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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 36166-3-II

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

STATE OF WASHINGTON
Respondent

v.

JACOB J. RIVERA
Appellant

APPEAL FROM
MASON COUNTY SUPERIOR COURT
The Honorable James B. Sawyer II
07-1-00030-5

BRIEF OF RESPONDENT

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COURT RULES

RPC 3.18
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A. APPELLANT’S ASSIGNMENTS OF ERROR

1. The trial court erred in not taking count I, unlawful imprisonment, from the jury for lack of sufficiency of the information.
2. The trial court erred in calculating Rivera’s offender score when it added one point for his being on community placement or custody at the time of his commission of his current offense.
3. The trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction.
4. The trial court erred in permitting Rivera to be represented by counsel who provided ineffective assistance by failing to object to any claim that he was on community placement or custody at the time of the commission of the current offense.
5. The trial court erred in permitting Rivera to be represented by counsel who provided ineffective assistance by acknowledging he was on community placement or custody at the time of the commission of the offense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the information adequately informed Rivera of the nature of the charges against him. [Assignment of Error 1].
2. Whether the trial court erred by including an offender score point for being on community placement at the time the offense was committed. [Assignment of Error 2]
3. Whether the trial court erred by imposing a 57 month sentence plus 9 to 18 months of community custody where the total potential time would exceed the statutory maximum. [Assignment of Error 3]

4. Whether trial counsel was ineffective for not objecting to the sentence imposed and for failing to argue the community placement point.

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts recitation of the procedural and substantive facts set forth in his opening brief.

D. ARGUMENT

1. THE INFORMATION ADEQUATELY INFORMED RIVERA OF THE NATURE OF THE CHARGES AGAINST HIM.

As Rivera recognizes, the test for sufficiency of the information when challenged for the first time on appeal is:

(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

State v. Kjorsvik, 117 Wn.2d 93, 105-106, 812 P.2d 86 (1991).

Further, where, as here, the information is challenged for the first time on appeal, the language will be liberally construed in favor of validity. *Kjorsvik* at 102.

This Court, in *State v. Warfield*, 103 Wn.App. 152, 5 P.3d 1280 (2000), has previously recognized that the language Rivera

now complains was missing from his charging documents is inherent in the word “restrains”, noting that the Legislature saw “fit to fold all four components into the definition of restrain.” *Warfield* at 157. Those four components being (1) restricting another’s movements; (2) without that person’s consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person’s liberty. See *Warfield* at 157. These are exactly the elements Rivera now claims are absent.

Since the word “restrains” was clearly intended by the Legislature (and understood by this Court in *Warfield*) to include the four elements Rivera bases his claim of error upon, there is no shortcoming in the charging documents. Even assuming for the sake of argument that the complaint should have spelled out the four elements specifically, under *Kjorsvik*, the “missing” elements can clearly be found folded into the word “restrains” and the complaint is valid. Under that scenario, Rivera has not claimed nor can he demonstrate any prejudice.

2. THE TRIAL COURT DID NOT ERR IN INCLUDING AN OFFENDER POINT FOR BEING ON COMMUNITY CUSTODY AT THE TIME THE CURRENT OFFENSE WAS COMMITTED.

The State, in reciting Rivera’s criminal history, identified a 2004 VUCSA conviction for which Rivera was still on community

placement or custody at the time of these offenses. [RP 160-161]. Acknowledgement by defense counsel can support the court's findings as sentencing under the SRA. See *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999) and generally *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986). In this case, unlike *Ford*, defense counsel affirmatively acknowledged agreement with the State's recitation of criminal history. Further, the sentencing court was clearly well-acquainted with Rivera's history. See RP 171-174. There simply was sufficient basis for the court to include the additional offender point.

3. THE TRIAL COURT DID NOT ERR BY IMPOSING A SENTENCE WHICH INCLUDED BOTH INCARCERATION NEAR THE STATUTORY MAXIMUM AND THE REQUIRED PERIOD OF COMMUNITY CUSTODY.

Rivera cites to *State v. Sloan*, 121 Wn.App. 220, 87 P.3d 1214 (2004) in support of his argument that the trial court exceeded the statutory maximum for a class C felony by imposing both a 57 month sentence plus 9-18 months of community custody. However that is exactly the type of sentence upheld in *Sloan*. Tina Sloan was sentenced to 60 months (the maximum) plus 36-48 months community custody. The *Sloan* court recognized that a defendant may earn early release credits and that those credits could effect

the time in custody and therefore the total time on community custody status. *Sloan* at 223.

The remedy in such a circumstance is clarification of the sentence, not resentencing.

To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum.

Sloan at 223-224.

This court should remand for solely for clarification of the existing sentence by incorporating a statement “that the total of incarceration and community custody cannot exceed the maximum” as suggested by the *Sloan* court. There is no need under existing caselaw for any other change in the sentence as ordered.

4. RIVERA HAS NOT SHOWN THAT COUNSEL WAS DEFICIENT NOR THAT HE HAS SUFFERED ANY PREJUDICE

An appellate court will presume the defendant was properly represented. *Strickland v. Washington*, 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Lord*, 117 Wn.2d

829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L. Ed. 2d 112 (1992); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

A criminal defendant's must overcome this strong presumption of effectiveness of his trial counsel by proof that counsel's representation fell below an objective standard of reasonableness, i.e. that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. .

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Hendrickson*, 129 Wn.2d at 78; *State v. Bennett*, 87 Wn. App. 73, 77, 940 P.2d 299 (1997). The defendant must meet both prongs of the test to merit relief. *Thomas*, 109 Wn.2d at 225-226; *Bennett*, 87 Wn. App at 77.

A defendant must first demonstrate that defense counsel's representation was deficient. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

The test of incompetence is after considering the entire record, can it be said that the accused was not afforded effective representation

and a fair and impartial trial. *State v. Johnson*, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980).

For the second part, the defendant must show prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

While defense counsel may defend a case so as to require the State to prove each element, there is also a corresponding ethical obligation not to controvert an issue absent a non-frivolous basis in law or fact. RPC 3.1. Further, defense counsel has a duty of candor to the tribunal. RPC 3.3. If there was no basis to object to the inclusion of the community placement offender point, counsel was not deficient. Rivera offers speculation as to prejudice. The trial court obviously had the criminal history explained orally and in printed format on the proposed judgment and sentence. As previously noted, the trial court was obviously very familiar with Rivera as his previous history as well.

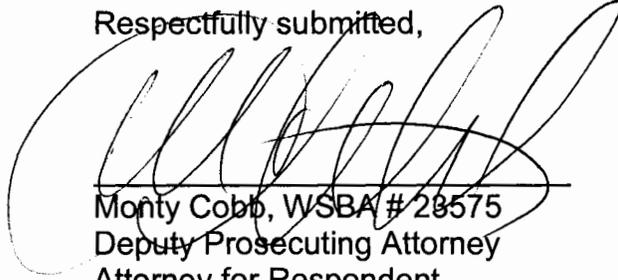
Rivera simply has not shown that counsel acted in any way short of the expectations of competent representation or that he was in any way prejudiced.

E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm the conviction and sentence imposed remanding only for the inclusion of the clarifying language required by *Sloan*.

DATED this 28th day of December 2007.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	No. 36166-3-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
JACOB J. RIVERA,)	
)	
Appellant,)	
_____)	

I, TRICIA KEALY, declare and state as follows:

On December 31, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Thomas E. Doyle
P.O. Box 510
Hansville, WA 98340-0510

I, Tricia Kealy, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 31st day of December , 2007, at Shelton, Washington.

Tricia Kealy

Tricia Kealy

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