

90732-3

Received  
Washington State Supreme Court

SEP - 8 2014

Ronald R. Carpenter  
Clerk

No.

SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
plaintiff/respondent

v.

MARIO NOYOLA,  
defendant/petitioner

COPY

-----  
MOTION FOR DISCRETIONARY REVIEW  
-----

MARIO NOYOLA 767684  
COYOTE RIDGE CORR. CNTR  
PO BOX 769  
CONNELL, Wa. 99326

FILED

SEP 11 2014

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

**A. IDENTITY OF PETITIONER**

Mario Noyola defendant/petitioner, asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

**B. COURT OF APPEALS DECISION**

Review the commissioner's ruling filed on May 9, 2014 that denied petitioner's arguments in his supplemental statement of additional grounds after remand. Also, the order entered on July 30, 2014 by Chief Judge, Laurel H. Siddoway denying petitioner's motion to modify the commissioner's ruling. (A copy of the decision's are in the appendix.)

**C. ISSUES PRESENTED FOR REVIEW**

1. DID THE COURT MISAPPLY THE "STATUTORY MAXIMUM" WHERE THE RELEVANT STATUTORY MAXIMUM IS THE HIGH END OF THE STANDARD RANGE UNDER RCW 9A.20.021(1)?
2. IS RCW 9A.20.021(1) AMBIGUOUS WITH REGARDS TO THE "STATUTORY MAXIMUM"?
3. DOES MR. NOYOLA'S PREVIOUS DOUBLE JEOPARDY ISSUE(S) CONTAIN MATTERS OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST WHICH REQUIE REVIEW, TO PROVIDE FUTURE GUIDANCE TO PUBLIC OFFICIALS?

#### D. STATEMENT OF THE CASE

On June 21, 2011, Mario Noyola, (herein after 'Mr. Noyola) was charged by information with assault in the second degree, intimidating a public servant, and assault in the third degree. The basis for the charges was for an alleged assault on a correction officer at the Grant County Jail. CP 1

On February 8, 2012, the state filed an amended information charging Mr. Noyola with custodial assault RCW 9A.36.100(1)(b): intimidating a public servant RCW 9A.76.180; and assault in the third degree RCW 9A.36.031(1)(g). CP60

Mr. Noyola noted his objection to the amendment based on the duplicative nature of count one and three and that they were both based on the same intent. 2/8/12 RP All three convictions involved the same alleged victim. RP25-35 On February 9, 2012 Mr. Noyola was convicted by a jury of all three counts. CP64-66

At the sentencing hearing on March 7, 2012, Mr Noyola moved to vacate one of 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 RP51-53 The Court sentenced Mr. Noyola to 60 months confinement on each of the three convictions to run concurrently. CP146 The Court also ordered 18 months community custody. CP147 Mr. Noyola appealed. CP78

In his appeal Mr. Noyola argued, through counsel, three issues; 1) The trial court erred in denying Noyola's motion to dismiss the third degree assault conviction as a violation of double jeopardy; 2) The trial court erred in imposing comm-

unity custody of 18 months as part of the sentence; and 3) The trial court erred in imposing a sentence that exceeded the statutory maximum. (see Appellant's Brief dated nov. 28, 2012 at 5-6)

In their response brief, the state subsequently conceded all three issues. The state asked this court to remand the matter to the Superior Court to dismiss the third degree assault conviction, change the term of community custody to 12 months, and clarify that the combined length of confinement and community custody cannot exceed 60 months. (see respondents brief filed june. 11, 2013)

On June 28, 2013 court of appeals commissioner Monica Wasson entered an order remanding the matter to the Superior Court for action in accordance with the state's concession's. (see order filed June 28, 2013)

On remand, at the resentencing hearing held Sept. 10, 2013, the trial court dismissed the third degree assault conviction based on the state's concession that it violated double jeopardy and changed the community custody from 18 months to 12, applying the 12 months community custody to the intimidating a public servant charge. (see RP. Sept. 10, 2013 45-46)

Mr. Noyola noted his objection to the imposition of the 12 months community custody arguing, it exceeded the statutory maximum. Noyola appealed and filed a supplemental SAG. (see supp. SAG filed Feb. 27, 2014)

On May 7, 2014 Noyola argued the issues in his supplemental SAG by teleconference before the commissioner Monica Wasson. id.

On May 9, 2014 Appeals Court commissioner, Monica Wasson entered an order dismissing Noyola's appeal as moot. (see order filed May 9, 2014)

On June 8, 2014 Noyola filed a motion to modify arguing that the court failed to properly rule on the issues presented in his supp. SAG. (see motion to modify filed June, 8, 2014)

On July 30, 2014 Appeals Court Chief Judge Laurel H. Siddoway entered an order denying Noyola's motion to modify. (see order filed July 30, 2014)

#### E. ARGUMENT

##### RAP 13.4

(a) "A party seeking discretionary review by the Supreme Court of a Court of Appeals decision... must file a petition for review or an answer to the petition that raises new issues."

