

COURT OF APPEALS

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NO. 33786-0-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

BRIAN P. JUSZCZYK,

Appellant.

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Chris Wickham, Judge  
Cause No. 04-1-02264-2

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in imposing a school bus route enhancement where the State assumed the burden of proving that the bus stop at issue was designated on maps submitted by school districts to Office of the Superintendent of Public Instruction.
02. The trial court erred in violating Juszczuk's Sixth Amendment right to a jury trial under Blakely v. Washington when it failed to sentence him under the statute in effect at the time of the commission of the offense where the jury was not required to identify the particular substance underlying Juszczuk's conviction for unlawful possession of a controlled substance (methamphetamine) with intent to deliver and where it cannot be determined based on the evidence presented the jury premised Juszczuk's conviction on methamphetamine base.
03. The trial court erred in permitting Juszczuk to be represented by counsel who provided ineffective assistance by failing to object to the trial court's failure to sentence Juszczuk under the statute in effect at the time of the offense, and by failing to argue that a sentence under the correct statute based on the evidence presented would have violated Juszczuk's Sixth Amendment right to a jury trial under Blakely v. Washington.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in imposing a school bus route enhancement where the State assumed the burden of proving that the bus stop at issue was designated on maps submitted by school districts to Office of the Superintendent of Public Instruction? [Assignment of Error No. 1].

02. Whether the trial court erred in violating Juszczyk's Sixth Amendment right to a jury trial under Blakely v. Washington when it failed to sentence him under the statute in effect at the time of the commission of the offense where the jury was not required to identify the particular substance underlying Juszczyk's conviction for unlawful possession of a controlled substance (methamphetamine) with intent to deliver and where it cannot be determined based on the evidence presented the jury premised Juszczyk's conviction on methamphetamine base? [Assignment of Error No. 1].
03. Whether the trial court erred in permitting Juszczyk to be represented by counsel who provided ineffective assistance by failing to object to the trial court's failure to sentence Juszczyk under the statute in effect at the time of the offense, and by failing to argue that a sentence under the correct statute based on the evidence presented would have violated Juszczyk Sixth Amendment right to a jury trial under Blakely v. Washington? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Brian P. Juszczyk (Juszczyk) was charged by first amended information filed in Thurston County Superior Court on July 26, 2005, with unlawful possession of methamphetamine with intent to deliver, with school-bus-route enhancement, contrary to RCWs 69.50.401(2)(b) and 69.50.435(a)(3). [CP 12].

The court denied Juszczyk's pretrial motion to suppress evidence and entered the following Findings of Fact and Conclusions of Law Denying Defendant's Motion to Suppress Under CrR 3.6:

#### FINDINGS OF FACT

##### I.

It was a Crime Stopper's tip that led law enforcement to the fifth wheel occupied by the defendant on October 19, 2004. Detectives Rudloff and DeHan contacted the defendant at his front door and had a conversation with him outside his trailer. The defendant granted consent to search his trailer while standing outside. He understood the Ferrier warnings given to him orally and in writing at the time he signed to consent to search form. He was not coerced and law enforcement obtained the defendant's consent in writing. The defendant's consent was not conditioned upon anything he identified in the written consent form.

##### II.

There are many disputed facts, which are not relevant to the decision in this case. One disputed fact is the defendant's consent to search Melody Ashby's belongings. The defendant said that his consent was limited to his belongings alone and withheld consent to search Ms. Ashby's. He said this limitation was conveyed initially and was at least made known prior to opening the dictionary box.

##### III.

The defendant admitted to Det. Rudloff that the dictionary lock box was his. The detective provided detail when describing his conversation with the defendant concerning the ownership of the lock box. The evidence is consistent with other witnesses, with the exception to the details as to what was specifically stated by the defendant. After finding the lock box, Det. Rudloff asked the defendant questions that elicited behavior from him that

tended to demonstrate that he was nervous. The detective observed this and he too became concerned enough about the defendant's behavior that he asked to move the conversation to a larger area in the living room. Det. Rudloff's conversation was consistent with a police investigation. The defendant first claimed that the lock box was not his, but after being challenged by Det. Rudloff, he admitted that the box was indeed his and he described in detail its contents. His description ultimately proved to be accurate.

