must be reversed and remanded for resentencing.

2. **THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE IMPOSITION OF FIREARM ENHANCEMENTS WHERE THE STATE FAILED TO PROVE THAT MR. PRATHER WAS ARMED WITH AN OPERATIONAL FIREARM**

The Court Commissioner of the Supreme Court found that the State presented sufficient evidence to prove the shotgun was an operable firearm. On review, the Supreme Court granted the motion to modify to clarify the sentence under *Brooks*, but did not address the issue of firearm operability. The appellant submits that he may now raise this issue pursuant to his CrR 7.8 motion for relief from judgment.

A defendant is subject to a firearm sentence enhancement under RCW 9.94A.533 if the defendant was armed with a firearm during the commission of the applicable underlying offense. The State must prove each element of the enhancement beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational

trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where plainly indicated as a matter of logical probability. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, at 201; *Craven*, at 928.

A firearm enhancement cannot be imposed unless the firearm proves to be operable. CP 47 (Instruction 32); *State v. Pam*, 98 Wn.2d 748, 659 P.3d 454 (1983), overruled in part on other grounds by *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988); *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) ("We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement"); *State v. Pierce*, 155 Wn. App. 701, 714 n. 11, 230 P.3d 237 (2010).

As instructed in this case, for sentencing enhancement purposes, a firearm is a weapon or device from which a projectile may be fired by an explosive such as gunpowder. [Instruction No. 32]. See *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) (a jury must be presented with sufficient evidence to find a firearm operable in order to uphold the enhancement). In *State v. Pierce*, 155 Wn. App. 701, 714-15, 230 P.3d 237 (2010), this Court, citing *Recuenco*, held that a gun must be operable during commission of an offense before a firearm enhancement can be imposed. Here, there was an absence of proof in the record from which a reasonable jury could find that Mr. Prather was armed with an operational firearm during the commission of the offenses alleged in Counts 1, 3 and 4 because the gun was never test fired. While shotgun shells were recovered, this is insufficient to establish beyond a reasonable doubt that the gun was operational, with the result that the firearm enhancements must be stricken and the case remanded for resentencing without the enhancements.

E. CONCLUSION

The 18- to 36-month term of community custody imposed in Count 1 exceeded the court's statutory authority. The 84 month sentence imposed in Count one is unlawful because, when combined with the enhancement and

the term of community custody, it exceeds the 120-month statutory maximum sentence. Therefore, Mr. Prather must be resentenced. In addition, Mr. Prather respectfully requests this court to remand for resentencing without the firearm enhancements.

DATED: November 19, 2012.

Respectfully submitted,
THE TILLER LAW FIRM

Peter B. Tiller

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 19, 2012, this Opening Brief of Appellant was e-filed to (1) the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and (2) Mr. James Smith, Deputy Prosecutor at Smith.James@co.cowlitz.wa.us and copies were mailed by U.S. mail, postage prepaid, the appellant, Mr. Clinton Prather, DOC# 714185, Stafford Creek Correction Center, 191 Constantine Way, Aberdeen, WA 98520.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 19, 2012.

Peter B. Tiller

PETER B. TILLER

TILLER LAW OFFICE

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