No. 30736-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MARIO NOYOLA JR.,

Defendant/Appellant.

Appellant's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Noyola's motion to dismiss the third degree assault conviction as a violation of double jeopardy.

2. The trial court erred in imposing community custody of 18 months as part of the sentence.

3. The trial court erred in imposing a sentence that exceeded the statutory maximum.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Mr. Noyola's convictions for custodial assault and third degree assault violate the constitutional prohibition against double jeopardy, where the evidence required to support a conviction upon one of the charged crimes would have been sufficient to warrant a conviction upon the other?

2. Did the sentencing court not have the statutory authority to impose a sentence of community custody of 18 months where only one year is authorized for the offense under RCW 9.94A.701, the statute authorizing community custody?

3. Is the sentence imposed on the assault convictions invalid because the judgment and sentence does not clearly indicate that the term

of community custody is not to extend the total sentence beyond the statutory maximum?

C. STATEMENT OF THE CASE

Mario Noyola was charged and convicted by a jury of custodial assault, third degree assault and intimidation of a public servant. CP 64-66. The basis for the convictions was an altercation with a corrections officer at the Grant County Jail. All three convictions involved the same alleged victim. RP 25-35.[1]

At the sentencing hearing on March 7, 2012, Mr. Noyola moved to vacate one on the assault convictions for violating double jeopardy. The Court denied the motion but found the two assaults constituted the same criminal conduct for sentencing purposes. 3/7/12 RP 51-53. The Court sentenced Mr. Noyola to 60 months confinement on each of the three convictions to run concurrently. CP 146. The statutory maximum for the two assault convictions was 60 months. CP 145. The Court also ordered 18 months community. CP 147. This appeal followed. CP 78.

[1] "RP" refers to the verbatim report of proceedings of the trial, excluding the verdict, contained in two volumes, 86 pages long. Citations to any other hearing will be "RP" preceded by the hearing date.

D. ARGUMENT

1. Mr. Noyola's convictions for custodial assault and third degree assault of the same victim violate the constitutional prohibition against double jeopardy, since the evidence required to support a conviction upon one of the charged crimes would have been sufficient to warrant a conviction upon the other.

The *Blockburger*[2] "same elements" and "same evidence" test remains the correct means of determining whether convictions for two offenses violate double jeopardy. *In re Orange*, 152 Wn.2d 795, 815-16, 100 P.3d 291 (2004). However, in some cases our appellate courts have misapplied the "same elements" test by merely comparing the statutory elements of the two crimes in a generic sense. *Id.* 152 Wn.2d at 817-19; *State v. Valentine*, 108 Wn.App. 24, 29 P.3d 42 (2001). Instead, the *Blockburger* test requires the court to determine "whether each provision *requires proof of a fact which the other does not.*" *Id.* 100 P.3d at 302, citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (emphasis added). Thus, double jeopardy will be violated where " 'the evidence required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction

[2] *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

upon the other.' " *Id.* 152 Wn.2d at 820, citing *State v. Reiff*, 14 Wn. 664, 667, 45 P. 318 (1896).

In *Orange*, the Court held that Mr. Orange's convictions for first degree attempted murder and first degree assault of the same victim violated the constitutional prohibition against double jeopardy, because the two crimes were based on the same gunshot in the same incident. *Orange*, 152 Wn.2d at 820-21, 100 P.3d 291. The Court noted that the State alleged in count two of the information that Orange committed the crime of first degree attempted murder, when he "act[ed] with premeditated intent to cause the death of another person and did attempt to cause the death of Marcel Walker." *Orange*, 152 Wn.2d at 814, 100 P.3d 291. Count three alleged that Orange committed an assault in the first degree when he, "at the same time as the crime charged in count 2, then and there, with intent to inflict great bodily harm upon another person, did intentionally assault Marcel Walker with a firearm." *Orange*, 152 Wn.2d at 815, 100 P.3d 291.