#### IV.

The detective has very little interest in fabricating his testimony. The detective already had the two possible owners of the lock box identified, the defendant and Ms. Ashby. The detective had probable cause to obtain a search warrant to open the box. The fact that he did not obtain a search warrant supports his testimony that the defendant told him that the box was his, and that the detective believed him.

#### V.

The detective testified that after finding a number of incriminating items, the defendant offered a number of explanations exculpating himself. Initially, he stated that Ms. Ashby was the owner of the lock box, and then reluctantly changed his story.

#### VI.

Ms. Ashby's behavior during the search is circumstantial evidence that her and the defendant's testimony were less than credible. She and the defendant testified that he was angry with the police for searching the trailer in the first place. She did not, however, take any actions to protect herself or her belongings from being searched, when she had several clear opportunities to do so. She made no attempt to remove the lock box or any of the \$275 dollars found in the box, that she claimed to be lying just under her clothing on the bed. She took no action to stay at the trailer, either to monitor or limit the search. Once the lock box was discovered and only the key was

needed to reveal its contents, she retrieved the key from the main house and handed it directly to the defendant. The defendant accepted the key without comment or objection when it was clear that the detective fully intended to search the box.

From the foregoing Findings of Fact, the court makes the following:

### CONCLUSIONS OF LAW

I.

The consent to search form contained the appropriate Ferrier warnings. The defendant understood all three of his rights when he granted the detectives that permission to search his trailer.

II.

The defendant's claim that he limited the scope of his consent to his belongings only is not credible.

III.

Det. Rudloff's testimony is credible.

IV.

The defendant's credibility is suspect.

V.

Ms. Ashby's testimony is suspect.

VI.

The detectives reasonably believed that the lock box was included in the defendant's consent to search.

VII.

Where the defendant consents to a search of his belongings, and an item is later identified as one of his belongings and a subsequent search occurs, there is no violation of his Constitutional Rights.

VIII.

Based upon the above-mentioned Findings of Fact and Conclusions of Law, the defendant's motion to suppress under CrR 3.6 is hereby denied.

[CP 110-113].

Trial to a jury commenced on September 1, 2005, the Honorable Chris Wickham presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 09/01/05 173]. The jury returned a verdict of guilty as charged, including enhancement, Juszczuk was sentenced within his standard sentence range and timely notice of this appeal followed [CP 93-94, 98, 100-08].

02. Substantive Facts: CrR 3.6 Hearing

On October 19, 2004, at about 11:00 a.m., Detectives Jeff DeHan and Tim Rudloff, acting on a "crime stoppers tip," contacted Juszczuk at a travel trailer in which he was residing. [RP 08/29/05 11-15, 80]. Melody Ashby, Juszczuk's girlfriend was also in the trailer. [RP 08/29/05 17, 28]. Ashby told the officers that she did not live there and was only visiting. [RP 08/29/05 41].

Juszczuk denied the allegation of trafficking methamphetamine and consented to a search of the trailer. [RP 08/29/05 19, 41-42]. DeHan then went over the consent to search form

with Mr. Juszczuk as I filled the form out, read it to him in its entirety, and then handed him the form and asked him to read it as well before signing.

[RP 08/29/05 19-20].

The consent to search form stated the right to refuse the search of one's property unless the officer had a valid search warrant, in addition to advising that even after a consent to search, a person could withdraw or revoke consent at anytime. It also stated that a person could limit the scope of his or her consent to certain areas of the premises to be searched.

[RP 08/29/05 22; CP 24; State's Exhibit 1].

