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King County Prosecutor  
Appellate Unit

NO. 65375-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

KERRY PARENT,

Appellant.

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

REPLY BRIEF OF APPELLANT

JENNIFER L. DOBSON  
DANA M. LIND  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206)623-2373

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A. ARGUMENT IN REPLY

THE TRIAL COURT EXCEEDED ITS SENTENCING  
AUTHORITY.

Appellant asserts the trial court exceeded its sentencing authority under RCW 9.95.210(1) when it stacked probationary periods beyond the statutory limit of two years. Brief of Appellant (BOA) at 3-6. In response, the State claims the trial court acted within its discretion because the statutory language unambiguously manifests the Legislature's intent to permit the stacking of probation periods beyond the two year limit whenever there are multiple counts. Brief of Respondent (BOR) at 8-11. The State misreads the statute.

Where a statute expressly sets forth a maximum probation period, "the permissible limits of a trial judge's discretion are bounded by the statute; he is powerless to act beyond it." State v. Eilts, 23 Wn. App. 39, 44, 596 P.2d 1050 (1979) (citations omitted).

RCW 9.95.210(1) provides:

In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.

Emphasis added.

Here the maximum term of sentence was two years (one year for each of the two counts). Under the plain language of the statute, the trial court was only therefore only authorized to impose a total probation period of two years. Arguing to the contrary, the States suggests RCW 9.95.210(1) plainly and unambiguously manifests the Legislature's intent to permit a trial judge to stack multiple maximum probationary periods based on each count even where there is a single information and single sentencing order. BOR at 7-9. However, such an expansive reading of the court's authority is not supported by the text or persuasive case law.

A similar argument was made and rejected in Maryland v. Oliver, 302 Md. 592, 490 A.2d 242 (1985). In Oliver, the defendants faced suspended sentences on multiple counts. The law in effect permitted the trial court to suspend the sentence and grant probation "not in excess of five years." Id. at 596. The trial court imposed probation periods on each count separately and ran them consecutively, extending the total probation period well beyond the statutory five year limit (up to 50 years in one case). Id. at 598.

As here, in Oliver, the State argued that the text plainly permitted stacking because it used the singular term “sentence” and because the statute did not expressly prohibited stacking. The Oliver court rejected these arguments:

The State asserts that “the Legislature by its express language limited the grant of probation to five years solely in the context of a sentence for a single crime.” ... We do not think that the language of the statute, in itself, is so clear and unambiguous as to compel [this] view. We are not persuaded otherwise by the State's reliance upon the legislature's use of the singular rather than the plural of “conviction” and “sentence,” nor are we swayed by the State's notion that “[h]ad the Legislature intended to mandate that probation may extend only to five years no matter how many crimes a defendant may commit at one time, the Legislature would have manifested such an intent by simply stating what it meant in the statute.” Legislative actions in the past have demonstrated that this is not necessarily so.

Id. at 600.

The Oliver went on to review case law from several other jurisdictions regarding the stacking of probation periods and concluded:

We are not aware of a case in any jurisdiction which permits consecutive periods of probation as to a multi-count charging document if the aggregate of the probationary periods exceeds a statutory limitation or which allows, except for expressly specified, narrow statutory exceptions, a probationary term in excess of the limitation.

Id. at 607 (emphasis in original). The Court concluded the trial court had exceeded its statutory authority when it stacked probation periods beyond the statutory limit of five years. Id. at 611.

While Oliver is not binding authority, its analysis is sound and its reasoning is on point. RCW 9.95.210(1) does not unambiguously manifest the legislative intent to permit the stacking of maximum probation terms. Appellant, therefore, asks this Court to remand for resentencing within the statutory limits.

B. CONCLUSION

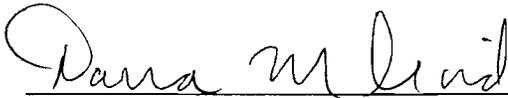
For the reasons stated above and those found in appellant's opening brief, appellant respectfully asks this Court to remand with instruction to impose a 24-month probation period.

DATED this 19<sup>th</sup> day of January, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
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JENNIFER L. DOBSON, WSBA 30487

  
\_\_\_\_\_  
DANA M. LIND, WSBA 28239  
Office ID No. 91051  
Attorneys for Appellant