

NO. 64350-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS MILLER,

Appellant.

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2010 MAR 31 PM 4:02

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

The Honorable Ellen J. Fair, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court abused its discretion in revoking Miller's special sex offender sentence alternative (SSOSA).

2. The ten-year community placement term imposed upon revocation of the SSOSA is not authorized by statute.

3. The court failed to credit the time appellant served on community custody during the SSOSA against the community placement ordered after revocation in violation of state and federal constitutional protections against double jeopardy.

Issues Pertaining to Assignments of Error

1. A court abuses its discretion when its decision is based on an erroneous understanding of the law. Did the court abuse its discretion when it revoked appellant's SSOSA in part because it erroneously believed if it sanctioned appellant for violating the conditions of his community custody, the time spent in confinement would reduce appellant's remaining community custody time?

2. Former RCW 9.94A.120(10) (1998) authorizes the court to impose community custody for three years or the amount of earned early release time, whichever is longer. Did the court err in imposing a ten-year term of community placement when appellant's SSOSA was revoked?

3. The double jeopardy clauses of the state and federal constitutions protect against multiple punishments for the same offense and require that punishment already exacted be credited to the offender. Do these principles require the time served on community custody during the SSOSA be credited against a similar term imposed upon revocation?

B. STATEMENT OF THE CASE

The Snohomish County prosecutor charged Nicholas Miller with first-degree rape of a child in 1999. CP 1. Miller was found guilty after a stipulated facts bench trial. CP 147-48. The court imposed a Special Sex Offender Sentence Alternative (SSOSA). CP 140. The court ordered 123 months confinement, but suspended all but four months. CP 140. Miller was to serve the remainder on community custody. CP 140, 144.

In 2001, the court found Miller violated his community custody conditions and sanctioned him to 45 days in jail. CP 99-100. The court warned Miller any further violations would result in revocation of the SSOSA. RP 98.

Eight years later, with only one year left to go on his SSOSA, the court found Miller again violated his community custody conditions. CP 140. On October 14, 2009, the court revoked the SSOSA and imposed the original 123 months confinement, with credit for time served, and 10 years

of community placement. CP 26-28. Notice of appeal was timely filed.
CP 25.

C. ARGUMENT

1. THE COURT ABUSED ITS DISCRETION IN REVOKING MILLER'S SSOSA BECAUSE IT ERRONEOUSLY BELIEVED ANY SANCTIONS IT IMPOSED WOULD DECREASE THE REMAINING COMMUNITY CUSTODY TERM.

A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)). The trial court here abused its discretion in revoking Miller's SSOSA because the decision was based in part on an erroneous understanding of the law. See State v. Badger, 64 Wn. App. 904, 827 P.2d 318 (1992) (reversing SSOSA revocation because court erroneously believed it did not have discretion to impose sanctions in lieu of revocation).

In considering options at the revocation hearing, the court voiced concern that there was not enough time remaining in the SSOSA period of community custody for Miller to learn and demonstrate new behaviors. RP 101. As of the hearing, approximately one year was left on Miller's term of community custody. Id. However, the court mistakenly believed

that if sanctions were imposed for the violations, there would be even less community custody time for Miller to learn and demonstrate new behaviors in the community. RP 101. “There’s only about a year, less than a year, if he would be incarcerated for some, perhaps significant portion of that period of time.” RP 101.

The court appears to have believed that the community custody term would continue to run while Miller was potentially incarcerated as a sanction for violations. But this is not the case. Community custody is tolled for any period that the offender is in confinement for any reason. Former RCW 9.94A.170(3) (1998);¹ RCW 9.94A.171(3). Thus, if the court had imposed sanctions for each of the seven violations, Miller could have served seven 45-day sanctions for a total of 315 days. After serving the sanctions, Miller’s remaining year of community custody would still be there, untouched and waiting for him.

This incorrect understanding of the law appears to have played a significant role in the court’s decision to revoke the SSOSA, because the court also acknowledged that there were “rational reasons not to revoke his SSOSA.” RP 101. Specifically, the court noted Miller would be incarcerated for a very lengthy period of time and that Miller had been far

¹ Former RCW 9.94A.170(3) provides, “Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.” Current RCW 9.94A.171(3) is substantially the same.

more successfully than the court thought he would be. RP 101. Additionally, the court acknowledged revocation of the SSOSA would result in Miller being incarcerated “beyond what’s actually necessary, given his level of risk.” RP 102.