DeHan and Rudloff, accompanied by Juszczuk, then entered the residence and began the search. [RP 08/29/05 23, 33, 42-43]. Rudloff told Juszczuk that he "was going to search anything that (Juszczuk) would allow me to. And if he had a problem at any time to let me know." [RP 08/29/05 43]. Rudloff located a "dictionary lock box" situated between two mattresses in the bedroom. [RP 08/29/05 47]. Beneath the front cover "there was \$275 in cash laying right on top." [RP 08/29/05 47]. After initially denying the box was his [RP 08/29/05 47-48], Juszczuk consented to the search of the box, saying it was his and that it contained drug paraphernalia and approximately half an ounce of methamphetamine. [RP 08/29/05 25-26, 50]. Rudloff unlocked the box with a key supplied by Ashby: "She handed it to Mr. Juszczuk. Mr. Juszczuk handed it to me

and I opened the lock box.” [RP 08/29/05 53]. The box contained “a large amount of methamphetamine including scales and other packing equipment.” [RP 08/29/05 26, 50-51, 53]. Juszczuk told the detectives that the box was his and that “he was only selling methamphetamine to a few people.” [RP 08/29/05 27, 35, 50].

Neither DeHan nor Rudloff had any recollection of Ashby limiting the search of any items of her personal property or of Juszczuk saying he did not want the detectives to search any items of property that were not his. [RP 08/29/05 32, 34, 45].

Melody Ashby, who testified she was residing at the trailer, was asleep when the detectives arrived. [RP 08/29/05 56, 65]. Before leaving the trailer to go to the main residence, she told the detectives to get out of the trailer and to not search her things. [RP 08/29/05 60]. “We live on the side of a house, I went like into the house.” [RP 08/29/05 70]. When she returned to the trailer about 30 minutes later to “see what was going on(,)” she again told the detectives to get out of the trailer and to “stay out of (her) things and they - - nobody was listening to me.” [RP 08/29/05 61-62]. As a result of the incident, Ashby pled guilty to possession of methamphetamine. [RP 08/29/05 63, 75].

Juszczuk testified that at the time of the search he had been living in the trailer for about a year and that Ashby had resided there for “(a)

month or so.” [RP 08/29/05 78]. He reviewed the consent to search form with one of the detectives and consented to the search of his property. [RP 08/29/05 85, 90-91]. He limited the scope of the search to his property. [RP 08/29/05 98].

And I said, but don't you have to ask her if you can search her stuff. And they said, no, as long as you've given us consent we can search anything we need to.

[RP 08/29/05 85].

I asked them, didn't they need consent from her to go through her stuff because she seemed quite adamant when she walked out of the trailer about them not searching her stuff.

[RP 08/29/05 86].

Juszczuk told the detectives that the locked box disguised as a dictionary belonged to Ashby, that she had the key and that he thought the box contained jewelry. [RP 08/29/05 88-89].

### 03. Substantive Facts: Trial

Detective Jeff DeHan testified consistent with his CrR 3.6 testimony, noting that Juszczuk admitted that it was his trailer, that the lock box found in the bedroom, which contained drug paraphernalia and 63.3 grams of what subsequently tested positive for methamphetamine, was his and that he had been dealing methamphetamine to a few of his friends to make some money. [RP

08/31/05 42-51; RP 09/01/05 44, 77]. Juszczyk introduced Ashby as his girlfriend, saying she had spent the previous night. [RP 08/31/05 52; RP 09/01/05 19]. Juszczyk told Rudloff that Ashby “had stayed last night, but that he was the sole residence (sic) of the home. [RP 09/01/05 35]. The estimated street value of the of the seized methamphetamine was “a couple thousand dollars.” [RP 09/01/05 49]. Detective Tim Rudloff recalled Ashby “indicat(ing) that she had just spent the night there(,)” though he never had a conversation with her. [RP 09/01/05 54, 56].

At the time of the incident, the fifth-wheel trailer where Juszczyk was residing was within one thousand feet of a school bus route stop designated by the school district. [RP 08/31/05 61; RP 09/01/05 83-85, 94-95].

Melody Ashby testified consistent with her CrR 3.6 testimony, emphasizing that she had resided at the trailer for three weeks to a month leading up to the incident, that she had used the dictionary box, that she had placed it where it was eventually seized and that she had the key. [RP 09/01/05 113, 119, 121-22, 129 133].

