

No. 62887-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Personal Restraint Petition of

NATHANIEL G. CRAVEN,

Petitioner.

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CLERK OF COURT
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SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE PRESENTED

Nathaniel Craven's sentence exceeded the statutory maximum. The trial court struck the unlawful sentence and imposed a new sentence without notifying Craven or his attorney and without holding a resentencing hearing. Where a sentence exceeds the statutory maximum, the remedy is to vacate the sentence and hold a new resentencing hearing at which the defendant has a right to be present with counsel. Is Craven therefore entitled to a full resentencing hearing?

B. STATEMENT OF THE CASE

In 2007, Nathaniel Craven pled guilty to one count of unlawful possession of a firearm in the second degree. State's Response Brief (SRB), Appendix C. At sentencing on March 4, 2008, the court calculated Craven's offender score as a 9 and his standard sentence range as 51 to 68 months. SRB, Appendix A. The court imposed a sentence of 64 months, which exceeded the statutory maximum of 60 months. SRB, Appendix A at 4; RCW 9.41.040(2)(b).

The Department of Corrections noticed the error in Craven's sentence and notified the sentencing judge. SRB, Appendix B. Accordingly, on March 28, 2008, the court entered an order

"amending" the judgment and sentence, which struck the unlawful sentence and imposed a new sentence of 60 months. SRB, Appendix B. The court "amended" the judgment and sentence without notifying Craven or his attorney, and without holding a hearing.

On January 9, 2009, Craven, *pro se*, filed a CrR 7.8 motion in the trial court, raising several issues. Among other things, he argued that he was entitled to be resentenced because the court amended his sentence in his absence and without counsel present. Petition. The trial court transferred the CrR 7.8 motion to this Court as a personal restraint petition (PRP). In its response to the PRP, the State conceded that the trial court had discretion to impose a new sentence anywhere within the standard range of 51 to 60 months, and that Craven had a right to be present with counsel when the court exercised that discretion. SRB at 6. The State therefore agreed with Craven that he was entitled to a new resentencing hearing.

This Court ruled that, in light of the State's concession of error, the PRP raised a debatable issue. Court's Ruling at 2. The Court therefore referred the matter to a panel of judges and appointed counsel to represent Craven. *Id.* The Court further

directed the parties to address "whether a correction of an illegal sentence constitutes a resentencing requiring the presence of the defendant where the modification makes the sentence less onerous." Id. (citing United States v. Erwin, 277 F.3d 727 (5th Cir. 2001)). The Court dismissed the petition as to the other issues Craven raised. Id.

C. ARGUMENT

BECAUSE THE ORIGINAL SENTENCE EXCEEDED THE STATUTORY MAXIMUM, CRAVEN WAS ENTITLED TO A FULL RESENTENCING HEARING AT WHICH HE HAD A RIGHT TO BE PRESENT WITH COUNSEL

1. A criminal defendant has a constitutional right to be present with counsel at any resentencing proceeding where the court imposes a new sentence. The right to be present at sentencing derives from the federal and state constitutions and court rule. Const. art. 1, § 22 ("In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel"); U.S. Const. amend. 14 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); CrR 3.4(a) ("The defendant shall be present . . . at the imposition of sentence").

The constitutional right to be present extends to any stage of the criminal proceedings where the defendant's "substantial rights

might be affected." State v. Walker, 13 Wn. App. 545, 557, 536 P.2d 657 (1975); see also Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (defendant must "be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge").

The right to be present applies at any resentencing proceeding where the court has discretion to determine the length of the new sentence. State v. Davenport, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007). When the original sentence is vacated and a new sentence pronounced, the defendant has just as much right to be present as at the original sentencing proceeding. State v. Verdugo, 78 N.M. 372, 373, 431 P.2d 750 (1967); Roberts v. State, 197 Kan. 687, 689-90, 421 P.2d 48 (1966).

A criminal defendant also has a constitutional right to the assistance of counsel at every "critical stage" of the proceedings. Const. art. 1, § 22; U.S. Const. amend. 6 ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"); State ex rel. Juckett v. Evergreen Dist. Court, Snohomish County, 100 Wn.2d 824, 828, 675 P.2d 599 (1984). Sentencing is a "critical stage" at which the

constitutional right to counsel applies. Gardner v. Florida, 430 U.S. 348, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005).

The right to counsel at sentencing is also specifically provided by court rule. CrR 3.1(a) ("The right to a lawyer shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise"); CrR 3.1(b)(2) ("A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review").

The right to counsel applies whenever the trial court considers any matter in connection with the defendant's sentence, which includes resentencing. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

2. Because Craven's sentence exceeded the statutory maximum, he was entitled to a full resentencing hearing at which he had a right to be present with counsel. The Washington Supreme Court has consistently and repeatedly held that a sentence in excess of statutory authority is subject to challenge and the defendant is entitled to be resentenced. E.g., In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869-72, 50 P.3d 618 (2002)

(and cases cited therein); State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999). "When a sentence has been imposed for which there is no authority of law, the trial court has the *power and duty to correct the erroneous sentence, when the error is discovered.*" In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (citation omitted).

