No. 97178-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ALAN NORD,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF RESPONDENT

Alan Nord, the respondent, asks this Court to deny the State's petition for discretionary review.

B. RESTATEMENT OF ISSUE

Sentences that exceed the statutory maximum are unlawful. Mr. Nord was sentenced on two convictions: delivery of a controlled substance and possession of a controlled substance. His total concurrent sentence of confinement was 10 years. The statutory maximum for delivery is 10 years while the maximum for possession is five years. Although he received a concurrent sentence of 10 years, the judgment and sentence imposed a one-year term of community custody on the sentence for possession. Is this sentence of 11 years—in excess of the statutory maximum of 10 years—unlawful?

C. RESTATEMENT OF THE CASE

In 2013, Mr. Nord first appealed convictions for delivery of a controlled substance, possession of a controlled substance, and attempting to elude a pursuing police vehicle. The Court of Appeals affirmed the drug convictions, but reversed the eluding conviction. CP 47; State v. Nord, 186 Wn. App. 1032 (2015) (unpublished), review denied, 184 Wn.2d 1002, 357 P.3d 665 (2015). The court remanded for resentencing. CP 39, 47.

At resentencing in 2016, the trial court again sentenced Mr. Nord to 10 years' of confinement on the delivery conviction. CP 48-50. This sentence was ordered to run concurrent with the two-year sentence for simple possession. CP 48-50. Over Mr. Nord's objection, the court ordered Mr. Nord to serve one year of community custody on top of the total sentence of 10 years. CP 51. Recognizing this was problematic, the court wrote a notation on the judgment and sentence, instructing that "community custody to be imposed only if defendant is released from prison early so there is still time available to serve on community custody." CP 51.

In the second appeal, Mr. Nord argued this was an unlawful sentence because the sentence exceeded the statutory maximum term of 10 years. CP 63; State v. Nord, 199 Wn. App. 1033 (2017) (unpublished). The State conceded that the trial court erred by imposing a sentence that exceeded the statutory maximum term of confinement. CP 63. The Court of Appeals reversed and remanded for proceedings consistent with its decision. CP 64.

At the remand proceedings, Mr. Nord asked the court to impose a lawful sentence of nine years' confinement and one year of community custody for the delivery conviction. RP 4. The State opposed Mr. Nord's request and asked that the Court simply strike both the notation about

community custody and the term of community custody on the delivery conviction. RP 3, 5. The State argued that the trial court did not have authority under the Court of Appeals' mandate to resentence Mr. Nord on the delivery conviction. RP 5. The trial court agreed with the State's reading of the Court of Appeals' decision and ruled in the State's favor. RP 5-6; CP 67. This left standing a one-year term of community custody on the possession conviction.

Mr. Nord appealed again. The Court of Appeals rejected Mr. Nord's argument that the trial court mistakenly believed it did not have discretion on remand to resentence him on the delivery conviction. Slip op. at 1. The Court of Appeals, however, agreed with Mr. Nord's argument that the one-year term of community custody associated with the possession conviction was unlawful and ordered it be stricken. Slip op. at 1-2. The Court of Appeals reasoned that "because [Mr. Nord's] 10-year total term of confinement in addition to the 12-month community custody term exceeded the 5-year maximum for unlawful possession, his judgment and sentence is unlawful." Slip op. at 9.

The State moved for reconsideration. The Court of Appeals denied the State's motion on April 8, 2019. The State seeks this Court's review.

D. ARGUMENT ON WHY REVIEW SHOULD BE DENIED

The unpublished decision by the Court of Appeals is not in conflict with precedent and the issue presented is not one of substantial public interest. The Court should deny review.

The Court of Appeals correctly remanded with instruction that the trial court strike the one-year term of community custody associated with the conviction for possession of a controlled substance. Slip op. at 7-9.

To summarize, Mr. Nord was sentenced on two current offenses: (1) delivery of a controlled substance; and (2) possession of a controlled substance. CP 49-50. The statutory maximum on delivery is 10 years' confinement while the maximum for possession is five years. RCW 69.50.401(2)(b); RCW 69.50.4013(2); RCW 9A.20.021(1)(b)-(c). The trial court imposed 10 years' confinement on the delivery conviction (the maximum) and two years' confinement on the possession conviction. CP 50. In connection to the conviction for possession, the court also ordered one year of community custody. CP 50, 66.

When a defendant is sentenced on two or more current offenses, the sentences "shall be served concurrently" unless the sentencing court imposes an exceptional sentence. RCW 9.94A.589(1)(a). Because Mr. Nord was sentenced on two current offenses and the trial court did not impose an exceptional sentence, Mr. Nord was correctly ordered to serve the sentences concurrently (as opposed to consecutively). CP 50.