Here, the factual analysis for the purposes of double jeopardy is indistinguishable from *Orange*. As noted in *Orange*, the trial court herein misapplied the "same elements" test by merely comparing the statutory elements of the two crimes in a generic sense. Instead, the *Blockburger*

test requires the court to determine "whether *each* provision requires proof of a fact which the other does not." Clearly, the evidence required to support a conviction on one of the charged assaults would have been sufficient to warrant a conviction upon the other. Therefore, allowing both assault convictions to stand violated the constitutional prohibition against double jeopardy.

The third degree assault conviction should be vacated because the custodial assault conviction is the more specific offense, applying only to a "full or part-time staff member or volunteer, any educational personnel, any personal service provider, or any vendor or agent thereof at any adult corrections institution or local detention facility who was performing his or her official duties at the time of the assault." RCW 9A.36.100(1)(b). Third degree assault, on the other hand, is the more general offense, since it would apply to *any* "law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." RCW 9A.36.031(1)(g). When a general and a specific statute are concurrent, the more specific law applies to the exclusion of the general. *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). Therefore, the third degree assault conviction should be vacated.

2. The sentencing court did not have the statutory authority to impose a sentence of community custody of 18 months where only one year is authorized for the offense under RCW 9.94A.701, the statute authorizing community custody.

Sentencing is a legislative power, not a judicial power. *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. *State v. Monday*, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Statutory construction is a question of law and reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293

(1980). The statute authorizing the superior court to impose a sentence of community custody is RCW 9.94A.701, which provides in pertinent part:

> (2) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.
>
> (3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:
>
> (a) Any crime against persons under RCW 9.94A.411(2).

RCW 9.94A.701(2) and (3)(a).

The three convictions at issue here are not violent offenses. RCW 9.94A.030(54). Instead, they are all crimes against persons. RCW 9.94A.411(2). Under RCW 9.94A.701(3)(a), the amount of community custody authorized is one year, not 18 months. Therefore, the sentencing court did not have the statutory authority to impose 18 months community custody.

3. The sentence imposed on the assault convictions is invalid because the judgment and sentence does not clearly indicate that the term of community custody is not to extend the total sentence beyond the statutory maximum.

Whether a person convicted of a crime was given a lawful sentence is a question of law that is reviewed de novo. *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005). The SRA directs that "a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5).

Here, the statutory maximum for the assault convictions was 60 months. RCW 9A.36.031(2), RCW 9A.36.100(2). The Court sentenced Mr. Noyola to 60 months confinement on all counts and ordered 18 months community custody. CP 146-47.

In *State v. Torngren*, 147 Wn. App. 556, 196 P.3d 742 (2008), this Court found that a sentence "is valid when the judgment and sentence 'set[s] forth the statutory maximum and clearly indicate[s] that the term of community [custody] does not extend the total sentence beyond that maximum.' " *Id.* at 566, 196 P.3d 742 (alterations in original) (quoting

State v. Hibdon, 140 Wn. App. 534, 538, 166 P.3d 826 (2007)). The Court concluded that a remand to the trial court for clarification was the proper remedy. *Torngren*, 147 Wn. App. at 566, 196 P.3d 742. In *Hibdon*, the Court held that either an amended sentence or a vacation and remand for resentencing are equally appropriate remedies in these circumstances. *Hibdon*, 140 Wn. App. at 538, 166 P.3d 826.

Similarly, in *In re Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009), the Supreme Court held that where the sentence specifically directs DOC to ensure that whatever release date it sets, under no circumstances may the offender serve more than the statutory maximum, the sentence does not exceed the statutory maximum. *Id.* at 673. Where a sentence is insufficiently specific regarding community custody, an amended sentence is the appropriate remedy. *Id.*, citing *State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997).

Here, the sentence imposed on the assault convictions is invalid because the judgment and sentence does not clearly indicate that the term of community custody is not to extend the total sentence beyond the statutory maximum. Therefore, the case should be remanded and the judgment and sentence amended accordingly.

E. CONCLUSION

For the reasons stated, the third degree assault conviction should be vacated and the case remanded with instructions to reduce the amount of community custody to one year, and to amend the judgment and sentence to clearly indicate that the term of community custody is not to extend the total sentence beyond the statutory maximum.

Respectfully submitted November 28, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on November 28, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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