1. The court misapplied the statutory maximum because it relied on RCW 9A.20.021(b) instead of RCW 9A.20.021(l) which identifies the standard range as the statutory maximum.

Sentencing is a legislative power, not a judicial power. *State v. Bryan*, 93 Wn.2d 177, 181 (1980). It is the function of the legislature and not the judiciary to alter the sentencing process. *State v. Monday*, 85 Wn.2d 906, 909-10 (1975). A court's discretion to impose a 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(1986).

A court reviews a discretionary sentencing decision made under the SRA for abuse of discretion or misapplication of law. *State v. Elliott*, 114 Wn.2d 6,17(1990). A court abuses its discretion if its decision is "manifestly unreasonable", based on "untenable grounds", or made for "untenable reasons". *State v. ExRel. Carroll v. Junker*, 79 Wn.2d 12,26(1971).

A decision is based on untenable grounds or made for untenable reasons if it rest on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices. *State v. Rohrich*, 149 Wn.2d 647,654(2003). Statutory construction is a question of law and reviewed de novo. *Cockle v. Dep't of labor & indus.*, 142 Wn.2d 801,807(2001).

RCW 9A.20.021(1) provides:

"Felony.. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state"...no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(b) for a class B felony, by confinement in a state correctional institution for a term of ten years...

Here, the court failed to acknowledge subsection (1) of the relevant statute when determining the statutory maximum, but instead bypassed it and relied on subsection (b) in its analysis which resulted in error.

Noyola points to subsection (1) and argues that the court could not use subsection (b) unless there is no other statute that identifies a maximum sentence for his crime, that being intimidating a public servant RCW 9A.76.180.

Noyola asserts that RCW 9.94A.515 identifies crimes with its seriousness level and that RCW 9.94A.510 is the statute that specifically establishes the maximum sentence he can receive based on the seriousness of the offense and his criminal history, i.e., its the maximum sentence allowed by law unless a judge or jury determine that facts exist that authorize an exceptional sentence beyond or below the standard range, in other words "statutory maximum".(emphasis added)

Noyola's standard range for intimidating a public servant is 51-68 months based on his criminal history of having 9+ points and the statute that specifically establishes it is RCW 9.94A.510 which ultimately the court failed to use.

In *Blakely v. Washington*, 542 U.S. 296, 124 S.ct. 2531 (2004) the Supreme court defined, in dictum, statutory maximum as the standard range. *Blakely*, at 303. Similarly, in *State v. Evans*, 154 Wn.2d 438, 441-42 (2005) reaffirming this definition the Washington Supreme Court clarified that the statutory maximum did not refer to the maximum sentence authorized by the legislature for the crime but instead, statutory maximum meant the maximum sentence a trial judge was authorized to give without finding additional facts, in the case of the SRA ch. 9.94A RCW, the top of the standard range. id

It is also consistent with court decisions that have consistently applied the rule that when two statutes are concurrent, the specific statute prevails over the general. *State v. Danforth*, 97 Wn.2d 255,257(1982)

In *State v. Cann*,92 Wn.2d 193,197(1979) this court stated "the rule is that where general and specific laws are concurrent, the special law applies to the subject matter contemplated by it to the exclusion of the general."

The rule of lenity applies to statutes specifying the penalty imposed as well as statutes defining the offense. *State v. Jackson*, 61 Wn.App.86(1991).

As in this case, RCW 9a.20.021 is the more general statute and RCW 9.94A.510 is the more specific statute which should exclude the general and the resulting statutory maximum is the standard ranges identified in 510.

For the reasons above the court abused its discretion and misapplied the law resulting in an unlawful sentence. Review should be granted.

2.RCW 9A.20.021(1) is ambiguous with regards to statutory maximum because it is subject to two interpretations, so the rule of lenity should apply to Mr. Noyola.

The interpretation of provisions of the SRA involves questions of law that are reviewed de novo. *State v. Jacobs*, 154 Wn.2d 596,600(2005). When interpreting a statute, a court's objective is to determine the legislative intent. To determine that intent, court's first look to the language of the statute. *State v. Armendariz*,160 Wn.2d 106,110(2007)

If a statute is subject to more than one reasonable



interpretation, it is ambiguous and the rule of lenity requires court's to interpret an ambiguous criminal statute in favor of the defendant, absent legislative intent to the contrary. State v. Mandanas, 168 Wn.2d 84, 87-88 (2010)

If the plain language of the statute is clear and unambiguous, court's must give effect to the language as an expression of legislative intent. Dept of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10 (2002)

The plain meaning of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Wash. ports ass'n v. Dept of Revenue, 148 Wn.2d 637, 645 (2003)

A change in statutory language usually creates a presumption of a change in legislative intent. State v. Slattum, 173 Wn.App. 640 (2013).