It is also well-established that a court exceeds its statutory authority when it imposes a sentence beyond the statutory maximum. 9.94A.505(5) ("a court may not impose a sentence providing for a term of confinement . . . which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW"); In re Pers. Restraint of Brooks, ___ Wn.2d ___, 211 P.3d 1023, 1026 (2009); State v. Brooks, 107 Wn. App. 925, 933, 29 P.3d 45 (2001).

When the sentence exceeds the statutory maximum, the remedy is to vacate the original sentence and impose a new sentence that does not exceed the statutory maximum. State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005).

When that occurs, the defendant is entitled to a full resentencing hearing. When a court vacates a sentence, there is no longer a final sentence, and resentencing is an entirely new sentencing proceeding. In re Pers. Restraint of Skylstad, 160

Wn.2d 944, 950, 162 P.3d 413 (2007); State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009); State v. McNeal, 142 Wn. App. 777, 786-87, 787 n.13, 175 P.3d 1139 (2008). The defendant is entitled to a full adversarial proceeding at which he may raise new issues pertaining to his sentence. Toney, 149 Wn. App. at 792. The defendant therefore has a right to be present with counsel at the new sentencing proceeding. Rupe, 108 Wn.2d at 741; Davenport, 140 Wn. App. at 932.

Here, Craven's original sentence exceeded the statutory maximum. The trial court was therefore required to vacate the original sentence and impose a new sentence within the statutory maximum. Craven was entitled to an entirely new sentencing proceeding at which he could raise new issues challenging his sentence. The court's failure to conduct a full resentencing hearing or provide Craven an opportunity to be present with counsel violated Craven's constitutional rights to be present and to the assistance of counsel.

Moreover, it is well-established under a separate line of authority that a defendant is entitled to a full resentencing hearing when correction of an erroneous sentence reduces the standard sentence range. State v. Kilgore, 141 Wn. App. 817, 824-25, 172

P.3d 373 (2007), rev. granted 164 Wn.2d 1001 (2008) (and cases cited therein).

Here, correction of the erroneous sentence reduced the standard range and Craven was therefore entitled to a full resentencing hearing. The trial court originally calculated Craven's standard range as 51 to 68 months, which exceeded the statutory maximum of 60 months. SRB, Appendix A; RCW 9.41.040(2)(b). Because the standard range exceeded the statutory maximum, the statutory maximum established the correct upper limit of the standard range. Brooks, 107 Wn. App. at 933; RCW 9.94A.599 ("If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence"). Thus, the correct standard range was 51 to 60 months, not 51 to 68 months as the trial court originally believed. Because correction of the sentence reduced the standard range, Craven was entitled to a full resentencing hearing at which he had a right to be present with counsel.

3. The remedy is remand for a full resentencing hearing.

Where a defendant's right to be present at resentencing is violated, the remedy is remand for a new resentencing hearing at which he

may exercise his right to be present. Davenport, 140 Wn. App. at 927.

Moreover, the complete denial of counsel at a critical stage such as sentencing is presumptively prejudicial. Golden v. Newsome, 755 F.2d 1478, 1483 (11th Cir. 1985) (citing United States v. Cronin, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Chapman v. California, 386 U.S. 18, 23 n. 8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Gardner, 430 U.S. at 358; Mempa v. Rhay, 389 U.S. 128, 133, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967)).

Obviously, where the precise sentence for a particular offense is mandatorily fixed by law such that its imposition is merely a ministerial ceremony, with no discretion to be exercised by the sentencing judge, the absence of counsel at such a proceeding could not *possibly* be prejudicial. In that rare and narrow circumstance, the legal presumption of prejudice due to the absence of counsel would not apply. Whenever the sentencing proceeding is more than ministerial, however, the presence of counsel is essential to guide the sentencing court in the exercise of its power and discretion, and to protect the rights and interests of the defendant; the absence of counsel is therefore legally presumed to be prejudicial if the sentencing court had the legal authority to impose a more lenient sentence than it actually did.

Newsome, 755 F.2d at 1483 n.9.

Here, the new sentencing proceeding was more than ministerial. The trial court had authority to impose a sentence anywhere within the 51- to 60-month standard range. The court

therefore had authority to impose a sentence that was more lenient than the 60-month sentence it actually imposed. The absence of counsel at the resentencing was therefore prejudicial and Craven is entitled to a new sentencing hearing at which he has a right to be present with counsel.

D. CONCLUSION

Because the trial court struck the original sentence and imposed a new sentence without notifying Craven or his attorney and without holding a hearing, the sentence must be reversed and vacated. Craven is entitled to a full resentencing hearing on remand at which he has a right to be present with counsel.

Respectfully submitted this 18th day of August 2009.


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DIVISION ONE**

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Personal Restraint Petition of)	
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)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, SIMON ADRIANE ELLIS, STATE THAT ON THE 18TH DAY OF AUGUST, 2009, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> NATHANIEL G. CRAVEN DOC# 996352 MONROE CORRECTIONAL COMPLEX PO BOX 7001 MONROE, WA 98272-7001	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF AUGUST, 2009.

x 

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