Excluding some inapplicable exceptions, "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.505(5).

Here, given the concurrent nature of the sentences and the sentence of ten years' confinement on the delivery conviction, it is unlawful to impose a one-year term of community custody on top. It results in a sentence of 11 years, which exceeds the statutory maximum of 10 years on the delivery conviction. It is effectively an unlawful consecutive sentence, not a concurrent sentence. This is unlawful.

Moreover, the legislature has provided that the sentencing court must reduce a term of community custody "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); State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

Here, given the concurrent nature of the sentences, the trial court was required to reduce the one-year term of community custody to zero because otherwise it results in a total sentence beyond the statutory maximum of 10 years on the delivery conviction. In re Pers. Restraint of

Johnson, No. 50461-8-II, slip op. (Wash. Ct. App. Dec. 5, 2017) (unpublished).[1]

Reading the foregoing statutes in this manner is consistent with principles of statutory interpretation. In determining legislative intent, the court considers the text, the context of the statute, related provisions, amendments, and the statutory scheme as a whole. State v. Conover, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). The purpose of reading related provisions together is "to achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes." State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282 (2000).

The State argues that the provisions of the Sentencing Reform Act, specifically RCW 9.94A.701(9), should be read in isolation. The State argues there is no problem with the trial court imposing one year of community custody on the possession conviction because Mr. Nord received a sentence of two years' confinement on that offense and the statutory maximum for that offense is five years. This reading fails to harmonize RCW 9.94A.701(9) with RCW 9.94A.589(1)(a) (generally requiring concurrent sentences) and RCW 9.94A.505(5) (forbidding sentences beyond the statutory maximum).

[1] Cited as persuasive authority. GR 14.1.

Moreover, statutes should be interpreted to avoid unlikely, absurd, or strained results. State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). The State's myopic interpretation of RCW 9.94A.701(9) results in anomalies, as a hypothetical illustrates. Imagine that Mr. Nord was convicted of *two* counts of delivery of a controlled substance (instead of one count of delivery and one count of simple possession). Suppose further that the sentencing court imposed two concurrent sentences of ten years' confinement on both convictions. Even the State would have to concede that imposing one year of community custody would violate RCW 9.94A.701(9). In this hypothetical, Mr. Nord would not serve any community custody and receive 10 years' punishment.

And yet the State insists a different result was warranted here because Mr. Nord was sentenced to two years' confinement on the conviction for simple possession (a less serious crime than delivery). In other words, because he was convicted of a less serious crime and the sentencing court imposed a lesser term of confinement on that conviction, the State argues Mr. Nord should receive a sentence of 11 years' punishment. It is unlikely that this was the intent of the Legislature in enacting RCW 9.94A.701(9).

In seeking review, the State asserts the unpublished decision is in conflict with published decisions by the Court of Appeals. RAP

13.4(b)(2). In support, the State relies on cases interpreting previous versions of the Sentencing Reform Act. The State principally relies on State v. Acrey, 97 Wn. App. 784, 899 P.2d 17 (1999). The problem for the State is that Acrey did not interpret RCW 9.94A.701(9). That provision was not discussed in Acrey because it did not go into effect until shortly before that decision was issued. Boyd, 174 Wn.2d at 472. Thus, Acrey is not on point and any perceived conflict with the decision here is superficial.

The State also cites State v. Thomas, 150 Wn.2d 666, 80 P.3d 168 (2003). Thomas involved application of special sentencing rules applicable to firearm enhancements. The statutes at issue in Thomas provided that the firearm enhancements ran *consecutive* to the longest concurrent base sentence and to one another. Thomas, 150 Wn.2d at 669, 972-73. This is unlike the community custody provisions and related provisions at issue in this case. Thus, Thomas does not support the result advocated for by the State, let alone show a conflict meriting review. See RAP 13.4(b)(1).

Because the Court of Appeals' decision is not in conflict with precedent, review is unwarranted.

The State also seeks review under the RAP 13.4(b)(4), claiming the issue presented is one of substantial public interest. The State asserts that review is warranted to ensure consistent sentencing.

Just as the State fails to provide any authority demonstrating a conflict, the State fails to show that any inconsistent sentencing is occurring. Thus, this case does not present an issue of substantial public interest meriting review.

E. CONCLUSION

The Court of Appeals' decision does not conflict with precedent. And the issue presented is not one of substantial public interest. The State's petition for discretionary review should be denied.

DATED this 5th day of June, 2019.

Respectfully submitted,

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