When the legislature has defined a statutory term, the statutory definition of a term controls its interpretation. State v. Morris, 77 Wn.App. 948, 950 (1995)

RCW 9A.20.021 identifies a procedure for which courts are required to follow but leaves two interpretations as to which one is to be used.

The relevant procedure that was to be used in Noyola's case is the one unincorporated in subsection (1) of 9A.20.021. The court was to use the specifically established statute of RCW 9.94A.510 not subsection (b) of 9A.20.021.

To help the court in determining what the legislature

intended he ask that you look at the following statutes.

RCW 9.94A.010 states:

"The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures , but does not eliminate discretionary decisions affecting sentences, and to:

(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;(emphasis added)

RCW 9.94A.030(49) states:

"Statutory maximum sentence" means the maximum length of time for which an offender may be confined as punishment for a crime as prescribed in chapter 9A.20RCW..teh statute defining the crime, or other statute defining the maximum penalty for a crime.

RCW 9.94A.505(2)(a)(i) states:

"Unless another term of confinement applies, a sentence within the standard sentence range established in RCW 9.94A.510 or 9.94A.517.

RCW 9.94A.701(9) states:

"The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW9A.20.021.

RCW 9A.20.010 states:

(1) Classified Felonies.(a)The particular classification of each felony defined in title 9A RCW is expressly designated in the section defining it.

(b) For purposes of sentencing, classified felonies are designated as one of three classes,as follows:

- (i)class A felony;or
- (ii)class B felony;or
- (iii)class C felony.

Noyola asserts that the court failed to take into consideration all these relevant statutes when determining the actual statutory maximum.The legislature has indicated that the standard range is what the statutory maximum is within these statutes and the statutory scheme as a whole. It further

acknowledged its intention on identifying what the statutory maximum was to be when it amended 9A.20.021. see laws of 2003, ch.288, section 7, in subsec.(1) when it added the exact sentence that Noyola identifies that is to be used before sections A,B, and C.

As this court stated, "remedial changes are generally enforced as soon as they are effective and can be enforced retroactively." *State v. pillatos*, 159 Wn.2d 459, 473(2007). A statute is remedial when it relates to practice, procedure, or remedies, and does not affect a substantive right. *id.*

Conversly, substantive changes include those that aggravate a crime or allow courts to impose a more severe punishment. *State v. Edwards*, 104 Wn.2d 63, 70-71(1985)

Here, it can only be both because its remedial and also allows the court to give a bigger punishment as it did in this case. For the reasons above the statute is ambiguous as to its application and the rule of lenity applies in this case.. Review should be granted.

3. Noyola's case contains matters of continuing and substantial public interest that are present for this court to review which would help future public officials in avoiding double jeopardy sentences.

A court has the power to decide a moot case to resolve issues of continuing and substantial public interest if guidance would be helpful to public officers and the issue is likely to recur. *Sorenson v. City of Bellingham*, 80 Wn.2d 547 558(1972).

In deciding whether a case presents issues of continuing

and substantial public interest, three factors are determinative:

1) whether the issue is of public or private nature; 2) whether an authoritative determination is desirable to provide guidance to public officers; 3) whether the issue is likely to recur.

*Satomi owners ass'n v. Satomi, LLC*, 167 Wn.2d 781, 786 (2009).

The court may also consider the likelihood that the issue will escape review because the facts of the controversy are short lived.

Our Supreme court has observed that issues of constitutional or statutory interpretation tend to be more public in nature more likely to arise again and the decisions help to guide public officials. In *re Bovan*, 157 Wn.App 588 (2010).

Noyola asks this court to review the issue of double jeopardy when a person is convicted of custodial assault and third degree assault based on the same intent for the same victim.

This case is public or private in nature because it deals with constitutional and statutory interpretation within the assault statutes. An authoritative determination is necessary to give guidance to public officers because of the adverse consequences having multiple convictions based on one act which either increases an offender score or subjects them to the persistent offender act. Also like this case it was short lived because of the states concession and its apparent that courts still have difficulty in sentencing offenders to crimes based on the same intent on the same victim. Review is necessary.

At issue is whether custodial assault and assault in the third degree are the same offense and if the legislature has

authorized punishment or convictions for both separately. Both state and federal constitutions prohibit multiple punishments for the same offense. U.S.const.amend.v;wash.const.art. I section 9 State v.tvedt,153 Wn.2d 705,710(2005). Claims of double jeopardy are questions reviewed de novo. State v. jackman, 156 Wn.2d 736,746(2006).

