

COURT OF APPEALS
NO. 34541-2-II
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NO. 34541-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

KENNETH RANDALE DOOR, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it sentenced Door to incarceration and community custody exceeding the maximum term allowed by law.
2. The trial court erred when it concluded that the judgment and sentence does not exceed the statutory maximum.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court err by denying Door's motion to modify sentence when the judgment and sentence was invalid on its face because it included a sentence and community custody exceeding the statutory maximum?

III. STATEMENT OF THE CASE

On July 12, 2002, Kenneth Randale Door was found guilty of one count of unlawful possession of a firearm in the first degree and five counts of assault in the second degree. CP 3-4. The jury returned special verdicts on the five assault counts, finding that a firearm was used. CP 4. Door was sentenced as follows:

<u>Count</u>	<u>Standard Range</u>	<u>Plus Enhance.</u>	<u>Sentence</u>	<u>CC</u>	<u>Stat. Max</u>	<u>Total Sentence</u>
I	87-116 mo.	n/a	116 mo.	n/a	10 years	116 mo.
II	63-84 mo.	36 mo.	74 mo. + enhance. (limited to 120 mo.)	18-36 mo.	10 years	138-156 mo.
III	63-84 mo.	36 mo.	74 mo. + enhance. (limited to 120 mo.)	18-36 mo.	10 years	138-156 mo.
IV	63-84 mo.	36 mo.	74 mo. (limited to 120 mo.)	18-36 mo.	10 years	138-156 mo.
V	63-84 mo.	36 mo.	74 mo. + enhance. (limited to 120 mo.)	18-36 mo.	10 years	138-156 mo.
VI	63-84 mo.	36 mo.	74 mo. + enhance. (limited to 120 mo.)	18-36 mo.	10 years	138-156 mo.

CP 6, 10. The base sentences were to run concurrently, but the five firearm enhancements were to be consecutive. CP 10. This would give a total sentence of 254 months on the assault charges. The parties recognized that the sentence could not exceed the 120 month maximum on the sentence—this is reflected in the transcript of the sentencing hearing. RP 7/12/02 57-59. Therefore, following the recitation of the confinement ordered in section 4.5, the judgment and sentence states: “The actual

number of months of total confinement ordered is 120 months. (Add mandatory firearm and deadly weapon enhancement time to run consecutively to other counts, see Section 2.3 above).” CP 10. Following that form language, the parties hand-wrote the following: “Statutory maximum sentence is 10 years – balance of sentence over ten years cannot be served.” CP 10.

In section 4.6, the judgment and sentence also includes community custody of 18-36 months on counts II-VI. CP 11. This section does not state the statutory maximum, or expressly limit the community custody time to the statutory maximum.

On February 3, 2006, Door filed a CrR 7.8 Motion to Modify and Correct Judgment and Sentence, asking that he be resentenced because his sentence and community custody exceed the statutory maximum. CP 19-22.

On February 13, 2006, the court entered an Order Denying Motion for Order Modifying Sentence. CP 25-29. In that order, the court found that this issue was properly raised under CrR 7.8 and that Door was correct that his sentence plus community custody for counts II-VI exceeded the 120 month statutory maximum. CP 27-28. However, the court further found that “the judgment and sentence expressly caps the amount of time served at 10 years. Because of this, the sentence does not

exceed the statutory maximum and so Mr. Door's motion is not supported by the facts." CP 29.

This appeal timely followed.

IV. ARGUMENT

ISSUE 1: THE JUDGMENT AND SENTENCE IS INVALID ON ITS FACE BECAUSE THE TOTAL PUNISHMENT, INCLUDING IMPRISONMENT AND COMMUNITY CUSTODY, EXCEEDS THE STATUTORY MAXIMUM.

The sole issue in this appeal is whether Door was sentenced beyond the statutory maximum for his five assault convictions. Door's judgment and sentence states that the statutory maximum for these convictions is 120 months. Door's period of imprisonment (120 months), plus the ordered community custody (18-36 months), exceeds the statutory maximum. Therefore, Door's sentence must be vacated and he must be sentenced within the standard range.

With certain exceptions that are not relevant here, a trial court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody that exceeds the statutory maximum for the crime. RCW 9.94A.505(5). In *State v. Zavala-Reynoso*, 127 Wn. App. 119, 124, 110 P.3d 827 (2005), Division Three, held that where the court imposes a sentence in violation of RCW 9.94A.505(5), the sentence should be vacated and remanded for resentencing. In a similar situation, Division One held that:

Where a defendant is sentenced to the statutory maximum, and also sentenced to community custody, the judgment and sentence should set forth the statutory maximum and clarify that the term of community custody cannot exceed that maximum.

State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004).

In this case, the parties realized at sentencing that the base sentences for the assault convictions, when combined with the firearm enhancements, would exceed the 120 month maximum. RP 7/12/02 57-59. Therefore, the parties made it clear in the judgment and sentence that the time imprisoned would not exceed 120 months. In the section of the judgment and sentence referring to the period of incarceration, the parties inserted the following language: “Statutory maximum sentence is 10 years – balance of sentence over ten years cannot be served.” CP 10. The location of this language and its own words make it clear that it refers to the period of incarceration, or at least makes it unclear to DOC whether this refers to the community custody ordered in a separate section of the judgment and sentence.

Section 4.6 of the judgment and sentence, setting out a term of community custody of 18-36 months on counts II-VI, does not state the statutory maximum, or expressly limit the community custody time to the statutory maximum. CP 11.

“Where a sentence is insufficiently specific about the period of community placement required by law, remand for amendment of the judgment and sentence to expressly provide for the correct period of community placement is the proper course.” *State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997). This judgment and sentence in this case orders Door to serve a total punishment, including incarceration and community custody, that exceeds the statutory maximum. The clarification sentence included in the section reciting the incarceration ordered does not make clear that the community custody cannot exceed the statutory maximum. Therefore, the judgment and sentence is in error on its face and must be vacated and remanded for resentencing.

V. CONCLUSION

For the reasons stated above, Door asks that the court reverse the order denying motion for order modifying sentence, vacate the judgment and sentence entered on July 12, 2002, and remand for resentencing.

DATED: November 29th, 2006.

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CERTIFICATE OF SERVICE

I certify that on the 29th day of November 2006, I caused a true and correct copy of this

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