The court abused its discretion in revoking Miller’s SSOSA because that decision was based in part on an incorrect view of the law. Miller therefore requests this court reverse the revocation of his SSOSA and remand so the court may exercise its discretion.

2. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING TEN YEARS OF COMMUNITY PLACEMENT.

A court may impose only those sentences authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). “When a sentence has been imposed for which there is no authority in law, the trial court has the duty and power to correct the erroneous sentence, when the error is discovered.” In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), overruled in part on other grounds by State v. Sampson, 82 Wn.2d 663, 513 P.2d 60 (1973)).

Interpretation of a statute is a question of law reviewed de novo. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). The goal of statutory construction is to carry out legislative intent. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). “[C]ourts are to give effect to that plain meaning as an expression of legislative intent.” State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004). The plain language of the Sentencing Reform Act (SRA) requires that Miller’s community placement term be stricken.

In 1998, when Miller’s offense was committed, the SRA provided for community custody for three years or up to the period of earned early release time, whichever is longer. Former RCW 9.94A.120(10) (1998);² State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) (sentencing courts must look to the statute in effect at the time of the offense). Nothing in the SRA authorized a court to impose ten years of community placement, as was

² Former RCW 9.94A.120(10)(a) (1998) provides in relevant part:

When a court sentences a person to the custody of the department of corrections for an offense categorized as a sex offense committed on or after June 6, 1996, the court shall, in addition to other terms of the sentence, sentence the offender to community custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

done in this case. Because this term of community placement was not authorized by statute, it should be stricken from Miller's Judgment and Sentence. See In re Pers. Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005) (holding imposition of an unauthorized sentence is grounds for reversing the erroneous portion of the sentence) (quoting State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980)).

3. DOUBLE JEOPARDY PRINCIPLES REQUIRE THAT TIME SERVED ON COMMUNITY CUSTODY DURING A SSOSA BE CREDITED AGAINST THE TERM OF COMMUNITY CUSTODY ONCE THE SSOSA IS REVOKED.

The double jeopardy clauses of the state³ and federal⁴ constitutions guarantee three separate protections, including the protection against "multiple punishments for the same offense." State v. Gocken, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995) (citations omitted); accord State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). The double jeopardy clause also requires that punishment already served be fully credited on re-sentencing if an initial sentence is reversed as unlawful. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

³ Const. art. I, § 9 provides: "[n]o person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense ."

⁴ In relevant part, the Fifth Amendment to the United States Constitution provides: "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb"

In Pearce, the court held “the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully ‘credited’ in imposing sentence upon a new conviction for the same offense.” Pearce, 395 U.S. at 718-19 (note omitted). Community custody is punishment for purposes of double jeopardy. See State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004) (holding total punishment that may not exceed the statutory maximum for a particular offense includes both imprisonment and community custody).

Miller’s nine years of community custody is punishment that was “already exacted” under Pearce. Although he had nearly completed the first term before revocation of the SSOSA, the court directed him to serve a second. By failing to credit Miller for the time he served on community custody, the court violated Miller’s rights to be free from multiple punishments for the same offense.

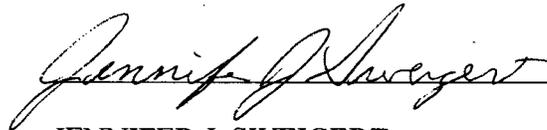
D. CONCLUSION

For the foregoing reasons, this Court should reverse the order revoking Miller's SSOSA.

DATED this 31st day of March, 2010.

Respectfully submitted,

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Attorney for Appellant

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

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| STATE OF WASHINGTON |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 64350-9-1 |
| |) | |
| NICHOLAS MILLER, |) | |
| |) | |
| Appellant. |) | |

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 31ST DAY OF MARCH 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WALTER SOWA
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH 2010.

x *Patrick Mayovsky*