

65562-1

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COA NO. 65562-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICARDO PEREZ,

Appellant.

REC'D

MAR 14 2011

King County Prosecutor
Appellate Unit

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

The Honorable Michael C. Hayden, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT MISAPPREHENDED THE SCOPE OF ITS SENTENCING AUTHORITY IN DECLINING PEREZ'S REQUEST FOR AN EXCEPTIONAL SENTENCE.

The State claims Perez cannot appeal his standard range sentence. Brief of Respondent (BOR) at 7-9. The length of a sentence is generally not subject to appeal if the punishment falls within the standard sentencing range. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). This general rule, however, does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentence. Williams, 149 Wn.2d at 147. Here, the underlying legal conclusion and determination is that the trial court lacked authority to order Perez into a Community Protection Program as part of or in conjunction with an exceptional sentence. It is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies. Id.

The trial court here made a legal error that affected its discretionary decision not to impose the exceptional sentence. A court abuses its discretion when it relies on an erroneous view of the law. State v. Brown, 145 Wn. App. 62, 81, 184 P.3d 1284 (2008) (trial court abused its discretion when it imposed a standard range sentence based on erroneous legal view about seriousness level of offense). Perez is able to

appeal the trial court's failure to impose an exceptional sentence because the court's decision is premised on a misunderstanding of the law and its range of sentencing authority. "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority." State v. McGill, 112 Wn. App. 95, 102, 47 P.3d 173 (2002).

The State cites State v. Garcia-Martinez for the proposition that the defense can only appeal the refusal to grant an exceptional sentence if the trial court refuses to exercise discretion. BOR at 8-9 (citing State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). But Garcia-Martinez recognizes the refusal to impose an exceptional sentence on an "impermissible basis" is allowed. Garcia-Martinez, 88 Wn. App. at 330. Such a basis must include legal errors or abuses of discretion in the determination of what sentence applies. Williams, 149 Wn.2d at 147.

The State asserts the trial court did not have the authority to *order DSHS to accept Perez* into the Community Protection Program. BOR at 11. But the trial court had the authority to *order Perez* into the Community Protection Program. That is the dispositive point, which the trial court failed to grasp.

The record shows the trial court's decision not to impose an exceptional sentence turned on its erroneous belief that it did not have the authority to order Perez into the program: "If I could order him into a 24/7

halfway house where they would keep an eye on him all the time and give him treatment, if the Legislature would let me do that, I could do that. I don't have that. There are no such facilities available to me to put him in." 2RP¹ 17. The salient question in the trial court's mind was whether it could order Perez into the program. 2RP 10. The court concluded "I can't order that he do it." 2RP 10.

But it could. Trial courts have authority to order offenders to perform affirmative conduct as part of any standard or exceptional sentence. See RCW 9.94A.505(8) ("As a part of any sentence, the court may impose and enforce . . . affirmative conditions as provided in this chapter."); RCW 9.94A.703(3)(d) (as part of community custody, trial court may order offender to "[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community."); State v. Bernhard, 108 Wn.2d 527, 528, 741 P.2d 1 (1987), overruled on other grounds, State v. Shove, 113 Wn.2d 83, 88-89, 776 P.2d 132 (1989) (trial court had authority to impose 12 months inpatient treatment as an exceptional sentencing condition outside the

¹ Citations to 2RP (the 5/21/10 sentencing hearing) refer to the corrected transcript.

range of conditions allowed under a standard community supervision sentence).

Such affirmative conduct may include participation in drug, alcohol and mental health treatment. Bernhard, 108 Wn.2d at 528 (inpatient mental health treatment); RCW 9.94B.080 (outpatient mental health treatment); RCW 9.94A.607(1) (treatment for chemical dependency); State v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (alcohol treatment); State v. Powell, 139 Wn. App. 808, 819, 162 P.3d 1180 (2007), rev'd on other grounds, 166 Wn.2d 73, 206 P.3d 321 (2009) (drug treatment).

Trial courts cannot order a treatment provider to provide services as part of the judgment and sentence. That does not preclude the trial court from imposing these types of sentencing conditions and ordering offenders to comply with them. To hold otherwise would mean no court could impose treatment-related conditions because there is always the possibility that a provider will refuse to provide a designated service based on the provider's eligibility requirements or any other reason. A trial court's authority to fashion an appropriate sentence would be neutered and the statutes allowing for such conditions would be rendered inoperable.

Acknowledging this argument, the State alternatively complains "[t]he trial court could have ordered an exceptional sentence of 60 months

and directed Perez to apply to the program, but would then have few options to protect the community if Perez were rejected, or was terminated from the program." BOR at 16 n.6. According to the State, the court could only impose a 60-day sanction for a violation of his community custody and could not impose a standard range sentence, which would not have satisfied the trial court's concern for community protection. Id.

The State's argument wrongly presumes sanctions are the only response available in the event Perez did not comply with a Community Protection Program requirement. The plain language of RCW 9.94B.040(1) allows the court to modify its order of judgment and sentence if an offender violates any condition or requirement of a sentence.² See State v. Nason, 146 Wn. App. 744, 751, 192 P.3d 386 (2008), rev'd on other grounds, 168 Wn.2d 936, 233 P.3d 848 (2010) ("When an offender violates any requirement of a sentence, the trial court retains broad discretion to *modify the sentence or* impose additional punishment.") (emphasis added). Nothing in the statute prohibits the trial court from revoking the exceptional sentence in the event Perez were

² RCW 9.94B.040(1) provides "If an offender violates any condition or requirement of a sentence, *the court may modify its order of judgment and sentence* and impose further punishment in accordance with this section." (emphasis added).

unable to comply with the court's order to enter and remain in the Community Protection Program upon release from the DOC.

Furthermore, the trial court had the authority to make the exceptional sentence contingent on the availability of the Community Protection Program and could later modify the sentence in the unforeseen event that the program became unavailable to Perez for whatever reason. State v. Smith, __ Wn. App. __, __ P.3d __, 2011 WL 446865 at *2-3 (slip op. filed Jan. 27, 2011) (court could modify sentence where fundamental underpinning of the judge's sentencing decision (availability of county partial confinement program) was changed (county eliminated program) and the judge's sentencing objective was thereby undermined).

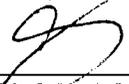
B. CONCLUSION

For the reasons stated, this court should reverse the standard range sentence and remand for resentencing.

DATED this 14th day of March 2011.

Respectfully Submitted,

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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 14TH DAY OF MARCH, 2011 I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICARDO PEREZ
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2011 MAR 14 PM 4:26



SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MARCH, 2011.

x Patrick Mayovsky