

FILED
COURT OF APPEALS
DIVISION II

06 AUG 01 AM 11:00

STATE OF WASHINGTON

BY

NO. 34544-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

EDGAR PEREZ,

Appellant.

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

The Honorable Thomas J. Felnagle, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
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pm 8/30/06

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A. ASSIGNMENT OF ERROR

Appellant's sentence exceeds the five-year statutory maximum.

Issue Pertaining to Assignment of Error

A court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody exceeding the statutory maximum sentence for the crime. Here, the statutory maximum for appellant's crime of conviction is 60 months, but the court imposed a 69-72 month sentence – 60 months of confinement and 9-12 months of community custody. Must appellant's sentence be remanded to clarify it may not exceed the statutory maximum?

B. STATEMENT OF THE CASE

The State charged appellant Edgar Perez with possession of methamphetamine with intent to deliver (Count One) and reckless driving, a misdemeanor (Count Two), following a May 18, 2005 traffic stop. CP 1-12. In addition, the State alleged Perez was armed with three knives at the time of commission of the crime in Count One. CP 9.

The case proceeded to trial in March of 2006. 1RP¹ 4-11. A jury

¹ This brief refers to the five volumes of the verbatim report of proceedings as follows: 1RP – 3/1/06; 2RP – 3/2/06; 3RP – 3/6/06; 4RP – 3/7/06; and 5RP – 3/15/06.

found Perez guilty of possession of methamphetamine,² a lesser-included offense. 4RP 242; CP 41. As to that count, the jury answered “yes” to two special verdict forms inquiring whether Perez was armed with a deadly weapon but answered “no” to a third. 4RP 243; CP 42-44. The jury also found Perez guilty of reckless driving. 4RP 242; CP 40.

The sentencing court calculated Perez’s standard range as 51-68 months based on an offender score of one.³ 5RP 3; CP 48. Perez’s deadly weapon enhancements were calculated at six months each, totaling 12 months.⁴ 5RP 3. But the court sentenced Perez to 60 months of confinement, the statutory maximum for the charge.⁵ 5RP 4, 12; CP 50.

² RCW 69.50.4013.

³ Under RCW 9.94A.518, Perez’s possession conviction was elevated from a “level I” drug crime to “level III” by the jury’s deadly weapon special verdict. 5RP 3.

⁴ Former RCW 9.94A.533(4)(c).

⁵ Former RCW 9.94A.533(4)(g) states:

If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

The court also sentenced Perez to 9-12 months of community custody. 5RP 12; CP 51.

At his sentencing hearing, Perez argued his total sentence, including community custody, ought not to exceed the statutory maximum of five years. 5RP 7-8. At the court's request, the State researched the matter during the hearing and later informed the court, "it does appear [community custody] is a mandatory condition." 5RP 8, 11. The court stated: "Well, . . . since it's mandatory, unless there's case law to suggest that it can't be imposed, I've got to impose it." 5RP 12.

Perez timely appeals. CP 57.

C. ARGUMENT

PEREZ'S SENTENCE SHOULD BE REMANDED FOR CLARIFICATION BECAUSE IT EXCEEDS THE FIVE-YEAR STATUTORY MAXIMUM.

By statute, the maximum sentence for possession of a controlled substance, a class C felony, is five years. RCW 69.50.4013(2); RCW 9A.20.021(1)(c). Because the court sentenced Perez to a term exceeding the statutory maximum, however, this Court should vacate his sentence and remand for resentencing.

The Sentencing Reform Act (SRA) requires community custody for most drug offenses under chapter 69.50 RCW:

When a court sentences a person to the custody of the department [of corrections] for. . . a felony offense under chapter 69.50 or 69.52 RCW . . . the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established by RCW 9.94A.850 or up to the period of earned early release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer.

Former RCW 9.94A.715(1). But under RCW 9.94A.505(5), “Except as [otherwise] provided . . . a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.”

Where a sentence is insufficiently specific about the required period of community placement⁶ — such as when a court imposes a sentence that could theoretically exceed the statutory maximum, yet fails to clarify that the sentence may not do so — remand for amendment of the judgment and sentence is proper. See State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004) (quoting State v. Broadaway, 133 Wn.2d

⁶ Former RCW 9.94A.030(7) defines “community placement” as:

that period during which the offender is subject to the condition of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.

118, 136, 942 P.2d 363 (1997)); see also State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005) (on appeal, court could consider challenge to sentence that on its face exceeded maximum term even if defendant would likely receive good time credit).

Here, Perez was sentenced to a term of 69-72 months. Because the sentence exceeds the statutory maximum of five years or 60 months, this Court should vacate Perez's sentence and remand for resentencing to clarify his sentence may not exceed the statutory maximum.

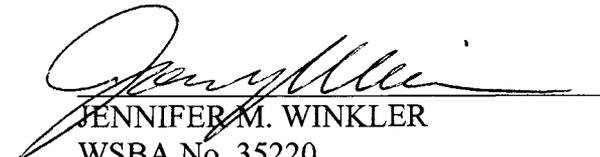
D. CONCLUSION

Perez's case should be remanded for resentencing.

DATED this 30 day of August, 2006.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

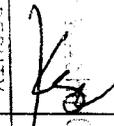

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STATE OF WASHINGTON)
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 vs.)
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 EDGAR PEREZ,)
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 Appellant.)

COA NO. 34544-7-II

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STATE OF WASHINGTON
BY 
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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 30TH DAY OF AUGUST 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF AUGUST, 2006.

x 