As the supreme court stated in state v. tili,139 Wn.2d116 117(1999): "The assault statute does not define the specific unit of prosecution in terms of each physical act against a victi Rather, the legislature defined assault only as that occurring when an individual assaults another.id

This case presents the perfect set of facts for this court to devulge and help give guidance to other courts and officials when it comes to sentencing offenders to crimes of assault. Review should be granted.

#### CONCLUSION

This court should grantpetitioner's motion for discretion-ary review and also review the double jeopardy issues.

Respectfully submitted this 2nd day of August,2014.



A handwritten signature in black ink, consisting of a stylized first name and a last name, positioned above a horizontal line.

CERTIFICATE OF SERVICE

I certify that on this date I mailed the following documents to which is affixed, by U.S mail, postage pre-paid to.

Ronald R. Carpenter  
Supreme Court Clerk  
PO Box 40929  
Olympia, Wa. 98504-0929

AND TO:

Renee S. Townsley  
Court of Appeals Clerk Div.3  
500 N. Cedar ST.  
Spokane, Wa. 99201

Dated this 1st day of August, 2014 at Connell, Wa.

  
MARIO NOYOLA PRO SE

The Court of Appeals

of the

State of Washington

Division III

FILED

MAY - 9 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

STATE OF WASHINGTON, )  
)  
)  
Respondent, )  
)  
v. )  
)  
)  
MARIO NOYOLA, )  
)  
Appellant. )  
\_\_\_\_\_ )

No. 30736-1-III

COMMISSIONER'S RULING

Mario Noyola appealed the Grant County Superior Court's February 28, 2012 judgment and sentence, which the court entered on a jury finding that Mr. Noyola had committed custodial assault, intimidation of a public servant, and third degree assault (law enforcement officer). He challenged the third degree assault conviction on the ground it violated the prohibition against double jeopardy. He also challenged the length of the term of community custody imposed, and the fact that the judgment and sentence

did not specify that the term of confinement when added to the term of community custody could not exceed the statutory maximum sentences for the convictions. Mr. Noyola's statement of additional grounds for review raised identical issues.

The State appropriately conceded all three issues. This Court therefore remanded the matter to the superior court for re-sentencing in June 2013. The order of remand directed the State to file in the court of appeals a copy of the amended judgment and sentence once it was obtained. The Court indicated it would then dismiss the appeal as moot, or it would consider any argument Mr. Noyola wished to make that other issues remained in his appeal.

The superior court entered its second amended judgment and sentence on September 10, 2013. The judgment dismissed the third degree assault conviction, imposed 12 months of community custody, and imposed 60 months for intimidating a public servant, which is a class B felony that has a statutory maximum of 10 years. *See* RCW 9A.76.180(4) and RCW 9A.20.021(b).

Mr. Noyola subsequently filed a supplemental statement of additional authorities, in which he argued that his statutory maximum for intimidating a public servant was 68 months, the alleged high end of his standard range. He misinterprets the statutes. The new sentence complies with RCW 9.94A.701(9), which states that the community custody term "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*



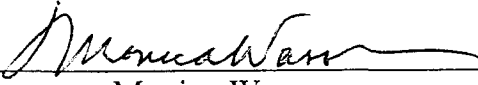
No. 30736-1-III

*maximum* for the crime.” (Emphasis added.) Here, the 60-month sentence of confinement added to 12 months of community custody does not exceed the statutory maximum of ten years (120 months).

Mr. Noyola also argues that the Court should review the double jeopardy issue, even though it is moot, to give guidance to other courts. This Court has determined no such need exists, as the law is fully developed in this area.

Accordingly, IT IS ORDERED, the appeal is dismissed as moot.

May 9 , 2014

  
\_\_\_\_\_  
Monica Wasson  
Commissioner

**FILED**  
**JULY 30, 2014**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION THREE**

STATE OF WASHINGTON,	)	
	)	No. 30736-1-III
Respondent,	)	
	)	
v.	)	
	)	ORDER DENYING
MARIO NOYOLA, JR.,	)	MOTION TO MODIFY
	)	COMMISSIONER'S RULING
Appellant.	)	

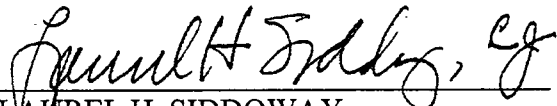
Having considered appellant's motion to modify the commissioner's ruling of May 9, 2014, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

PANEL: Judges Brown, Korsmo, Fearing

DATED: July 30, 2014

FOR THE COURT:

  
LAUREL H. SIDDOWAY  
CHIEF JUDGE