63508-5

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NO. 63508-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD BARKHOFF,

Appellant.

REC'D
OCT 28 2009
King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 OCT 28 PM 4:

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

The Honorable Jeffrey Ramsdell, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The combination of prison time and community custody potentially exceeds the statutory maximum sentence for appellant's crimes.

2. The judgment erroneously indicates that appellant's offender score is 9.

Issues Pertaining to Assignments of Error

1. The statutory maximum sentence for appellant's crimes is 120 months. Did the sentencing court err when it sentenced appellant to 120 months plus a term of community custody without clarifying that the combined terms may not exceed the statutory maximum sentence?

2. Although appellant's offender score was calculated as an 8, the judgment indicates it is 9. Should the judgment be corrected?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Clifford Barkhoff with one count of delivering cocaine and one count of possessing cocaine with intent to deliver. CP 1-5. A jury found him guilty, and the court imposed a standard range sentence of 120

months in prison plus a period of community custody. CP 6, 151, 153-154. Barkhoff timely filed his Notice of Appeal. CP 159-160.

C. ARGUMENT

1. THE COMBINATION OF CONFINEMENT AND COMMUNITY CUSTODY POTENTIALLY EXCEEDS THE STATUTORY MAXIMUM SENTENCE.

Barkhoff's drug offenses are class B felonies and carry a maximum sentence of ten years (120 months). RCW 69.50.401(1), (2)(a); RCW 9A.20.021(1)(b). The sentencing court imposed that maximum sentence for each of Barkhoff's crimes. CP 153. The court then added community custody for "9 to 12 months or for the entire period of earned early release awarded under RCW 9.94A.728 whichever is longer." CP 154.

When, as here, a sentence may potentially exceed the statutory maximum because of a combination of incarceration and community custody, the sentence does not unlawfully exceed the maximum and is not indeterminate or otherwise invalid if it is clarified to state that the combined term of community custody and confinement shall not exceed the statutory maximum. In re Pers. Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009); see also State v. Sloan, 121 Wn. App. 220, 223, 87 P.3d 1214 (2004). Barkhoff's judgment must be clarified in this manner.

2. THE JUDGMENT MISTAKENLY INDICATES AN OFFENDER SCORE OF 9.

Scrivener's errors are clerical errors that are the result of mistake or inadvertence, especially in writing or copying something on the record. See Black's Law Dictionary, 582, 1375 (8th ed. 1999). Under CrR 7.8(a), clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time of its own initiative or on the motion of any party. "A challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal." State v. Ford, 137 Wn.2d 472, 478, 973 P.2d 452 (1999) (citing State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994)).

Barkhoff's offender score on the drug charges was calculated as 8. CP 91-92. The judgment, however, mistakenly indicates his score is 9. CP 151. The standard range is the same for each score. CP 91-92. But the judgment should be corrected to avoid any confusion.

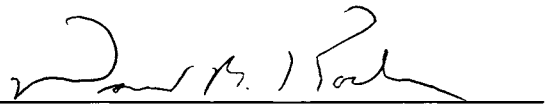
D. CONCLUSION

This Court should remand Barkhoff's case to clarify and correct his judgment and sentence.

DATED this 28th day of October 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CLIFFFORD BARKHOFF
DOC NO. 307720
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF OCTOBER, 2009.

x Patrick Mayovsky