Brian Juszczyk also testified consistent with his CrR 3.6 testimony, again noting that he permitted the police to search because he had nothing to fear, that he had never seen the dictionary box before it was seized and that he never told the detectives that the box was his or what was in it or

that he was selling methamphetamine to his friends. [RP 09/01/05 147, 152-55, 165-66].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN IMPOSING A SCHOOL BUS ROUTE STOP ENHANCEMENT WHERE THE STATE ASSUMED THE BURDEN OF PROVING THAT THE BUS STOP WAS DESIGNATED ON MAPS SUBMITTED BY SCHOOL DISTRICTS TO THE OFFICE OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

The State introduced two exhibits through two witness: State's exhibit 16, an itemized list of school bus stops for a local elementary school with attached map of the bus stops [RP 09/01/05 85], and State's exhibit 17, an aerial photograph encompassing the scene of the alleged offense and the school bus route stop at issue. [RP 09/01/05 94-95]. The distance between the bus stop and Juszczak's residence was measured to be "approximately 293 feet." [RP 08/31/05 61]. No evidence was presented that the bus route stop was designated on maps submitted by school districts to the Office of the Superintendent of Public Instruction.

The jury answered "Yes" to SPECIAL VERDICT A, which reads:

Did the defendant, BRIAN PAUL JUSZCZYK, possess with the intent to deliver a controlled substance within one thousand feet of a school bus route stop designated by a school district?

[CP 94].

The court's instruction 21 reads:

"School bus route stop" means a school bus route stop as designated on maps submitted by school districts to the Office of the Superintendent of Public Instruction.

[CP 87].

On appeal, an appellant may assign error to elements added under the

law of the case doctrine. State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 631 (1988) (because the State failed to object to the jury instructions they "are the law of the case and we

will consider error predicated on them.” (citations omitted)). Such assignment of error may include a challenge to the sufficiency of the evidence of the added element. Barringer, 32 Wn. App. at 887-88....

State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

If the reviewing court finds insufficient evidence to prove the added element, reversal is required. Lee, 128 Wn.2d at 164; Hobbs, 71 Wn. App. at 425. Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)....

State v. Hickman, 135 Wn.2d at 103.

By virtue of its acquiesce to the court’s instruction 21, the State assumed the burden of proving that the school bus route stop was designated on maps submitted by school districts to the Office of the Superintendent of Public Instruction, as required by former RCW 69.50.435.<sup>1</sup> The instruction, to which the State did not object, became the law of the case. See State v. Hickman, 135 Wn.2d at 97. Since the State presented no evidence that the school bus route stop was “designated on maps submitted by school districts to the Office of the Superintendent of Public Instruction,” as the jury instruction required [CP 87], the State failed to meet this burden and it was error to enhance Juszczuk’s sentence, with the result that the matter should be remanded for resentencing without the school bus route stop enhancement.

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<sup>1</sup> In 1997, this requirement was deleted. Laws 1997, ch. 23, sec.1.

02. THE TRIAL COURT VIOLATED JUSZCZYK'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL UNDER BLAKELY V. WASHINGTON WHEN IT FAILED TO SENTENCE HIM UNDER THE STATUTE IN EFFECT AT THE TIME OF THE COMMISSION OF THE OFFENSE WHERE THE JURY WAS NOT REQUIRED TO IDENTIFY THE PARTICULAR SUBSTANCE UNDERLYING JUSZCZYK'S CONVICTION FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE) WITH INTENT TO DELIVER AND WHERE IT CANNOT BE DETERMINED BASED ON THE EVIDENCE PRESENTED THAT THE JURY PREMISED JUSZCZYK'S CONVICTION ON METHAMPHETAMINE BASE.

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (citing State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996)). And while a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986).

