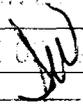


COURT OF APPEALS
DIVISION II

NO. 34541-2

07 JUN 21 11 09 AM

STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH R. DOOR, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 01-1-05424-6

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO COURT ORDERED RESPONSE.

1. As defendant was convicted of five violent offenses, each firearm enhanced, may the court impose a term of total confinement longer than 120 months under the authority of the Supreme Court decision in State v. Thomas?
2. Does Thomas still require that the sentence imposed on any single offense, including enhancements and community custody, not exceed the statutory maximum for that crime?

B. STATEMENT OF THE CASE.

A jury found appellant, KENNETH R. DOOR, hereinafter defendant, guilty of five counts of assault in the second degree and one count of unlawful possession of a firearm in the first degree. CP 1-18. The jury also returned firearm enhancements on each of the assault convictions. Id. The court entered the judgment on July 12, 2002. On the unlawful possession of the firearm count (Count I) the court imposed a standard range sentence of 116 months. There was no enhancement term or term of community custody imposed on this count. Count I carried a ten year statutory maximum. Id. On each of the assault in the second degree convictions (Counts II through VI) the court imposed a standard range sentence of 74 months, plus an additional 36 months for the firearm

enhancement and a community custody range of 18-36 months. Counts II through VI each carried a ten year statutory maximum. Id. The court ordered “all counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm [enhancement.]” Id. The court also wrote in a limitation that the “balance of sentence over ten years cannot be served.” Id.

On February 3, 2006, defendant filed a CrR 7.8 motion to modify his judgment, alleging that the combination of the time imposed for confinement and community custody exceeded the statutory maximum. The court denied the motion. The defendant filed a timely notice of appeal from entry of this order denying the motion to modify. CP 39-44.

The court has ordered supplemental briefing on the effect of multiple enhancements on the statutory maximum for one offense under State v. Thomas, 150 Wn.2d 666 (2003) and the application of the enhancements to a base sentence under RCW 9.94A.533(3).

C. ARGUMENT.

1. WHEN A DEFENDANT HAS BEEN CONVICTED OF MULTIPLE CLASS B FELONIES EACH CARRYING A FIREARM ENHANCEMENT, THE TOTAL TERM OF CONFINEMENT IS NOT LIMITED TO A 120 MONTH SENTENCE; HOWEVER, THE SENTENCE ON ANY SINGLE CLASS B OFFENSE IS LIMITED TO 120 MONTHS.

In State v. Thomas, 150 Wn.2d 666, 80 P.3d 168 (2003), the Washington Supreme Court held that statutory maximums apply to each offense separately. When sentencing on multiple offenses the overall sentence, including enhancements, may exceed the statutory maximum for the highest level felony. However on any one offense the sentence, including enhancements and community custody, may not exceed the statutory maximum for that crime. State v. Thomas, 150 Wn.2d at 670. The decision in Thomas resolved a split among the divisions and overruled Division II's decision in State v. Harvey, 109 Wn. App. 157, 166, 34 P.3d 850 (2001). Division Two had held that when base sentences are served concurrently, the total sentence, including enhancements, cannot exceed the maximum statutory sentence for the highest level felony.

In this case defendant was sentenced at a time when State v. Harvey was the controlling authority in Pierce County superior courts. At the time it was imposed, the sentence imposed was correct. Under the principles set forth in Thomas, the sentence is now erroneous. Defendant

should be sentenced to a term of total confinement of 296 months. This is comprised of the 116 month base sentence on Count I followed by five consecutive mandatory 36 month firearms enhancements.

The decision in Thomas also makes clear, however, that on any single offense the sentence, including enhancements and community custody, may not exceed the statutory maximum for that crime. In this case the sentence imposed on each of the assault counts consisted of 74 months of confinement, an additional 36 months of enhancement time, and 18-36 months of community custody. This creates a potential total sentence of 128 to 146 months, which exceeds the statutory maximum of 120 months. To address this issue, the court inserted a hand-written notation in the judgment stating:

Statutory maximum sentence is 10 years – balance of sentence over ten years cannot be served.

CP 10. Another method of bringing the sentence in to conformity of this rule would have been for the court to impose a term of community custody of only 10 months; the State contends the limiting language achieved the same result.

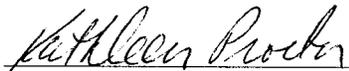
In sum, defendant has still failed to show that the court erred in denying his post-judgment motion for relief of judgment based upon the materials filed. It would appear that defendant was indeed sentenced erroneously, but in his favor.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the denial of the motion for relief from judgment.

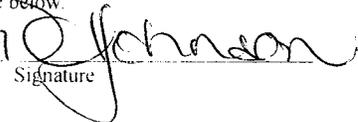
DATED: June 21, 2007.

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WSB # 14811

COURT OF APPEALS
07 JUN 21 AM 9:15
STATE OF WASHINGTON
BY DEPUTY

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/21/07 
Date Signature