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack and "that a defendant cannot agree to punishment in excess of that which the Legislature has established." In re Goodwin, 146 Wn.2d 861, 873-74, 50

P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where, as here, the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Since there was “simply no question that Goodwin’s offender score was miscalculated, and his sentence is as a matter of law in excess of what is statutorily permitted for his crimes given a correct offender score,” the court held that Goodwin “cannot agree to a sentence in excess to that statutorily authorized.” In re Goodwin, 146 Wn.2d at 876.

Juszczyk was charged and convicted under RCW 69.50.401.

In that the defendant, BRIAN PAUL JUSZCZYK, in the State of Washington, on or about the 19<sup>th</sup> day of October, 2004, as a principle or accomplice, did unlawfully possess a controlled substance with intent to deliver, to-wit: Methamphetamine....

[CP 12].

Former RCW 69.50.401 was amended in 2003, effective date July 1, 2004, Laws 2003, ch. 53 § 331, which merely renumbered the former statute, and then again in 2005, effective July 24, 2005, Laws 2005, ch.

218 § 1, the latter of which inserted “including its salts, isomers, and salts of isomers” in subsections 2(a), three times in 2(b), and in 2(d). Between July 1, 2004 and July 24, 2005, RCW 69.50.401 made no mention of “salts, isomers, and salts of isomers.” It is this version, sans the mention of “salts, isomers, and salts of isomers,” that is applicable to Juszczyk, since a criminal defendant has a constitutional right to be charged and sentenced under the law in effect at the time of the commission of the crime. See State v. Lindsey, 194 Wash. 129, 77 P.2d 596 (1938); State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

Juszczyk should have been sentenced under the version of RCW 69.50.401(1)(2)(b) comparable to former RCW 69.50.401(a)(1)(ii), which did not include “salts, isomers, and salts of isomers,” which was in effect at the time of the commission of his offense, and such a sentence would have violated his Sixth Amendment right to a jury trial under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). “(T)rial court errors implicating constitutional rights may be raised for the first time on appeal.” State v. Thomas, 150 Wn.2d 821, 868, 83 P.3d 970 (2004); RAP 2.5(a). In addition, challenges to the sufficiency of the evidence implicate due process rights and may be raised for the first time on appeal. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

In State v. Morris, 123 Wn. App. 467, 472-73, 98 P.3d 513 (2004), this court held that the language of former RCW 69.50.401(a)(1)(ii) is “unambiguous,” and that “its prohibition only covers methamphetamine in its pure form, its base” and not “methamphetamine hydrochloride.” State v. Morris, 123 Wn. App. at 474.<sup>2</sup>; See State v. Evans, 129 Wn. App. 211, 118 P.3d 419 (2005).

The identity of a “controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant.” State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004) (citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 435 (2000)). And the “statutory maximum” is “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely v. Washington, 124 S. Ct. at 2537.

Even though Juszcyk should have been charged and convicted of possession of a controlled substance (methamphetamine) with intent to deliver under the version of RCW 69.50.401(1)(2)(b) comparable to former RCW 69.50.401(a)(1)(ii), which did not include “salts, isomers,

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<sup>2</sup> Cf. State v. Cromwell, \_\_\_ Wn. App. \_\_\_, 112 P.3d 1273, 1275 (2005), review accepted, No. 77356-4 (January 19, 2006), where Division I of this court disagrees with this conclusion, reasoning that “the Legislature intended to penalize the possession with the intent to deliver ... methamphetamine in any form more harshly than the possession with intent and delivery of any controlled substances listed in the schedules.”

and salts of isomers,” it cannot be determined based on the evidence presented that the jury premised his conviction on methamphetamine base. The State introduced evidence of a crystal substance, a sampling of which tested positive for methamphetamine [RP 09/01/05 45, 77]. The verdict form did not require the jury to identify the particular substance underlying the conviction. Instead, the jury convicted Juszczuk of “Possession of a Controlled Substance with Intent to Deliver as charged.” [CP 93].

Based on an offender score of 4 and a seriousness level of II, Juszczuk was sentenced to 40 months, within the standard range of 20+ to 60 months, plus enhancement, under the version of RCW 69.50.401, which is applicable only to offenses occurring after the date of Juszczuk’s offense. RCW 9.94A.517. [CP 97]. As Juszczuk’s offense was committed on October 19, 2004, his seriousness level was actually VI under former RCW 9.94A.515 (classifying the “(m)anufacture, delivery or possess(ion) with intent to deliver narcotics from Schedule I or II” as an offense with a seriousness level of VI); RCW 69.50.206(d)(2) (classifying “(m)ethamphetamine, its salts, isomers, and salts of its isomers” as Schedule II drugs).

And while Juszczuk received a standard range sentence of 40 months, to which the enhancement was added, which base is within the

standard range of 31 to 41 months under RCW 9.94A.510, he was also subjected to the 10-year maximum sentence prescribed by the current version of RCW 69.50.401(2)(b), rather than the five-year maximum required prior to the July 24, 2005 insertion of “salts, isomers, and salts of isomers” within the framework of the statute.

The sentencing court should have sentenced Juszczuk under the version of RCW 69.50.401(1)(2)(b) comparable to former RCW 69.50.401(a)(1)(ii), which omitted “salts, isomers, and salts of isomers,” and which was in effect at the time of the commission of his crime, and, under Blakely, by so doing would have invaded the province of the jury when it determined that Juszczuk’s conviction was premised on methamphetamine in its pure form, its base, even where it can not be determined based on the evidence presented that the jury based Juszczuk’s conviction on methamphetamine base, with the result that Juszczuk’s sentence must be vacated and remanded for resentencing within the five-year maximum sentence, which would include the 9 to 12 months the trial court imposed for community custody [CP 104], since a sentencing court “may not impose a sentence providing for a term of confinement or community supervision, community placement, or custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.” RCW 9.94A.505(5); State v. Hudnall, 116 Wn. App. 190, 195, 64 P.3d

687 (2003); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214  
(2004)(the total punishment, including imprisonment and community  
custody, may not exceed the statutory maximum).

03. JUSZCZYK WAS PREJUDICED BY HIS  
COUNSEL'S FAILURE TO OBJECT TO  
THE TRIAL COURT'S FAILURE TO  
SENTENCE JUSZCZYK UNDER THE STATUTE  
IN EFFECT AT THE TIME OF THE  
COMMISSION OF THE OFFENSE, AND BY  
FAILING TO ARGUE THAT A SENTENCE  
UNDER THE CORRECT STATUTE BASED ON  
THE EVIDENCE PRESENTED WOULD HAVE  
VIOLATED JUSZCZYK'S SIXTH  
AMENDMENT RIGHT TO A JURY TRIAL  
UNDER BLAKELY V. WASHINGTON.

A criminal defendant claiming ineffective  
assistance must prove (1) that the attorney's performance was deficient,  
i.e. that the representation fell below an objective standard of  
reasonableness under the prevailing professional norms, and (2) that  
prejudice resulted from the deficient performance, i.e. that there is a  
reasonable probability that, but for the attorney's unprofessional errors,  
the results of the proceedings would have been different. State v. Early,  
70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d  
1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).  
Competency of counsel is determined based on the entire record below.  
State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v.

Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of invited errors, see State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996), citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995).

Assuming arguendo, this court finds that trial counsel waived the issue relating to the trial court's sentencing of Juszczuk as set forth in the preceding section of this brief, then both elements of ineffective assistance of counsel have been established.<sup>3</sup>

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to the trial court's sentencing of Juszczuk. For the reasons set forth in the preceding section of this brief, had counsel done so, the trial court would not have so sentenced Juszczuk.

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<sup>3</sup> While it is submitted that the error at issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

Second, the prejudice is self evident: but for counsel's failure to object the trial court would not have imposed a sentence in excess of what is statutorily permitted.

E. CONCLUSION

Based on the above, Juszczuk respectfully requests this court to reverse and remand his case for resentencing consistent with the arguments presented herein.

DATED this 28<sup>th</sup> day of June 2006.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing same in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 28<sup>th</sup> day of June 2006..

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